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

15 BENNION & DEVILLE FINE ) Case No. 2:15-CV-07322  
16 HOMES, INC., a California )  
17 corporation, BENNION & DEVILLE ) **COMPLAINT FOR:**  
18 FINE HOMES SOCAL, INC., a )  
19 California corporation, WINDERMERE ) **(1) Breach of Contract – Coachella**  
20 SERVICES SOUTHERN ) **Valley Franchise Agreement;**  
21 CALIFORNIA, INC., a California ) **(2) Breach of Contract – Area**  
22 corporation, ) **Representation Agreement;**  
23 ) **(3) Breach of Contract – SoCal**  
24 Plaintiffs, ) **Franchise Agreement;**  
25 ) **(4) Breach of Contract – Modification**  
26 v. ) **Agreement;**  
27 ) **(5) Breach of Contract –**  
28 WINDERMERE REAL ESTATE ) **Confidentiality Agreement;**  
SERVICES COMPANY, a Washington ) **(5) Breach of the Covenant of Good**  
corporation; and DOES 1-10. ) **Faith and Fair Dealing;**  
 ) **(6) Intentional Interference with**  
Defendant. ) **Contractual Relations; and**  
 ) **(7) Intentional Interference with**  
 ) **Prospective Economic Advantage.**  
 ) **DEMAND FOR JURY TRIAL**

1 Plaintiffs Bennion & Deville Fine Homes, Inc. (“B&D Fine Homes”), Bennion &  
2 Deville Fine Home SoCal, Inc. (“B&D SoCal”), and Windermere Services Southern  
3 California, Inc. (“Windermere SoCal”) (collectively, “Plaintiffs”) hereby complain and  
4 allege as follows:

5 **NATURE OF ACTION**

6 1. Plaintiffs are Area Representatives and franchisees of Defendant  
7 Windermere Real Estate Services Company (“WSC”), a large real estate brokerage  
8 company based in the Pacific Northwest. Plaintiffs expanded the Windermere brand into  
9 Southern California establishing a thriving business with franchises and offices stretching  
10 from San Diego to the Coachella Valley.

11 2. What was once a thriving real estate system that WSC offered its Southern  
12 California franchisees become antiquated and irrelevant. The once fruitful relationship  
13 would quickly erode as WSC’s contractually obligated support to Plaintiffs diminished.  
14 Plaintiffs would be essentially left in the desert for years on end with little support from  
15 WSC, forcing Plaintiffs to establish their own system at a significant expense. WSC was  
16 out of touch, ineffective and behind the times while focused on increasing its fees instead  
17 of supporting its franchise system.

18 3. WSC had assured Plaintiffs that it would provide trained staff that would be  
19 able to assist and advise Plaintiffs and the franchisees within California in all aspects of  
20 the franchised business. It did not. WSC failed to provide the local and regional  
21 marketing and advertising materials critical for any franchise system to be successful in a  
22 competitive marketplace. When Plaintiffs took it upon themselves to market their  
23 businesses, WSC exerted significant pressure on certain advertisers to discontinue  
24 Plaintiffs’ marketing campaigns and otherwise terminate their relationships with  
25 Plaintiffs.

26 4. WSC’s real estate technology provided to its franchisees and necessary for  
27 the operation of the franchised businesses was outdated, unstable, and no longer a viable  
28 option for the Southern California region. Notwithstanding WSC’s failure to update this

1 technology, it continued to increase the fees and threatened franchisees with termination  
2 for refusing to pay for this unstable, antiquated technology.

3 5. There came a tipping point in the parties' relationship where WSC grew  
4 insecure about the Plaintiffs' superior operations, marketing and support for the  
5 Windermere brand in Southern California and began treating Plaintiffs as competitors  
6 instead of partners.

7 6. In 2014, Michael Teather ("Teather"), WSC's Senior Vice President of  
8 Client Services implemented a strategy wherein WSC changed its focus from providing  
9 ongoing services to collecting new initial franchise fees. This was a "churn and burn"  
10 franchise model – *i.e.*, forcing existing franchisees out of business in order to resell the  
11 territory/location to generate new, substantial initial franchise fees.

12 7. For all practical purposes, WSC stopped supporting its franchise system in  
13 Southern California. It failed to respond to operational, marketing and technical requests  
14 submitted by Plaintiffs and franchisees in their territory. WSC essentially refused to  
15 process new franchised businesses in the Southern California region although its Vice  
16 President, Teather, had approved of the locations and continued to encourage Plaintiffs to  
17 expend significant sums of money and time pursuing new franchise locations.

18 8. After Plaintiffs expressed disagreement with WSC's churn and burn  
19 strategy, Teather and WSC's other executives began implementing a strategy to  
20 systematically damage Plaintiffs' businesses, thereby pushing them out of the  
21 Windermere franchise system. In pursuing this strategy, WSC has violated several terms  
22 of their contractual agreement with Plaintiffs, marketed franchises in Plaintiffs' territory  
23 without consultation, infringing and interfering with Plaintiffs' business relationships  
24 with sales agents, employees, advertisers, and other franchisees. As a result of WSC's  
25 strategy, several franchisees have left or otherwise been terminated from the Windermere  
26 franchise system.

1 9. WSC's actions have destroyed its relationship with Plaintiffs and left  
2 Plaintiffs with no recourse but to seek legal action to protect their franchisees and  
3 employees from WSC's detrimental conduct.

4 10. For these reasons, set forth in detail below, Plaintiffs now seek  
5 compensatory and punitive damages in amounts to be proven at trial, a judicial  
6 determination and declaration that WSC did not have cause to terminate the Area  
7 Representation Agreement and a preliminary and permanent injunction enjoining WSC  
8 from improperly recruiting B&D Fine Homes and B&D SoCal's sales associates and  
9 other employees to join WSC and other Windermere offices.

### 10 THE PARTIES

11 11. Defendant Windermere Real Estate Services Company is a Washington  
12 corporation registered with the California Secretary of State to do business in California.

13 12. Plaintiff Bennion & Deville Fine Homes, Inc. is a California Corporation  
14 with its principal place of business in Rancho Mirage, California.

15 13. Plaintiff Bennion & Deville Fine Homes SoCal, Inc. is a California  
16 Corporation with its principal place of business in Rancho Mirage, California.

17 14. Plaintiff Windermere Services Southern California, Inc. is a California  
18 Corporation with its principal place of business in Rancho Mirage, California.

### 19 JURISDICTION AND VENUE

20 15. Plaintiffs have satisfied the amount in controversy requirement as the value  
21 of the requested relief exceeds the jurisdictional threshold of \$75,000.

22 16. This Court has jurisdiction over this action under diversity of citizenship  
23 jurisdiction, 28 U.S.C. § 1332. Plaintiffs are all California corporations and Defendant is  
24 a Washington corporation. Therefore, complete diversity exists.

25 17. Venue is also proper in this district in that the Defendant is subject to  
26 personal jurisdiction in this District, a substantial part of the events occurred in this  
27 District and all parties specifically agreed to the Western Division of the Central District  
28

1 of California pursuant to a forum selection clause contained within a contract that is in  
2 dispute in this action. (Ex. E [Modification Agreement], § 9.)

3 **RELEVANT FACTUAL BACKGROUND**

4 **A. Background On The Windermere Franchise System And Bennion And Deville**

5 18. Defendant Windermere Real Estate Services Company (“WSC”) is the  
6 franchisor of the Windermere system of franchisees providing real estate brokerage  
7 services to customers seeking to buy, sell or lease real property. The Windermere  
8 network of franchisees and company-owned locations is collectively considered the  
9 largest real estate company in the Pacific Northwest with locations in Washington,  
10 Oregon, British Columbia, Idaho, Montana, California, Nevada, Arizona and Colorado.

11 19. The Plaintiffs are each owned and operated by Robert L. Bennion  
12 (“Bennion”) and Joseph R. Deville (“Deville”). Bennion and Deville are both  
13 experienced real estate brokers working in the real estate industry since 1988 and 1971,  
14 respectively. Sometime in 1993, Bennion and Deville merged their brokerage firms and  
15 quickly became one of the leading real estate partnerships in Seattle, Washington and  
16 surrounding area.

17 20. Due to their success, Bennion and Deville decided to expand their real estate  
18 brokerage business to California. It was this move that spurred a series of contractual  
19 relationships between WSC and entities owned by Bennion and Deville that serve as the  
20 subject of this litigation.

