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9  
10 **UNITED STATES DISTRICT COURT**  
11 **CENTRAL DISTRICT OF CALIFORNIA**

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

Plaintiffs,

v.

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

Defendant.

24 **AND RELATED COUNTERCLAIMS**

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

*Hon. Manual L. Real*

**DECLARATION OF JOSEPH R.  
DEVILLE IN OPPOSITION TO  
WINDERMERE REAL ESTATE  
SERVICES COMPANY'S  
APPLICATION FOR RIGHT TO  
ATTACH ORDERS AND ORDERS  
FOR ISSUANCE OF WRITS OF  
ATTACHMENT**

1 I, Joseph R. "Bob" Deville, state as follows:

2 1. I am a counter-defendant in the above-named action. I am also a co-owner  
3 and President of Plaintiffs and Counter-Defendants Bennion & Deville Fine Homes, Inc.  
4 ("B&D Fine Homes"), Bennion & Deville Fine Homes SoCal, Inc. ("B&D SoCal"), and  
5 Windermere Services Southern California, Inc. ("Services SoCal") (collectively,  
6 "Plaintiffs"). Co-owner Robert Bennion ("Bennion") and I manage the day-to-day affairs  
7 of Plaintiffs and are ultimately responsible for the conduct of Plaintiffs. Plaintiffs,  
8 Bennion, and I are collectively referred to herein as the "B&D Parties."

9 2. I have created this declaration in support of the B&D Parties' Opposition to  
10 Windermere Real Estate Services Company's ("WSC") Application for Right to Attach  
11 Orders and Orders for Issuance of Writs of Attachment (the "Application"). The  
12 statements in this declaration are based upon my personal knowledge, and if called as a  
13 witness, I could testify competently thereto.

14 3. I have reviewed the Application and the concurrently filed Memorandum,  
15 declarations of Michael Teather, Paul Drayna, Mark Oster, Jeffery Feasby, and the  
16 proposed right to attach orders.

17 4. As a preliminary matter, my review of the materials submitted by WSC and  
18 the amount that it seeks to attach suggest that the Application is being pursued for an  
19 improper purpose. After the fallout between the parties that gave rise to this litigation, my  
20 company is now a direct competitor with WSC in the real estate industry. This means that  
21 we compete for brokers, agents, clients, listings, and office space. WSC's Application for  
22 writs of attachment in an attempt to create judicial liens on the property of the B&D  
23 Parties – more than 14 months after the lawsuit was commenced – is something that  
24 WSC use in its discussions with potentials clients, brokers, and agents to spread the  
25 fallacy that the B&D Parties are insolvent or otherwise incapable of paying their debts.

26 5. There is no justification for the requested writs. Neither I nor any of my  
27 companies are insolvent and – setting aside the issue of liability – we are fully capable of  
28 satisfying a judgment in the amount that Windermere seeks in this case.

1           6.     The bad faith intent behind the Application is also evident by WSC's request  
2 to attach assets of the B&D Parties in the amount of \$5,754,887.55 even though WSC is  
3 admittedly only seeking \$1,354,407.49 plus attorneys' fees and costs. [See D.E. 72-4, p.  
4 2; D.E. 72-3, p. 2; D.E. 72-1, p. 2; D.E. 72-2, p. 2; D.E. 72-7 (Declaration of Mark  
5 Oster), p. 16.] This much higher, unsubstantiated figure would prove crippling to most  
6 businesses in the real estate industry and will undoubtedly be used by WSC to emphasize  
7 the B&D Parties' purported insolvency.

8           7.     Likewise, WSC seeks to attach its entire attorneys' fees and costs (\$422,916)  
9 against each of the B&D Parties, thereby multiplying the alleged debt of the B&D Parties  
10 by 400% to more than \$1.6 million. Again, there is no basis for such a large sum except  
11 to use it against us while competing in the same industry.

12           8.     Notwithstanding WSC's true intent for pursuing the requested relief, as  
13 explained below and in the concurrently filed Opposition Memorandum, the B&D Parties  
14 were justified in their discontinuation of payments to WSC under the franchise  
15 agreements and their early departure from the Windermere system.

16                   **The B&D Parties' Commenced This Breach Of Contract Action**

17           9.     On September 17, 2015, I directed counsel to initiate this lawsuit on behalf  
18 of B&D Fine Homes, B&D SoCal, and Services SoCal against WSC. Currently, the B&D  
19 Parties are pursuing the following viable claims against WSC: (1) breach of the  
20 Coachella Valley Franchise Agreement, (2) breach of the implied covenant of good faith  
21 and fair dealing in the Coachella Valley Franchise Agreement, (3) breach of the Area  
22 Representation Agreement, (4) breach of the implied covenant of good faith and fair  
23 dealing in the Area Representation Agreement, (5) breach of the SoCal Franchise  
24 Agreement, and (6) breach of the implied covenant of good faith and fair dealing in the  
25 SoCal Franchise Agreement.

26           10.    Only after being served with the B&D Parties' lawsuit did WSC pursue  
27 claims against us for alleged breaches of the same underlying agreements at issue in the  
28 B&D Parties' claims. Conveniently, WSC's Application does not account for, and fails to

1 even mention, many of the B&D Parties' claims that defeat – or, at a minimum, offset –  
2 the counterclaims asserted by WSC.

3 **WSC's Conduct Excused The B&D Parties' Performance**

4 11. The performance of B&D Fine Homes and B&D SoCal under their franchise  
5 agreements with WSC was excused as of August 2014 (the state that B&D Fine Homes  
6 and B&D SoCal stopped paying fees to WSC) as a result of WSC's numerous material  
7 breaches of the agreements. These breaches involved WSC's failure to take  
8 "Commercially Reasonable" efforts to combat Windermere Watch, and termination of  
9 Services SoCal as the Area Representative for the Southern California region. I will  
10 address the factual context of each of these breaches, in turn, below.

11 ***A. WSC's Failure to Make "Commercially Reasonable Efforts" With Respect***  
12 ***to Windermere Watch***

13 12. During the course of the parties' contractual relationships, a disgruntled  
14 former WSC client named Gary Kruger initiated an anti-marketing campaign – under the  
15 name "Windermere Watch" – specifically designed to direct defamatory statements,  
16 materials, and focused conduct against WSC, its franchisees, and real estate agents.  
17 Although none of the B&D parties have any prior personal history or relationship with  
18 Mr. Kruger, I have personal knowledge of his efforts as I received and reviewed many of  
19 his mailings and his anti-Windermere websites.

20 13. Mr. Kruger's first known website (at [www.windermerewatch.com](http://www.windermerewatch.com)) would  
21 regularly appear as a top internet search result for customers (existing and potential)  
22 when searching Google, Yahoo, or any other search engine for the term "Windermere."  
23 For reasons I do not completely understand, Mr. Kruger was able to add content to his  
24 website in a manner that would result in the website appearing at the top (or near the top)  
25 of the internet search engine results. Historically, Windermerewatch.com was the first  
26 search result that would appear when I performed "Google" searches using the term  
27 "Windermere."  
28

1           14. In the real estate industry, it is routine for potential clients to select their real  
2 estate broker and/or agent based upon information that is made available on the internet. I  
3 received numerous complaints from my brokers, agents, and employees alerting me that  
4 the prominent placement of Windermere Watch – and its anti-Windermere marketing  
5 campaign – in the internet search results was diverting potential clients away from  
6 WSC’s brokers and agents. In fact, my companies lost agents because they no longer  
7 wanted to be associated with Windermere because of the Windermere Watch website.

8           15. I sat through the depositions of all of WSC’s executives and employees and  
9 they concurred that the Windermere Watch website was a problem for Windermere  
10 agents, brokers, and clients.

11           16. In addition to the website’s high search engine visibility expressing strong  
12 anti-Windermere rhetoric, Mr. Kruger also regularly sent out mass mailings of postcards  
13 and other materials containing anti-Windermere propaganda to residents and potential  
14 clients in areas where new Windermere franchise locations were scheduled to open.  
15 Again, I have viewed more than a dozen of these postcards first hand and they appeared  
16 to contain printouts of the same anti-Windermere propaganda that was on the  
17 Windermere Watch website.

18           17. This was damaging to my businesses and the businesses of my agents and  
19 fellow Windermere franchisees. The loss of actual and potential clients as a result of  
20 Windermere Watch’s negative marketing campaign ultimately forced many agents to  
21 disassociate themselves from Windermere.

22           18. In 2012, the Windermere Watch website began to systematically list all of  
23 the Windermere offices by name and address, the names of all Windermere agents in  
24 those offices, and the agents’ Department of Real Estate and/or California Bureau of Real  
25 Estate numbers. This is substantiated by the deposition testimony of my Director of  
26 Technology, Eric Forsberg. (*See Declaration of Kevin A. Adams (“Adams Decl.”)*, Ex.  
27 H, pp. 57:6-58:9.) Because of this, any internet searches for those agents or offices would  
28

bring up the Windermere Watch website and its negative treatment of the Windermere brand and its agents.

19. The attacks by Mr. Kruger were becoming more personal over time causing public relations issues and the loss of agents, clients, and listings for us. Not only were we prevented from receiving any positive benefits from our association with the Windermere name and mark, but we also sustained damage to our businesses, personal reputations and goodwill as a result of the negative connotation now associated with the Windermere name and mark.

20. By late 2012, the harm caused by the growing Windermere Watch anti-marketing campaign nearly forced us to leave the Windermere system. In an effort to entice us to stay with Windermere, WSC offered to make several financial and operational concessions to the Coachella Valley Franchise Agreement and the SoCal Franchise Agreement. In particular, WSC promised to (i) 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 my businesses. The parties’ agreement was memorialized in the December 18, 2012 “Agreement Modifying Windermere Real Estate Franchise License Agreement” (the “Modification Agreement”). A copy of the Modification Agreement is attached to the declaration of Paul Drayna (“Drayna Decl.”) [D.E. 72-6], Ex. H.

21. The Modification Agreement amended the parties’ obligations under the Coachella Valley Franchise Agreement and the SoCal Franchise Agreement and provides, in relevant part, as follows:

- a. WSC would “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”;

1 b. WSC waived \$1,151,060 in past due franchise fees and technology  
2 fees owed by B&D Fine Homes and B&D SoCal under the franchise  
3 agreements; and

4 c. Bennion and I were personally released from any personal liability  
5 under the personal guarantees we provided WSC for all amounts  
6 incurred and owed by B&D Fine Homes and B&D SoCal prior to  
7 April 1, 2012.

8 [D.E. 72-6, Ex. H, § 3(A) (emphasis added).]

9 22. Notwithstanding WSC's agreement to make "commercially reasonable  
10 efforts" with respect to Windermere Watch, we eventually learned that WSC made this  
11 empty promise to entice us to stay in the Windermere system. The testimony and records  
12 produced in this case show that WSC made virtually no effort for nearly a year – and the  
13 commercial reasonableness of the effort thereafter is suspect at best – to combat  
14 Windermere Watch.

