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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BENNION & DEVILLE FINE HOMES, INC., a California corporation, BENNION & DEVILLE FINE HOMES SOCAL, INC., a California corporation, WINDERMERE SERVICES SOUTHERN CALIFORNIA, INC., a California corporation, Plaintiffs, v. WINDERMERE REAL ESTATE SERVICES COMPANY, a Washington corporation; and DOES 1-10. Defendant. AND RELATED COUNTERCLAIMS	Case No. 5:15-cv-01921-R-KK *Hon. Manual L. Real* **FIRST AMENDED COMPLAINT** Complaint filed: September 17, 2015 DEMAND FOR JURY TRIAL

Pursuant to the Court's Order of November 13, 2015 [D.E. 30], Plaintiffs Bennion & Deville Fine Homes, Inc. ("B&D Fine Homes"), Bennion & Deville Fine Home SoCal, Inc. ("B&D SoCal"), and Windermere Services Southern California, Inc. ("Services SoCal") (collectively, "Plaintiffs") hereby submit this First Amended Complaint as follows:

NATURE OF ACTION

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

2. What was once a viable real estate system offered by WSC to its Southern California franchisees has become antiquated and irrelevant. WSC's real estate technology and related services have become outdated, unstable, and no longer a real option for its franchisees in the Southern California region.

3. WSC has also failed to provide local and regional marketing and advertising support crucial to the success of any franchise system in a competitive marketplace. This lack of marketing and brand support was only exacerbated by the highly visible Windermere Watch marketing campaign undertaken by Gary Kruger – a self-proclaimed "public service consumer advocate" directing prospective real estate clients to avoid Windermere "at all costs."

4. WSC's shortcomings forced Plaintiffs, through the substantial expenditure of both time and money, to develop much of the technology and others services needed for the Southern California region to succeed. As a direct result of Plaintiffs' efforts, the Southern California region has grown into one of WSC's most successful regions, and Plaintiffs became the most successful Area Representative and franchisees in the Windermere system.

5. By early 2014, there came a tipping point in the parties' relationship where WSC grew jealous of Plaintiffs' success and desired to take back Plaintiffs' rights as Area Representative – most notably, Plaintiffs' right to 50% of all initial franchise fees and monthly licensing fees paid by the franchisees in Southern California.

6. In pursuing the Area Representative rights to the Southern California region, WSC has (i) committed numerous express breaches of the parties' franchise and area representation agreements, (ii) deprived Plaintiffs of the implied benefits of these agreements, and (iii) shown an utter disregard for California's franchise laws violating both the California Franchise Relations Act and the California Franchise Investment Law. This conduct by WSC has caused serious damage to Plaintiffs and their businesses.

7. For these reasons, set forth in detail below, Plaintiffs now seek compensatory and statutory damages in an amount to be proven at trial, and a judicial determination and declaration that WSC did not have cause to terminate the Area Representation Agreement.

THE PARTIES

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

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

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

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

JURISDICTION AND VENUE

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

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

14. Venue is also proper in this district in that the Defendant is subject to personal jurisdiction in this District, a substantial part of the events occurred in this District, and all parties specifically agreed to the Western Division of the Central District of California pursuant to a forum selection clause contained within a contract that is in dispute in this action. (Ex. G [Modification Agreement], § 9.)

RELEVANT FACTUAL BACKGROUND

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

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

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

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

B. The Coachella Valley Franchise Agreement

18. On August 1, 2001, Bennion, Deville, and their company Plaintiff Bennion & Deville Fine Homes, Inc. ("B&D Fine Homes") entered into a "Windermere Real Estate License Agreement" with WSC (hereafter referred to as the "Coachella Valley Franchise Agreement"). A true and correct copy of the Coachella Valley Franchise Agreement is attached hereto as Exhibit A.

19. Bennion, Deville, and B&D Fine Homes entered into the franchise relationship with WSC "to obtain and benefit from the right to use the [Windermere] Trademark and the Windermere System and the services to be provided by WSC under the terms set forth in this Agreement."[1] (Ex. A, Recital D.) As with any noteworthy franchise concept, the Windermere name and brand carried with it a certain recognition and goodwill that Plaintiffs (and any reasonable franchisee) expected to benefit from in the operation of their real estate business.

20. Thus, in exchange for an initial fee of $15,000.00 and license fees in an amount equal to five percent of the gross revenues earned during the term of the agreement (*see* Ex. A, § 5), WSC agreed to provide Bennion, Deville, and B&D Fine Homes the following:

a. A license to use the Windermere trademarks, service marks, logotypes (collectively, the "Trademark") and "Windermere System" in the conduct of real estate brokerage and sales activities at 850 N. Palm Canyon Drive, in Palm Springs, California (*see* Ex. A, § 2);[2]

b. An undefined "variety of services" that are specifically "designed to complement the real estate brokerage business activities of [Bennion,

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[1] Item 13, page 21 of Windermere Franchise Disclosure Document states that: "WSC must protect your right to use the principal trademark identified above."

[2] The "Windermere System" is defined broadly by the Coachella Valley Franchise Agreement as "the standards, methods, procedures, techniques, specifications and programs developed by WSC for the establishment, operation and promotion of independently owned real estate brokerage offices." (*See* Ex. A, Recital A.)

Deville, and B&D Fine Homes] and to enhance [their] profitability" (*see* Ex. A, § 1); and

c. To take action (legal or otherwise) "consistent with good business judgment to prevent infringement of the Trademark or unfair competition against [Bennion, Deville, and B&D Fine Homes]." (*See* Ex. A, § 4.)

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

22. The Coachella Valley Franchise Agreement provided that the parties' franchise relationships was for an indefinite term, terminable by either party subject to no less than six months written notice by the terminating party of its intent to terminate the agreement. (Ex. A, § 6.)

23. Consistent with its rights and obligations under the Coachella Valley Franchise Agreement, B&D Fine Homes opened its first California Windermere franchised business in Palms Springs, CA.

24. As explained below, over the course of the parties' fifteen year relationship, Bennion and Deville, with the approval of WSC, would ultimately become the Windermere Area Representative for Southern California and, through the substantial expenditure of time and money, would open a series of Windermere franchised businesses in their region, making Bennion and Deville the most successful Windermere franchisees and Area Representative in the Windermere system.

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C. Bennion And Deville Become Windermere Area Representatives For The Southern California Region

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

26. The Area Representation Agreement was the byproduct of WSC's desire to further expand its franchising operation into California by utilizing the experience, knowledge and success of Bennion and Deville to develop that "Region." (*See* Ex. B, Recital A, §§ 1.5, 2.)

27. As the "Area Representative," Services SoCal was tasked with two distinct roles. First, it was granted the "the non-exclusive right to offer Windermere licenses to real estate brokerage businesses to use the Trademark[3] and the Windermere System[4] in the Region." (Ex. B, § 2.) Second, Services SoCal was to provide certain "support and auxiliary services" to both incoming and existing Windermere franchisees in the Region. (*See* Ex. B, §3.)

28. In exchange, Services SoCal was to share "***equally***" with WSC in "***all initiation and licensing fees***" for (i) the seven existing Windermere franchises in

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[3] The term "Trademark" is defined by the Area Representation Agreement to mean various Windermere trade names, trademarks, service marks, and other symbols. (*See* Ex. B, § 1.6.)

[4] The term "Windermere System" is defined as "the standards, methods, procedures, techniques, specifications and programs developed by WSC for the establishment, operation and promotion of independently owned real estate brokerage offices [… expressly including] the Windermere foundation, Windermere Personal Marketing Programs, Premier Properties Program, Windermere Retirement Plan for Real Estate

Southern California (*see* Ex. B, Exhibit A – emphasis added), and (ii) "all future Windermere offices" opened in Southern California. (*See* Ex. B, §§ 3, 10, Exhibit A, § 3.)

29. Although Services SoCal was responsible for collecting the fees from the franchisees and remitting 50% to WSC, *Services SoCal was **not** a guarantor of any of the fees*. (*See* Ex. B, §§ 3, 11-13, Exhibit A, § 3 – "It is understood that collection of fees will be the responsibility of Area Representative, but Area Representative will not be responsible for payment of uncollectable fees.")