21 **B. The Coachella Valley Franchise Agreement**

22 21. On August 1, 2001, Bennion, Deville, and their company Plaintiff Bennion  
23 & Deville Fine Homes, Inc. (doing business as Windermere Real Estate Coachella  
24 Valley)(hereafter, “B&D Fine Homes”), entered into a “Windermere Real Estate License  
25 Agreement” with WSC (hereafter referred to as the “Coachella Valley Franchise  
26 Agreement”). A true and correct copy of the Coachella Valley Franchise Agreement is  
27 attached hereto as Exhibit A.  
28

1       22. Pursuant to the Coachella Valley Franchise Agreement, and in exchange for  
2 an initial fee of \$15,000.00 and license fees in an amount equal to five percent of the  
3 gross revenues earned during the term of the agreement (*see* Ex. A, § 5), WSC agreed to  
4 provide Bennion, Deville, and B&D Fine Homes the following:

- 5           a. A license to use the Windermere trademarks, service marks, logotypes  
6 (collectively, the “Trademark”), and “Windermere System” in the  
7 conduct of real estate brokerage and sales activities at **850 N. Palm**  
8 **Canyon Drive, in Palm Springs, CA.** (*See* Ex. A, § 2.) The  
9 “Windermere System” is defined broadly by the Coachella Valley  
10 Franchise Agreement as “the standards, methods, procedures,  
11 techniques, specifications and programs developed by WSC for the  
12 establishment, operation and promotion of independently owned real  
13 estate brokerage offices” (*see* Ex. A, Recital A);  
14  
15           b. “[A] variety of services [...] designed to complement the real estate  
16 brokerage business activities of [B&D Fine Homes] and to enhance its  
17 profitability” (*see* Ex. A, § 1); and  
18  
19           c. An agreement to take legal action “consistent with good business  
20 judgment to prevent infringement of the Trademark or unfair  
21 competition against [B&D Fine Homes].” (*See* Ex. A, § 4.)  
22

23       23. In addition to the initial fee and license fees identified above, Bennion,  
24 Deville, and B&D Fine Homes were also required to pay certain other fees to WSC  
25 outlined in the “Affiliate Fee Schedule” attached to the Coachella Valley Franchise  
26 Agreement. (*See* Ex. A, Affiliate Fee Schedule.) These fees included (i) a “Technology  
27 Fee” of “\$10 per month per licensed agent and agent assistant,” (ii) an “Administrative  
28 Fee” of “\$25 per agent per month,” and (iii) a “Windermere Foundation Fee” of “\$7.50  
per transaction side for each closed transaction.” (*Id.*)

29       24. The Technology Fee was promised to be a fee for “basic” technology  
30 services provided by WSC and required by its franchisees and their agents to post and  
31 manage their real property listings and to otherwise carry out their real estate businesses.  
32 In truth, the technology services provided by WSC were underwhelming at best, and

1 more recently had become antiquated and irrelevant. The technology made available by  
2 WSC had become outdated, unstable, and not a viable option for the needs of the  
3 Southern California region. Notwithstanding WSC's failure to provide these technology  
4 services, it has substantially increased these fees and threatened franchisees with  
5 termination for refusing to pay for this unstable, antiquated technology.

6 25. The Coachella Valley Franchise Agreement was also for an indefinite term,  
7 terminable by either party subject to no less than six months written notice of their intent  
8 to terminate the agreement. (*See Ex. A, § 6.*)

9 26. Subject to the terms above, B&D Fine Homes opened its first Windermere  
10 franchised business under the Coachella Valley Franchise Agreement in Palms Springs,  
11 CA.

12 27. As explained in detail below, Plaintiffs would ultimately open 14  
13 Windermere franchised businesses under the Coachella Valley Franchise Agreement.  
14 Each new franchised business would be reflected in an addendum to the Coachella Valley  
15 Franchise Agreement signed by all parties to the agreement. (*See Ex. A, § 2.*)

16 **C. Bennion And Deville Become Windermere Area Representatives For The**  
17 **State Of California**

18 28. On or around May 1, 2004, Bennion and Deville, on behalf of their newly  
19 formed entity Plaintiff Windermere Services Southern California, Inc. ("Windermere  
20 SoCal"), on the one hand, and WSC, on the other hand, entered into a "Windermere Real  
21 Estate Services Company Area Representation Agreement for the State of California"  
22 (the "Area Representation Agreement"). A true and correct copy of the Area  
23 Representation Agreement is attached hereto as Exhibit B.

24 29. Under the Area Representation Agreement, Windermere SoCal – serving as  
25 WSC's "Area Representative" – was granted the non-exclusive right throughout the State  
26 of California to (i) offer franchises to real estate brokerage businesses enabling them to  
27  
28

1 use the Windermere “Trademark”<sup>1</sup> and “Windermere System,”<sup>2</sup> and (ii) “to administer  
2 and provide support and auxiliary services” to Windermere franchisees in the state. (*See*  
3 Ex. B, Recital A, §§ 1.5, 2.)

4 30. Windermere SoCal was also tasked with collecting certain fees from the  
5 franchisees in its Region, including, but not limited to, the license fees, administrative  
6 fees, Advertising Fund contributions, Windermere Foundation fees, technology fees,  
7 “and other amounts due under the license agreements in the Region, and to remit to WSC  
8 its share of such fees.” (Ex. B, §§ 3, 11-13.)<sup>3</sup> Although Windermere SoCal was  
9 responsible for collecting these fees from the franchisees, it was not a guarantor of any of  
10 the fees to WSC. In fact, the Area Representation Agreement expressly provided that  
11 Windermere SoCal “will not be responsible for payment of uncollectable fees.” (*See* Ex.  
12 B, Exhibit A, § 3.)

13 31. In exchange for Windermere SoCal’s agreement to provide the Area  
14 Representative services identified above, WSC was contractually obligated to provide,  
15 among other things, the following support and services:

- 16 a. “[P]rovide servicing support in connection with the marketing,  
17 promotion and administration of the Trademark and Windermere  
18 System” (Ex. B, § 3);

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19  
20  
21 <sup>1</sup> The term “Trademark” is defined by the Area Representation Agreement to mean  
22 various Windermere trade names, trademarks, service marks, and other symbols. (*See* Ex.  
23 B, § 1.6.)

24 <sup>2</sup> The term “Windermere System” is defined as “the standards, methods, procedures,  
25 techniques, specifications and programs developed by WSC for the establishment,  
26 operation and promotion of independently owned real estate brokerage offices [...  
27 expressly including] the Windermere foundation, Windermere Personal Marketing  
28 Programs, Premier Properties Program, Windermere Retirement Plan for Real Estate  
Salespersons and Windermere salesperson educational formats and outlines.” (Ex. B, §  
1.7.)

<sup>3</sup> Technology fees were “intended to support the operation and development of WSC’s  
technology systems.” (*See* Ex. B., § 13.)



- 1           b. “[P]romptly and diligently commence and pursue the preparation and  
2           filing of all Franchise registration statements, disclosure statements, or  
3           applications required under the laws of the state of California and/or  
4           the United States of America” (Ex. B., § 7); and
- 5           c. “[B]e responsible for any registration filing fee and for all legal  
6           expenses incurred in the revision and registration of all required  
7           disclosure documents.” (Ex. B., § 7.)

8           32.       Notwithstanding these ongoing contractual obligations, WSC has recently  
9           **failed to** (a) provide the necessary marketing materials needed for the Southern  
10           California region, (b) participate financially in the marketing, promotion, or  
11           administration of the Windermere trademark or brand in Southern California, and (c)  
12           timely make available required franchise disclosure materials required by Windermere  
13           SoCal to offer Windermere franchises for sale – including WSC’s utter failure to make  
14           available a 2015 franchise disclosure document notwithstanding numerous promises by  
15           Mr. Teather and other WSC personnel that the documents would be provided  
16           “immediately.” In fact, as of the filing of this Complaint, WSC still had not registered the  
17           required franchise disclosure documents with the California Department of Business  
18           Oversight for the 2015 year. These filings are typically due in April. WSC’s failure to  
19           timely register the franchise disclosure documents has precluded Windermere SoCal from  
20           being able to offer and sell franchises pursuant to the Area Representation Agreement.