15 23. Thereafter, on February 11, 2013, Bennion, I and our legal counsel, Robert  
16 Sunderland, participated in a conference call with representatives of WSC to discuss the  
17 efforts that WSC planned to undertake to combat Windermere Watch's anti-marketing  
18 campaign. Despite this call and the initial appearance that WSC would take action against  
19 Windermere Watch, my subsequent interactions with WSC's executives, their deposition  
20 testimony, and the documents produced in this case reveal that nothing happened until  
21 October 2014, at the earliest. (See deposition testimony of Geoff Wood, Paul Drayna,  
22 Michael Teather, OB Jacobi, and Noelle Bortfeld attached to the Adams Decl.)

23 24. Instead of communicating their effort (or lack thereof) to us, WSC's  
24 executives simply ignored my numerous emails requesting updates on WSC's plan to  
25 combat Windermere Watch.

26 25. For instance, on March 29, 2013, Bennion and I sent a series of emails to  
27 WSC's General Counsel, Paul Drayna, requesting an update on WSC's efforts to combat  
28 Windermere Watch. In the email, we informed Mr. Drayna that (i) Windermere Watch  
propaganda had recently been circulated among several of the B&D Parties' clients,

1 costing the B&D Parties' multiple real estate listings, (ii) insurance carrier Lloyd's of  
2 London had recently refused to insure a franchisee in the B&D Parties' region after  
3 discovering the Windermere Watch websites on the internet, and (iii) customers had  
4 voiced concerns that Windermere – along with the B&D Parties' businesses – would be  
5 going out of business after viewing the postings on the Windermere Watch websites. No  
6 one at WSC ever responded to this email March 29th email. I was present at the  
7 deposition of Mr. Drayna and he admitted that he never responded to my email and  
8 refused to explain why he did not respond on the basis of attorney/client privilege. A true  
9 and accurate copy of my March 29, 2013 email is attached hereto as Exhibit 1. (*See also*,  
10 Adams Decl., Ex. B (Drayna Depo., Vol. I), pp. 227:4-228:17, Ex. 27.)

11         26. After another month of continued silence from WSC, on April 20, 2013, I  
12 sent another email – this including both Mr. Drayna and WSC's President, Geoff Wood –  
13 informing WSC that Windermere Watch was continuing to pose significant problems for  
14 the Windermere businesses in Southern California. A true and accurate copy of my April  
15 20, 2013 email is attached hereto as Exhibit 2. In the email, I explain that I was with one  
16 of my real estate agents at a recent listing presentation for property in excess of  
17 \$5,000,000. During the live presentation, the seller of the property "Googled" the names  
18 Bennion and Deville on the internet and was immediately directed to the Windermere  
19 Watch websites. Not only did we not get the property listing, but I also expressed my  
20 thoughts that we would likely lose the agent to a competitor – which we later did. At the  
21 conclusion of the email, I asked Drayna and Wood to "[p]lease advise [what] has been  
22 done since our phone discussion months ago about [Windermere Watch] and what [are]  
23 the plans to make this go away." Incredibly, Drayna, Wood, and everyone else at WSC  
24 again ignored my request and WSC still failed to take any action against Windermere  
25 Watch. WSC's failure to respond to my email was again confirmed in the deposition of  
26 Mr. Drayna who, again, refused to explain this failure on the basis of attorney/client  
27 privilege. (*See* Adams Decl., Ex. B (Drayna Depo., Vol. I), pp. 231:13-233:1, Ex. 28.)  
28



1           27. By June 2013, Windermere Watch had severely impacted our ability to  
2 function in Southern California. We were losing listings, clients, and agents on a regular  
3 basis. Windermere Watch continued not only posting anti-Windermere content on its  
4 websites, but also flooded the markets of new Windermere franchise locations and the  
5 sellers of all new properties listed by us with the anti-Windermere postcards and other  
6 mailings.

7           28. On June 12, 2013, both Bennion and I voiced our frustration in emails to Mr.  
8 Drayna concerning WSC's failure to act. A true and accurate copy of our June 12, 2013  
9 email is attached hereto as Exhibit 3. First, I wrote: "[p]lease let me know what is being  
10 done about [Windermere Watch]. It has now been months since we have discussed this  
11 problem and it is still affecting our business both in [Southern California] as well as  
12 Seattle." I also informed Mr. Drayna that Windermere Watch continued to be used  
13 against us by competitor real estate companies vying for both real estate listings and  
14 agents, and that we had recently lost a prospective franchisee to a competitor after the  
15 prospect learned what Windermere Watch was posting about the Windermere brand.

16           29. Bennion followed my email with one of his own, telling Mr. Drayna that he  
17 "really need[ed] an update" on Windermere Watch, and that Bennion had "sent several  
18 emails in the past with no response" from WSC, which he described as "disheartening."  
19 Again, our pleas for support regarding Windermere Watch were ignored by WSC. Again,  
20 Mr. Drayna testified that he received our email, but refused to explain why the continued  
21 silence from WSC on the basis of attorney/client privilege. (*See Adams Decl., Ex. B*  
22 *(Drayna Depo., Vol. I), pp. 233:4-234:5, Ex. 29.)*

23           30. By July 2013, our competitors in Southern California were using elaborate  
24 PowerPoint presentations – based entirely upon information they obtained from the  
25 Windermere Watch websites and mailings – with both clients and agents painting  
26 Windermere as an untrustworthy real estate firm. This too was brought to Messrs. Drayna  
27 and Wood's attention in emails dated July 4, 2013 and July 8, 2013. For instance, in the  
28 July 8, 2013 email, Deville again wrote to Drayna and Wood, "are we anywhere near

1 developing a plan [to] address the [Windermere Watch] issue?” A true and accurate copy  
2 of the July 8, 2013 email is attached hereto as Exhibit 4. Amazingly, WSC continued to  
3 ignore our pleas for support.

4 31. By the middle of summer 2013, WSC’s failure to take any action to combat  
5 the anti-marketing campaign of Windermere Watch had metastasized to other areas of  
6 our businesses and had now included a direct campaign from Windermere Watch  
7 attacking Bennion and myself personally. At this point and time, the positive goodwill  
8 that we sought by joining the Windermere system no longer existed, and from that point  
9 forward, we reluctantly continued our association with the name Windermere.

10 32. More than seven months after WSC signed the Modification Agreement, it  
11 still had not identified any effort or plan to counteract the damage that Windermere  
12 Watch was causing in Southern California. Completely frustrated over WSC’s inaction,  
13 on July 24, 2013, I sent another email to Mr. Drayna questioning whether “anyone on  
14 your end [was] doing anything to make this go away?” A true and accurate copy of the  
15 July 2013 email chain is attached hereto as Exhibit 5. Again, my pleas for assistance went  
16 unanswered.

17 33. The following week, on July 31, 2013, I sent another email to Messrs.  
18 Drayna and Wood with a detailed report summarizing the recent events involving  
19 Windermere Watch. I started the email by informing Messrs. Drayna and Wood that:

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

25 A true and accurate copy of my July 31, 2013 email is attached hereto as Exhibit 6.

26 34. I continued by identifying specific instances in which several franchisees in  
27 the Southern California region were prevented from hiring new agents because of  
28 Windermere Watch. (*See Ex. 6.*) Also, I noted that the Windermere Watch “postcard

1 campaign” continued to be used by competitors vying for the same real estate listings.  
2 Again, no response was forthcoming. (*Id.*)

3 35. Like a broken record, Messrs. Drayna and Wood continued to ignore my  
4 requests. Mr. Drayna testified that they received my email but refused to explain why no  
5 response was forthcoming on the basis of attorney/client privilege. (*See* Adams Decl., Ex.  
6 B (Drayna Depo, Vol. I, pp. 234:20-239:10, Ex. 30.)

7 36. I then followed my unanswered July 31, 2013 email with an August 10,  
8 2013 email, asking Mr. Drayna “again for an update and what approach [WSC] is taking  
9 on this.” Out of pure frustration, I also demanded that Mr. Drayna forward me “any  
10 information that [he] may have on responding and addressing this matter.” Again, the  
11 email was received but Mr. Drayna refused to answer why WSC failed to respond. (*See*  
12 Adams Decl., Ex. B (Drayna Depo.), pp. 293:12-296:13, Ex. 48.)

13 37. Drayna’s continued refusal to explain why WSC ignored my emails on the  
14 basis of attorney/client privilege suggests that he was directed by WSC’s executives to  
15 ignore us in Southern California to let us fend for ourselves; basically, the same  
16 circumstances that gave rise to the Modification Agreement in the first instance. (*See e.g.*,  
17 Adams Decl., Ex. B (Drayna Depo., Vol. I), pp. 231:13-223:1, 295:19-20.)

18 38. In late summer 2013, we took it upon ourselves to hire several internet  
19 content programmers and bloggers, and devoted their time to increasing Windermere’s  
20 internet search engine rankings in an attempt to bury Windermere Watch’s online  
21 presence. Of course, this did nothing to offset Windermere Watch’s continued use of  
22 postcards and other print materials to mail to Windermere agents and clients.

23 39. On August 24, 2013, I sent another pointed email to Messrs. Drayna and  
24 Wood. A true and accurate copy of my August 24, 2013 email is attached hereto as  
25 Exhibit 7. This time, I wrote: “I had sent numerous emails to both of you regarding  
26 [Windermere Watch], our challenges and the effect it is having on us in Southern  
27 California with both my company as well as our [Windermere] Southern California  
28 [franchisees]. To date I have received no response other than one email some time back

1 [indicating] that we need to get together again and see what we are going to do about  
2 them.” However, Deville concluded, “I have seen nothing from [WSC] to make that  
3 happen.” (*See* Ex. 7.)

4 40. Amazingly, Messrs. Drayna and Wood remained silent on the Windermere  
5 Watch matter until my attorney, Robert Sunderland, at my direction, sent an email to Mr.  
6 Drayna on August 26, 2013, addressing the Windermere Watch situation in Southern  
7 California and making clear that the Southern California businesses sought “a definite  
8 response in terms of what is being done” about Windermere Watch. A true and accurate  
9 copy of Mr. Sunderland’s August 26, 2013 email as directed by me is attached hereto as  
10 Exhibit 8.

11 41. The next day, on August 27, 2013, Mr. Drayna contacted me and asked to  
12 set up a meeting to discuss the matter by phone. I agreed and asked for Mr. Drayna send  
13 us WSC’s “plan” in advance of our call. True to form, no plan was ever provided.

14 42. WSC’s failure to take any meaningful action against Windermere Watch’s  
15 anti-marketing campaign in Southern California constitutes a clear breach of both the  
16 Coachella Valley Franchise Agreement and the SoCal Franchise Agreement, as amended  
17 by the Modification Agreement. Further, WSC’s inaction with respect to Windermere  
18 Watch also breached the Area Representation Agreement to the extent that WSC was  
19 contractually obligated to provide Southern California franchisees a viable “Windermere  
20 System,” and “support in connection with the marketing, promotion and administration of  
21 the Trademark and Windermere System.”

22 43. It was only after my attorney, Robert Sunderland, sent a threatening letter to  
23 Mr. Drayna that WSC set up a meeting with us to discuss Windermere Watch. Shortly  
24 thereafter, in January 2014, WSC’s CEO, Geoff Wood, sent us an email acknowledging  
25 that there was simply nothing that WSC could (or would) do with respect to Windermere  
26 Watch.