30. In order for Services SoCal to be in a position to provide the Area Representative services set forth in the Area Representative Agreement, and thereby benefit financially from providing those services, WSC was required to comply with certain franchisor-specific obligations of its own. These obligations included, but were not limited to the following:

a. Maintain and make available to franchisees and Services SoCal a viable "Windermere System" (Ex. B, § 1.7);

b. "[P]rovide servicing support in connection with the marketing, promotion and administration of the Trademark and Windermere System" (Ex. B, § 3);

c. "[P]romptly and diligently commence and pursue the preparation and filing of all Franchise registration statements, disclosure statements, or applications required under the laws of the state of California and/or the United States of America" (Ex. B, § 7);

d. "[M]aintain the registration or disclosure documents and all necessary amendments, updates and/or applications for renewal" (Ex. B, § 7);

e. "[B]e responsible for any registration filing fee and for all legal expenses incurred in the revision and registration of all required disclosure documents" (Ex. B, § 7);

Salespersons and Windermere salesperson educational formats and outlines." (Ex. B, § 1.7.)

f. "[M]ake available to Area Representative its key people to the extent necessary to assist Area Representative in carrying out its obligations as set forth in this Agreement" (Ex. B, § 3); and

g. Make available to Area Representative and franchisees an up-to-date and viable "technology system" – including the website Windermere.com and Windermere Online Resource Center Intranet system – necessary for the operation of the franchised businesses. (Ex. B, § 13.)

31. The Area Representation Agreement was for a perpetual term and could only be "**terminated**": (i) by mutual agreement of the parties, (ii) *without cause* "upon one hundred eighty (180) days written notice to the other party," or (iii) "*for cause* based upon a material breach of the Agreement and following "ninety (90) days written notice" to the breaching party and opportunity to cure. (Ex. B., § 4.1.) The parties further agreed to comply with the termination provision "in good faith" and "give the other [party] reasonable notice and opportunity to cure any real or perceived default or misperformance or malperformance on either party's part." (*Id*.)

32. In the event the Area Representative Agreement is terminated *without cause*, the terminating party is required to make termination payments to the terminated party in an "amount equal to the fair market value of the Terminated Party's interest in the Agreement." (*See* Ex. B., § 4.2.) The "fair market value" is to be "determined by mutual agreement of the parties or, if unable to reach agreement, by each party selecting an appraiser and the two appraisers selecting a third appraiser." (*See* Ex. B, § 4.2.) No termination payment is required to be made if the Area Representation Agreement was terminated *for cause*.

33. As discussed in detail below, WSC ultimately neglected and/or intentionally refused to comply with its obligations under the Area Representation Agreement, thereby damaging Services SoCal by preventing it from benefiting as the Area Representative for Southern California. Further, WSC's conduct constituted a constructive termination of

the Area Representation Agreement, without cause, subjecting WSC to comply with the buyout provision of Section 4.2.

D. Bennion And Deville Significantly Expand Their Windermere Businesses

34. As Area Representatives, Bennion and Deville, through their company Services SoCal, were now entitled to 50% of all initial franchise fees and monthly royalties owed to WSC under the Coachella Valley Franchise Agreement and any other franchise agreement facilitated by Services SoCal in Southern California. This 50% reduction in all initial franchise fees and monthly royalties created a symbiotic relationship between the Area Representative business and any Windermere franchise business owned by Bennion and Deville. This underlying economic benefit to Bennion and Deville from serving as both the Area Representative and franchisee was a significant material consideration of Bennion and Deville when they agreed to (and did) aggressively expand their Windermere franchise operations in Southern California.

35. Beginning in early 2004, Bennion and Deville, with the approval of WSC, began developing new Windermere franchises throughout Southern California. This included more than thirteen franchised businesses located in various Southern California cities including, but not limited to, Desert Hot Springs, Rancho Mirage, La Quinta, Indian Wells, Palm Springs, Palm Desert, Indio, and Cathedral City, among others. Instead of entering into new franchise agreements for each new location, the parties memorialized the new franchise businesses in addenda to the Coachella Valley Franchise Agreement.

36. Without the 50% reduction in initial franchise fees and monthly licensing fees provided by the Area Representation Agreement, Bennion and Deville would not have engaged in this subsequent mass expansion of the Windermere brand in Southern California.

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E. Services SoCal Becomes A Party To The Coachella Valley Franchise Agreement

37. On August 10, 2007, the parties formalized the symbiotic relationship between the Coachella Valley Franchise Agreement and the Area Representation Agreement by amending the Coachella Valley Franchise Agreement to add Services SoCal as a party to that agreement and all subsequent addenda thereto. A true and accurate copy of the August 10, 2007 amendment is attached hereto as Exhibit C.

38. From this point forward, Service SoCal was included as a party to every Windermere franchise agreement facilitated by Bennion and Deville, including those agreements involving third-party franchisees. As a party to these agreements, Services SoCal was (and continues to be) entitled to 50% of all franchise fees paid by the franchisees – irrespective of the subsequent termination of the Area Representative Agreement.

F. Bennion and Deville Enter Into New Windermere License Agreement

39. By 2011, Bennion and Deville had become the most successful franchisee and Area Representative in the entire Windermere system. In order to continue capitalizing on this success, on March 29, 2011, WSC entered into a new franchise agreement, titled "Windermere Real Estate Franchise License Agreement" (the "SoCal Franchise Agreement"), with Services SoCal and Bennion and Deville's newly formed entity Plaintiff Bennion & Deville Fine Homes SoCal, Inc. ("B&D SoCal"). The SoCal Franchise Agreement allowed B&D SoCal to open new franchise locations in La Mesa, Laguna Niguel, Carmel Valley, and Solana Beach. A true and correct copy of the SoCal Franchise Agreement is attached hereto as Exhibit D.

40. Pursuant to the SoCal Franchise Agreement, B&D SoCal agreed to pay to WSC and Services SoCal: (i) a monthly "Ongoing License Fee," (ii) a "Technology Fee" of "$25 per month per licensed agent and agent assistant for basic service," and (iii) a "Windermere Foundation Suggested Donation" of "$10.00 per transaction side for each

closed transaction."[5] (Ex. D, § 7, Appendix 1.) As reflected above, Services SoCal was entitled to 50% of the ongoing license fees, thereby effectively reducing by half the amount owed by Bennion and Deville to WSC. This, of course, was an integral part of Bennion and Deville's decision to enter into the SoCal Franchise Agreement. (*See* Ex. D, Recital C.)

41. In exchange for these fees, WSC agreed to provide B&D SoCal with the following:

a. A license to use the Windermere Trademark and Windermere System in the conduct of real estate brokerage services (Ex. D, §§1, 2);

b. "[G]uidance" in operating the franchised businesses, "furnished in the form of written materials distributed physically or electronically, including through the Windermere Online Resource Center (WOC) intranet website, consultations by telephone or in person, or by other means of communication" (Ex. D, § 3); and

c. To take action, "in its discretion and consistent with good business judgment to prevent infringement of the Trademark or unfair competition against Windermere licensees." (Ex. D, § 6(e).)

42. Similar to that of the Coachella Valley Franchise Agreement, the SoCal Franchise Agreement provided that it could be terminated by either party upon no less than 180 days' notice of intent to terminate. (Ex. D, § 8.)

43. Also like that of the Coachella Valley Franchise Agreement, Bennion and Deville acquired numerous subsequent franchised businesses under the SoCal Franchise Agreement. These subsequent acquisitions too were memorialized by addendums to the SoCal Franchise Agreement.

44. Bennion and Deville's aggressive pursuit of new Windermere franchise locations in San Diego County was actively encouraged by WSC, and resulted in

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[5] The Windermere Foundation was purportedly a not-for-profit organization managed by WSC.

investments by Bennion and Deville of more $4,000,000 into the San Diego businesses alone.

G. The Windermere Brand Is Severely Damaged In Southern California By Windermere Watch

45. Upon information and belief, in or around 2005, Gary Kruger, a disgruntled former Seattle Windermere client, and his associates initiated an anti-marketing campaign under the name "Windermere Watch," which was specifically designed to direct defamatory statements, materials, and focused conduct against Windermere, and its franchisees and real estate agents. Plaintiffs had no prior personal history or relationship with Kruger.

46. On March 9, 2006, Windermere Watch created its first known anti-Windermere website at www.windermerewatch.com. The website has been (and continues to be) used by Kruger as a tool to generate and/or spread negative and derogatory articles and comments concerning Windermere's purported business practices, litigation, owners, executives, brokers, agents, and general participation in the real estate market. A true and accurate copy of a portion of a printout from www.windermerewatch.com is attached hereto as Exhibit E.

47. On the website, Kruger identifies himself as "[a] public service consumer advocate reporting clear, compelling evidence of America's most dangerous and unethical corporate predator, Windermere Real Estate." He claims that, "[w]hen your home is listed for sale by Windermere, the resulting commission will fund Windermere's predatory legal strategies[…]," and encourages each consumer to "[p]rotect your life, home, family and future by cancelling or not renewing your Windermere listing. Don't risk doing business with Windermere Real Estate, the brand built on lies, fraud and ruined lives." (*See* www.windermerewatch.com.)