21           33.       Further, WSC and Windermere SoCal also agreed to share “all initiation and  
22           licensing fees equally for all future Windermere offices” in California. (*See* Ex. B, §§ 3,  
23           9, Exhibit A, § 3.) In other words, the initial franchise fees and ongoing licensing fees  
24           were to be split 50-50 between WSC and Windermere SoCal pursuant to the terms of the  
25           Area Representation Agreement. Windermere SoCal’s inability to sell franchises as a  
26           result of WSC’s failures to comply with California’s franchise registration laws has  
27           harmed Windermere SoCal’s ability to earn initiation and licensing fees.

1 34. Similar to that of the Coachella Valley Franchise Agreement, the Area  
2 Representation Agreement was for an indefinite term, terminable by either party, without  
3 cause, “upon one hundred eighty (180) days written notice to the other party.” (*See* Ex.  
4 B., § 4.1(b).) Or, in the event of a “material breach,” the agreement was terminable upon  
5 ninety days written notice to the other party with an opportunity to cure. (Ex. B, § 4.1(c).)  
6 In the event the material breach was not cured within the ninety day period, the Area  
7 Representation Agreement could then be terminated “for cause.” (*Id.*)

8 35. In the event the agreement is terminated without cause, the terminating party  
9 is required to make termination payments to the terminated party in an “amount equal to  
10 the fair market value of the Terminated Party’s interest in the Agreement.” (*See* Ex. B., §  
11 4.2.) The “fair market value” is to be determined in accordance with the terms of  
12 sections 4.2 and 4.3 of the Area Representation Agreement. Notably, no termination  
13 payment was required to be made if the Area Representation Agreement was terminated  
14 for cause. (*See* Ex. B., § 4.2.)

15 36. During its time as the Area Representative for WSC, Windermere SoCal  
16 sold more franchises to large franchise owners than any other Area Representative in the  
17 Windermere system.

18 **D. Bennion And Deville Expand Their Windermere Businesses**

19 37. With the signing of the Area Representation Agreement, Bennion and  
20 Deville, through their company Windermere SoCal, were now entitled to 50% of all  
21 initiation and licensing fees owed to WSC under the Coachella Valley Franchise  
22 Agreement.

23 38. This symbiotic relationship between the Area Representation Agreement  
24 and the Coachella Valley Franchise Agreement effectively granted Bennion and Deville a  
25 50% reduction in all initial franchise fees and ongoing licensing fees for all franchise  
26 businesses they would acquire during the life of the Area Representation Agreement.  
27 (*See* Ex. B [Area Representation Agreement], §§ 3, 9, Exhibit A, § 3.) The economic  
28 benefit derived by Bennion and Deville’ operation of Windermere SoCal and B&D Fine

1 Homes as a single integrated enterprise, and the underlying economic benefit that flowed  
2 from serving as both the Area Representative and franchisee, were significant material  
3 considerations of Bennion and Deville when then agreed to expand their Windermere  
4 franchising operations. Without the Area Representation Agreement, Bennion and  
5 Deville would not have engaged in their subsequent expansion of the Windermere brand  
6 in Southern California.

7 39. Starting in early 2004, and in anticipation of the parties' entry into the Area  
8 Representation Agreement, the parties began executing addenda to the Coachella Valley  
9 Franchise Agreement allowing for the rapid expansion of Bennion and Deville's  
10 Windermere franchised businesses. In total, Bennion and Deville, on behalf of B&D Fine  
11 Home and Windermere SoCal, executed 13 different addenda to the Coachella Valley  
12 Franchise Agreement (hereafter, the "Coachella Valley Addenda"). True and correct  
13 copies of the Coachella Valley Addenda are attached hereto as Exhibit C.

14 40. The Coachella Valley Addenda granted Bennion and Deville the right to  
15 open and operate Windermere franchised businesses in the following Southern California  
16 locations:

- 17 a. Desert Hot Springs, CA;
- 18 b. Rancho Mirage, CA;
- 19 c. La Quinta, CA;
- 20 d. Indian Wells, CA;<sup>4</sup>
- 21 e. Palm Springs, CA;
- 22 f. Palm Desert, CA;
- 23 g. Indian Wells, CA #2;<sup>5</sup>
- 24 h. Rancho Mirage, CA #2;

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26 <sup>4</sup> This franchised business was subsequently moved to Rancho Mirage, California. (See  
27 Ex. C [Addendum dated April 1, 2009].)

28 <sup>5</sup> This franchised business was also subsequently moved to Rancho Mirage, California.  
(See Ex. C [Addendum dated April 1, 2009].)

- i. Rancho Mirage, CA #3;
- j. Palm Desert, CA #2;
- k. La Quinta, CA #2;
- l. Indio, CA; and
- m. Cathedral City, CA;

(See Ex. C.)

41. Further, the Coachella Valley Addenda incorporated Windermere SoCal – the Area Representative – as a party to the Coachella Valley Franchise Agreement. (See Ex. C.) This significant alteration of the parties under the Coachella Valley Franchise Agreement cemented the symbiotic relationship between Bennion and Deville’s status as Area Representative and franchisee.

42. As is reflected below, WSC has recently taken action to terminate the Area Representation Agreement, and with it, the 50% franchise fee discount that was central to Bennion and Deville’s agreement to open and operate more than a dozen Windermere franchised businesses. Due to the integrated nature of the Area Representative and franchisee relationships, Plaintiffs contend that the termination of the Area Representation Agreement serves as a *de facto* termination of the franchise agreements as well.

**E. Bennion and Deville Enter Into A New Windermere Franchise Agreement**

43. In or around March 29, 2011, Bennion and Deville, through Windermere SoCal and their newly formed entity Plaintiff Bennion & Deville Fine Homes SoCal, Inc. (“B&D SoCal”), entered into a new Windermere Real Estate Franchise License Agreement (the “SoCal Franchise Agreement”) with WSC. A true and correct copy of the SoCal Franchise Agreement is attached hereto as Exhibit D.

44. Similar to that of the Coachella Valley Franchise Agreement, the SoCal Franchise Agreement granted B&D SoCal “the revocable and non-exclusive right to use

1 the Windermere Trademark and Windermere System in the conduct of real estate  
2 brokerage services” in certain specified locations.<sup>6</sup> (Ex. D, §§1, 2.)

3 45. The SoCal Franchise Agreement also obligated WSC to provide some  
4 nebulous form of “guidance to Licensee with respect to the Windermere System [...],  
5 furnished in the form of written materials distributed physically or electronically,  
6 including through the Windermere Online Resource Center (WOC) intranet website,  
7 consultations by telephone or in person, or by other means of communication.” (Ex. D, §  
8 3.) In truth, WSC provided little to no “guidance” and instead left Bennion and Deville to  
9 provide all of the services to B&D SoCal and to all of the other Windermere franchised  
10 businesses in Southern California.

11 46. Also, WSC represented that it would take action, “in its discretion and  
12 consistent with good business judgment to prevent infringement of the Trademark or  
13 unfair competition against Windermere licensees.” (Ex. D, § 6(e).) Again, as reflected  
14 below, WSC failed to comply with this term of the SoCal Franchise Agreement.

15 47. On the other hand, the SoCal Franchise Agreement obligated B&D SoCal to  
16 pay to WSC and Windermere SoCal: (i) a monthly “Ongoing License Fee,” (ii) a  
17 “Technology Fee” of “\$25 per month per licensed agent and agent assistant for basic  
18 service,” and (iii) a “Windermere Foundation Suggested Donation” of “\$10.00 per  
19 transaction side for each closed transaction.”<sup>7</sup> (Ex. D, § 7, Appendix 1.)  
20  
21

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22  
23 <sup>6</sup> Again, the term “Trademark” is defined to mean various Windermere trade names,  
24 trademarks, service marks, and other symbols. (See Ex. D, Recital A.) The term  
25 “Windermere System” is defined as “the standards, methods, procedures, techniques,  
26 specifications and programs developed by WSC for the establishment, operation and  
27 promotion of independently owned real estate brokerage offices [...]” (Ex. D, Recital A.)  
28 <sup>7</sup> Concurrent with their execution of the SoCal Franchise Agreement, Bennion and  
Deville also executed a personal guaranty. (Ex. D, Appendix 2.) This personal guaranty  
was later released upon the parties’ written agreement to modify the terms of the  
franchise agreements.