27 44. WSC’s failure to act forced us to incur significant time and expense  
28 employing our own counter-marketing campaign. By October 2013, we had devoted a

1 minimum of five employees to offset Windermere Watch's negative marketing campaign  
2 over the internet. Through this significant expenditure of time, money, and effort, we  
3 were able to forestall some of the negative effects of the Windermere Watch websites.  
4 Unfortunately, our efforts were too little too late. By the end of 2013, virtually all of  
5 Windermere's competitors had incorporated information from Windermere Watch into  
6 their sales pitches to both agents and clients. Moreover, the continued mailings of Mr.  
7 Kruger coupled with the continued existence of Windermere Watch were now permanent  
8 impediments into the operations of all Windermere businesses in Southern California.

9 45. WSC's failure to take action breached both of the parties' franchise  
10 agreements as amended by the Modification Agreement and left the B&D Parties with no  
11 choice but to absorb a significant expense in combatting Windermere Watch on their  
12 own. WSC eventually reimbursed us for some of the significant expenses that we  
13 undertook to combat Windermere Watch as a result of WSC failure to take action.  
14 However, the reimbursed amount does not reflect all of our expenses arising out of  
15 WSC's breach. These unreimbursed expenses that we are pursuing in this lawsuit total  
16 \$146,954.

17 46. More significantly, during 2013, we opened up two additional Windermere  
18 offices in San Diego that we never would have opened had we known that WSC was  
19 going to ignore its contractual agreement to combat Windermere Watch. These locations  
20 have resulted in a loss to us in excess of \$1.4 million, an amount that we are seeking  
21 under our contract claims against WSC.

22 47. In an attempt to avoid its breach of the Modification Agreement, WSC  
23 argues that a June 3, 2014 letter from Mr. Teather to Mr. Sunderland somehow relieved  
24 WSC of its obligation to take action against Windermere Watch. WSC's argument is  
25 flawed as no such letter was made known to me until after it was produced by WSC  
26 during this lawsuit and, even if I had known about it, I would never have agreed to it. Mr.  
27 Teather's position in the letter is contrary to the discussions that were taking place during  
28 that time period – *i.e.*, our discussions prior to June 3, 2014 concerned our request for

1 reimburse from WSC for our expenses incurred in fighting Windermere Watch without  
2 WSC's support and demand that WSC do something to comply with its obligations under  
3 the Modification Agreement going forward. It is also noteworthy that no one on behalf of  
4 the B&D Parties ever countersigned Mr. Teather's June 3, 2014 letter or the promissory  
5 note attached to his letter. Also, if the June 3 letter was as important as WSC' suggests, it  
6 would have been sent via registered mail like everything else of importance delivered by  
7 WSC.

8 48. WSC's use of my deposition testimony to suggest that the parties had an  
9 agreement consistent with Mr. Teather's letter takes my testimony out of context and  
10 ignores my subsequent explanation of the relationship between the parties at that time.  
11 [See Adams Decl., Ex. I (Deville Depo.), pp. 377:4-379:22, 381:2-5, 383:11-16, Errata.] I  
12 stated then, and I will state now, I did believe WSC to be in breach of its obligations  
13 under the franchise agreements as amended by the Modification Agreement. I disagree  
14 with Mr. Teather's self-serving letter that cut against the essence of the parties' dealings.  
15 I never did agree (and never would have agreed) that WSC was relieved of its obligation  
16 to take action against Windermere Watch. As is reflected in my numerous emails to  
17 WSC, Windermere Watch was a real distraction to our everyday operations and  
18 damaging to our business that we needed immediate action. To even suggest that we  
19 agreed WSC no longer had to comply with the Modification Agreement is ridiculous.

20 49. As stated at the time of my deposition, I never received a copy of Mr.  
21 Teather's June 3, 2014 letter and never reached an agreement consistent with what he  
22 states therein. If there was an agreement to that effect, I would have insisted on a written  
23 agreement signed by all parties. No such agreement exists and I will not agree to be  
24 bound by a unilateral letter. As clearly stated at my deposition, I have no recollection of  
25 Mr. Teather's letter and never would have agreed to its contents.

26 50. In short, WSC breached a significant provision in the Modification  
27 Agreement by failing to take any action as to Windermere Watch. This breach harmed us  
28 in 2013 and continued to do so throughout the 2014 year and ultimately contributed to

1 our decision to discontinue payments to WSC under the franchise agreements and leave  
2 the Windermere system early.

3 **B. *WSC's termination of the Area Representation agreement excused our***  
4 ***performance under the franchise agreements***

5 51. Notwithstanding our contract claims for WSC's failure to combat  
6 Windermere Watch, as described above, this lawsuit is primarily about WSC's  
7 termination of Services SoCal's Area Representation Agreement and the resulting harm  
8 caused by that termination. Incredibly, WSC's Application ignores these critical issues  
9 and the B&D Parties' related implied contract claims in the First Amended Complaint  
10 ("FAC") (Counts 2 and 6).

11 52. On May 1, 2004, Bennion and I, on behalf of our newly formed entity  
12 Services SoCal, entered into a document titled, "Windermere Real Estate Services  
13 Company Area Representation Agreement for the State of California" (the "Area  
14 Representation Agreement") with WSC. A true and correct copy of the Area  
15 Representation Agreement is attached hereto as Exhibit 9. The Area Representation  
16 Agreement was the byproduct of WSC's desire to further expand its franchising operation  
17 into California by utilizing the experience, knowledge and success of Bennion and myself  
18 to develop that "Region." (See Ex. 9, Recital A, §§ 1.5, 2.)

19 53. As the "Area Representative," we were tasked with two distinct roles. First,  
20 we were granted the "the non-exclusive right to offer Windermere licenses to real estate  
21 brokerage businesses to use the Trademark and the Windermere System in the Region."  
22 (Ex. 10, § 2.) Second, we were to provide certain "support and auxiliary services" to both  
23 incoming and existing Windermere franchisees in the Region. (See Ex. 9, §3.)

24 54. In exchange, we were to share "equally" with WSC in "all initiation and  
25 licensing fees" for (i) the seven existing Windermere franchises in Southern California  
26 (see Ex. 10, Ex. A – emphasis added), and (ii) "all future Windermere offices" opened in  
27 Southern California. (See Ex. 9, §§ 3, 10, Ex. A, § 3.)  
28

1        55. The Area Representation Agreement was for a perpetual term and could only  
2 be “**terminated**”: (i) by mutual agreement of the parties, (ii) *without cause* “upon one  
3 hundred eighty (180) days written notice to the other party,” or (iii) “*for cause* based  
4 upon a material breach of the Agreement and following “ninety (90) days written notice”  
5 to the breaching party and opportunity to cure. (Ex. 9, § 4.1.) The parties further agreed  
6 to comply with the termination provision “in good faith” and “give the other [party]  
7 reasonable notice and opportunity to cure any real or perceived default or  
8 misperformance or malperformance on either party’s part.” (*Id.*) In the event the Area  
9 Representative Agreement was terminated *without cause*, the terminating party was  
10 required to make termination payments to the terminated party in an “amount equal to the  
11 fair market value of the Terminated Party’s interest in the Agreement.” (*See* Ex. 9, § 4.2.)

12        56. As Area Representative, we were entitled to 50% of all initial franchise fees  
13 and monthly royalties owed to WSC under the Coachella Valley Franchise Agreement  
14 and the SoCal Agreement. Moreover, our role as Area Representative ensured that our  
15 franchisee entities would be serviced and supported by a competent, local Area  
16 Representative and was memorialized as such in the franchise agreements. Local service  
17 and support was a substantial consideration of ours as WSC’s headquarters was located in  
18 Seattle, it did not have a presence in Southern California, and it was not in a position to  
19 support the Southern California franchise operations.

20        57. Ultimately, we built our entire franchise system and agent program upon the  
21 understanding that we would receive (i) a 50% fee reduction, and (ii) funding as an Area  
22 Representative to provide the service and support that WSC could not. Our status as both  
23 the Area Representative and franchisees created a symbiotic relationship between the  
24 Area Representative Agreement and the franchise agreements. These underlying benefits  
25 from serving as both the Area Representative and franchisee were significant material  
26 considerations when we agreed to (and did) aggressively expand our Windermere  
27 franchise operations in Southern California.  
28



1           59. Beginning in early 2004, Bennion and I, with the approval of WSC, began  
2 developing new Windermere franchises throughout Southern California. This included  
3 more than thirteen franchised businesses located in various Southern California cities  
4 including, but not limited to, Desert Hot Springs, Rancho Mirage, La Quinta, Indian  
5 Wells, Palm Springs, Palm Desert, Indio, and Cathedral City, among others. Instead of  
6 entering into new franchise agreements for each new location, the parties memorialized  
7 the new franchise businesses in addenda to the Coachella Valley Franchise Agreement.  
8 Without the 50% reduction in initial franchise fees and monthly licensing fees provided  
9 by the Area Representation Agreement, or the localized experience and support that we  
10 could provide as Area Representative, we would not have engaged in this subsequent  
11 mass expansion of the Windermere brand in Southern California.

12           60. On August 10, 2007, the parties formalized the symbiotic relationship  
13 between the Coachella Valley Franchise Agreement and the Area Representation  
14 Agreement by amending the Coachella Valley Franchise Agreement to add Services  
15 SoCal as a party to that agreement and all subsequent addenda thereto. [D.E. 72-6, p. 44.]  
16 From this point forward, Service SoCal was included as a party to every Windermere  
17 franchise agreement facilitated by us, including those agreements involving third-party  
18 franchisees.

19           61. On March 29, 2011, the parties – including Services SoCal – entered into the  
20 SoCal Franchise Agreement. [D.E. 72-6, Ex. F.] The SoCal Franchise Agreement  
21 allowed us to open new franchise locations in La Mesa, Laguna Niguel, Carmel Valley,  
22 and Solana Beach. Again, the SoCal Franchise Agreement provided that Services SoCal  
23 would be the Area Representative and it was implied by the symbiotic relationship of the  
24 agreements and the express terms of the Area Representation Agreement that we would  
25 receive a 50% reduction off our franchise fees.

26           62. As explained below, in late summer 2014 – and as the parties' 15-year  
27 relationship reached a tipping point – we learned of WSC's efforts to stop us from  
28 continuing to operate as the Area Representative for Southern California. It was this

1 effort, in conjunction with the continued Windermere Watch issues and other problems  
2 faced in the parties' relationships (discussed, in part, below) that caused us to stop paying  
3 WSC the fees required by the franchise agreements and to ultimately depart the  
4 Windermere system.

5 63. As reflected in the Area Representation Agreement, the right to offer and  
6 sell Windermere franchises (and the financial benefit that the sales derived) was a  
7 principal benefit to us under the Area Representation Agreement. (*See* Ex. 9.)

8 64. In August 2014, we learned that WSC had failed to register its Southern  
9 California franchise application although it was already in possession of our audited  
10 financials needed to register the document. I was an Area Representative for more than a  
11 decade, during this time I became very familiar with California's franchise disclosure and  
12 registration laws. WSC's failure to register the franchise application precluded us from  
13 being able to offer or sell any Windermere franchises under California's franchise laws.  
14 More importantly, this right was never restored to us for the short duration of our time  
15 with WSC.

16 65. Although WSC failed to renew the franchise application for Southern  
17 California, it misled us for months into believing that the franchise registration was  
18 forthcoming.