48. Windermerewatch.com is utilized and designed by Kruger to maximize its search engine presence. As a result, when internet users search for Windermere on Google and other internet search engines, windermerewatch.com has appeared as one of

the top search results – often ahead of Windermere's own website. The obvious (if not express) intent of Kruger is to use windermerewatch.com to turn potential clients, agents, and franchisees away from Windermere. In Kruger's own words, "WindermereWatch.com is an indispensable internet news and opinion resource that provides hard evidence why consumers, agents and prospective realty franchisees should avoid Windermere Real Estate at all costs." (*See* www.windermerewatch2.com.)

49. On August 8, 2010, Kruger created a second anti-Windermere website at www.windermerewatch2.com. This second website does more of the same, referring to Windermere as "the most poorly managed, unethical and predatory real estate company in America – thoroughly dishonest and incompetent." (*See* www.windermerewatch2.com.)

50. In the real estate industry, it is common for potential clients to select their real estate broker and/or agent based upon information that is made available on the internet. The prominent placement of Windermere Watch – and its negative marketing campaign – which is palpably prominent in internet search results often diverted potential clients away from Windermere's brokers and agents. The loss of actual and potential clients as a result of Windermere Watch's negative marketing campaign ultimately forced many agents to disassociate themselves from Windermere.

51. In addition to the websites' strong anti-Windermere rhetoric, Kruger also regularly sent out mass mailings of postcards and other materials containing anti-Windermere propaganda to residents and potential clients in areas where new Windermere franchise locations were scheduled to open. Examples of Kruger's anti-Windermere mass mailings to clients and prospective clients of Windermere franchisees in Southern California are reflected in Exhibit F, hereto.

52. Although WSC was legally obligated under the terms of the Coachella Valley Franchise Agreement, the SoCal Franchise Agreement, and the Area Representative Agreement to take action to protect the Windermere System, trademark, and brand, and to prevent unfair competition against its franchisees and their businesses,

WSC did virtually nothing to combat Windermere Watch's anti-Windermere marketing campaign in Southern California. (*See* Ex. A, § 4, Ex. B, § 3, Ex. D, § 6(e).)

53. The Windermere Watch anti-marketing campaign has had a significant and monetarily damaging effect on Bennion and Deville's businesses. As Bennion and Deville expanded the Windermere brand in Southern California, they had to push against the headwind that was (and continues to be) Windermere Watch with little or no assistance from WSC.

54. By 2012, the growing Windermere Watch anti-marketing campaign and internet presence – coupled with WSC's failure to make any serious effort to combat the anti-marketing campaign in Southern California – nearly forced Bennion and Deville to leave the Windermere System. Not only were Plaintiffs prevented from receiving any positive benefits from the use of the Windermere name and mark, but they also sustained damage to their businesses, personal reputations and goodwill as a result of the negative connotation now associated with the Windermere name and mark.

H. The Parties Amend The Terms Of The Franchise Agreements To Account For The Damage Caused By Windermere Watch

55. In late 2012, and in an effort to entice Bennion and Deville to remain in the Windermere System, WSC offered to amend both the Coachella Valley Franchise Agreement and the SoCal Franchise Agreement in favor of Bennion and Deville. The amendments promised would (i) require WSC to make "commercially reasonable efforts" against Windermere Watch and its anti-marketing campaign, and (ii) alleviate some of the financial burden that Windermere Watch had caused Bennion and Deville.

56. Consistent with these promises, on December 18, 2012, WSC, Services SoCal, B&D Fine Homes, and B&D SoCal amended the Coachella Valley Franchise Agreement and the SoCal Franchise Agreement by collectively entering into a document titled "Agreement Modifying Windermere Real Estate Franchise License Agreement" ("Modification Agreement"). A true and accurate copy of the Franchise Amendment is attached hereto as Exhibit G.

57. The Modification Agreement amended the parties obligations under the Coachella Valley Franchise Agreement and the SoCal Franchise Agreement as follows:

a. WSC was now obligated to "make commercially reasonable efforts to actively pursue counter-marketing, and other methods seeking to curtail the anti-marketing activities undertaken by Gary Kruger, his Associates, Windermere Watch and/or the agents of the foregoing persons." This included WSC express obligation to "curtail the impact of the activities of Kruger and/or windermerewatch" (Ex. G, § 3(A));

b. WSC waived and forgave $1,151,060 in past due franchise fees and technology fees owed to it by B&D Fine Homes and B&D SoCal under the franchise agreements (Ex. G, § 3(B));

c. The franchise fees owed by B&D Fine Homes and B&D SoCal were reduced for the preceding eight month period. This included a 90% reduction in fees for the months of April and May 2012, a 75% reduction for the months of June and July 2012, a 50% reduction for the months of August and September 2012, and a 25% reduction for the months of October and November 2012 (Ex. G, § 3(C));

d. The technology fees owed by B&D Fine Homes and B&D SoCal were capped at no more than $25,000 per month and $25 per agent (Ex. G, § 3(D)); and

e. Bennion and Deville were released from any personal liability under the personal guarantees they provided WSC for all amounts incurred and owed by B&D Fine Homes and B&D SoCal prior to April 1, 2012.[6] (Ex. G, § 3(G).)

58. In addition to the above amendments to the parties' franchise relationships, the Modification Agreement also extended the length of each franchise agreement to five years, commencing on December 18, 2012. (Ex. G, § 3(E).) The five-year period would, however, "automatically expire in the event […] it is adjudicated that WSC has

[6] Bennion and Deville had executed personal guaranties in connection with their ownership and operation of their Windermere franchised businesses.

committed a material, uncured breach of [its amended obligations under the franchise agreements]." (*Id*.) Section 3(F) of the Modification Agreement also contains a liquidated damages provision in the event that the franchise agreements are terminated early, without cause.

59. As explained below, despite its heightened obligations identified in the Modification Agreement, and repeated requests by Plaintiffs that it take action consistent with those obligations, WSC has failed to make any material effort to combat Windermere Watch. WSC's failure to take action has resulted in significant harm to Plaintiffs and constitutes breaches of the amended terms of both the Coachella Valley Franchise Agreement and the SoCal Franchise Agreement.

I. WSC Continued To Ignore Its Obligations To Take Action Against Windermere Watch

60. Notwithstanding the enhanced obligations which the Modification Agreement imposed upon WSC – *e.g*., to take action against Windermere Watch – WSC continued to ignore Windermere Watch's impact in Southern California and failed to take any action whatsoever to counteract its negative marketing campaign.

61. On February 11, 2013, just weeks after entering into the Modification Agreement, Bennion and Deville and their legal counsel participated in a conference call with representatives of WSC to discuss the efforts that WSC planned to undertake to combat Windermere Watch's anti-marketing campaign. This was the last (and only time) WSC showed any interest in actively combating Windermere Watch in Southern California as required by the Modification Agreement.

62. By the end of March 2013, WSC still had not taken any action on the Windermere Watch front. On March 29, 2013, Bennion and Deville sent a series of emails to WSC's General Counsel, Paul Drayna, requesting an update on WSC's efforts to combat Windermere Watch. In the email, Bennion and Deville also informed Drayna that (i) Windermere Watch propaganda had recently been circulated among several of Plaintiffs' clients, costing Plaintiffs' multiple real estate listings, (ii) insurance carrier

Lloyd's of London had recently refused to insure a franchisee in Plaintiffs' region after discovering the Windermere Watch websites on the internet, and (iii) customers had voiced concerns that Windermere – along with Plaintiffs' businesses – would be going out of business after viewing the postings on the Windermere Watch websites. No one at WSC ever responded to Bennion and Deville's March 29th email.

63. After another month of continued silence from WSC, on April 20, 2013, Deville send another email – this time to Drayna and WSC's President, Geoff Wood – informing them that Windermere Watch was continuing to pose significant problems for the Windermere businesses in Southern California. In the email, Deville explained that he and one of his real estate agents had recently been at a listing presentation for property in excess of $5,000,000. During the presentation, the seller of the property "Googled" the names of Bennion and Deville only to be directed to the Windermere Watch websites. Not only did Bennion and Deville not get the property listing, but Deville also expressed a likelihood that they were going to lose the agent to a competitor. At the conclusion of the email, Deville asked Drayna and Wood to "[p]lease advise [what] has been done since our phone discussion months ago about [Windermere Watch] and what [are] the plans to make this go away." Incredibly, Drayna, Wood, and everyone else at WSC again ignored Deville's email, and WSC still failed to take any action against Windermere Watch.

64. By June 2013, Windermere Watch had severely impacted Plaintiffs' ability to function in Southern California. They were losing listings, clients, and agents on a regular basis. Windermere Watch continued not only posting anti-Windermere content on its websites, but also flooded the markets of new Windermere franchise locations with the anti-Windermere postcards and other mailings. (*See* Ex. F.)