1 48. The SoCal Franchise Agreement can be terminated by either party, without  
2 cause, upon written notice “no less than 180 days, and no more than 366 days, prior to the  
3 expiration date specified in the notice,” or by WSC, with cause, and subject to the  
4 specific provisions of Section 8 of the SoCal Franchise Agreement. (Ex. D, § 8(a).)

5 49. Under the terms of the SoCal Franchise Agreement, Bennion and Deville  
6 opened and/or acquired Windermere franchised businesses in several cities throughout  
7 San Diego County. (Ex. D, “Office Announcement.”) WSC encouraged Bennion and  
8 Deville’s aggressive acquisition of new franchised business in San Diego, resulting in  
9 investment by Bennion and Deville of over \$4,000,000 into the San Diego franchises.

10 **F. Parties Enter Into Agreement Modifying Franchise Agreements**

11 50. On or about December 18, 2012, WSC, Windermere SoCal, B&D Fine  
12 Homes, and B&D SoCal entered into a document titled “Agreement Modifying  
13 Windermere Real Estate Franchise License Agreements” (hereafter, the “Modification  
14 Agreement”). A true and correct copy of the Modification Agreement is attached as  
15 Exhibit E.

16 51. The Modification Agreement was intended to, and did, modify several  
17 material terms of the Coachella Valley Franchise Agreement and SoCal Franchise  
18 Agreement in light of the damage to Plaintiffs’ businesses caused the anti-marketing  
19 campaign against Windermere and its franchisees engaged in by Gary Kruger and the  
20 Windermere Watch websites. (*See* Ex. E, Recitals.)

21 52. In light of this, WSC expressly agreed to, among other things, “make  
22 commercially reasonable efforts to actively pursue counter-marketing, and other methods  
23 seeking to curtail the anti-marketing activities undertaken by Gary Kruger, his  
24 Associates, Windermere Watch and/or the agents of the foregoing persons.” (Ex. E, §  
25 3(A).)

26 53. The Modification Agreement also modified several terms of the Coachella  
27 Valley Franchise Agreement and SoCal Franchise Agreement, limiting the obligations of  
28

1 Plaintiffs under these agreements. Specifically, the parties modified the franchise  
2 agreements as follows:

- 3 a. All past due franchise fees and Technology Fees owed by Plaintiffs  
4 under the franchise agreements were waived and forgiven (Ex. E, §  
5 3(B));
- 6 b. Plaintiffs were granted a temporary reduction in ongoing franchise  
7 fees for a period of eight months, applied retroactively (Ex. E, §  
8 3(C));
- 9 c. A limitation and cap of \$25 per agent per month were place on the  
10 Technology Fees owed by Plaintiffs (Ex. E, § 3(D));<sup>8</sup> and
- 11 d. The personal guarantees provided by Bennion and Deville in  
12 connection with their execution of the SoCal Franchise Agreement  
13 were extinguished and released (Ex. E, § 3(G)).

14 54. Further, in lieu of the provisions allowing for the termination of the  
15 agreements by either party following six month written notice, the term of each franchise  
16 agreement was modified to extend for five years from the date of the Modification  
17 Agreement. (Ex. E, §3(E).) Further, the Modification Agreement provided that the five-  
18 year term “shall automatically expire” if WSC, among other things, commits “a material,  
19 uncured breach of [the Modification Agreement].” (Ex. E, §3(E).)

20 55. The Modification Agreement also contains a confidentiality provision that  
21 the parties considered material to their agreement (the “Confidentiality Provision”). (Ex.  
22 E, § 15.) The Confidentiality Provision provides that:

23 The terms of the Agreement include information of a proprietary  
24 and/or confidential nature. The Parties expressly understand and agree  
25 that it shall constitute a breach of the Agreement to disclose the terms  
26 of the same except to the Parties’ attorneys and/or accountants or as  
27 may be required under a Court Order, subpoena and/or pursuant to an  
28 action to enforce the terms of the Agreement.

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<sup>8</sup>

1 (Id.)

2 56. As explained below, WSC has ignored its few obligations under the  
3 Modification Agreement and failed to make commercially reasonable efforts to actively  
4 pursue counter-marketing of the Windermere Watch websites, and, as the parties'  
5 relationships have deteriorated, has begun disclosing information about Plaintiffs to third  
6 parties that is protected by the Confidentiality provision.

7 **G. WSC's Treatment Of The Southern California Region Has Caused Significant**  
8 **Harm To Plaintiffs**

9 57. Sometime in 2014, Michael Teather, WSC's Senior Vice President of Client  
10 Services, implemented a strategy designed to systematically push Plaintiffs and other  
11 franchisees out of the Windermere system in order to resell the territories to new  
12 franchisees and to collect new initial franchise fees. This franchise model is known in the  
13 franchise industry as the "churn and burn" model.

14 58. Consistent with this new strategy, Teather directed Plaintiffs to "bring on" as  
15 many franchisees as possible, and if/when they failed, resell the territory to a new  
16 franchisee. Both Bennion and Deville expressed their disgust with Teather's new strategy  
17 and made clear that this was no longer the Windermere they had joined over a decade  
18 earlier.

19 59. In light of Plaintiffs' displeasure with the churn and burn strategy, Teather  
20 and others at WSC began creatively devising a plan to terminate Plaintiffs' Area  
21 Representation Agreement, and began surreptitiously meeting with other franchisees in  
22 the Southern California region undermining Plaintiffs' role and status as Area  
23 Representative. This included representations by Teather that he was now in charge of the  
24 region and would be taking the Services Division away from Plaintiffs.

25 60. WSC pressured Windermere SoCal to relinquish its rights under the ARA,  
26 falsely claiming that B&D Fine Homes and B&D SoCal could earn greater profits by just  
27 operating Windermere franchised offices without Windermere SoCal continuing to serve  
28 as the Windermere area representative for Southern California.



1       61.       WSC also began engaging in a practice of directly and indirectly recruiting  
2 Plaintiffs' employees and sales agents. For example, WSC invited several of Plaintiffs'  
3 employees and sales agents to a relocation event scheduled in San Diego without  
4 notifying either Bennion or Deville of the event. Following this event, multiple sales  
5 agents terminated their employment with Plaintiffs.

6       62.       WSC also solicited Plaintiffs' IT personnel in an effort to coerce these  
7 individuals to join WSC's operations in Seattle. Teather himself approached and offered  
8 a job to Plaintiffs' head of its technology department.

9       63.       WSC then disclosed Plaintiffs' proprietary information to other franchisees  
10 in its system in an attempt to improperly recruit B&D Fine Homes and B&D SoCal  
11 associates and other employees to join WSC and other Windermere offices.

12       64.       Teather also began authorizing the sale of new franchised businesses in San  
13 Diego County without mentioning these sales to Bennion or Deville. After learning of the  
14 sales, Bennion and Deville learned that these were very unattractive locations making it  
15 more difficult for the franchisee to succeed. This, of course, was Teather's plan. In  
16 addition to the surreptitious sales, Bennion and Deville also objected to several new  
17 franchisees and/or franchise locations that were brought to their attention. Again, Teather  
18 authorized the franchised businesses regardless.

19       65.       WSC's conduct demonstrated it had no interest in maintaining long-term  
20 relationships with Plaintiffs and their franchisees. Instead, it was only concerned with  
21 collecting upfront fees from new franchisees.

22       66.       WSC has undermined and ignored Plaintiffs at every turn. There have been  
23 significant periods of time where WSC would refuse and/or fail to respond to Plaintiffs'  
24 requests and the requests of the franchisees in the Southern California region.

25       67.       WSC's "churn and burn" franchise system is not only a deplorable model  
26 but has resulted in these numerous breaches of WSC's contractual obligations, as set  
27 forth in further detail below  
28

1 **H. WSC Has Failed To Provide The Support Required Under All Of The**  
2 **Agreements**

3 68. Under each of Plaintiffs' Agreements, WSC has the obligation to provide  
4 them with the support services integral to a franchisor-franchisee relationship. (See Ex.  
5 A, § 1, Recital A; Ex. B, § 3; Ex. D, § 3.) WSC has failed to do so.

6 69. WSC assured Plaintiffs that it had trained staff that would be able to assist  
7 and advise Plaintiffs and the franchisees within California in all aspects of the franchised  
8 business. In truth, WSC knew (and continues to know) very little about the California  
9 market, including marketing – and has provided Plaintiffs and the other franchisees in  
10 California with little or no support.

