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12 *Attorneys for Plaintiffs and Counter-Defendants*

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

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

23 Plaintiffs,

24 v.

25 WINDERMERE REAL ESTATE
26 SERVICES COMPANY, a Washington
27 corporation; and DOES 1-10

28 Defendant.

AND RELATED COUNTERCLAIMS

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

Hon. Manual L. Real

**DECLARATION OF JOSEPH R. "BOB"
DEVILLE IN SUPPORT OF PLAINTIFFS
AND COUNTER-DEFENDANTS'
MOTION IN LIMINE TO PRECLUDE
WSC FROM INTRODUCING
EVIDENCE OF WORK PERFORMED
ON THE SUNDBERG PRIOR TO
OCTOBER 2013**

Date: May 15, 2017

Time: 10:00 a.m.

Courtroom: 8

Action Filed: September 17, 2015

Pretrial Conf.: November 14, 2016

Trial: May 30, 2017

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' Motion in
10 Limine to Preclude Windermere Real Estate Services Company ("WSC") from
11 introducing any evidence, testimony, argument, or comment of work that was performed
12 on the Sundberg Report prior to October 2013. The statements in this declaration are
13 based upon my personal knowledge, and if called as a witness, I could testify
14 competently thereto.

15 3. A disgruntled former Seattle Windermere client initiated an anti-marketing
16 campaign under the name "Windermere Watch." The campaign created a website
17 (www.windermerewatch.com), which was designed to direct defamatory statements and
18 materials against Windermere, franchisees, and agents. We had no prior personal or
19 business history with the disgruntled client. The disgruntled client also targeted
20 franchisees in Southern California, including our businesses.

21 4. Windermere Watch had a substantial impact on our business, and we were
22 seeing the effects on the field. We communicated our concern with Windermere Watch to
23 WSC, and communicated that we needed WSC to take action to protect the Windermere
24 system and mark.

25 5. On December 21, 2012, we entered into an agreement with WSC wherein
26 WSC agreed that it "shall make commercially reasonable efforts to actively pursue
27 counter-marketing, and other methods seeking to curtail the anti-marketing activities
28

1 undertaken by . . . Windermere Watch” (“Modification Agreement”). A true and correct
2 copy of the Modification Agreement is attached hereto as Exhibit A.

3 I declare under penalty of perjury under the laws of the United States of America
4 that the foregoing is true and correct and that this Declaration was executed this 17th day
5 of April, 2017 in Rancho Mirage, California.

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7 Bob Deville
8 Bob Deville
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EXHIBIT A

**AGREEMENT MODIFYING WINDERMERE REAL ESTATE FRANCHISE
LICENSE AGREEMENTS**

This "Agreement" is entered into as of December 18, 2012 by and among Windermere Real Estate Services Company, a Washington Corporation (referred to herein as "WSC"); Windermere Services Southern California, Inc., a California corporation ("Area Representative"); Bennion & Deville Fine Homes, Inc., a California corporation dba Windermere Real Estate Coachella Valley and/or Windermere Real Estate SoCal, and Bennion & Deville Fine Homes SoCal Inc., dba Windermere Real Estate SoCal (collectively referred to herein as "B&D"). The above-named persons and/or entities are sometimes collectively referred to as "the Parties".

Recitals

WSC entered into a Windermere Real Estate License Agreement with Bennion & Deville Fine Homes, Inc. dated August 1, 2001. Area Representative was not a party to that original license agreement, but was subsequently added as a party by subsequent addenda thereto.

WSC and Area Representative entered into a Windermere Real Estate Franchise License Agreement with Bennion & Deville Fine Homes SoCal, Inc., dated March 29, 2011.

These agreements, as previously amended, are hereby collectively referred to as the "License Agreements." The Parties hereto desire to modify certain terms and conditions of the License Agreements.

Wherein an individual named Gary Kruger previously filed a lawsuit in Washington State Superior Court bearing case number 05-2-34433-4 SEA naming Windermere Real Estate Northeast, Inc., George Rudiger, Joan Whittaker and Windermere Real Estate Services Company alleging misrepresentation and/or other causes of action.

Wherein subsequent to the dismissal of the aforementioned lawsuit, Mr. Kruger and/or associates of Mr. Kruger have continuously engaged in an anti-marketing campaign against Windermere Real Estate Services Company and its franchisees including the utilization of web-based information and various website postings targeting Windermere (see www.windermerewatch.com and www.windermerewatch2.com).

Wherein B&D believe that Windermere Watch has resulted in significant lost revenue to B&D.