65. On June 12, 2013, both Bennion and Deville voiced their frustration in emails to Drayna concerning WSC's failure to act. First, Deville wrote: "[p]lease let me know what is being done about [Windermere Watch]. It has now been months since we have discussed this problem and it is still affecting our business both in [Southern

California] as well as Seattle." Deville also informed Drayna that Windermere Watch continued to be used against them by competitor real estate companies vying for both real estate listings and agents, and that Services SoCal had recently lost a prospective franchisee to a competitor after the prospect learned about Windermere Watch's anti-marketing propaganda.

66. Bennion followed Deville's email with one of his own, telling Drayna that they "really need[ed] an update" on Windermere Watch, and that Bennion had "sent several emails in the past with no response" from WSC, which he described as "disheartening." Again, Bennion and Deville's pleas for support regarding Windermere Watch were ignored by WSC.

67. By July 2013, Plaintiffs' competitors in Southern California were using elaborate PowerPoint presentations – based entirely upon information the competitors obtained from the Windermere Watch websites and mailings – with both clients and agents painting Windermere as an untrustworthy real estate firm. This too was brought to Drayna and Wood's attention in emails dated July 4, 2013 and July 8, 2013. For instance, in the July 8, 2013 email, Deville again wrote to Drayna and Wood, "are we anywhere near developing a plan [to] address the [Windermere Watch] issue?"

68. By the middle of summer 2013, WSC's failure to take any action to combat the anti-marketing campaign of Windermere Watch had metastasized to other areas of Bennion and Deville's businesses, including Windermere Watch's direct campaign against Bennion and Deville personally. At this point and time, the positive goodwill that Plaintiffs sought by joining the Windermere system no longer existed, and instead, Plaintiffs were harmed by continuing to use such marks.

69. More than seven months after WSC signed the Modification Agreement, it still had not taken any effort to counteract the damage that Windermere Watch was causing in Southern California. Helpless, and expressing his clear frustration over WSC's inaction, on July 24, 2013, Deville sent another email to Drayna questioning whether

"anyone on your end [was] doing anything to make this go away?" Again, Deville's pleas for assistance went unanswered.

70. The following week, on July 31, 2013, Deville sent another email to Drayna and Wood with a detailed report summarizing the recent events involving Windermere Watch. A true and accurate copy of this July 31, 2013 email is attached hereto as Exhibit H. Deville started the email by informing Drayna and Wood that:

> [Plaintiffs] continue to get bombarded with the same negative campaign against Windermere in the Desert, the Coast and in our San Diego market. Addressing these issues needs to be made a priority. There has been nothing forthcoming from [WSC] on this matter and I respectfully mention again we feel this is a responsibility of the Franchisor to protect its brand and the brand we are selling.

(*Id*.)

71. Deville continued by identifying specific instances in which several franchisees in the Southern California region were prevented from hiring new agents because of Windermere Watch. Also, he noted that the Windermere Watch "postcard campaign" continued to be used by competitors vying for the same real estate listings. (Ex. H.) Again, no response was forthcoming.

72. Deville followed his unanswered July 31, 2013 email to Drayna with an August 10, 2013 email, asking "again for an update and what approach [WSC] is taking on this." Deville also demanded that Drayna forward him "any information that [Drayna] may have on responding and addressing this matter."

73. WSC's failure to take action left Bennion and Deville with no choice but to take the matter into their own hands. In late summer 2013, Bennion and Deville hired three internet programmers and devoted their employment full-time to increasing Windermere's internet search engine rankings in an attempt to bury Windermere Watch's online presence. Of course, this did nothing to offset Windermere Watch's continued use of postcards and other print materials to mail to Windermere agents and clients.

74. On August 24, 2013, Deville sent another pointed email to Drayna and Wood. This time, Deville wrote: "I had sent numerous emails to both of you regarding

[Windermere Watch], our challenges and the effect it is having on us in Southern California with both my company as well as our [Windermere] Southern California [franchisees]. To date I have received no response other than one email some time back [indicating] that we need to get together again and see what we are going to do about them." However, Deville concluded, "I have seen nothing from [WSC] to make that happen."

75. Drayna and Wood remained silent on the Windermere Watch matter until Robert Sunderland, counsel for Bennion and Deville, sent an email to Drayna on August 26, 2013, addressing the Windermere Watch situation in Southern California and making clear that the Southern California businesses sought "a definite response in terms of what is being done" about Windermere Watch. The next day, on August 27, 2013, Drayna contacted Deville and asked to set up a meeting to discuss the matter by phone. Deville responded expressing a strong interest to "finally learn what [WSC] is doing about [Windermere Watch]," and asked that in advance of their call that Drayna email the "plan." True of form, no written plan was ever provided.

76. On information and belief, instead of providing Plaintiffs with a cohesive written plan of their intended counter-marketing efforts against Windermere Watch, in September 2013, WSC sent its Senior Vice President of Client Services (also a licensed attorney), Michael Teather, to meet with Kruger to negotiate an end to Windermere Watch. As predicted by Bennion and Deville before the meeting, Teather's efforts only brought about more incendiary posts on Windermere Watch and more negative attention to Windermere.

77. By October 2013, Bennion and Deville had devoted a minimum of five employees full-time to offsetting Windermere Watch's negative marketing campaign. Through this significant expenditure of time, money, and effort, Bennion and Deville were able to temporarily forestall the negative effects of the Windermere Watch websites. Unfortunately, Bennion and Deville's efforts were too little too late. By the end of 2013, virtually all of Windermere's competitors had incorporated information from

Windermere Watch into their sales pitches to both agents and clients. Moreover, the continued mailings of Kruger coupled with the continued existence of Windermere Watch were now permanent impediments into the operations of all Windermere businesses in Southern California. These ongoing concerns continued to be relayed to WSC to no avail.

78. After a year of essentially ignoring Bennion and Deville's pleas for assistance, on January 10, 2014, Bennion and Deville sent a formal demand letter to WSC to provide "immediate assistance addressing the ongoing challenges of the Windermere Watch." A true and accurate copy of the January 10, 2014 letter is attached hereto as Exhibit R. This demand letter sets forth detail involving the recruitment and staffing challenges and marketplace impact caused by Windermere Watch, together with the identification of costs incurred by Plaintiffs in attempting to offset Windermere Watch's negative and defamatory campaign.

79. In response to Bennion and Deville's formal demand letter, on January 16, 2014, Wood sent an email to Deville which made clear that, notwithstanding its contractual obligations to the contrary, WSC would not be taking any action against Kruger or Windermere Watch. A true and accurate copy of Wood's January 16, 2014 email is attached hereto as Exhibit I. While the January 16, 2014 letter marked a concession by WSC that it had breached the franchise agreements as amended, it did not mark the end of the damage that Plaintiffs and their business would incur as a result of WSC's failure to take immediate action to curtain Windermere Watch.

80. WSC's failure to take any meaningful action against Windermere Watch's anti-marketing campaign in Southern California constitutes a clear breach of both the Coachella Valley Franchise Agreement and the SoCal Franchise Agreement, as amended by the Modification Agreement.

81. Further, WSC's inaction with respect to Windermere Watch also breached the Area Representation Agreement to the extent that WSC was contractually obligated to provide Southern California franchisees a viable "Windermere System" (Ex. B, § 1.7),

and "support in connection with the marketing, promotion and administration of the Trademark and Windermere System." (Ex. B, § 3.)

82. Each Plaintiff has been severely damaged by WSC's inaction with respect to Windermere Watch in an amount unknown at this time. Additionally, WSC's failure to act forced Plaintiffs to incur significant time and expense employing their own counter-marketing campaign. In doing so, Plaintiffs have incurred in excess of $125,000 in additional expenses attempting to mitigate the negative impact of Windermere Watch.

J. WSC Disregarded State And Federal Franchise Registration And Disclosure Laws Subjecting Bennion And Deville To Civil And Criminal Liability

83. WSC's overt failure to provide the required support in combatting Windermere Watch was not its only material breach of the Area Representation Agreement. Instead, and unknown to Bennion and Deville at the time, WSC showed a complete disregard for California's franchise registration and disclosures laws, thereby breaching its obligations to Services SoCal under the Area Representation Agreement.

84. In California, the offer and sale of franchises is heavily regulated by both state and federal law. Under the Federal Trade Commission's ("FTC") Amended Franchise Rule, located at title 16, part 436 of the Code of Federal Regulations, a franchisor is required to disclose to prospective franchisees a franchise disclosure document ("FDD") that contains a copy of the form franchise agreement and twenty-three specific "Items" about the franchised business, including specific information about the franchisor's executives and managers, its relevant litigation history, the expected business of the franchisee, the costs and fees associated with the franchised business, the financial wellbeing of the franchisor, and the conditions in which the franchise can be terminated or renewed, among other things. 16 CFR 436.