11 70. WSC not only failed to keep up to date with effective marketing materials  
12 and systems for the Southern California region, including the creation, distribution and  
13 ongoing maintenance of local and regional marketing and advertising materials critical  
14 for any franchise system to be successful in a competitive marketplace, but WSC also  
15 intentionally interfered with Plaintiffs' relationships with advertisers. WSC exerted  
16 significant pressure on certain advertisers to discontinue Plaintiffs' marketing campaigns  
17 and otherwise terminate their relationships with Plaintiffs.

18 **I. WSC Breached The Technology Fees Clause Central To All Agreements**

19 71. Windermere franchisees, including those of B&D Fine Homes and B&D  
20 SoCal, are required to pay certain technology fees. These are among the fees which  
21 Windermere SoCal collects. (See Ex. B., §§ 11-13.) The technology fees were  
22 “intended to support the operation and development of WSC’s technology systems”.  
23 (See Ex. B, § 13.)

24 72. WSC’s antiquated, incomplete and obsolete technology systems suffer from  
25 so many deficiencies that the system is rendered unusable. Its deficiencies include that  
26 the system’s tools do not cover MLS systems in Southern California. Which as to be  
27 expected, is a major issue for a Southern California based real estate company.  
28

1 73. Despite the shortcomings of WSC's technology system made available to  
2 the Southern California region, Plaintiffs continue to pay their monthly, per agent fees.  
3 While Plaintiffs' technology fee is capped at \$25 per agent per month, WSC has  
4 continued to aggressively increase the fees paid by the other franchised businesses in the  
5 region. By early 2015, this fee had been significantly increased to \$50 per agent, per  
6 month for the Southern California franchisees, a fee that was (and continues to be)  
7 disproportionately out of line with any benefits received by the franchisees and similar  
8 technology available in the marketplace. This amount was a far cry from the \$10 fee  
9 charged by WSC just a few years back.

10 74. WSC's escalating "technology fees" did not result in any improvement to  
11 the instability, operational deficiencies, and unreliability of the Windermere technology  
12 services. On information and belief, these technology fees bear no relationship to the  
13 amounts spent on Windermere's technology system.

14 75. The failure of WSC to provide the agreed upon technology system breaches  
15 the Coachella Valley Franchise Agreement, Area Representation Agreement and SoCal  
16 Franchise Agreement. (See Ex A, §§ 1, 5, Affiliate Fee Schedule, Ex., B, § 13, Ex. D, §§  
17 3, 7(c).)

18 76. In light of this fee, franchisees in the region are paying between \$16,000 and  
19 \$25,000 per month for this essentially useless technology. This excessive fee has caused  
20 a wave of franchisees to leave the system, resulting in harm to both the Windermere  
21 brand in the region, but also to Plaintiffs' ongoing revenue as the Area Representative.  
22 This has not only caused the rescission of franchise agreements but has damaged  
23 Windermere SoCal as it acts as a significant deterrent to the recruitment of new  
24 franchisees.

25 77. For instance, a franchise ran by Richard King was rescinded in significant  
26 part because of the "technology fee of \$75 per licensee." A true and correct copy of an  
27 email from King to Deville regarding the rescission dated May 6, 2015 is attached hereto  
28

1 as Exhibit F. Mr. King noted that he was receiving nothing for this technology fees and  
2 that it made it “quite expensive to be affiliated with Windermere.”

3 78. B&D Fine Homes and B&D SoCal have been damaged in that they have  
4 paid tens of thousands in technology fees with no corresponding benefit. Windermere  
5 SoCal has been damaged through the loss of franchisees (and their attendant license  
6 revenue).

7 79. WSC’s inferior technology services and inflated technology fees caused  
8 Plaintiffs to incur substantial costs in developing and supporting their own technology  
9 systems. This has required Plaintiffs to subsidize an expensive infrastructure in order to  
10 provide the franchisees in their region with support that WSC has contractually agreed to  
11 provide. This infrastructure includes:

- 12 a. Plaintiffs had to construct windermeresocal.com and associated tools in  
13 order provide its agents an industry standard technology service, rather than  
14 use WSC’s deficient and incomplete windermere.com offering;
- 15 b. Plaintiffs had to maintain a separate email server;
- 16 c. Plaintiffs had to maintain separate RETS (Real Estate Transaction Standard)  
17 to give brokers, agents and third parties access to listing and transaction  
18 data; and
- 19 d. Plaintiffs had to maintain separate syndicate options pathways in order to  
20 provide a higher standard of accuracy and reactivity.

21 80. B&D Fine Homes and B&D SoCal have been damaged in that they have had  
22 to incur hundreds of thousands of dollars in expenses to maintain a technology platform  
23 to support the franchisees and their agents.

24 **J. WSC Breached The Area Representation Agreement By Failing To Maintain**  
25 **A Continuous Franchise Registration In California**

26 81. The right to offer Windermere franchises to prospective franchisees was  
27 central to Windermere SoCal’s role as an Area Representative for WSC. The Area  
28 Representation Agreement granted Windermere SoCal the right to offer the franchise

1 opportunity to real estate brokerage businesses. (See Ex. B, Recital A, §§ 1.5, 2.)  
2 Windermere SoCal would then receive 50% of the initial franchise fees and 50% of the  
3 ongoing royalties that would flow from any new franchised businesses in its region.

4 82. Plaintiffs are informed and believe that on several occasions, WSC failed to  
5 properly and timely renew its California franchise registration, thereby negating  
6 Windermere SoCal's ability to offer Windermere franchises for sale. This failure by  
7 WSC not only negatively impacted Windermere SoCal's profitability, but it also had the  
8 effect of suppressing the value of the Area Representative business upon termination.

9 83. Instead of properly registering a franchise disclosure document for the  
10 Southern California region, WSC would demand that Windermere SoCal provide  
11 prospective franchisees with the Northern California disclosure documents – identifying  
12 incorrect fees. A true and accurate copy of an email from WSC's General Counsel to  
13 Deville, directing Deville to use the Northern California disclosure document "for now,"  
14 is attached hereto as Exhibit G.

15 84. By negating Windermere SoCal's ability to offer Windermere franchises for  
16 sale, WSC has deprived Windermere SoCal of the benefits of the Area Representative  
17 Agreement.

18 **K. WSC Breached The Termination Provision Of The Area Representation**  
19 **Agreement**

20 85. In light of the parties' ongoing dispute, on January 28, 2015, Paul S. Drayna,  
21 the General Counsel for WSC, sent a short, one paragraph letter to Deville announcing  
22 that WSC was "exercising its right to terminate [the] Area Representation Agreement  
23 dated May 1, 2004, pursuant to the 180-day notice provision of Paragraph 4.1." A true  
24 and accurate copy of the January 28, 2015 letter is attached hereto as Exhibit H.  
25 According to the letter, Windermere SoCal's "rights and responsibilities as Area  
26 Representative will terminate on Tuesday, July 28, 2015." (*Id.*)

27 86. By exercising its rights under Paragraph 4.1 of the Area Representation  
28 Agreement, WSC was terminating the agreement without cause, and therefore triggering

1 Section 4.2 requiring WSC to make termination payments to Windermere SoCal in an  
2 “amount equal to the fair market value of the Terminated Party’s interest in the  
3 Agreement.” (See Ex. B, § 4.2.)

4 87. The January 28, 2015 letter did not purport to terminate or otherwise change  
5 the status of any of the franchise agreements between Plaintiffs and WSC.

6 88. In stark contrast to WSC January 28, 2015 letter seeking to terminate the  
7 Area Representation Agreement *without cause*, on February 26, 2015, WSC served  
8 Plaintiffs with a second termination letter, this time announcing WSC’s intent to  
9 terminate “with cause.” A true and accurate copy of the February 26, 2015 letter is  
10 attached as Exhibit I.

11 89. According to this second letter, WSC now claimed to have cause to  
12 terminate the agreement in light of Windermere SoCal’s alleged “material breach” of  
13 sections 3, 4 and 10 of the Area Representation Agreement for purportedly “failing to  
14 collect and/or remit license and technology fees from licensees.” (Ex. I.) The second  
15 letter also provided Windermere SoCal 90 days to cure these alleged breaches. (*Id.*)

16 90. WSC’s attempt to terminate the Area Representation Agreement for “*cause*”  
17 is improper. Under the Area Representation Agreement, Windermere SoCal was only  
18 tasked with collecting certain franchise fees from the franchisees in its territory; it is not  
19 the guarantor to WSC of any of the unpaid/uncollectable fees. (Ex. B, §§ 3, 11-13,  
20 Exhibit A, § 3 [Windermere SoCal “will not be responsible for payment of uncollectable  
21 fees.”]) Because Windermere SoCal has not withheld from WSC any of the franchise fees  
22 that it has collected, WSC’s stated breaches of the Area Representation Agreement are  
23 not actionable. Thus, no *cause* existed for WSC to terminate the Area Representation  
24 Agreement.