Wherein the Parties contend that Mr. Kruger and/or others' actions through the Windermere Watch websites violate State (California & Washington) and/or federal laws.

Wherein through this Agreement, the Parties further intend to modify the terms and conditions of the License Agreements, as well as that certain Promissory Note dated

Agreement to Modify Windermere Real Estate License Agreements

December 31, 2008 in the original principal sum of \$465,308.37, executed by Bennion & Deville Fine Homes, Inc. as Maker.

NOW, THEREFORE, for and in consideration of the promises and terms set forth herein, the undersigned Parties agree as follows:

TERMS & CONDITIONS

1. **Incorporation of Recitals.** The above recitals are incorporated herein by reference.

2. **Benefit of Counsel.** The Parties acknowledge that they have had the opportunity to and have in fact obtained the advice of legal counsel prior to entering into this Agreement. Each of the Parties hereto executes this Agreement with full knowledge of its significance and with the express intention of affecting its legal consequences.

3. **Consideration.** In consideration for the full and timely performance of each of the terms and conditions of this Agreement in the manner prescribed herein, the Parties agree to the following:

A. **Windermere Watch:** WSC agrees that it shall 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. Such efforts may include litigation, at WSC's discretion. WSC shall pay all attorney's fees, costs, and other third party fees and costs associated with addressing Windermere Watch as contemplated herein. WSC shall seek input, suggestion and confer with B&D prior to taking action(s) regarding Gary Kruger and Windermere Watch. WSC covenants that it shall indemnify B&D and its directors, officers, owners and shareholders in any demand, action, proceeding, mediation, arbitration, lawsuit and/or Complaint of any nature whatsoever asserted by Gary Kruger, his Associates, Windermere Watch and/or the agents of the foregoing persons. Said indemnity includes the payment of Attorney's Fees and other costs/fees necessary to defend B&D, and its directors, officers, owners and shareholders and/or the payment of any judgment, settlement and/or award against the foregoing Parties. The indemnity shall not apply however to any claims arising from actions by B&D, or any of its shareholders, officers, directors or agents, which were not authorized in advance by WSC. B&D acknowledges that WSC has not and cannot guarantee any particular outcome of the efforts contemplated herein. The failure of WSC to eliminate windmerewatch.com shall not constitute a breach of this Agreement, so long as WSC has made commercially reasonable efforts to curtail the impact of the activities of Kruger and/or windmerewatch.

B. **Waiver of Unpaid Franchise & Technology Fees:** WSC and Area Representative hereby agree to waive and forgive Past Due Franchise Fees, and Technology Fees owing under the License Agreements in the sum total of

Agreement to Modify Windermere Real Estate License Agreements

\$1,151,060. A detailed breakdown of the amounts forgiven is attached as Exhibit A, and the amounts waived are summarized as follows:

(i) **Promissory Note:** Waiver and forgiveness of the complete unpaid balance remaining from original note dated December 31, 2008 including all past due fees and accrued interest with a present balance left of \$399,960.00.

(ii) **Franchise & Technology Fees for Bennion & Deville Fine Homes SoCal Inc., dba Windermere Real Estate SoCal:** Waiver and forgiveness of all Past Due Franchise and Technology Fees as well as all related charges for late fees and/or interest through March 31, 2012 in the amount of \$191,025.00 including any accrued late fees, interest and/or claims for recapture of previously discounted fees.

(iii) **Franchise & Technology Fees for Bennion & Deville Fine Homes, Inc., dba Windermere Real Estate Coachella Valley:** Waiver and forgiveness of all Past Due Franchise and Technology Fees as well as all related charges for late fees and/or interest through March 31, 2012 in the amount of \$560,075.00 including any accrued late fees, interest and/or claims for recapture of previously discounted fees.

C. **Ramp up and Payment of Fees for April 2012 through present.** In addition, WSC and Area Representative agree to grant B&D a temporary reduction in Ongoing Franchise License Fees for a period of eight months. The "ramp up" reduction shall be applied retroactively as follows:

Months	Discount
April and May 2012	90%
June and July 2012	75%
August and September 2012	50%
October and November 2012	25%

Effective with fees for December 2012 (due in January 2013), Ongoing Franchise Fees shall revert to the full amount with no discount. WSC and Area Representative acknowledge that B&D has already paid fees for April through July 2012, inclusive, with the discounts applied. In consideration of the accommodations granted herein, B&D agrees to pay all fees for August through November 2012 to WSC and/or Area Representative no later than December 31, 2012. A detailed breakdown of the amounts owing through October is attached hereto as Exhibit A, but B&D acknowledge this does not include fees for November 2012 which have not yet been reported.