85. The California Franchise Investment Law ("CFIL") builds upon the FTC's Amended Franchise Rule and serves as the primary vehicle for regulating the registration, offer, and sale of franchises in California. Under the CFIL, a franchisor must register a franchise application – including its current FDD – with the California Department of

Business Oversight ("DBO") before a franchise can be offered or sold within the state.[7] Cal. Corp. Code §§ 31110, 31119. *A franchisor's California registration must be renewed* ***every year***. Cal. Corp. Code § 31120.

86. Once the franchise application is properly registered with – and approved by – the DBO, the FDD, together with copies of all proposed agreements and other exhibits, must be provided to any prospective franchisee at least 14 days before the earlier of the day the franchisee executes the franchise agreement or pays the franchisor any consideration for the franchised business. Cal. Corp. Code § 31119(a).

87. These statutory registration and disclosure obligations are intended to assure that prospective franchisees have the information necessary to make an intelligent decision concerning the franchise offered, to prohibit the sale of franchises that would lead to fraud or a likelihood that the franchisor's promises would not be fulfilled, and to protect both the franchisor and franchisee by clarifying the parties' business relationship. Failure to comply with these obligations can (and will) subject the franchisor, its principal executive officers and directors, and the sales agents to both civil and criminal liability. Cal. Corp. Code §§ 31302, 31404, 31410, 31411.

88. WSC has historically offered materially different contract terms to its Northern California prospective franchisees from the terms that it offered to its Southern California prospective franchisees.[8] These divergent terms required WSC to file two different FDDs with the DBO – one for Northern California and the other for Southern California. In order to quickly and easily identify one California FDD from the other, the bottom of every page of the FDD was identified either "Northern California" or

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[7] There are certain exemptions from California's registration obligations, but none of those apply to the facts of this case. *See*, *e.g.*, Cal. Corp. Code §§ 31101, 31106, 31108, 31109; 10 Cal. Code Regs. § 310.100.2.

[8] Most notably, the initial franchise fees and ongoing monthly fees offered to the Southern California prospective franchisees were significantly lower than those offered to the prospects in Northern California.

"Southern California." *See, e.g.*, Windermere's April 18, 2013 FDD for Northern California, attached hereto as Exhibit J.

89. WSC's California franchise registrations expire every year on April 20th. *See* 10 Cal. Code Regs. § 310.120. To avoid a lapse in registration – and thus, a hiatus on offering franchises in California – WSC was required to file both a Northern California and a Southern California renewal franchise application with the DBO at least 15 business days before the registrations expired – *i.e.* sometime in late March.

90. In 2013, WSC filed a franchise registration renewal for Northern California on April 19, 2013, but for unknown reasons, delayed in filing its Southern California franchise registration until June 17, 2013. A true and accurate copy of a printout of the DBO's online Securities & Franchise Filings portal reflecting WSC's historical franchise filings in California is attached hereto as Exhibit K.

91. Because of WSC's late Southern California franchise registration filing, it was statutorily prohibited from offering or selling franchises in Southern California from April 21, 2013 to July 5, 2013, when the DBO approved of WSC's June 17, 2013 Southern California franchise filing. A true and accurate copy of the DBO's approval notice is attached hereto as Exhibit L. Any offer or sale of a franchise during this "dark" period would result in a violation of the CFIL.

92. As reflected below, representatives of WSC – most notably, WSC's General Counsel Drayna – attempted to cover up WSC's failure to maintain the registration of the 2013 Southern California FDD in breach of the Area Representation Agreement by instructing Plaintiffs to offer prospective franchisees the wrong FDD. This blatant violation of the CFIL was not apparent to Plaintiffs who are not attorneys and relied entirely upon Drayna for support and guidance with respect to any legal issues involving the Windermere FDD.

93. In early June 2013, Deville met with a prospective franchisee for the Southern California region and requested a copy of the current, registered FDD from WSC. Instead of advising Deville that the Southern California FDD had not yet been

registered, and that under these conditions the offer of a franchise could expose Deville personally to both civil and criminal liability, Drayna sent an email to Deville on June 12, 2013, instructing him to provide the prospect with the Northern California FDD – containing a franchise agreement with significantly different terms – and that they could simply "swap out" the signed franchise agreement with the Southern California franchise agreement at a future time. A true and accurate copy of Drayna's June 12, 2013 email is attached hereto as Exhibit M. Drayna directed Deville to engage in conduct that Drayna knew would violate the CFIL in an effort to avoid admitting that he had failed to timely register the Southern California FDD. Unbeknownst to Plaintiffs, and adhering to Drayna's legal advice and direction, Plaintiffs provided the prospective franchisee with the Northern California FDD.

94. Drayna's deceitful legal instruction concerning the disclosure to prospective franchisees did not end there. Two days later, on June14, 2013, Drayna sent another email to Plaintiffs stating that:

> Your [Southern California FDD] renewal packet is going out today to the State of California for filing. We typically receive approval within two weeks. As soon as it is approved I will let you know, and upload it to [Windermere's intranet]. In the meantime you can use the Northern California filing, which is already approved for this year, and which I sent to [Deville] earlier this week. We can use that one to sign up the new San Diego office as a temporary solution until the SoCal version is ready. Be sure to have them sign the Item 23 receipt (crossing off [the Northern California Area Representative's] name and writing in [Deville's]).

A true and accurate copy of Drayna's June 14, 2013 email is attached hereto as Exhibit N.

95. As reflected in his email, Drayna conceded that the Southern California FDD registration packet had not yet been approved (or even received) by the DBO. Nonetheless, he continues to hide WSC's breach of its obligation to maintain registration

of the Southern California FDD by instructing Plaintiffs to provide prospective franchisees in San Diego the Northern California FDD.

96. Drayna was not the only representative of WSC directing Plaintiffs to unknowingly violate the franchise laws. As is reflected in an email dated June 21, 2013, Drayna included WSC's President, Geoff Wood, in an email instructing Plaintiffs that the Southern California FDD was mailed to the State of California "last week," and [i]n the mean time (*sic*) you may proceed with the Northern California [FDD] as we discussed." A true and accurate copy of Drayna's June 21, 2013 email is attached hereto as Exhibit O. Wood – the President of a large national-wide franchisor – did nothing to correct the misleading direction of Drayna or stop Plaintiffs' from offering the Northern California FDD to Southern California prospects in violation of the CFIL.

97. Incredibly, on July 3, 2013, and still without approval of the Southern California FDD from the DBO, Drayna continued to instruct Services SoCal to have franchisees sign the Northern California franchise agreement as a "stop gap" while they are "waiting on approval on the SoCal UFDD," and until they can "get the real agreement in place." A true and correct copy of Drayna's July 3, 2013 email is attached hereto as Exhibit P.

98. The communications reveal that Drayna clearly knew that the terms of the franchise agreement in the Northern California FDD were materially different than those in the Southern California FDD, but still instructed Services SoCal to have the Southern California franchisees sign the Northern California franchise agreement "as is, even though it doesn't yet reflect the terms [Services SoCal has] discussed with them. Those terms will be shown in the new [Southern California FDD], and in the real license agreement they will sign ASAP." (*See* Ex. P.)

99. As reflected above, the DBO did not approve of WSC's Southern California FDD until July 5, 2013 (*see* Ex. L), and this approval notice was not received by WSC until July 12, 2013. A true and accurate copy of the July 12, 2013 email from Drayna identifying receipt of the DBO's letter "today" is attached as Exhibit Q.

100. Drayna's advice and counsel is a clear contradiction of the law and could have subjected Services SoCal and it owners, Bennion and Deville, to civil and criminal liability under the CFIL. Moreover, WSC's failure to timely register the 2013 Southern California FDD, and Drayna's subsequent intentional and malicious misrepresentations to Plaintiffs concerning the substituted use of the Northern California FDD constitute multiple breaches of the Area Representation Agreement.

101. Most notably, WSC breached the Area Representation Agreement for failing to:

a. "promptly and diligently commence and pursue the preparation and filing" of the Southern California FDD with the DBO breached Section 1.7 of the Area Representation Agreement;

b. "maintain the registration" of the Southern California FDD breached Section 7 of the Area Representation Agreement; and

c. provide competent "key people to the extent necessary to assist Area Representative in carrying out its obligations as set forth in this Agreement" violated Section 3 of the Area Representation Agreement.

102. Ultimately, WSC's failure to properly and timely renew its California franchise registration and provide competent assistance to Plaintiffs in lawfully navigating that nonrenewal, not only negatively impacted Service's SoCal's ability to offer new franchises under the Area Representation Agreement, but, more importantly, exposed Services SoCal and its owners to civil and criminal personal liability. The action or inaction by WSC constitutes material breaches of the Area Representation Agreement.