25 91. WSC has breached Section 4.2 of the Area Representation Agreement by  
26 failing to pay Windermere SoCal the required termination fee. (See Ex. B, § 4.2.)

27 **L. WSC Breached The Modification Agreement By Failing To Make**  
28 **Commercially Reasonable Efforts To Curtail The Windermere Watch**

1 92. Windermere has been the target of anti-marketing campaign initiated by  
2 Gary Kruger. Kruger and his associates initiated a web based campaign, at both  
3 www.windermerewatch.com and www.windermerewatch2.com, targeting Windermere  
4 and its franchised businesses.

5 93. The Windermere Watch anti-marketing campaign has had a very significant  
6 and monetarily damaging effect on Plaintiffs. As Plaintiffs expanded the Windermere  
7 brand in Southern California they had to push against the headwind that is Windermere  
8 Watch. Prior to Plaintiffs' involvement, Windermere had a very minimal presence in  
9 California.

10 94. In deciding on picking a real estate broker, consumers often would research  
11 Windermere to obtain background information on it. The Windermere Watch website  
12 prominently appears in website search engines (such as Google). Its effect then is to  
13 immediately damage a franchisee's broker's opportunity to obtain clients which in turn  
14 financially damages the franchisee and the Area Representative.

15 95. In the Modification Agreement, WSC enticed Plaintiffs to remain with  
16 Windermere by agreeing to make "commercially reasonable efforts to actively pursue  
17 counter-marketing, and other methods seeking to curtail the anti-marketing activities  
18 undertaken by Gary Kruger, his Associates, Windermere Watch and/or the agents of the  
19 foregoing persons." (Ex. E, § 3(A).) The Modification Agreement specifically  
20 suggested litigation as one type of counter marketing. (*Id.*)

21 96. WSC also should have engaged and devoted significant resources in search  
22 engine optimization to target and diminish the Windermere Watch site content's  
23 appearance in internet search engines. On information and belief, WSC has failed to  
24 engage in any such campaign and has failed to devote resources to curtail the  
25 Windermere Watch.

26 97. Despite their obligation under the Modification Agreement, and repeated  
27 requests by Plaintiffs that it take action, WSC has failed to take any material efforts to  
28 combat the Windermere Watch.

1 98. WSC's failure to act has forced Plaintiffs to incur significant time and  
2 expense employing their own counter-marketing campaign to combat the damage that the  
3 Windermere Watch has caused to the Southern California franchisees. Plaintiffs have  
4 incurred in excess of \$125,000 in additional expenses attempting to mitigate the negative  
5 impact of the Windermere Watch website activities.

6 99. Because WSC failed to make commercially reasonable efforts to pursue  
7 counter marketing of Windermere Watch as required by the Modification Agreement,  
8 WSC has effectively breached its obligations under that agreement.

9 **M. After Plaintiffs Explore Selling The Business Back To Windermere, WSC**  
10 **Exploits The Attempted Transaction By Breaching The Confidentiality Provision**

11 100. After WSC had committed extensive contractual breaches and shown that it  
12 had a cavalier attitude toward its' legal obligations, Plaintiffs naturally looked to options  
13 for ending the relationship. Plaintiffs eventually explored selling the business, or parts  
14 thereof, back to Windermere and WSC.

15 101. As part of these negotiations, Plaintiffs entered into a confidentiality  
16 agreement with WSC's President John Jacobi and had Jacobi and his associates sign the  
17 agreement (hereafter, the "Confidentiality Agreement"). Jacobi acted on behalf and in  
18 concert with WSC in signing the Confidentiality Agreement and exploring the sale. A  
19 true and correct copy of the Confidentiality Agreement signed by various representatives  
20 of WSC is attached hereto as Exhibit J.

21 102. As part of the parties' negotiations, Plaintiffs shared the financial  
22 information necessary to value its business. Plaintiffs only shared such information for  
23 purposes of reaching a deal to sell the business or parts thereof.

24 103. After the parties were ultimately unable to come to an agreement, WSC took  
25 the confidential and proprietary information and brandished it as weapon to use in its  
26 campaign against Plaintiffs. This includes informing Plaintiffs' employees and third  
27 parties that Plaintiffs are selling their business and using this and the information gained  
28



1 in the negotiations as leverage to attempt to get agents and employees to leave Plaintiffs  
2 businesses.

3 104. WSC's conduct is in violation of sections 1, 2 and 3 of the Confidentiality  
4 Agreement. The Confidentiality Agreement expressly forbids the disclosure of any  
5 information obtained in the negotiations. (See Ex. J, § 1 [The Information... will not be  
6 used by Jacobi or any of the Jacobi affiliates, other than in connection with Jacobi's  
7 evaluation of the transaction"], § 2 ["Jacobi may share the Information only with his  
8 accountant Kelly MacDonald, and not with any other of the Jacobi Affiliates or other  
9 third parties"]; § 3 ["Jacoby agrees that prior to disclosing any of the Information to any  
10 person...Jacobi will cause such person to sign a confirmation, agreeing to be bound by  
11 the terms of the Confidentiality Agreement".])

12 **N. WSC Also Violated The Confidentiality Provision In the Modification**  
13 **Agreement**

14 105. As part of the Plaintiffs' agreement to continue their relationships with WSC  
15 notwithstanding all of the problems confronting the WSC franchise system, the parties  
16 entered into the Modification Agreement which significantly modified (and reduced) the  
17 Plaintiffs' obligations under the franchise agreements. During the extensive negotiations  
18 leading up to the execution of the Modification Agreement, Plaintiffs provided WSC with  
19 sensitive, proprietary financial and other information, the contents of which are expressly  
20 protected by the Confidentiality Provision in the Modification Agreement.

21 106. Plaintiffs are now informed and believe that WSC has disclosed to other  
22 franchisees in its system Plaintiffs' proprietary information provided to WSC as part of  
23 the negotiations surrounding the Modification Agreement and, to some extent,  
24 incorporated in the terms of the Modification Agreement.

25 107. WSC's activities not only violate the express terms of the Confidentiality  
26 Provision, but they undermine the purpose of the negotiations giving rise to the  
27 Modification Agreement. (See Ex. E., § 15.) WSC's disclosure of the Plaintiffs'  
28 confidential and proprietary information has significantly harmed Plaintiffs' businesses.

1 **O. WSC Has Unlawfully Interfered With Plaintiffs' Franchise And Employment**  
2 **Relationships**

3 108. As part of its efforts to replace Plaintiffs and generate more fees, WSC has  
4 interfered with both B&D Fine Homes and B&D SoCal's franchises as well as  
5 undermined Windermere SoCal's role as Area Representative. WSC has implemented a  
6 strategy of attempting to poach Plaintiffs' employees through improper practices as well  
7 as replace Plaintiffs by inserting new franchisees in the region.

8 109. WSC has directly and indirectly recruited Plaintiffs' employees and sales  
9 agents to join WSC or other franchisees. This has resulted in multiple sales agents and  
10 support staff terminating their employment with Plaintiffs.

11 110. WSC has damaged Plaintiffs' existing relationships with franchisees (and  
12 prospective franchisees) in Southern California region by announcing, without Plaintiffs'  
13 knowledge, that Windermere SoCal was relinquishing its "servicing" rights under the  
14 ARA, when in fact Windermere SoCal has not expressed any such intention or plan.

15 111. WSC supported and assisted a Windermere franchise to relocate into the  
16 same Northern San Diego County market, in which there was already a B&D SoCal  
17 franchise office already operating. WSC then pressured B&D SoCal to "give" its office  
18 over to this franchisee without any remuneration.

19 112. WSC has authorized and approved the opening of various Windermere  
20 franchised offices within Windermere SoCal's territory without approval of Windermere  
21 SoCal.