D. **Limitation & Cap Regarding Future Technology Fees:**
Bennion & Deville Fines Homes, Inc., dba Windermere Real Estate Southern

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California and/or Windermere Real Estate Coachella Valley and Bennion & Deville SoCal Inc., dba Windermere Real Estate SoCal collectively shall be required to pay no more than a total \$25,000 per month of Technology Fees for a period of five years from the date of execution of this Agreement by all Parties. Said fees are to be calculated on the basis of \$25.00 per Agent.

E. Five Year Term From B&D: In exchange for consideration contained within Sections 3, B-C inclusive, and subject to Section 3, E herein, B&D covenant to remain as Windermere Real Estate franchisees for five years from the date of execution of this Agreement by all Parties. This term shall automatically expire in the event WSC becomes insolvent, files bankruptcy, fails to maintain proper licensing as required by State and/or Federal Regulations (provided that expiration of WSC's license(s) to sell new franchises in California shall not be considered such a failure for purposes of this Agreement), sells more than 50% of its interest in WSC or assigns the day-to-day administration and/or management of WSC's activity to any other entity without approval of B&D and/or if it is adjudicated that WSC has committed a material, uncured breach of this Agreement.

F. Liquidated Damages Clause: In the event B&D terminates its franchise with WSC prior to the expiration of five years from the date of execution of this Agreement by all Parties, the waiver and forgiveness as set forth within Sections 3, B (i)-(iii) shall be pro-rated against the total elapsed years from said date (including any increment thereof) on a straight line basis with no additional interest and/or other accrued fees.

G. Personal Guarantee. WSC and Area Representative agree that neither Robert L. Bennion nor Joseph R. Deville shall be personally liable for any of the amounts forgiven and/or waived pursuant to Sections 3, B (i)-(iii) above. All prior personal guarantees of said amounts are hereby released. The personal guarantees set forth in the License Agreements, and prior addenda thereto, shall continue to apply to amounts that become due and owing under the License Agreements on or after April 1, 2012.

4. Warranty of Non-Reliance. Each Party hereto represents and warrants that they have selected and retained their own experts and consultants to inspect, analyze and advise them regarding the nature, extent and cause of the alleged problems which are the subject of the this Agreement. Each Party further represents and warrants that they are not relying upon any representation, opinion, conclusion, recommendation or estimate expressed by or provided by any other Party and/or any other Party's experts or consultants.

5. Warranty of Non-Assignment. Each Party hereto represents and warrants that it has not sold, transferred, conveyed, assigned or hypothecated any of the rights, claims, or causes of action for the payments contemplated within Section 3, B (i)-(iii) herein.

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6. **No Admission of Liability.** The Parties acknowledge that the execution of this Agreement restructures previous obligations as to and between the Parties but said Agreement shall at no time and in any manner to be considered as an admission of liability or responsibility on the part of any Party.

7. **Attorney's Fees.** Notwithstanding the term contained within Section 3, A herein pertaining to the payment of attorney's fees and costs regarding Gary Kruger and Windermere Watch, the Parties hereto acknowledge and agree that each of them are to bear their own costs, expenses and attorney's fees arising out of or connected with the negotiation, drafting and execution of this Agreement, except that, in the event any action is brought by any Party hereto to enforce this Agreement the prevailing Party shall be entitled to reasonable attorney's fees and costs in addition to all other relief to which the Party or those Parties may be entitled.

8. **Construction of Agreement.** This Agreement shall be construed in accordance with its fair meaning, the captions being for the convenience of the Parties only and not intended to describe or define the provision in the portions of the Agreement to which they pertain. Each Party has agreed to the use of the particular language of the provisions of this Agreement, and any question of doubtful interpretation shall not be resolved by any rule of interpretation providing for interpretation against the Party who causes an uncertainty to exist or against the draftsman. The Parties further agree that Civil Code Section 1654, or any similar common law or equitable principle, is not applicable to this Agreement. Therefore, the terms of this Agreement have been freely negotiated by the Parties and this Agreement shall not be construed against any other Party or drafter. Nothing in this Agreement shall affect in any way those certain Loan Agreements, Promissory Notes and related documents between Robert L Bermion and Joseph R. Deville as Borrowers, and CARMED, LLC or Washington Loan Company, Inc. as Lenders.