19 66. For instance, on October 28, 2014, I sent an email to Mr. Drayna stating,  
20 "[a]sked about 4 weeks ago when we would have the new [Southern California franchise  
21 application]. I have 2 prospects and need to have for them to sign a receipt. Please advise  
22 when we will have the new [Southern California franchise application]." A true and  
23 accurate copy of my October 28, 2014 email is attached hereto as Exhibit 10.

24 67. The next day, Mr. Teather responded to my email as follows: "I spoke with  
25 [Mr. Drayna] today regarding the [Southern California franchise application], I will make  
26 sure that it is out to you by the end of the week." Notwithstanding Mr. Teather's  
27 representation, the Southern California franchise application was never registered with  
28 the State of California for 2014.

1           68. I was at Mr. Drayna's deposition when he admitted that he did not register  
2 the Southern California franchise application because he understood that WSC was in the  
3 process of reacquiring the Area Representative rights. This was not known to us at the  
4 time, and instead, we were pleading with WSC to register Southern California franchise  
5 application so we could offer and sell franchises as permitted by the Area Representation  
6 Agreement.

7           69. In short, we were deprived of one of the primary benefits under the Area  
8 Representation Agreement – the right to 50% of all franchise fees and subsequent  
9 royalties paid by all new Windermere franchisees in the Southern California region.

10          70. In addition to thwarting our ability to offer and sell new franchises, WSC  
11 also engaged in conduct designed to disrupt our relationships with existing franchisees  
12 and to acquire the information and technology developed by us before we left the  
13 Windermere system and became competitors.

14          71. It was well known in the Southern California region that the technology and  
15 services we offered were far superior to those made available by WSC. The only way for  
16 WSC to compete with us in this regard was to acquire our technology before it could take  
17 the Area Representative rights from us.

18          72. Through late summer and early fall 2014, Mr. Teather pushed us to  
19 "combine our tech companies, and put [Eric Forsberg, our Director of Technology] in  
20 charge of the customer experience and have [WSC] pick up his salary." A true and  
21 accurate copy of the email from Mr. Teather to me to this effect is attached hereto as  
22 Exhibit 11.

23          73. After we rejected this offer, Mr. Teather attempted to solicit Mr. Forsberg to  
24 leave us and to come work for WSC. This was relayed to me by Mr. Forsberg directly  
25 and attested to at his deposition.

26          74. Further, by summer 2014, Mr. Teather had begun bypassing us as the Area  
27 Representative for the Southern California region and dealing directly with current and  
28 prospective Windermere franchisees himself. We have since learned that Mr. Teather was

1 telling existing and prospective franchisees that we were “giving up” our right to serve as  
2 Area Representative in the Southern California region and that all communications  
3 involving the region should be directed to WSC.

4         75. Mr. Teather also ingratiated himself to the existing franchisees by approving  
5 franchise locations and expansion plans that we had already rejected for legitimate  
6 business reasons. Throughout the remainder of our short time as Area Representative,  
7 Mr. Teather was surreptitiously informing the local franchisees that we were on our way  
8 out and that he, on behalf of WSC, was taking over as the Area Representative.

9         76. I also learned through my review of materials produced in discovery that Mr.  
10 Teather informed the existing San Diego franchisees that he would get us to give them  
11 one or more of our offices on the coast in San Diego. Although we would consider selling  
12 the office for the amount we had put into it, we spent far too much to just give the office  
13 over to anyone. When the franchisees learned that we were not going to “give” them the  
14 office(s) and that we did not have any intention of giving up the Area Representative  
15 rights, tensions between us and the franchisees grew. This was all orchestrated by Mr.  
16 Teather and his contrasting representations to each of us. This conduct by Mr. Teather  
17 seriously frustrated our rights and ability to serve as the Area Representative.

18         77. Ultimately, WSC terminated our Area Representative rights (both  
19 constructively and expressly). As reflected in the concurrently submitted report of our  
20 damages expert, Peter Wrobel, we now seek damages for the fair market value of our  
21 Area Representative rights in the amount of \$2,592,526. At a minimum, this amount  
22 would offset the amount WSC seeks in this action.

23         78. Further, WSC’s termination of the Area Representation Agreement deprived  
24 us of the fee reduction and support that were implied benefits under the Coachella Valley  
25 Franchise Agreement and SoCal Franchise Agreement, thereby contributing to our  
26 decision to stop paying fees to WSC and to leave the Windermere system before five  
27 years.

1           **C.     *WSC's Offering of TouchCMA to our Competitors Excused our***  
2           ***Performance Under the Franchise Agreements***

3           79.    On July 18, 2012, WSC executive and owner, OB Jacobi, sent out a memo  
4 to all "Owners and Managers" alerting us that WSC and its sister company, Windermere  
5 Solutions, were exploring the sale of their highly touted TouchCMA technology to "non-  
6 competing real estate brokerages outside of the Windermere footprint." A true and  
7 accurate copy of the July 18, 2012 notice is attached hereto as Exhibit 12.

8           80.    This was a highly debated topic because WSC touted TouchCMA as its  
9 flagstaff technological resource that helped to put Windermere owners and agents above  
10 the competitors in the same market. Naturally, the sale of this technology to competing  
11 brokerages would have been harmful to the Windermere brokers and agents, explaining  
12 why WSC represented that the technology would only be offered to those competitors  
13 outside of the geographies of Windermere's owners and agents.

14          81.    While TouchCMA proved to be a contentious topic between Windermere  
15 representatives in Southern California and WSC, WSC's sale and offering of this product  
16 to non-Windermere brokerages was not known to be an issue for some time.

17          82.    Then, in early August 2014, an internet article published on the east coast  
18 was brought to my attention regarding the use of TouchCMA by non-Windermere  
19 brokerages. This news caused me and others in my employment to question exactly  
20 where WSC was offering TouchCMA and whether this was being offered within our  
21 "footprint." After some internet research and discussions with other agents, we learned  
22 that WSC had been selling the TouchCMA technology to our competitors in Southern  
23 California. In particular, we learned that WSC and/or Windermere Solutions had entered  
24 into an agreement with the California Association of Realtors – the largest membership  
25 of real estate agents in California – and that this technology was now being used in direct  
26 competition with our agents and brokers in Southern California.

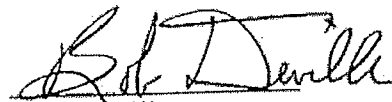
27          83.    I have since learned through the deposition of Windermere Solutions CEO,  
28 York Baur, that notwithstanding the earlier representation in Mr. Jacobi's July 2012

1 email, after Mr. Baur became CEO in late 2012, he immediately began negotiating the  
2 sale of WSC's technology to competitors within our same geographic region. I also  
3 learned from Mr. Baur's deposition that Windermere Solutions used the same pool of  
4 funds paid by franchisees to develop and support TouchCMA that it is now selling to  
5 competitors.

6 84. It had been apparent for some time that WSC was more concerned about its  
7 bottom line than its owners and agents; however, when I learned of this direct  
8 competition with the owners and agents, I was astounded. WSC had sunk to a new low.

9 85. While we have not been able to quantify the harm that we suffered as a  
10 result of WSC's sales to our direct competitors of the same technology that was supposed  
11 to set us apart from the competition, this was a high consideration of mine when deciding  
12 to stop paying franchise fees to WSC and to leave the Windermere system early.

13 I declare under penalty of perjury under the laws of the United States of America  
14 that the foregoing is true and correct and that this Declaration was executed this 28th day  
15 of November, 2016 in Rancho Mirage, California.

16  
17  
18   
19 Bob Deville  
20  
21  
22  
23  
24  
25  
26  
27  
28

# EXHIBIT 1

---

**From:** Bob Bennion <bbennion@windermere.com>  
**Sent:** Friday, March 29, 2013 10:04 AM  
**To:** Bob Deville  
**Cc:** Paul Drayna; Geoff Wood; bbennion@windermersocal.com; attny-Robert Sunderland (rsunderland@sunmclaw.com)  
**Subject:** Re: Windermere - EPLI

Yes this site was circulated among my Seattle clients and one very good client called to give me the heads up and thought I should know about it and was very concerned if Windermere was on and if we were going to be closing. Argh!

Sent from my iPhone

On Mar 29, 2013, at 8:54 AM, Bob Deville <bdeville@windermersocal.com> wrote:

See below

Please advise where we are with WRE Watch.

It has also cost us two listings on the coast (used by Sotheby's) and Bob B has had two clients in Seattle contact him directly about it.

I know we had one phone conversation a couple of months back but to date have had nothing else communicated on this issue.

Bob Deville

Bob Deville  
Broker/Owner  
Windermere Real Estate Southern California  
A Division of Bennion & Deville Fine Homes, Inc.

---

**From:** Troy McFadin  
**Sent:** Friday, March 29, 2013 8:32 AM  
**To:** Robert Sunderland; Bob Deville  
**Subject:** FW: Windermere - EPLI

Thought I would pass this on to you guys for review. I was able to get more clarification in a phone call with this broker. Apparently Lloyds of London had provided a fairly competitive quote for the EPLI insurance then pulled their quote after they found the Windermere Watch blog on the internet. I tried to get feedback directly from Lloyds but they didn't want anything to do with formal documentation, nor will they consider working with Windermere for any insurance purposes because of Windermere Watch.

**Troy McFadin / Human Resource Director**

Windermere Real Estate Southern California  
A Division of Bennion & Deville Fine Homes, Inc.

71-691 HWY 111 / Rancho Mirage, CA 92270  
Ofc 760-770-6801 / Mbl 760-898-3859  
Fax 760-770-6951  
[www.windermersocal.com](http://www.windermersocal.com)

**Exhibit No.**

27

DRAYNA

8-22-16

Cynthia A. Kennedy, CSR, RPR

B&D0044615



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**From:** Brad Butlin [mailto:brad@a-ains.com]  
**Sent:** Thursday, March 28, 2013 8:03 AM  
**To:** Troy McFadin  
**Subject:** Windermere - EPLI

Hi Troy,

I am working with a wholesaler to get Employer's Practices Liability Insurance quotes for your office.

During the process, the wholesaler mentioned that one of his markets ran across some information on the internet regarding Windermere and as result were hesitant to offer a quote.

THANKS!

*Brad Butlin*

AUSTIN & AUSTIN INSURANCE SERVICES INC  
BROKER  
CORP LICENSE # OC10853  
PH: 800.987.1475 F: 925.416.1693 E-Fax: 925.226.7543  
5890 STONERIDGE DRIVE #209 | PLEASANTON CA 94588  
VISIT US ON THE WEB AT [HTTP://WWW.A-AINS.COM/](http://www.a-ains.com/)  
[BRAD@A-AINS.COM](mailto:BRAD@A-AINS.COM)  
<image001.jpg>  
*SERVING THE REAL ESTATE COMMUNITY SINCE 1988*  
*E & O - WORKERS COMP - GENERAL LIABILITY*

## EXHIBIT 2

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**From:** Bob Deville  
**Sent:** Saturday, April 20, 2013 9:12 AM  
**To:** 'Paul Drayna'; Geoff Wood; 'bbennion@windermereocal.com'; attny-Robert Sunderland (rsunderland@sunmclaw.com)  
**Subject:** WRE Watch

Once again the WRE Watch has come to bite us in the butt.