22 **FIRST CLAIM FOR RELIEF**

23 **Breach of Contract – Coachella Valley Franchise Agreement**

24 (By B&D Fine Homes and Windermere SoCal against WSC)

25 113. Plaintiffs repeat, reallege and incorporate by reference the preceding  
26 paragraphs of their Complaint as though fully set forth herein.  
27  
28

1 114. As alleged above, B&D Fine Homes entered into the Coachella Valley  
2 Franchise Agreement with WSC on August 1, 2001. This agreement was later amended  
3 to include Windermere SoCal as a party.

4 115. Plaintiffs performed all obligations required of them under the Coachella  
5 Valley Franchise Agreement, unless otherwise excused by WSC's breach.

6 116. WSC breached the Coachella Valley Franchise Agreement by failing to  
7 comply with the following requirements:

- 8 a. Section 1, for failing to provide the promised "services" to enhance  
9 Plaintiffs' "profitability";  
10 b. Section 4, for failing to take necessary action (legal or otherwise) to prevent  
11 infringement of the Windermere trademark or the related unfair competition  
12 faced by Plaintiffs in the Southern California region as a result of the  
13 Windermere Watch websites;  
14 c. Recital A, for failing to provide Plaintiffs with a viable "Windermere  
15 System" as defined in the agreement; and  
16 d. Affiliate Fee Schedule Attachment, for failing to provide adequate  
17 technology systems in return for technology fees.

18 117. As a result of WSC's breaches of the Coachella Valley Franchise  
19 Agreement, Plaintiffs suffered actual damages in an amount to be proven at trial, but far  
20 in excess of the jurisdictional minimums of this Court.

21 118. Plaintiffs are also entitled to recover "reasonable attorneys' fees" under the  
22 Coachella Valley Franchise Agreement. (*See* Ex. A, § 11.)

23 **SECOND CLAIM FOR RELIEF**

24 **Breach of Contract – Area Representation Agreement**

25 (By Windermere SoCal against WSC)

26 119. Plaintiffs repeat, reallege and incorporate by reference the preceding  
27 paragraphs of their Complaint as though fully set forth herein.  
28

1 120. As alleged above, on May 1, 2004, Windermere SoCal entered into the Area  
2 Representation Agreement with WSC.

3 121. Windermere SoCal performed all obligations required of it under the Area  
4 Representation Agreement, unless otherwise excused by WSC's breach.

5 122. WSC breached the Area Representation Agreement by failing to comply  
6 with the following requirements:

- 7 a. Section 2, for failing to provide Windermere SoCal with the uninterrupted  
8 right to offer Windermere franchised businesses in Southern California;  
9 b. Section 2, for failing to provide a viable "Windermere System" as defined in  
10 the agreement;  
11 c. Section 4.2, for failing to pay Windermere SoCal the termination fee – *i.e.*  
12 the fair market value of its interest in the Area Representation Agreement –  
13 following termination without cause;  
14 d. Section 7, for failing to promptly and diligently commence and pursue the  
15 preparation and filing of all franchise registration filings required under  
16 California law and/or the United States of America; and  
17 e. Section 13, for failing to provide a technology system to support the  
18 operation and development of the franchise system in Southern California,  
19 and for unilaterally increasing the technology fees to amounts that on  
20 information and belief bear no relationship to the amounts actually spent on  
21 Windermere's technology system.  
22

23 123. As a result of WSC's breaches of the Area Representation Agreement,  
24 Windermere SoCal has suffered (and will continue to suffer) actual damages in an  
25 amount to be proven at trial, but far in excess of the jurisdictional minimums of this  
26 Court.

27 124. Windermere SoCal is also entitled to recover "reasonable attorneys' fees"  
28 under the Coachella Valley Franchise Agreement. (*See* Ex. B, § 21.)

1 **THIRD CLAIM FOR RELIEF**

2 **Breach of Contract – SoCal Franchise Agreement**

3 (By B&D SoCal, Bennion, Deville, and Windermere SoCal against WSC)

4 125. Plaintiffs repeat, reallege and incorporate by reference the preceding  
5 paragraphs of their Complaint as though fully set forth herein.

6 126. As alleged above, on March 29, 2011, B&D SoCal, Windermere SoCal,  
7 Bennion, and Deville entered into the SoCal Franchise Agreement with WSC.

8 127. Plaintiffs performed all obligations required of them under the SoCal  
9 Franchise Agreement, unless otherwise excused by the conduct of WSC.

10 128. WSC breached the SoCal Franchise Agreement by failing to comply with  
11 the following requirements:

- 12 a. Section 3, for failing to provide the promised “guidance” to Plaintiffs with  
13 respect to the “Windermere System”;
- 14 b. Section 6, for failing to take necessary action (legal or otherwise) to prevent  
15 infringement of the Windermere trademark or the related unfair competition  
16 faced by Plaintiffs in the Southern California region as a result of the  
17 Windermere Watch websites;
- 18 c. Recital A, for failing to provide Plaintiffs with a viable “Windermere  
19 System” as defined in the agreement; and
- 20 d. Affiliate Fee Schedule Attachment, for failing to provide adequate  
21 technology systems in return for technology fees.

22 129. As a result of WSC’s breaches of the SoCal Franchise Agreement, Plaintiffs  
23 suffered actual damages in an amount to be proven at trial, but far in excess of the  
24 jurisdictional minimums of this Court.

25 130. Plaintiffs are also entitled to recover “reasonable attorneys’ fees” under the  
26 SoCal Franchise Agreement. (*See Ex. D, § 13.*)

27 **FOURTH CLAIM FOR RELIEF**

1 **Breach of Contract – Modification Agreement**

2 (By all Plaintiffs against WSC)

3 131. Plaintiffs repeat, reallege and incorporate by reference the preceding  
4 paragraphs of their Complaint as though fully set forth herein.

5 132. As alleged above, on December 18, 2012, Plaintiffs and WSC entered into  
6 the Modification Agreement.

7 133. Plaintiffs performed all obligations required of them under the Modification  
8 Agreement, unless otherwise excused by the conduct of WSC.

9 134. WSC breached the Modification Agreement by failing to comply with the  
10 following requirements:

- 11 a. Section 3(A), for failing to make commercially reasonable efforts to curtail  
12 Windermere Watch and related attacks on the Windermere brand in  
13 Southern California; and  
14 b. Section 15, for violating the confidentiality provision by disclosing to other  
15 franchisees in its system Plaintiffs’ confidential, proprietary information.

16 135. As a result of WSC’s breaches of the Modification Agreement, Plaintiffs  
17 suffered actual damages in an amount to be proven at trial, but far in excess of the  
18 jurisdictional minimums of this Court.

19 136. Plaintiffs are also entitled to recover “reasonable attorneys’ fees and costs”  
20 under the Modification Agreement. (*See Ex. E, § 7.*)

21 **FOURTH CLAIM FOR RELIEF**

22 **Breach of Contract – Confidentiality Agreement**

23 (By all Plaintiffs against WSC)

24 137. Plaintiffs repeat, reallege and incorporate by reference the preceding  
25 paragraphs of their Complaint as though fully set forth herein.

26 138. As alleged above, Plaintiffs entered into the Confidentiality Agreement on  
27 April 22, 2015.  
28

1 139. Plaintiffs performed all obligations required of them under the  
2 Confidentiality Agreement, unless otherwise excused by the conduct of WSC.

3 140. WSC breached Section 1 through 3 of the Confidentiality Agreement by  
4 revealing confidential and proprietary information obtained in the negotiations.

5 141. As a result of WSC's breaches of the Confidentiality Agreement, Plaintiffs  
6 suffered actual damages in an amount to be proven at trial, but far in excess of the  
7 jurisdictional minimums of this Court.

8 **SIXTH CLAIM FOR RELIEF**

9 **Breach of Implied Covenant of Good Faith and Fair Dealing**

10 (By all Plaintiffs against WSC)

11 142. Plaintiffs repeat, reallege and incorporate by reference the preceding  
12 paragraphs of their Complaint as though fully set forth herein.

13 143. As alleged above, B&D Fine Homes entered into the Coachella Valley  
14 Franchise Agreement on August 1, 2001, Windermere SoCal entered into the Area  
15 Representation Agreement on May 1, 2004 and B&D SoCal entered into the SoCal  
16 Franchise Agreement on March 29, 2011. Plaintiffs entered into the Modification  
17 Agreement on December 18, 2012 and Confidentiality Agreement on April 22, 2015.