9. **Governing Law.** This Agreement is made and entered into in the State of California and shall in all respects be interpreted, enforced, and governed under the laws of the State of California. By signing this Agreement, the Parties select Riverside County Superior Court – Main in Riverside, California, and/or U.S. District Court located in Los Angeles, California as the proper and sole venue for any action filed to enforce, construe, or interpret this and/or any previous agreement(s) between the Parties.

10. **Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the Parties and each of their respective heirs, executors, administrators, trustees, beneficiaries, predecessors, successors, assigns, partners, affiliates and related entities, officers, directors, principals, agents, servants, employees, representatives, and all persons, firms, associates and/or corporations connected with them including without limitation their insurers, sureties, and attorneys.

11. **Severability.** If any provision, or any part thereof, of this Agreement shall for any reason be held to be invalid, unenforceable or contrary to public policy or any law, then the remainder of this Agreement shall not be affected thereby.

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12. **Effective Date.** The Parties hereto deem this Agreement to be signed as of the latest day, month and year on which a Party executes this Agreement.

13. **Notices.** Communications between the parties to this agreement must be in writing and must be delivered personally, sent by first class mail, by facsimile, or by Federal Express to the following addresses:

If to WSC: Geoffrey P. Wood, CEO
Windermere Real Estate Services Company
5424 Sand Point Way NE
Tel: (206) 527-3801
Fax: (206) 526-7629
E-Mail: gwood@windermere.com

If to B&D: Joseph R. Deville, President
Bennion & Deville Fine Homes, Inc.
71691 Highway 111
Rancho Mirage, CA 92270
Tel: (760) 770-6801
Fax: (760) 770-6951
E-Mail: bdeville@windermereocal.com

A party may change the listed address by written notice to the others. Communications are effective when actually received.

14. **Counterparts.** This Agreement may be executed in several counterparts and all so executed shall constitute one agreement, which shall be binding upon all parties hereto, notwithstanding that all Parties' signatures do not appear on the same page. If an original signature is affixed by a Party to a counterpart of this Agreement, and a facsimile and/or electronic file (such as a "pdf" or "tif" file as attached to an e-mail) of such originally executed counterpart signature is thereafter telecopied or e-mailed to a Party or Parties' attorneys of record, the telecopied facsimile or e-mail shall be afforded the same validity as the originally executed counterpart, and may be relied upon by all Parties for any and all purposes relating to the Agreement.

15. **Confidentiality.** The terms of the Agreement include information of a proprietary and/or confidential nature. The Parties expressly understand and agree that it shall constitute a breach of the Agreement to disclose the terms of the same except to the Parties' attorneys and/or accountants or as may be required under a Court Order, subpoena and/or pursuant to an action to enforce the terms of the Agreement.

16. **Entire Agreement.** The Parties hereto have entered into this Agreement after extensive review and discussion. The Parties have incorporated the sum and substance of all such discussions and representations leading up to this Agreement within this document. As such, this Agreement constitutes the entire agreement to modify any previous obligations between the Parties hereto and as such, there are no other representations, agreements or promises, either written or oral, either as an inducement to

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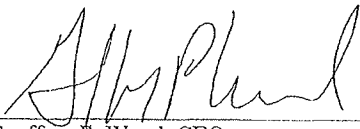
enter into this Agreement or as to its meaning or effect, which are not contained herein. It is the Parties' intent that any ambiguity or conflicting term between this Agreement and any other document or other agreement between the Parties shall be construed such that the terms within this Agreement supersede, control and take priority over any such conflicting term.

17. **Warranty of Authority.** Each individual executing this document on behalf of any Party represents that he/she has been authorized by said Party to execute this document, and does so execute this document on behalf of said Party.

18. **Amendment.** This Agreement may only be modified if the modification is in writing and is signed by the Party against whom enforcement is sought.

Party Signatures:

Dated: Dec. 21, 2012



Geoffrey P. Wood, CEO
Windermere Real Estate Services Company

Dated: _____, 2012

Joseph R. Deville, President
Bennion & Deville Fines Homes, Inc., dba
Windermere Real Estate Coachella Valley and/or
Windermere Real Estate SoCal; and Bennion &
Deville Fine Homes SoCal Inc., dba Windermere
Real Estate SoCal

Dated: _____, 2012

Robert L. Bennion, Officer
Bennion & Deville Fines Homes, Inc., dba
Windermere Real Estate Coachella Valley and/or
Windermere Real Estate SoCal; and Bennion &
Deville Fine Homes SoCal Inc., dba Windermere
Real Estate SoCal

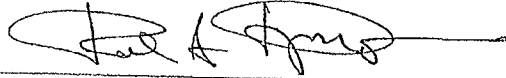
Dated: _____, 2012

Joseph R. Deville, President
Windermere Services Southern California, Inc.