I was in a listing presentation with an agent last week for a property in excess of \$5,000,000 with one of our agents and the seller Googled my name and Bob B name

Guess what popped up – WRE Watch.

Feel like we were set up in front of our agent but regardless the fact remains it is still directly affecting our business - we did not get the listing and I think I am going to lose the agent to Sotheby's.

Please advise has been done since our phone discussion months ago about WRE Watch and what the plans to make this go away.

Bob D

Bob Deville  
Broker/Owner  
Windermere Real Estate Southern California  
A Division of Bennion & Deville Fine Homes, Inc.

Exhibit No.

28

DRAYNA

8-22-16

Cynthia A. Kennedy, CSR, RPR

B&D0044612

## EXHIBIT 3

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**From:** Bob Deville  
**Sent:** Wednesday, June 12, 2013 9:49 AM  
**To:** attny-Robert Sunderland  
**Subject:** Fwd: WRE Watch

FYI

Begin forwarded message:

**From:** Bob Bennion <[bbennion@windermere.com](mailto:bbennion@windermere.com)>  
**Date:** June 12, 2013, 9:43:55 AM PDT  
**To:** 'Bob Deville' <[bdeville@windermereocal.com](mailto:bdeville@windermereocal.com)>, 'Paul Drayna' <[pdrayna@windermere.com](mailto:pdrayna@windermere.com)>, <[bbennion@windermereocal.com](mailto:bbennion@windermereocal.com)>  
**Subject:** RE: WRE Watch

Yes Paul I really need an update. This was extremely uncomfortable and I was really grilled on this. I have sent several emails in the past with no response which I find equally disheartening. Thank you. Bob

---

**From:** Bob Deville [<mailto:bdeville@windermereocal.com>]  
**Sent:** Wednesday, June 12, 2013 8:48 AM  
**To:** Paul Drayna ([pdrayna@windermere.com](mailto:pdrayna@windermere.com)); [bbennion@windermereocal.com](mailto:bbennion@windermereocal.com)  
**Subject:** WRE Watch

Paul,  
Please let me know what is being done about the WRE Watch. It has now been months since we have discussed this problem and it is still affecting our business both in So CA as well as Seattle. Bob B was on a listing appt in the Highlands and was grilled up and down about WRE Watch. It is definitely being used against us by other real estate companies by subtly bringing it up on listing presentations. I met with a possible WRE Owner in So Cal last week and he kept bring this issue up to me as well. Have now heard he is doing a Sotheby's franchise.  
Bob D

Bob Deville  
Broker/Owner  
Windermere Real Estate Southern California  
A Division of Bennion & Deville Fine Homes, Inc.

Exhibit No.

29

DRAYNA

8-22-16

Cynthia A. Kennedy, CSR, RPR

B&D0034865

## EXHIBIT 4

---

**From:** Bob Deville  
**Sent:** Monday, July 08, 2013 12:35 PM  
**To:** attny-Robert Sunderland (rsunderland@sunmclaw.com)  
**Subject:** FW: Windermere Watch & Real Living

Just for your records

I am very consistent with my requests for them to do something about the damn WRE Watch that they agreed to do per our last agreement

Can use when/if the time that we need it presents itself

Bob Deville  
Broker/Owner  
Windermere Real Estate Southern California  
A Division of Bennion & Deville Fine Homes, Inc.

---

**From:** Bob Deville  
**Sent:** Monday, July 08, 2013 12:12 PM  
**To:** 'Geoff Wood'; Paul Drayna (pdrayna@windermere.com)  
**Cc:** 'bbennion@windermereocal.com'  
**Subject:** FW: Windermere Watch & Real Living

Hello Geoff and Paul,

As you see our friends with Real Living are at it again. They are actually making power points and circulating them to agents not only with RL but other companies as well. WRE included.

Seems we have something in our settlement agreement that prohibits this and I am meeting with Rob and Tim on Tuesday to discuss options and how we want to deal with this.

Just keeping you all in the loop.

This said are we anywhere near developing a plan the address the WRE Watch issues?

Bob D

Bob Deville  
Broker/Owner  
Windermere Real Estate Southern California  
A Division of Bennion & Deville Fine Homes, Inc.

---

**From:** Bob Deville  
**Sent:** Friday, July 05, 2013 8:24 PM  
**To:** Richard Johnson  
**Subject:** Re: Windermere Watch & Real Living

Anything u can get in writing can stop it

On Jul 5, 2013, at 6:24 PM, "Richard Johnson" <[rrj2020@gmail.com](mailto:rrj2020@gmail.com)> wrote:

Bob;

## EXHIBIT 5



Not sure how or what's being done on your end about this but thought the purpose of Rosie was to get this thing down on the list  
See below  
I am talking to people here telling me that unless she uses 500 or more word content she is wasting her time.  
Just sharing  
Bob D

Bob Deville  
Broker/Owner  
Windermere Real Estate Southern California  
A Division of Bennion & Deville Fine Homes, Inc.

---

**From:** Bob Deville  
**Sent:** Wednesday, July 24, 2013 5:32 PM  
**To:** 'bbennion@windermereocal.com'; Eric Forsberg  
**Cc:** attny-Robert Sunderland ([rsunderland@sunmclaw.com](mailto:rsunderland@sunmclaw.com)); Paul Drayna ([pdrayna@windermere.com](mailto:pdrayna@windermere.com))  
**Subject:**

Just had agents I met with Google Bennion & Deville, Inc. Decided they better not rock the boat with existing clients

Very first line --- WINDERMERE WATCH

Is anyone on your end doing Anything to make this go away

Bob Deville  
Broker/Owner  
Windermere Real Estate Southern California  
A Division of Bennion & Deville Fine Homes, Inc.

## EXHIBIT 6

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**From:** Bob Deville  
**Sent:** Wednesday, July 31, 2013 11:35 AM  
**To:** 'Geoff Wood'; Paul Drayna (pdrayna@windermere.com)  
**Cc:** 'bbennion@windermersocal.com'; attny-Robert Sunderland (rsunderland@sunmclaw.com)  
**Subject:** FW: VoiceMail\_1375217617536.3gp  
**Attachments:** VoiceMail\_1375217617536.3gp; ATT00001.txt

Geoff and Paul,

We continue to get bombarded with the same negative campaign against Windermere in the Desert, at the Coast and in our San Diego markets.

addressing this issue needs to be made a priority. There has been nothing forthcoming from Seattle 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.

I was on another conference call yesterday with our new San Diego owners Brian Gooding and Rich Johnson concerning this matter. They say it is directly affecting their recruiting ability and as a result of this negative campaign from Windermere Watch it has prevented them from getting agents. I am experiencing the same problem in Orange County as well as the desert. I do not know if it is because of our size, more visible in the type of advertising and marketing we do or the personal success of Bennion & Deville in Southern CA and Seattle but it is coming at us from many sides. These guys are attaching Bennion & Deville's association with Windermere directly as well.

The postcard campaign is hitting our San Diego Windermere clients again and other real estate companies are using it every way possible to retain their agents that may be thinking about joining Windermere. They are also using Windermere Watch as a way retain sellers that want to transfer listings to Windermere.

Attached is a recent phone conversation from an Owner using Windermere Watch against us and he is not the only owner or company doing taking this approach.

The information on line on the Windermere web site that we have as a comeback is not enough to overcome this continuing problem.

Bob Deville

Broker/Owner

Windermere Real Estate Southern California A Division of Bennion & Deville Fine Homes, Inc.

-----Original Message-----

From: rrj2020@gmail.com [mailto:rrj2020@gmail.com]

Sent: Tuesday, July 30, 2013 3:47 PM

To: Bob Deville

Subject: VoiceMail\_1375217617536.3gp

Bob;

Here is the voicemail message.

Rich

## EXHIBIT 7

# Redacted - Attorney-Client Privilege

---

**From:** Paul Drayna [mailto:pdrayna@windermere.com]  
**Sent:** Tuesday, August 27, 2013 2:59 PM  
**To:** Bob Deville  
**Co:** Robert Sunderland (rsunderland@sunmclaw.com)  
**Subject:** RE: URGENT RE: WINDERMERE WATCH

Hi Bob, I spoke with Bob S. this morning. Is there a time this week you and I could speak about this by phone?

---

Paul S. Drayna, General Counsel  
Windermere Services Co.  
5424 Sand Point Way NE  
Seattle, WA 98105  
206.527.3801  
[pdrayna@windermere.com](mailto:pdrayna@windermere.com)

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**From:** Bob Deville [mailto:bdeville@windermeresocal.com]  
**Sent:** Saturday, August 24, 2013 15:11  
**To:** Geoff Wood; Paul Drayna; attny-Robert Sunderland (rsunderland@sunmclaw.com); bbernion@windermeresocal.com  
**Subject:** FW: URGENT RE: WINDERMERE WATCH

Geoff and Paul,  
Please see below,

I have sent numerous emails to both of you regarding WRE Watch, our challenges and the effect it is having on us in Southern California with both my company as well as our other WRE Southern CA Owners.  
To date I have had no response other than one email some time back that we need to get together again and see what we are going to do about them.

We ( Bob Bennion in Seattle and Me in Southern California) have three employees working on this issue to try and bury WRE Watch on the internet. This does nothing about the continued print materials being mailed to WRE agents and WRE clients.

I realize this is an issue everyone wants to go away but have seen nothing from our Franchisor to make that happen.  
Bob Deville

Bob Deville

262

Exhibit No.

49  
DRAYNA

8-22-16

Conthia A. Kennedy, CSR RPR

B&D0033454

Broker/Owner:  
Windermere Real Estate Southern California  
A Division of Bennion & Deville Fine Homes, Inc.

---

**From:** Robert Sunderland [<mailto:rsunderland@sunmclaw.com>]  
**Sent:** Friday, August 23, 2013 4:01 PM  
**To:** Bob Deville  
**Cc:** Robert Sunderland; Bopi Villarino-Moisés  
**Subject:** FW: URGENT RE: WINDERMERE WATCH

Hello Bob,

I just completed a teleconference with Bopi and the new clients to explain the Windermere Watch. Apparently, the Sellers received a new Windermere Watch card within 10 days or so of switching to Windermere. Right at this time, traffic also seemed to slow so there was some serious concern. Bopi did a phenomenal job explaining how she too saw this before she joined Windermere and what she's personally experienced with Windermere since joining.

We seem to have smoothed it over and kept these folks off the ledge. Still though, I wanted you to know since apparently we have a new mailing out there just as interest rates and inventory have climbed.

Bopi – you were awesome!

Best regards,

Robert

Sent From:  
**Robert J. Sunderland, Esq.**  
SUNDERLAND | MCCUTCHAN, LLP  
11770 Bernardo Plaza Court, Suite 310  
San Diego, CA 92128  
Tel: (858) 675-7800  
Fax: (858) 675-7807  
Web: [www.sunmclaw.com](http://www.sunmclaw.com)

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**From:** Bopi Villarino-Moisés [<mailto:bopi@windermereocal.com>]  
**Sent:** Friday, August 23, 2013 3:15 PM  
**To:** Robert Sunderland  
**Subject:** URGENT RE: WINDERMERE WATCH

Hi Robert –

I hired an agent from KW....she has a 6M development deal. Her developers are now very leery of the info they have learned about Windermere because someone told them about Windermere Watch. How do I diffuse this situation. She has to call her clients back before 4:00 today. They may want to cancel the listing.