103. Further, as discussed in detail below, WSC did not renew its Southern California FDD for the 2014 year in violation of Sections 1.7 and 7 of the Area Representative Agreement. Moreover, on July 11, 2014, July 30, 2014, and December 2, 2014, WSC offered new franchises to existing franchisees in the region. While neither Bennion nor Deville were involved in the solicitation, negotiation, or sale of these new

franchises, Drayna still directed Deville to sign each of the agreements on behalf of Services SoCal. Again, these offers and sales constitute the unlawful sale of an unregistered franchise under the CFIL. Drayna's continued efforts to cover up WSC's failure to register the Southern California FDD in 2014 represents separate breaches of the Area Representative Agreement.

K. WSC Implements A Strategy To Take Back The Southern California Region From Bennion And Deville

104. Notwithstanding the affirmative damage caused to Plaintiffs and their businesses by Windermere Watch and WSC's failure to timely renew the 2013 Southern California FDD, Bennion and Deville, through significant financial investment into the region along with the devotion of countless hours cultivating relationships with franchisees, agents and clients, improving Windermere brand recognition and goodwill, and developing a tried and tested regional business model and technology services that the franchisees utilized in the opening and operation of dozens of Windermere franchise locations, were able to ameliorate these problems and maintain the Southern California region as an overall success.

105. Upon information and belief, by early 2014, WSC had decided to remove Bennion and Deville as the Area Representative from the Southern California region in order to claim all of the benefits – most notably, all franchise fees and royalties – for itself.

106. In spring 2014, Teather traveled to Southern California to meet with Deville about the region and to discuss WSC's new strategy intended to "bring on" as many franchisees as possible, and if/when they failed, resell the territory to a new franchisee.[9] Deville expressed his disgust with Teather's proposed strategy and made clear that this was not the strategy of the Windermere that he and Bennion had joined over a decade earlier.

[9] In the franchise world, this is referred to as the "churn and burn" franchising model.

107. After discussions involving WSC's new franchising model were met with distaste by Deville, Teather announced WSC's interest in reacquiring the Area Representative responsibilities from Bennion and Deville. After a brief dialogue in which Deville refused to hand over the Area Representative rights without just compensation, the discussion on this topic also quickly ended.

108. It is believed to be around this time when WSC decided to terminate the Area Representation Agreement, and with it, Bennion and Deville's rights to serve as Area Representative for Southern California. However, before WSC could end the Area Representative relationship with Bennion and Deville, it knew that it had to first inject its own personnel into the region, develop a better relationship with the existing franchise base, learn and acquire the regional business model and technology services developed and utilized by Bennion and Deville in the region, and thwart Bennion and Deville's ability to continue bringing on new franchisees while the rest of these efforts were being pursued. WSC also knew that dislodging Bennion and Deville as the Area Representative for Southern California without first accomplishing these objectives was likely to result in upsetting the existing franchise base followed by a potential mass exodus from the Windermere system.

109. In order to effectively push Bennion and Deville out of the Windermere system with little disruption to the Southern California region, WSC implemented a plan that allowed it to (i) stop Bennion and Deville from bringing on new "friendly" franchisees, (ii) surreptitiously acquire Bennion and Deville's technology and system offered to the Southern California franchisees, and (iii) install new franchisees and develop relationships with existing franchisees in the region without the involvement of Bennion and Deville.

110. As discussed below, WSC's execution of its plan throughout the 2014 year ultimately culminated in its delivery of a notice of termination of the Area Representation Agreement to Bennion on January 28, 2015. However, the notice of termination is rendered moot in light of WSC's conduct leading up to the January 28, 2015 date which

resulted in a constructive termination of the Area Representation Agreement, without proper notice or just cause.

(i) WSC surreptitiously elected not to register a Southern California FDD for 2014 year, thus, precluding Bennion and Deville from bringing on new franchisees

111. Every year from 2003 to 2013, WSC dutifully – even if untimely – registered or renewed its franchise application for the Southern California region. (*See* Ex. K.) In 2014, however, WSC elected not to renew its Southern California offering, thereby precluding Bennion and Deville from bringing on any new franchises after April 20, 2014.[10]

112. Although WSC elected not to renew the franchise application for Southern California, it misled Bennion and Deville for months into believing that the franchise registration was forthcoming in an attempt to avoid Bennion and Deville's discovery of WSC's plan to surreptitiously strip the Area Representative rights from them.

113. For instance, in an email from Deville to Drayna, dated October 28, 2014, Deville wrote, "[a]sked about 4 weeks ago when we would have the new [FDD]. I have 2 prospects and need to have for them to sign a receipt. Please advise when we will have the new [FDD]."[11] A true and correct copy of Deville's October 28, 2014 email is attached hereto as Exhibit S.

114. The next day, Teather responded, "I spoke with [Drayna] today regarding the [Southern California FDD], I will make sure that it is out to you by the end of the week." A true and accurate copy of Teather's October 29, 2014 email is attached as

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[10] As reflected above, WSC's California franchise registration expired every year on April 20th. *See* 10 Cal. Code Regs. § 310.120.

[11] This did not stop prospective franchisees from contacting Bennion and Deville about franchise opportunities. However, without an updated FDD, Bennion and Deville could not pursue new franchisees.

Exhibit T. In truth, Teather wrote his email knowing that the Southern California FDD had not been (and was not going to be) filed with the DBO.

115. Thereafter, on October 31, 2014, Drayna sent an email representing that the FDD "[j]ust went out via UPS overnight delivery to the State of CA." The records of the DBO show otherwise. (*See* Ex. G.)

116. After April 20, 2014, Bennion and Deville were deprived of one of their primary benefits under the Area Representation Agreement – *i.e.*, the right to 50% of all franchise fees and subsequent royalties paid by all new Windermere franchisees in the Southern California region. (*See* Ex. B, §§ 2, 3.) WSC's unilateral termination of Bennion and Deville's right and ability to solicit and sell new Windermere franchises resulted in the premature, constructive termination of the Area Representation Agreement.

117. WSC's termination of the Area Representation Agreement without first providing Bennion and Deville 180 days written notice of the termination breached Section 4 of the Area Representation Agreement.

118. Further, WSC's termination of the Area Representation Agreement without cause, obligated WSC to pay Bennion and Deville the fair market value of their interest in the Area Representation Agreement pursuant to Section 4.2 of that agreement. WSC's failure to pay this amount constitutes a breach of Section 4.2.

119. Bennion and Deville now seek damages in the form of 50% of all lost franchise fees they should have recovered for the period April 20, 2014 to the commencement of this litigation and the fair market value of their rights in the Area Representation Agreement.

120. Moreover, Bennion and Deville's lost franchise fees – and the ability to aggressively solicit and sell new franchises from April 20, 2014 forward – artificially depressed the value of Bennion and Deville's rights under the Area Representation Agreement. The fair market value to be paid by WSC should reflect these lost sales as well.

(ii) WSC attempted to surreptitiously acquire Bennion and Deville's technology and other services offered to the Southern California franchisees

121. It was apparent to all in the Windermere System that the technology and services offered by Bennion and Deville were far superior to those made available by WSC. Because of this, WSC knew that it had to acquire – and be able to offer the Southern California franchisees – Bennion and Deville's services and technology before it could take the Area Representative rights from Bennion and Deville.

122. In pursuit of this goal, Teather, on behalf of WSC, opened a dialogue with Bennion and Deville regarding a feigned interest in "working together" to grow their respective businesses by "sharing" services and technology. This, of course, was all a farce as Teather knew that WSC had not renewed (and was not going to renew) the franchise registration for the Southern California region.

123. With this in mind, on July 18, 2014, Teather sent an email to Deville and others in an attempt to "begin a dialog regarding what services [WSC] provide[s], what services [Bennion and Deville] provide and consider the possibility of eliminating duplicity where quality will not be impacted." Knowing that Bennion and Deville's services were far superior to those offered by WSC, this email was Teather's opening attempt to convince Bennion and Deville to allow WSC access to their services and corresponding technology.

124. Through late summer and early fall, Teather continued pushing Bennion and Deville to "combine our tech companies, and put [Bennion and Deville's Director of Technology] in charge of the customer experience and have [WSC] pick up his salary."

125. Once Bennion and Deville denied Teather's request, Teather attempted to solicit several of Bennion and Deville's employees and sales agents to join WSC or other franchisees. For example, WSC invited several of Plaintiffs' employees and sales agents to a relocation event scheduled in San Diego without notifying either Bennion or Deville

of the event. Following this event, multiple sales agents terminated their employment with Bennion and Deville.

126. WSC also solicited Plaintiffs' IT personnel in an effort to coerce these individuals to join WSC's operations in Seattle. Teather himself approached and offered a job to Bennion and Deville's Director of Technology.

127. WSC's efforts to acquire Bennion and Deville's superior services and related technology constitute a clear breach of the obligation of good faith and fair dealing implied in the Area Representation Agreement.