18 144. Incorporated into the Coachella Valley Franchise Agreement, Area  
19 Representation Agreement, SoCal Franchise Agreement, Modification Agreement and  
20 Confidentiality Agreement is an implied covenant of good faith and fair dealing.

21 145. Plaintiffs performed all obligations required of them under the Coachella  
22 Valley Franchise Agreement, Area Representation Agreement, SoCal Franchise  
23 Agreement, Modification Agreement and Confidentiality Agreement.

24 146. WSC breached the implied covenant of good faith and fair dealing by acting  
25 in a manner so as to deprive Plaintiffs of the benefits of their agreements. This included

- 26 a. Failing to provide a viable Windermere System in the Southern California  
27 region. To the extent WSC provided services or assistance it was worthless;  
28

- 1 b. Failing to make commercially reasonable efforts to curtail the Windermere  
2 Watch;
- 3 c. Marketing franchisees in Windermere SoCal's territory without  
4 consultation;
- 5 d. Granting Windermere branch offices to third parties in markets served by  
6 Windermere SoCal;
- 7 e. Soliciting Windermere SoCal's participation in offers and sales of franchises  
8 in violation of the franchise laws;
- 9 f. Improperly recruiting B&D Fine Homes and B&D SoCal's sales associates  
10 and other employees to join WSC and other Windermere offices;
- 11 g. Disclosing to other franchisees in its system Plaintiffs' proprietary  
12 information;
- 13 h. Failing to provide a modern and up to date technology system platform;
- 14 i. Increasing the technology fees to amounts that on information and belief  
15 bear no relationship to the amounts spent on Windermere's technology  
16 system; and
- 17 j. Failing to act in good faith and conduct its business such that Plaintiffs  
18 received the benefits of being part of a franchise system.

19 147. As a result of WSC's breach of the implied covenant of good faith and fair  
20 dealing, Plaintiffs have suffered damages in an amount to be proven at trial.

21 **SEVENTH CLAIM FOR RELIEF**

22 **Tortious Interference with Contractual Relations**

23 (By all Plaintiffs against WSC)

24 148. Plaintiffs repeat, reallege and incorporate by reference the preceding  
25 paragraphs of the Complaint as though fully set forth therein.

26 149. Windermere SoCal has valid, existing agreements with franchisees  
27 throughout its region concerning Windermere real estate brokerages.  
28



1 150. WSC had knowledge of the aforementioned agreement and knew of its value  
2 to Windermere SoCal.

3 151. WSC intentionally disrupted the performance of the aforementioned  
4 agreement by:

- 5 a. Marketing franchisees in Windermere SoCal's territory without  
6 consultation;
- 7 b. Granting Windermere branch offices to third parties in markets served by  
8 Windermere SoCal; and
- 9 c. Soliciting Windermere SoCal's participation in offers and sales of franchises  
10 in violation of the franchise laws.

11 152. WSC's conduct has prevented performance of the Area Representation  
12 Agreement by reducing Windermere SoCal's ability to maintain franchisees in the  
13 region.

14 153. B&D Fine Homes and B&D SoCal have valid, existing agreements with  
15 their agents in each of their locations.

16 154. WSC had knowledge of the aforementioned agreements and knew of their  
17 value to B&D Fine Homes and B&D SoCal.

18 155. After WSC gave notice to terminate the Area Representation Agreement and  
19 received notice of the termination of the Coachella Valley Franchise Agreement and  
20 SoCal Franchise Agreement, WSC set out to disrupt B&D Fine Homes and B&D SoCal's  
21 agreements with their agents.

22 156. WSC intentionally disrupted the performance of the aforementioned  
23 agreement by improperly recruiting B&D Fine Homes and B&D SoCal's sales associates  
24 and other employees to join WSC and other Windermere offices.

25 157. WSC's conduct has caused B&D Fine Homes and B&D SoCal to lose  
26 employees thus preventing the performance of the employment agreements.

27  
28

1 158. As a direct, proximate and foreseeable result, Plaintiffs have been damaged  
2 in an amount to be proven at trial. WSC's conduct was a substantial factor in causing  
3 this harm.

4 159. WSC's conduct was malicious, fraudulent and oppressive and done with a  
5 conscious disregard for Plaintiffs' contractual rights. As such, Plaintiffs are entitled to  
6 exemplary damages in an amount to be proven at trial.

7 **EIGHTH CLAIM OF RELIEF**

8 **Tortious Interference with Prospective Economic Advantage**

9 (By all Plaintiffs against WSC)

10 160. Plaintiffs repeat, reallege and incorporate by reference the preceding  
11 paragraphs of the Complaint as though fully set forth therein.

12 161. Windermere SoCal's Area Representation Agreement allowed it to prospect  
13 franchisees throughout its region to add them as Windermere real estate brokerages.  
14 WSC knew of these prospective relationships.

15 162. WSC intentionally disrupted Windermere SoCal's ability to solicit and  
16 enroll new franchisees by:

- 17 a. Marketing franchisees in Windermere SoCal's territory without  
18 consultation;
- 19 b. Granting Windermere branch offices to third parties in markets served by  
20 Windermere SoCal; and
- 21 c. Soliciting Windermere SoCal's participation in offers and sales of franchises  
22 in violation of the franchise laws.

23 163. WSC's conduct has prevented Windermere SoCal from being able to recruit  
24 additional franchisees in the region.

25 164. B&D Fine Homes and B&D SoCal continually have attempted to expand  
26 their franchises by adding stores and real estate agents. WSC knew of these prospective  
27 relationships.

28

1 165. WSC intentionally disrupted the potential acquisition of additional stores  
2 and agent by improperly recruiting sales associates and other employees in the region to  
3 join WSC and other Windermere offices.

4 166. WSC's conduct has caused B&D Fine Homes and B&D SoCal to lose out  
5 on the acquisition of potential stores and employees.

6 167. As a direct, proximate and foreseeable result, Plaintiffs have been damaged  
7 in an amount to be proven at trial. WSC's conduct was a substantial factor in causing  
8 this harm.

9 168. WSC's conduct was malicious, fraudulent and oppressive and done with a  
10 conscious disregard for Plaintiffs' contractual rights. As such, the Plaintiffs are entitled  
11 to exemplary damages in an amount to be proven at trial.

12 **WHEREFORE**, Plaintiffs pray for relief against WSC as follows:

13 1. On the First through Sixth Causes of Action:

- 14 a. For compensatory damages in amounts to be proven at trial;  
15 b. For a judicial determination and declaration that WSC did not have cause  
16 to terminate the Area Representation Agreement, as provided for in the  
17 agreement.

18 2. On the Seventh and Eighth Causes of Action:

- 19 a. For compensatory damages in amounts to be proven at trial;  
20 b. For punitive damages in amounts to be proven at trial.  
21 c. For a preliminary and permanent injunction enjoining WSC from  
22 improperly recruiting B&D Fine Homes and B&D SoCal's sales  
23 associates and other employees to join WSC and other Windermere  
24 offices.

25 3. For reasonable costs and attorneys' fees incurred in this action pursuant to  
26 Section 11 of the Coachella Valley Franchise Agreement, Section 21 of the  
27

28

1 Area Representation Agreement; Section 13 of the SoCal Franchise Agreement;  
2 and Section 7 of the Modification Agreement; and

3 4. For such other and further relief as the Court may deem just and proper.  
4

5 DATED: September 17, 2015

**MULCAHY LLP**

6  
7 By: /s/ James M. Mulcahy

8 James M. Mulcahy

9 Kevin A. Adams

Attorneys for Plaintiffs

10 BENNION & DEVILLE FINE HOMES,

11 INC., BENNION & DEVILLE FINE

HOMES SOCAL, INC., WINDERMERE

12 SERVICES SOUTHERN CALIFORNIA,

13 INC.  
14

15 **JURY DEMAND**

16 Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs demand a jury trial on  
17 all issues triable to a jury.  
18

19 DATED: September 17, 2015

**MULCAHY LLP**

20  
21 By: /s/ James M. Mulcahy

22 James M. Mulcahy

23 Kevin A. Adams

Attorneys for Plaintiffs

24 BENNION & DEVILLE FINE HOMES,

25 INC., BENNION & DEVILLE FINE

HOMES SOCAL, INC., WINDERMERE

26 SERVICES SOUTHERN CALIFORNIA,

27 INC.  
28