*Bopi Villarino-Moises*

Branch Manager

Windermere Real Estate SoCal

Carlsbad 760-893-8040

Solana Beach 858-345-1377

Cell 619-971-2490

## EXHIBIT 8



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**From:** Paul Drayna  
**Sent:** Tuesday, August 27, 2013 9:45 AM  
**To:** Robert Sunderland  
**Subject:** RE: Windermere Watch - San Diego Homes and Estates, Inc.

Hi Robert, I just tried calling you. I'm available until 11am this morning, then in meetings for a couple of hours. Do you have a little time this morning to discuss this?

---

Paul S. Drayna, General Counsel  
Windermere Services Co.  
5424 Sand Point Way NE  
Seattle, WA 98105  
206.527.3801  
[pdrayna@windermere.com](mailto:pdrayna@windermere.com)

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**From:** Robert Sunderland [<mailto:rsunderland@sunmclaw.com>]  
**Sent:** Monday, August 26, 2013 17:30  
**To:** Paul Drayna  
**Cc:** [bdeville@windermereocal.com](mailto:bdeville@windermereocal.com); [roverbob@windermereocal.com](mailto:roverbob@windermereocal.com)  
**Subject:** Windermere Watch - San Diego Homes and Estates, Inc.

Hello Paul,

I just got off the phone with Ray Brown of San Diego Homes and Estates, Inc. He requested that I participate in a teleconference at 2.00 p.m. tomorrow to review this with him, Fred Schuster, Rich Johnson and Brian Gooding. I'll be pleased to share with him how we have sold against the negative campaign in the past and will invite him to share his specific inquiry into what Seattle will do with you directly.

One thing is clear though. These new folks are expecting a definite response in terms of what is being done. In this regard, I think they may have previously suggested the provision of a position paper or formal statement from Windermere's upper management addressing what the Windermere Watch is and so forth. This is something they would like to share with either prospective recruits or clients.

Apparently, the recent mailing of postcards was directed to several of their listings and these folks are getting nervous.

Best regards,

Robert

Sent From:  
**Robert J. Sunderland, Esq.**  
SUNDERLAND | MCCUTCHAN, LLP  
11770 Bernardo Plaza Court, Suite 310  
San Diego, CA 92128  
Tel: (858) 675-7800

Fax: (858) 675-7807  
Web: [www.sunmclaw.com](http://www.sunmclaw.com)

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## EXHIBIT 9

#### AREA REPRESENTATION AGREEMENT

THIS AGREEMENT is to be effective as of the 1<sup>st</sup> day of MAY, 2004, between WINDERMERE REAL ESTATE SERVICES COMPANY, ("WSC"), a Washington Corporation with its principal place of business at 5424 Sand Point Way N.E., Seattle, Washington, 98105, and Windermere Services Southern California, Inc. ("WSSC" or "Area Representative"), a California corporation with its principal place of business at Palm Sprints, California.

#### RECITALS

A. WSC owns the Trademark and currently licenses real estate brokerage firms to use the Trademark. WSC desires to expand its operations and licenses into the Region and to have Area Representative offer licenses to use the Trademark in the Region and to administer and provide support and auxiliary services to Windermere licensees in the Region.

THEREFORE, the parties covenant and agree as set forth in this Agreement.

#### 1. Definitions

1.1 "Continuing License Fees" shall refer to the ongoing percentage-based fees paid by licensees on a monthly basis.

1.2 "Gross License Fees" shall mean 100% of the license fees paid by licensees in the Region.

1.3 "Initial License Fees" shall refer to the one-time, lump sum license fees paid by licensees upon the execution of a license agreement.

1.4 "Principals" shall mean the shareholders of Area Representative which at the date of execution of this Agreement are as follows:

Name	% Ownership
Bob Deville	% 50
Bob Bennion	% 50

1.5 "Region" shall mean the State of California.

1.6 "Trademark" shall mean the trade names "Windermere Real Estate", "Windermere" and variations of those names, and all trademarks, service marks, related symbols and logotypes, owned by WSC and used in connection with real estate brokerage services and activities and licensing activities, together with all related names, marks and symbols used in connection with these activities.

1.7 "Windermere System" shall mean the standards, methods, procedures, techniques, specifications and programs developed by WSC for the establishment, operation and promotion of independently owned real estate brokerage offices, as those standards, methods, procedures, techniques, specifications and programs may be added to, changed, modified, withdrawn or otherwise revised by WSC. These programs include without limitation the Windermere Foundation, Windermere Personal Marketing Programs, Premier Properties Program, Windermere Retirement Plan for Real Estate Salespersons and Windermere salesperson educational formats and outlines.

## 2. Grant of Area Representation Rights.

WSC hereby grants to Area Representative, and Area Representative hereby accepts the non-exclusive right to offer Windermere licenses to real estate brokerage businesses to use the Trademark and the Windermere System in the Region in accordance with the terms of the Windermere License Agreement. Area Representative agrees not to make or authorize any use, direct or indirect, of the Trademark for any other purpose or in any other manner. Licenses offered will in all cases be subject to the approval of WSC and will be granted and issued by WSC to the licensee.

Area Representative agrees that during the entire term of this Agreement, including the period of notice of expiration of the term, Licensee will in good faith actively and with Area Representative's best efforts engage in the business described herein using the Trademark, and will not, either directly or indirectly, (i) engage in any other competing activity or (ii) sell all or any part of Area Representative's business or operating assets to a person or entity engaged in a competing real estate brokerage and/or franchising business.

### 3. Administration of Windermere System.

WSC hereby delegates to and Area Representative hereby assumes the responsibility for the administration and supervision of the use and display of the Trademark by licensees in the Region, and of the use by them of the Windermere System in the Region and the provision of support and auxiliary services to Windermere licensees in the Region in accordance with this Agreement and the policies and guidelines enunciated from time to time by WSC. Area Representative's responsibilities will include marketing Windermere licenses in the Region; establishing and operating a training, education and professional development program for licensees under the License Agreement and for their respective salespersons; implementing the intra-system referral program; offering Windermere marketing programs and Premier Properties Programs; making available samples of Windermere forms and listing and marketing materials; administering, collecting and remitting contributions to the Windermere Foundation; monitoring licensees' compliance with the errors and omissions and general liability insurance requirements; and coordination of advertising and public relations.

In addition, Area Representative's responsibilities will include the responsibility to receive, collect, account for all license fees, administrative fees, Advertising Fund contributions, and other amounts due under license agreements in the Region, and to remit to WSC its share of such fees. It will be Area Representative's responsibility to monitor and see that its licensees in the Region comply with and conform to the policies and guidelines enunciated by WSC, including those pertaining to the use of the Trademark, the use and display of the Trademark in accordance with standard or authorized formats, the quality of the image projected by licensees and the nature, type and quality of the services offered by licensees.

Area Representative agrees to give prompt, courteous and efficient service, and to be governed by the highest ethical standards of fair dealing and honesty when dealing with the public and all members of the Windermere System in order to preserve and enhance the identity, reputation, quality image and goodwill built by WSC and the value of the Trademark. Area Representative will comply with all

applicable and valid laws and regulations in the conduct of its business.

Area Representative agrees at its expense to have and maintain during the term of this Agreement adequate personnel and resources available to market and service the Trademarks and services and administer the Windermere System in the Region in accordance with the terms and provisions of this Agreement.

WSC will provide to Area Representative initial training for its personnel and will provide servicing support in connection with the marketing, promotion and administration of the Trademark and Windermere System. Specifically, WSC will make 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. WSC will bear the salary costs for its personnel in connection therewith; however, travel and out of pocket expenses for WSC personnel will be reimbursed by Area Representative.

#### 4. Term and Termination.

4.1 General. The parties approach the Transaction with optimism for its success, but recognize that its success depends on a successful and mutually consensual relationship which in turn depends on many intangibles such as philosophies of the parties and interrelationships of the principals of each party. The term of this Agreement shall commence with the "Effective Date" of the Agreement and continue until it is terminated as follows:

(a) At any time by mutual written agreement of the parties.

(b) By either party upon one hundred eighty (180) days written notice to the other party.

(c) By either party upon ninety (90) days written notice to the other party; provided that such termination shall be limited to termination for cause based upon a material breach of the Agreement described in the notice and not cured within the ninety (90) day period. The parties pledge to deal with one another in good faith and each party agrees to give the other reasonable notice and

opportunity to cure any real or perceived default or misperformance or malperformance on either party's part.

(d) By either party without giving prior notice if the other party (i) is adjudicated bankrupt or insolvent, (ii) makes an assignment for the benefit of creditors or similar disposition of the assets of its business, (iii) voluntarily abandons its Franchise or licensing business, or (iv) is (or its principals are) convicted of or pleads guilty or no contest to a charge of violating any franchise laws and regulations and/or any real estate licensing laws and regulations.

4.2 Termination Obligation. In the event either party elects to terminate the Agreement as provided in § 4.1 (b) above (the "Terminating Party"), it is agreed that the other party (the "Terminated Party") will be paid an amount equal to the fair market value of the Terminated Party's interest in the Agreement (the "Termination Obligation"), in accordance with the provisions of this Agreement. The fair market value of the Terminated Party's interest in the Agreement will 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. The fair market value of the Terminated Party's interest will be determined by the appraisers without consideration of speculative factors including, specifically, future revenue. The appraisers shall look at the gross revenues received under the Transaction during the twelve months preceding the termination date from then existing licensees that remain with or affiliate with the Terminating Party. The median appraisal of the three appraisers shall determine price, and each party agrees to be bound by the determination.

There will be no Termination Obligation if the termination by the Terminating Party is made in good faith based upon the material breach of the obligations of the Terminated Party under this Agreement continuing after reasonable notice and opportunity to cure.

4.3 Payment. The Termination Obligation shall be paid in monthly installments solely from Continuing License Fees described below, until paid in full. Monthly installments in an amount equal to twenty-five percent (25%) of the Continuing License Fees, if any, received by the terminating Party from licensees in the



Region existing at the termination date and remaining with or affiliating with the Terminating Party. The monthly payments will be made on the twenty-fifth day of the month following the receipt of the revenues, commencing with the twenty-fifth day of the month following the first full calendar month after the determination of the Termination Obligation. The parties acknowledge that the Termination Obligation is not a purchase transaction but, rather, constitutes a payment of the agreed "run-off" entitlement of the Terminated Party and for tax purposes will be expensed by the Terminating Party and recognized as income by the Terminated Party. The parties acknowledge that this provision has been specifically negotiated, and both parties agree that it constitutes a reasonable and fair liquidated amount as of the date of execution of this agreement.

4.4 No Other Obligation. Except as specifically provided herein neither party will owe any obligation to the other following termination of the Agreement, except for final accounting and settlement of any previously accrued license fees, and excluding any accrued claim for damages and associated attorneys' fees and costs, or otherwise arising by law. In the event of a termination Area Representative will have no interest in the name or Trademark and will discontinue all use of the names and Trademarks, but otherwise will not be bound by any non-competition covenant.