(iii) WSC interfered with Bennion and Deville's relationships with prospective and existing franchisees in the Southern California region in attempt to disrupt these relationships

128. By May 2014, Teather had begun bypassing Services SoCal as the Area Representative for the region and dealing directly with current and prospective Windermere franchisees.

129. While unbeknownst to Bennion and Deville at the time, they have since learned that during his direct communications with the Southern California franchisees, Teather was telling them that Bennion and Deville were "giving up" their right to serve as Area Representative in the Southern California region, and that all communications involving the region should be directed to him.

130. Teather also ingratiated himself to the existing franchisees by approving of franchise locations and expansion plans that Bennion and Deville had already rejected for legitimate business reasons. For instance, in July 2014, Deville was approached by an existing franchisee that was interested in expanding its operations by opening additional franchise locations in San Diego County. After learning more about the possible expansion, Deville could not recommend it due to concerns over the franchisee's aggressive expansion plans, the cost of the expansion, and the finances of the franchisee. Notwithstanding Deville's comments and position, Teather met with the franchisee and approved of the expansion without any further input from Bennion or Deville.

131. On October 3, 2014, fully cognizant of WSC's plan to soon terminate Bennion and Deville's Area Representation Agreement, Teather sent Bennion and Deville an email urging them to give up several of their franchise locations on the basis that they "own more than enough offices" and that "the future lies in franchising" – *i.e.*, selling franchised businesses and not operating them. Disingenuously, Teather professes that "working together we can succeed as franchisors" although WSC has already taken away Bennion and Deville's ability to offer franchises and solicited several of their employees and agents to come work for WSC. A true and accurate copy of Teather's October 3, 2014 email is attached hereto as Exhibit U.

132. Throughout the remainder of Bennion and Deville's time as Area Representative, Teather continued to secretly tell the local franchisees that Bennion and Deville were on their way out and that he, on behalf of WSC, was taking over as the Area Representative. Because of this, some of the local franchisees began to pirate customers and agents that were in the territory of Bennion and Deville's franchised businesses.

133. Teather's efforts to interfere with and undermine Bennion and Deville's rights as Area Representative only compounded the problems they already faced in the region. Again, this conduct by WSC frustrated Bennion and Deville's rights as Area Representative in breach of the obligation of good faith and fair dealing implied in the Area Representation Agreement.

L. WSC's Termination Of The Area Representation Agreement Was A Material Breach Of The Franchise Agreements

134. Once WSC was satisfied that it had strung out Bennion and Deville long enough, on January 28, 2015, Drayna sent a short, one paragraph letter to Deville announcing that WSC was "exercising its right to terminate [the] Area Representation Agreement dated May 1, 2004, pursuant to the 180-day notice provision of Paragraph 4.1," and that Bennion and Deville's "rights and responsibilities as Area Representative will terminate on Tuesday, July 28, 2015." A true and accurate copy of the January 28, 2015 letter is attached hereto as Exhibit V.

135. As reflected above, WSC had constructively terminated the Area Representation Agreement eight months earlier, when WSC failed register the FDD and long before sending the notice of termination letter. However, whether the Area Representative Agreement was terminated at the end of April 2014, or on July 28, 2015, WSC's unilateral termination of the Area Representation Agreement breached both the express and implied terms of the franchise agreements.

136. As reflected above, there existed a symbiotic relationship between the Area Representation Agreement and the franchise agreements to the effect that Bennion and Deville would not have entered into the SoCal Franchise Agreement or built out the Coachella Valley Franchise Agreement but for the benefits that flowed to them as the Area Representative for the region.

137. Moreover, at the time Bennion and Deville entered into the SoCal Franchise Agreement and the amendments to the Coachella Valley Franchise Agreement, the parties agreed that Services SoCal would be the Area Representative for the region – not WSC or some third-party. The knowledge, experience, and services made available to the franchisees in the region by Bennion and Deville through Services SoCal rendered Services SoCal an indispensable part of not only Plaintiffs' franchise agreements, but also the franchise agreements of many of the other franchisees in the Southern California region. *See*, for example, Recital B to the SoCal Franchise Agreement, which provides that Services SoCal has the right "to administer the Windermere System in the Region in accordance with this Agreement." (Ex. D, Recital B.)

138. Due to the literal and implied integration of Bennion and Deville's Area Representation Agreement and the franchise agreements, the termination of the Area Representation Agreement also constitutes a *de facto* breach of the franchise agreements.

M. <u>WSC Failed to Provide The Technology Services Implied In Each Agreement</u>

139. In addition to WSC's numerous breaches of the parties' agreements set forth above, WSC also frustrated the Plaintiffs' rights under each of the agreements by failing

to provide the technology services either expressly identified or implied in each agreement.

140. B&D Fine Homes and B&D SoCal are required to pay certain technology fees pursuant to the franchise agreements. Although the agreements do not expressly identify the "technology" that WSC is to provide for said fees, it is at least implied by the very nature of the fee that WSC would provide certain technology services needed by real estate franchises and their agents to post and manage real property listings and to otherwise carry out their real estate business.

141. Moreover, pursuant to the Area Representation Agreement, WSC expressly agreed to provide "technology systems, including without limitation the public website operated at www.windermere.com , as well as the Windermere Online Resource Center Intranet system," to its franchisees in exchange for the technology fees. (*See* Ex. B, § 13.)

142. Whether characterized as an express or implied obligation, the technology that was to be provided by WSC was integral to the operation of its franchisees' real estate businesses.

143. Notwithstanding the importance of this service by WSC, the technology provided by WSC was underwhelming at best, and more recently had become unusable and irrelevant.

144. Examples of the recent shortcomings of WSC's technology includes the following:

a. Properties listed by the Windermere Southern California agents often did not properly display (if at all) on WSC's websites;

b. WSC's technology team was inexperienced at best, often causing numerous unnecessary delays to the posting and visibility of Southern California real estate listings;

c. Repeated listing syndication problems for agents' listings on third-party websites, often resulting in extended disruption in the syndication (*i.e.*, publishing) of the listings of Bennion and Deville's agents; and

d. WSC removed entirely the listings and/or pictures of real estate listing belonging to numerous Southern California agents resulting in lost clients and, ultimately, the loss of agents.

145. WSC's inferior technology services have caused Bennion and Deville to incur substantial costs in developing and supporting their own technology systems for the franchisees in their region in order to offset the inferior technology services offered by WSC.

146. Despite the numerous shortcomings of WSC's technology services, Bennion and Deville continued to pay their monthly, non-trivial technology fees of approximately $16,000 to $25,000 per month.

147. The failure of WSC to provide the technology services has breached the express and/or implied terms of the Coachella Valley Franchise Agreement, Area Representation Agreement and SoCal Franchise Agreement. (*See* Ex A, §§ 1, 5, Affiliate Fee Schedule, Ex., B, § 13, Ex. D, §§ 3, 7(c).)

FIRST CLAIM FOR RELIEF

Breach of Contract – Coachella Valley Franchise Agreement

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

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

149. As alleged above, B&D Fine Homes entered into the Coachella Valley Franchise Agreement with WSC on August 1, 2001. This agreement was later amended on August 10, 2007 to include Services SoCal as a party, and again amended on December 18, 2012 pursuant to the parties' execution of the Modification Agreement.

150. Plaintiffs performed all obligations required of them under the Coachella Valley Franchise Agreement as amended, unless otherwise excused by WSC's breach.

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

a. Section 1, for failing to provide the promised "variety of services" designed to enhance Plaintiffs' "profitability;

b. Section 2, for failing to provide Plaintiffs with a viable "Windermere System" as defined in the agreement;

c. Section 4, for failing to take necessary action (legal or otherwise) to prevent infringement of the Windermere trademark or the related unfair competition faced by Plaintiffs in the Southern California region as a result of the Windermere Watch websites; and

d. Section 3(A) of the Modification Agreement, for failing to make commercially reasonable efforts to curtail Windermere Watch and related attacks on the Windermere brand in Southern California.

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

153. Further, Plaintiffs seek liquidated damages pursuant to Section 3(F) of the Modification Agreement as a result of WSC's early termination of the Coachella Valley Franchise Agreement without cause.

154. Plaintiffs are also entitled to recover "reasonable attorneys' fees" under the Coachella Valley Franchise Agreement. (*See* Ex. A, § 11; Ex. G, § 7.)

SECOND CLAIM FOR RELIEF

Breach of Implied Covenant of Good Faith and Fair Dealing – Coachella Valley Franchise Agreement

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

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

156. As alleged above, B&D Fine Homes entered into the Coachella Valley Franchise Agreement on August 1, 2001, the parties amended the agreement to include

Services SoCal as a party on August 10, 2007, and further amended the agreement pursuant to the terms of the Modification Agreement on December 18, 2012.