Agreement to Modify Windermere Real Estate License Agreements

Approved for Form:

Dated: Dec-21, 2012



Paul S. Drayna, WSBA#26636
General Counsel for Windermere Real Estate
Services Company

Dated: _____, 2012

Robert J. Sunderland, Esq.
Sunderland | McCutchan, LLP
Counsel for Bennion & Deville Fines Homes, Inc.,
dba Windermere Real Estate Coachella Valley
and/or Windermere Real Estate SoCal; and Bennion
& Deville Fine Homes SoCal Inc., dba Windermere
Real Estate SoCal

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EXHIBIT A TO AGREEMENT MODIFYING FRANCHISE AGREEMENTS

AMOUNTS TO BE WAIVED (Through 3/31/12)

Source	WSC	WSSC	Total
Promissory Note dated 12/31/08	\$399,960	\$0	\$399,960
CV Ongoing Franchise Fees	\$202,500	\$202,500	\$405,000
CV Technology Fees	\$155,075	\$0	\$155,075
CV TOTAL	\$357,575	\$202,500	\$560,075
SoCal Ongoing Franchise Fees	\$85,000	\$85,000	\$170,000
SoCal Technology Fees	\$21,025	\$0	\$21,025
SOCAL TOTAL	\$106,025	\$85,000	\$191,025
TOTAL FEES TO BE WAIVED	\$863,560	\$287,500	\$1,151,060

AMOUNTS TO BE PAID BY 12/31/12*

CV Ongoing Franchise Fees	\$39,375	\$39,375	\$78,750
CV Technology Fees	\$53,775	\$0	\$53,775
CV TOTAL	\$93,150	\$39,375	\$132,525
SoCal Ongoing Franchise Fees	\$17,500	\$17,500	\$35,000
SoCal Technology Fees	\$13,550	\$0	\$13,550
SOCAL TOTAL	\$31,050	\$17,500	\$48,550
TOTAL DUE BY 12/31	\$124,200	\$56,875	\$181,075

* These figures do not include fees for November 2012, which have not yet been reported, but which are also due in full no later than 12/31/12.

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enter into this Agreement or as to its meaning or effect, which are not contained herein. It is the Parties' intent that any ambiguity or conflicting term between this Agreement and any other document or other agreement between the Parties shall be construed such that the terms within this Agreement supersede, control and take priority over any such conflicting term.

17. Warranty of Authority. Each individual executing this document on behalf of any Party represents that he/she has been authorized by said Party to execute this document, and does so execute this document on behalf of said Party.

18. Amendment. This Agreement may only be modified if the modification is in writing and is signed by the Party against whom enforcement is sought.

Party Signatures:

Dated: _____, 2012

Geoffrey P. Wood, CEO
Windermere Real Estate Services Company

Dated: 12-20, 2012

Joseph R. Deville, President
Bennion & Deville Fine Homes, Inc., dba
Windermere Real Estate Coachella Valley and/or
Windermere Real Estate SoCal; and Bennion &
Deville Fine Homes SoCal Inc., dba Windermere
Real Estate SoCal

Dated: 12-20, 2012

Robert L. Bennion, Officer
Bennion & Deville Fine Homes, Inc., dba
Windermere Real Estate Coachella Valley and/or
Windermere Real Estate SoCal; and Bennion &
Deville Fine Homes SoCal Inc., dba Windermere
Real Estate SoCal

Dated: 12-20, 2012

Joseph R. Deville, President
Windermere Services Southern California, Inc.

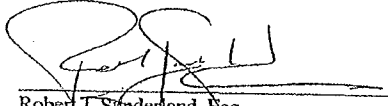
Agreement to Modify Windermere Real Estate License Agreements

Approved for Form:

Dated: _____, 2012

Paul S. Drayna, WSBA#26636
General Counsel for Windermere Real Estate
Services Company

Dated: 21 December, 2012



Robert J. Sunderland, Esq.
Sunderland | McCutchan, LLP
Counsel for Bennion & Deville Fines Homes, Inc.,
dba Windermere Real Estate ~Coachella Valley
and/or Windermere Real Estate SoCal; and Bennion
& Deville Fine Homes SoCal Inc., dba Windermere
Real Estate SoCal