5. Anticipated Effective Date.

The parties desire the Effective Date of the transaction contemplated by this Agreement to be January 1, 2004 and the parties will use their best efforts to comply with all legal and regulatory requirements so as to permit commencement of the Agreement on that date. In the event the parties are unable to meet that effective date it will be as soon thereafter as is possible and mutually agreed by the parties.

6. Retention of Proprietary Interest in Name and Trademark.

Exclusive ownership of the proprietary rights in and to the Windermere Real Estate tradename and Trademarks shall be retained by WSC and the use thereof by Area Representative is by the license granted by WSC under this

Agreement and shall be in accordance with the terms of this Agreement. WSC will have the sole right to file, in its own name, all state and federal trademark and service mark registrations for the Trademark. In the event of a termination of this Agreement for any reason Area Representative will change its name to a name not containing any reference to Windermere or Windermere Real Estate and will discontinue all use or reference to the tradename and Trademark.

**7. Franchise Registration or Compliance.**

The parties will promptly 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. WSC will be responsible for any registration filing fee and for all legal expenses incurred in the revision and registration of all required disclosure documents, except that Area Representative will pay the cost of its own legal services in connection with review and cooperative efforts in the registration and the preparation of this and other related agreements or documents. The parties will jointly maintain the registration or disclosure documents and all necessary amendments, updates and/or applications for renewal, each bearing their respective costs of preparation of necessary and required audited financial statements. Required audited financial statements shall be provided to WSC not later than March 1 of each year, beginning March 1, 2005.

**8. Terms of Licensees' Agreements.**

Licenses will be offered to licensees in the Region, other areas or jurisdictions initially for an initial fee of \$15,000.00 (which amount will be subject to prospective change by WSC) and a continuing license or royalty fee of either five percent (5%) of the gross sales commissions ("Gross Commission Income") earned and received by the licensee, or a fixed dollar amount per agent per month. In addition licensees in the Region will be required to pay additional fees as set forth in WSC's Uniform Franchise Offering Circular (UFOC) as currently on file with the State of California, and as revised from time to time.

9. Area Representation Fee.

Initial Fees. Due to the special circumstances of this offering, Area Representative will not be required to pay any initial fee for its Area Representation rights.

10. Payment, Collection and Allocation of License Fees.

The license fees (initial and continuing) as well as all additional fees will be paid by the licensees in the Region to Area Representative which will have responsibility for collecting the fees and any applicable late charges and interest and accounting for them to and for the mutual benefit and account of Area Representative and WSC. Area Representative will provide monthly reports to WSC in a form and format acceptable to WSC. WSC will have the right at reasonable times to inspect, review and copy the books and records of Area Representative. Area Representative will pay WSC 50% of the initial and continuing license fees received by it in cash from a licensee under a License Agreement, as follows. By the 22<sup>nd</sup> day of each calendar month, Area Representative will pay WSC its 50% share of fees received in cash from licensees that month. Payment will be accompanied by a report showing the source and amount of fees received by Area Representative from each licensee, and by the report provided by the licensee showing its calculation of the percentage fees remitted.

11. Administration Fee.

All licensees in the Region will pay a monthly "Administration Fee" as set forth in the UFOC, and the license agreements executed by each licensee. The Administration Fee shall be one of the additional fees collected by Area Representative and forwarded in full to WSC. WSC may in its discretion use the Administration Fees collected in the Region for any purpose in WSC's sole discretion.

12. Windermere Foundation.

All licensees in the Region and their respective licensed sales agents will participate in the Windermere Foundation program on the same basis as other WSC licensees and their respective sales agents. Area Representative

will implement the Windermere Foundation program with the licensees under this Agreement and their respective sales agents, in accordance with the written guidelines established by WSC or the Windermere Foundation from time to time and applicable and applied consistently to all WSC licensees and their respective licensed sales agents. Under the current program, each sales agent licensed with a WSC licensee contributes \$7.50 for each real estate sales transaction (listing or selling side) in which the sales agent is involved, to the Windermere Foundation. Sales transactions for which a contribution to the foundation needs to be made do not include a licensee's outgoing referral transactions. The amount of the contribution is subject to change from time to time.

WSC shall cause the Windermere Foundation to expend the contributions received by it from the Region, less a portion of the Foundation's administration expenses, on programs presented or conducted by the Windermere Foundation in the Region, in affiliation with Area Representative. The time and amount expended and the programs and location and method of presentation shall be determined by the Windermere Foundation in cooperation with WSC and Area Representative. All such activities, programs and expenditures must be consistent with the Foundation's Bylaws and Articles of Incorporation, must not disqualify the Windermere Foundation for tax exempt treatment for income tax purposes, and may not violate any other applicable state or federal laws.

### 13. Technology Fees

Licensees in the Region shall pay Technology Fees in an amount determined by WSC, and as disclosed in the UFOC and the license agreements executed by each licensee. Area Representative shall be responsible for collecting all Technology Fees in the region, as one of the additional fees collected by Area Representative and forwarded in full to WSC. The Technology Fee is intended to support the operation and development of WSC's technology systems, including without limitation the public web site operated at [www.windermere.com](http://www.windermere.com), as well as the Windermere Online Resource Center Intranet system (WORC site). Area Representative acknowledges that features available in and for the Region may be limited due to the currently small number of Windermere licensees in the Region. It is anticipated that technology services available for the Region will expand with the number of licensees. However,

such expansion will be time and cost-intensive, and may require the imposition of additional or increased Technology Fees to fund such development. Area Representative agrees to cooperate with WSC in establishing and implementing a technology strategy for the Region, and in financing the development of technology tools for the Region through increased contributions from Area Representative and/or its licensees in such amounts as determined by WSC and Area Representative.

#### 14. No Exclusive Territory.

The license granted herein is a non-exclusive license to market and service the Trademark and the Windermere System to franchisees and prospective franchisees in the Region. WSC intends to have more than one representative for the Region, and does not intend to assign any representative any particular area or territory. At the time that this Agreement is executed Area Representative has been assigned responsibility for (and the right to collect fees from) the specific franchisees identified in Exhibit A. Additional offices may be added, and offices may be transferred to other representatives, at any time by WSC in WSC's sole judgment. Area Representative agrees to cooperate with WSC in this regard.

Area Representative shall establish and maintain an office in a location to be mutually determined by Area Representative and WSC. Area Representative must receive WSC's permission before opening additional branch offices or relocating any office, but is not restricted from seeking new franchisees from any specific geographical area. Likewise, other representatives in the Region will be free to solicit new franchisees in areas serviced by Area Representative. WSC will determine in its discretion which representative will service each franchisee in the Region, and explicitly reserves the right to reassign franchisees to a different representative at any time in WSC's sole business judgment.

#### 15. Relationship of Parties.

Area Representative will be an independent contractor responsible for exercising full control over the internal management and day-to-day operations of its business and the administration of the Windermere System in the Region. The Agreement does not and will not create a relationship

of principal and agent, joint venture or partnership. Each party will be fully responsible for its own actions and each will agree to indemnify one another for any and all liability incurred by one by virtue of or arising out of the acts of the other. Each party will agree to obtain and keep in force comprehensive general liability insurance, automobile liability insurance and any other insurance required by law, with policy limits in amounts approved by WSC.

**16. No Restriction - WSC.**

Nothing contained in this Agreement shall be construed to limit the freedom and flexibility of WSC to sell itself or its assets, merge or discontinue business or to liquidate or dissolve.

**17. Non-Transferability / Personal Responsibility of Principals / Modifications to Organizational Documents**

a. The composition, principals and management of Area Representative has been an essential factor in the determination of WSC to enter into this Agreement. Accordingly the Agreement and Area Representative's rights under the Agreement are non-transferable without the express written consent of WSC, which may be withheld in WSC's sole discretion. Any change of the ownership of Area Representative to ownership outside the group of Principals identified in §1.4 shall be considered a transfer or assignment for this purpose, and a breach of this Agreement.

b. The Principals of Area Representative identified above in §1.4 shall be at all times actively and personally involved in the operation of Area Representative's business, and shall be personally responsible for discharging all duties of the Area Representative set forth herein. In the event any individual Principal identified herein dies, becomes permanently disabled, or ceases to be actively involved in the operation of Area Representative's business, WSC may terminate this Agreement with cause.

c. A copy of Area Representative's organizational document(s) are attached hereto as Exhibit B. Said documents were reviewed and approved by WSC as a pre-condition of the granting of this Agreement, and may not be modified without WSC's prior permission. A violation of

this provision shall be grounds for WSC to terminate this Agreement with cause.

18. Entire Agreement.

This Agreement constitutes the entire understanding of the parties and shall be subject to modification or change only in writing and signed by all of the parties.

19. Waiver. The waiver of any breach or default under this Agreement will not constitute a waiver of any other right hereunder or any subsequent breach or default.

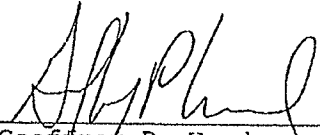
20. Arbitration. Except for equitable or injunctive relief involving intellectual property rights, the parties hereto shall submit any other dispute or controversy arising out of or related to this Agreement to binding arbitration before the American Arbitration Association pursuant to the rules of the American Arbitration Association. The decision by the arbitrators shall be binding and conclusive upon the parties, and they shall comply with such decision in good faith, and each party hereby submits itself to the jurisdiction of the courts of the place where the arbitration is held, but only for the entry of judgment with respect to the decision of the arbitrators hereunder. The institution of any arbitration proceeding hereunder shall not relieve either party of its obligations hereunder.

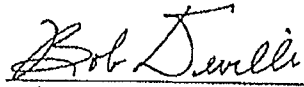
21. Attorney's Fees and Costs.

Should any party institute legal proceedings to enforce the terms and conditions of this Agreement or its rights hereunder, the substantially prevailing party shall be entitled to recover all of its reasonable expenses, including attorney fees, court costs and other expenses reasonably and necessarily incurred in connection with such proceedings and any appeal.