157. Plaintiffs performed all obligations required of them under the Coachella Valley Franchise Agreement as amended.

158. Incorporated into every contract is an implied covenant of good faith and fair dealing. WSC breached the implied covenant of good faith and fair dealing by acting in a manner so as to deprive Plaintiffs of the benefits of the Coachella Valley Franchise Agreement. This included:

a. Failing to provide adequate technology services in return for the excessive technology fees;

a. Failing to provide a viable Windermere System to the Southern California region. To the extent WSC provided service or assistance, it was worthless;

b. Improperly recruiting Plaintiffs' sales agents and other employees to join WSC and other Windermere offices;

c. Terminating Services SoCal as the Area Representative for the Southern California region and thereby negating Plaintiffs' 50% reduction in franchise fees owed to WSC under the Coachella Valley Franchise Agreement; and

d. Terminating Services SoCal as the Area Representative for the Southern California region and not providing a comparable replacement.

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

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THIRD CLAIM FOR RELIEF

Breach of Contract – Area Representation Agreement

(By Services SoCal against WSC)

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

161. As alleged above, on May 1, 2004, Services SoCal entered into the Area Representation Agreement with WSC.

162. Services SoCal performed all obligations required of it under the Area Representation Agreement, unless otherwise excused by WSC's breach.

163. WSC breached the Area Representation Agreement by failing to comply with the following requirements:

a. Section 2, for failing to provide Services SoCal with the uninterrupted right to offer Windermere franchised businesses in Southern California;

b. Section 2, for failing to provide a viable "Windermere System" as defined in the agreement;

c. Section 3, for failing to provide servicing support in connection with the marketing, promotion and administration of the Trademark and Windermere System;

d. Section 3, for failing to make available to Services SoCal competent "key people" necessary to assist Services SoCal in carrying out its obligations to offer and sell franchises as the Area Representative;

e. Section 4.2, for failing to pay Services SoCal the termination fee – *i.e.* the fair market value of its interest in the Area Representation Agreement – following termination without cause;

f. Section 7, for failing to promptly and diligently commence and pursue the preparation and filing of all franchise registration filings required under California law and/or the United States of America;

g. Section 7, for failing to maintain the registration of the Southern California FDD;

h. Section 10, for depriving Services SoCal of its right to offer new Windermere franchises rendering it unable to collect initial franchise fees and continuing license fees from new franchisees;

i. Section 13, for failing to provide a technology system to support the operation and development of the franchise system in Southern California, and for unilaterally increasing the technology fees to amounts that on information and belief bear no relationship to the amounts actually spent on Windermere's technology system; and

j. Exhibit A, § 3, by attempting to terminate the Area Representation Agreement under the pretense that Services SoCal was the "guarantor" of the franchise fees owed by the franchisees in the Southern California region.

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

165. Further, Services SoCal seeks a judicial determination and declaration that WSC did not have cause to terminate the Area Representation Agreement.

166. Services SoCal is also entitled to recover "reasonable attorneys' fees" under the Area Representative Agreement. (*See* Ex. B, § 21.)

FOURTH CLAIM FOR RELIEF

Breach of Implied Covenant of Good Faith and Fair Dealing – Area Representation Agreement

(By Services SoCal against WSC)

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

168. As alleged above, WSC and Services SoCal entered into the Area Representation Agreement on May 1, 2004.

169. Services SoCal performed all obligations required of it under the Area Representation Agreement.

170. Incorporated into every contract is an implied covenant of good faith and fair dealing. WSC breached the implied covenant of good faith and fair dealing by acting in a manner so as to deprive Services SoCal of the benefits of the Area Representation Agreement. This included:

a. Failing to provide a viable Windermere System in the Southern California region. To the extent WSC provided service or assistance, it was worthless;

b. Taking action to interfere with and damage many of the relationships between Services SoCal and franchisees in the Southern California region;

c. Soliciting Services SoCal's participation in offers and sales of franchises in violation of the franchise laws;

d. Making effort to acquire Services SoCal's superior services and related technology; and

e. Failing to act in good faith and conduct its business such that Plaintiffs received the benefits of being an Area Representative in the franchise system.

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

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FIFTH CLAIM FOR RELIEF

Breach of Contract – SoCal Franchise Agreement

(By B&D SoCal and Services SoCal against WSC)

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

173. As alleged above, on March 29, 2011, B&D SoCal and Services SoCal entered into the SoCal Franchise Agreement with WSC. The Services SoCal Franchise Agreement was subsequently amended by the Modification Agreement on December 18, 2012.

174. Plaintiffs performed all obligations required of them under the SoCal Franchise Agreement as amended, unless otherwise excused by the conduct of WSC.

175. WSC breached the SoCal Franchise Agreement by failing to comply with the following sections of the agreement:

a. Section 1, for failing to provide Plaintiffs with a viable "Windermere System" as defined in the agreement;

b. Section 3, for failing to provide the promised "guidance" to Plaintiffs with respect to the "Windermere System";

c. Section 6, for failing to take necessary action (legal or otherwise) to prevent infringement of the Windermere trademark or the related unfair competition faced by Plaintiffs in the Southern California region as a result of the Windermere Watch websites; and

d. Section 3(A) of the Modification Agreement, for failing to make commercially reasonable efforts to curtail Windermere Watch and related attacks on the Windermere brand in Southern California.

176. As a result of WSC's breaches of the SoCal Franchise Agreement as modified, Plaintiffs suffered actual damages in an amount to be proven at trial, but far in excess of the jurisdictional minimums of this Court.

177. Plaintiffs are also entitled to recover "reasonable attorneys' fees" under the SoCal Franchise Agreement. (*See* Ex. D, § 13.)

SIXTH CLAIM FOR RELIEF

Breach of Implied Covenant of Good Faith and Fair Dealing

(By B&D SoCal and Services SoCal against WSC)

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

179. As alleged above, B&D SoCal and Services SoCal entered into the SoCal Franchise Agreement on March 29, 2011, and the parties amended the agreement pursuant to the terms of the Modification Agreement on December 18, 2012.

180. Plaintiffs performed all obligations required of them under the SoCal Franchise Agreement as amended.

181. Incorporated into every contract is an implied covenant of good faith and fair dealing. WSC breached the implied covenant of good faith and fair dealing by acting in a manner so as to deprive Plaintiffs of the benefits of the SoCal Franchise Agreement. This included:

a. Failing to provide adequate technology services in return for the excessive technology fees;

e. Failing to provide a viable Windermere System to the Southern California region. To the extent WSC provided service or assistance, it was worthless;

f. Improperly recruiting Plaintiffs' sales agents and other employees to join WSC and other Windermere offices;

g. Terminating Services SoCal as the Area Representative for the Southern California region and thereby negating Plaintiffs' 50% reduction in franchise fees owed to WSC under the SoCal Franchise Agreement; and

h. Terminating Services SoCal as the Area Representative for the Southern California region and not providing a comparable replacement.

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

SEVENTH CLAIM FOR RELIEF

Violation of the California Franchise Relations Action (Cal. Bus. & Prof. Code § 20020)

(By Services SoCal against WSC)

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

184. As reflected above, the Area Representation Agreement, by its very terms, continued into perpetuity "until it is terminated" by the parties. Notwithstanding the procedure identified in Section 4 of the Area Representation Agreement purportedly allowing the parties to terminate the agreement *without cause*, the California Franchise Relations Act ("CFRA"), at California Business & Profession Code § 20020, precludes WSC from terminating the Area Representation Agreement absent "good cause."

185. As reflected above, WSC's termination (constructive or by written notice) of the Area Representation Agreement without good cause violated § 20020 of the CFRA.

186. As a result of the WSC's violation of the CFRA, Plaintiffs seek both statutory and contractual damages for the unlawful termination of the Area Representation Agreement.

WHEREFORE, Plaintiffs pray for relief against WSC as follows:

1. On Counts One through Six:

a. For compensatory damages in amounts to be proven at trial;

b. For a judicial determination and declaration that WSC did not have cause to terminate the Area Representation Agreement, as provided for in the agreement.

2. On Count Seven for statutory and contractual damages permitted under the CFRA;

3. For reasonable costs and attorneys' fees incurred in this action pursuant to Section 11 of the Coachella Valley Franchise Agreement, Section 21 of the Area Representation Agreement; Section 13 of the SoCal Franchise Agreement; and Section 7 of the Modification Agreement; and

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

DATED: November 16, 2015

MULCAHY LLP

By: _/s/ James M. Mulcahy
James M. Mulcahy
Kevin A. Adams
Attorneys for Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion & Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc., and Counter-Defendants Robert L. Bennion and Joseph R. Deville

JURY DEMAND

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

DATED: November 16, 2015

MULCAHY LLP

By: /s/ James M. Mulcahy
James M. Mulcahy
Kevin A. Adams
Attorneys for Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion & Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc., and Counter-Defendants Robert L. Bennion and Joseph R. Deville