WINDERMERE REAL ESTATE  
SERVICES COMPANY

AREA REPRESENTATIVE

By   
Geoffrey P. Wood  
Chief Executive Officer

By   
Bob Deville, President

Date: 5/1/04

Date: 5-1-04



EXHIBIT A  
LIST OF LICENSEES TO BE SERVICED BY AREA REPRESENTATIVE  
AND SPECIAL FEE ARRANGEMENTS

<u>Carlsbad/San Diego</u>	Email: <a href="mailto:carlsbad@windermere.com">carlsbad@windermere.com</a> Phone: (760) 434-4340	Carlsbad/San Diego 355 Carlsbad Village Drive Carlsbad, CA. 92008
<u>Desert Hot Springs</u>	Email: <a href="mailto:coachellavalley@windermere.com">coachellavalley@windermere.com</a> Phone: 760-329-3130	Desert Hot Springs 66337 Pierson Blvd. Desert Hot Springs, CA. 92240
<u>Escondido</u>	Email: <a href="mailto:escondido@windermere.com">escondido@windermere.com</a> Phone: 760-291-1000	Escondido 100 South Escondido Blvd. Escondido, CA. 92025
<u>La Quinta</u>	Email: <a href="mailto:coachellavalley@windermere.com">coachellavalley@windermere.com</a> Phone: 760-564-9685	La Quinta 47-250 Washington Street Ste B La Quinta, CA. 92253
<u>Palm Springs</u>	Email: <a href="mailto:coachellavalley@windermere.com">coachellavalley@windermere.com</a> Phone: 760-327-3990	Palm Springs 850 N Palm Canyon Dr. Palm Springs, CA. 92262
<u>Rancho Mirage</u>	Email: <a href="mailto:coachellavalley@windermere.com">coachellavalley@windermere.com</a> Phone: 760-770-6801	Rancho Mirage 36101 Bob Hope Drive, Suite F-2 Rancho Mirage, CA. 92270
<u>Solana Beach</u>	Email: <a href="mailto:solana@windermere.com">solana@windermere.com</a> Phone: 858-794-5900	Solana Beach 514 Via de la Valle #102 Solana Beach, CA. 92075

1. San Diego Branches

Effective January 1, 2004, the San Diego offices will be part of Area Representative's Southern California (SCA) region. Windermere Services Northern California, Inc., the Area Representative for Northern California (NCA) will receive one half of license fees generated by the Carlsbad, Escondido and Solana Beach offices until it has received \$35,000 or January 1, 2006 whichever comes first. (Example: \$1,000 income -- \$500 to WSC; \$250 to Area Representative and \$250 to NCA).

## 2. Coachella Valley Offices Licensing Fees

Area Representative will retain fifty percent (50%) of all licensing fees generated by the Coachella Valley offices beginning January 1, 2004 with the exception of the Palm Springs office which will begin on July 1, 2004.

## 3. Other Initiation Fees and Licensing Fees

Area Representative and WSC will share all initiation and licensing fees equally for all future Windermere offices in the SCA region.

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.

## 4. Administrative Fee

Administrative Fees are currently assessed on a \$25.00 per agent per month basis. The Administrative Fees generated in the State of California will be applied to the region from which the fees were collected with the following exception:

### 4.1 For the period between 1/1/04 to 12/31/05:

- a. All NCA fees will be applied to the Stanford Cup expenses
- b. Fees generated from 89 SCA agents will be applied to Stanford Cup expenses.
- c. As of 1/1/04 the fees being applied from SCA agents to the Stanford Cup expenses will be reduced by any increase in the NCA agent base of 197. (Example: If agent base in NCA is 197 on 1/1/04 and 200 on 2/1/04, then only fees from 86 agents in SCA will be applied to the NCA Stanford expenses in February.)
- d. SCA participation in Stanford Cup expenses will never exceed 89 agents even if the NCA agent base drops below 197; therefore, the maximum SCA participation in each year would be \$26,700.

### 4.2 For the period 1/1/06 forward:

100% of SCA fees will be retained for SCA regardless of the NCA agent base.

### 4.3 Administrative Fee increases:

Administrative Fees are currently set at \$25.00. In the event SCA increases Administrative fees for any reason, 100% of any increased amount shall be retained for SCA. (Example: SCA increases fee to \$45.00: \$20 difference is retained by SCA and \$25.00 is applied to any fees being allocated to NCA.)

4.4 1/1/04: Initial SCA Administrative Fee Pool:  
Starting 1/1/04, Administrative Fees from the first 89 SCA agents each month will be divided as set forth herein. Administrative Fees for any additional agents in the SCA area will be credited to the SCA Administrative Fund.

4.5 Accounting  
Administrative fees accounting records will be maintained by Windermere Services (WSC). Agent numbers used will be as reported monthly to WSC on the Month End Statistical and Fee Calculation Form.

All fees are paid one month in arrears. For example, fees accrued in January 2004 were paid in February 2004. Accordingly all references in this Agreement to fees for any specified month or period shall be interpreted to mean fees accrued during such time, but paid a month later.

EXHIBIT B  
AREA REPRESENTATIVE'S  
APPROVED ORGANIZATIONAL DOCUMENTS

## EXHIBIT 10

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**From:** Bob Deville  
**Sent:** Tuesday, October 28, 2014 9:29 AM  
**To:** pdrayna@windermere.com  
**Subject:** SoCal UFDD

Good morning Paul,

Asked about 4 weeks ago when we would have the new UFDD. I have 2 prospects and need to have for them to sign receipt.

Please advise when we will have the new UFDD.

Thanks.

Bob D

**Exhibit No.**

54

DRAYNA

8-22-16

*Cynthia A. Kennedy, CSR, RPR*

**B&D0003725**

## EXHIBIT 11

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**From:** Mike Teather <mike.teather@windermere.com>  
**Sent:** Wednesday, October 29, 2014 11:39 AM  
**To:** Bob Deville  
**Subject:** FW: CDAR Sweep

Bob,

I spoke with Paul today regarding the SoCal UFDD, I will make sure that it is out to you by the end of the week. Again, please advise when you are available to discuss the issues below.

Thanks,

Michael J. Teather  
WSC

---

**From:** Mike Teather  
**Sent:** Monday, October 27, 2014 6:02 PM  
**To:** 'Bob Deville'  
**Subject:** RE: CDAR Sweep

Bob,

I'm sorry that I did not call you today. I thought that I would give you a quick outline of things to discuss on my end so that we can be efficient when we speak.

1. The sweep issue that involves both your and our tech departments is troublesome, but it is also illustrative of a problem we face. In this case your tech department accused ours of incompetence, and our tech department perhaps proved them right. The problem is that the two departments did not "share" the problem in any way shape or form. I also worry that by taking sides and adding to the accusatory language we are contributing to the divide rather than reducing the same. This becomes important as we become more successful selling franchises and need to speak in one positive note regarding technology issues. One big idea may be to combine our tech companies, and put Eric F. in charge of the customer experience and have us pick up his salary? This may well be a stupid idea, but I do think we need to show more unity than division if we are going to grow our network.
2. I have spoken with both John J. and Tuna, and I believe that we can accommodate all of your wishes regarding the foundation, and welcome WSoCal back into the fold and present one foundational face. This type of common purpose and joint activity between our two companies could be a very positive thing.
3. You can update me on your current thinking on where our growth opportunities lie so far as franchising is concerned, and how we might build connections between our affiliate owners and your organization.
4. I need an update on delinquent fees on your end.

Perhaps 20 minutes is enough time. Is there a good time to call you?

Michael J. Teather  
WSC

---

**From:** Bob Deville [mailto:bdeville@windermeresocal.com]  
**Sent:** Wednesday, October 22, 2014 9:58 AM



**To:** Eric Forsberg  
**Cc:** Mike Teather; Bob Bennion Rover; attny-Robert Sunderland ([rsunderland@sunmclaw.com](mailto:rsunderland@sunmclaw.com))  
**Subject:** RE: CDAR Sweep

Good Morning Mike

See below

My agents, Brokers and myself are extremely disappointed in the manner in which your Tech Dept. has handled this issue. The Windermere.com technology should have been prepared and knowledgeable to get our listings syndicated. The length of time to correct an issue report over a week ago and still not have it corrected is unacceptable but not surprising. Not only are they inept and do not know what to do, my technology dept. and web designers are doing much of the work at my expense. Seems harder and harder to send tech fees every month when the service and backup is not there.

Bob D

Bob Deville  
Broker/Owner  
Windermere Real Estate Southern California  
A Division of Bennion & Deville Fine Homes, Inc.

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**From:** Eric Forsberg  
**Sent:** Wednesday, October 22, 2014 9:40 AM  
**To:** Bob Deville  
**Subject:** FW: CDAR Sweep

Latest update from Seattle below. I have a meeting with Office Depot at 10.

---  
**Eric Forsberg - Director of Technology**  
Windermere Real Estate Southern California  
*A Division of Bennion & Deville Fine Homes, Inc.*  
71703 Highway 111, Suite 1-D  
Rancho Mirage, CA 92270  
**Office:** 760-340-0203  
**Fax:** 760-340-3029

---

**From:** Cass Herrin <[cass.herrin@windermeresolutions.com](mailto:cass.herrin@windermeresolutions.com)>  
**Date:** Wednesday, October 22, 2014 at 9:20 AM  
**To:** Eric Forsberg <[eforsberg@windermeresocal.com](mailto:eforsberg@windermeresocal.com)>  
**Subject:** CDAR Sweep

Hey Eric -

I wanted to give you an update on our progress with the CDAR conversion.

As of this morning we have Listings caught up and processing every 15 minutes for both residential and manufactured property types.

We are working on the other property types.

As far as syndication to Zillow, Trulia, etc., residential and manufactured listing should be showing in the 24 – 48 hours.

I will continue to keep your updated.

Thanks,

Cass

**Cass Herrin | Director, Data Services**

WINDERMERE SOLUTIONS/MOXI WORKS

815 Western Ave. Suite 400

Seattle, WA 98104

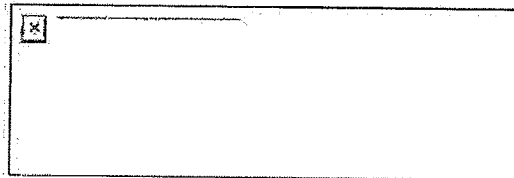
☎ OFFICE (206) 508-0180

✉ EMAIL [cass.herrin@windermeresolutions.com](mailto:cass.herrin@windermeresolutions.com)

## EXHIBIT 12

**From:** OB Jacobi [mailto:obj=windermereolutions.com@mail55.us2.mcsv.net] **On Behalf Of** OB Jacobi  
**Sent:** Wednesday, July 18, 2012 12:41 PM  
**To:** Bob Deville  
**Subject:** Technology Update

Is this email not displaying  
correctly?  
[View it in your browser.](#)



Dear Owners and Managers,

As you all know, during the past year, we have invested a great deal of time and resources revamping our technology tools and launching new products. Much more is yet to come, including a complete rebuild of the WORC site, new listing management tools, and ongoing improvements to Windermere.com. We're proud of what has been rolled out so far, and very excited by what is still to come.

When we created our touchCMA app we did so knowing that it had the potential to be sold to non-competing real estate brokerages outside of the Windermere footprint. However, one thing we did not anticipate was the challenge this would pose. Several of the brokerages who have previewed touchCMA are incredibly interested in the product, but apprehensive about buying it from a "perceived" competitor, despite the fact that we do not operate in their market. After hearing this repeatedly, we decided that we needed to create a self-funded, spin-off company that focuses solely on developing and selling products to non-competing brokerages. The name of this new company is Sweepre (pronounced "sweeper"). I would like to make it clear that Sweepre will in no way be funded by the agent technology fee; we've intentionally kept the two entities completely separate.

As far as our agents and owners are concerned there will be no change to the service and technology development you've come to expect from Windermere Solutions. The same team is in place working on product updates and new technology that support you, your agents, and their clients.

**Exhibit No.**

128

Baur

8-26-16

Cynthia A. Kennedy, CSR, RPR

B&D0034396

As word of our new spin-off venture spreads, I wanted to make sure that all of you have the correct information so there's no confusion or misunderstandings. As always, if you have any questions or feedback, please don't hesitate to contact me.

Thanks,

OB Jacobi  
5424 Sandpoint Way NE  
Seattle, WA 98105  
206/660-5727  
[obj@windermere.com](mailto:obj@windermere.com)

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