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

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

Plaintiffs,

v.

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

Defendant.

25
26 **AND RELATED COUNTERCLAIMS**
27
28

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

Hon. Manual L. Real

**DECLARATION OF ROBERT J.
SUNDERLAND 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, Robert J. Sunderland, declare as follows:

2 1. I am an attorney at law, duly authorized to practice law in the State of
3 California. I am a partner in the law firm of Sunderland | McCutchan, LLP. I have
4 personal knowledge of the facts as set forth in this Declaration, and if called as a witness,
5 I could and would competently testify thereto as to the statements contained within this
6 Declaration.

7 2. At all times relevant to my professional relationship with Messrs. Robert L.
8 Bennion and Joseph R. Deville, I have been a licensed attorney retained by them and/or
9 the insurance carrier(s) for one or more entities controlled by Messrs. Bennion and
10 Deville. These entities include Bennion & Deville Fine Homes, Inc., Bennion & Deville
11 Fine Homes SoCal, Inc., Windermere Services Southern California, Inc., and other
12 business ventures controlled by Robert L. Bennion and Joseph R. Deville.

13 3. I have reviewed the declarations of Paul Drayna and Michael J. Teather, the
14 General Counsel and Senior Vice President, respectively for Windermere Real Estate
15 Services Company (“Windermere”), submitted in support of Windermere’s Application
16 for Right to Attach Orders and Orders for Issuance of Writs of Attachment (the
17 “Application”).

18 4. Enclosed as Exhibit K to Mr. Drayna’s declaration is a June 3, 2014 e-mail
19 attaching a 2-page letter (also dated January 3, 2014) and 1-page Amendment to
20 Promissory Note (dated May 23, 2014). The contents of Exhibit K are hereafter
21 collectively referred to as “June 3 Letter.”

22 5. The June 3 Letter purports to have been transmitted from Paul S. Drayna to
23 the Declarant at the following addresses: E-Mail: rsunderland@sunmclaw.com and Mail:
24 Mr. Robert J. Sunderland, Sunderland | McCutchan, LLP, 11770 Bernardo Plaza Court,
25 Suite 250, San Diego, CA 92128.

26 6. In their declarations, both Mr. Drayna and Mr. Teather testify that the June 3
27 Letter was transmitted to me via e-mail and U.S. Mail on June 3, 2014. However, the
28 June 3 Letter was never delivered to my email account or physical address and I did not

1 between me and Messrs. Drayna and/or Teather. No copy of the June 3 Letter was
2 revealed through said diligent search.

3 12. It is my normal custom and practice to check e-mails periodically throughout
4 each day and once again each evening to ensure I have reviewed all transmissions
5 received at rsunderland@sunmclaw.com. This includes checking junk and spam folders.
6 In addition, it is my custom and practice to timely forward e-mails to clients that involve
7 their interests. The June 3 Letter is such a document that I would forward to Messrs.
8 Bennion and Deville upon receipt. I would forward the same within a matter of minutes
9 to no more than 4 business hours with comment and if time did not permit, with an
10 indication that my comments would be forthcoming. As stated herein, I have no record
11 of receiving the June 3 Letter and I have no record of forwarding the same to Messrs.
12 Bennion and/or Deville.

13 13. I have no recollection of ever communicating with Messrs. Teather and/or
14 Drayna regarding the specific existence of the June 3 letter. Had I received the June 3
15 Letter, I would have taken exception with its contents as they do not accurately reflect the
16 communications that I shared with Messrs. Teather and/or Drayna in or around the date
17 of June 3, 2014. To clarify, discussions had been ongoing with Mr. Teather regarding
18 concerns with the same subject matter that is contained within the June 3 Letter. As of
19 June 3, 2014, the status of the issues raised within the June 3 Letter were as follows: (a)
20 Balloon Payment on 2009 Loan: The June 3 Letter accurately reflects the existence of
21 the previous CARMED loan and there had been discussion between me and Mr. Teather
22 regarding payment. However, the 1-page Amendment to Promissory Note (dated May 23,
23 2014) that is contained within the June 3 appears to contain inaccurate calculations. I
24 have no reason to believe the same was ever executed by Messrs. Bennion and/or Deville.
25 (b) Windermere Watch: The June 3 Letter accurately reflects that the respective parties
26 previously discussed that \$85,280 would be deducted from the obligations of Messrs.
27 Bennion and Deville and/or related entity(ies). The statement that the payment resolved
28 all current and/or future issues regarding the Windermere Watch, that the parties agreed

1 receive a copy of it until it was produced by Windermere during the course of this
2 litigation.

3 7. I first became aware of the June 3 Letter on or about July 28, 2016 when
4 provided with a copy of the same from counsel, Kevin Adams of Mulcahy LLP. I have
5 no recollection of ever having seen the June 3 Letter prior to July 28, 2016. This includes
6 the receipt of the same via e-mail and/or U.S. Mail. The June 3 Letter is of the nature that
7 I would distinctly recall the same if I had previously viewed it.

8 8. The office of Sunderland McCutchan, LLP relocated from Suite 250 at
9 11770 Bernardo Plaza Court to Suite 310 also located at 11770 Bernardo Plaza Court on
10 January 4, 2013. Concurrent with our relocation, the Firm undertook the following
11 actions: Provision of forwarding request to the U.S. Postal Service, change of mailing
12 address on all business cards, stationary, e-mail signatures blocks, change of address with
13 CA State Bar, change of address notification to vendors and clients.

14 9. Consistent with the foregoing address changes, e-mail communications from
15 me to Mr. Teather and/or Windermere after January 4, 2013 would reflect Suite 310
16 rather than Suite 250 located at 11770 Bernardo Plaza Court. I have no explanation for
17 why the June 3 Letter reflects the incorrect mailing address for Sunderland McCutchan,
18 LLP.


19 10. Since January 4, 2013, it has come to our attention that despite our change of
20 address, from time-to-time, mail is nonetheless delivered to Suite 250 located at 11770
21 Bernardo Plaza Court and is then at times forwarded to our office by the Tenant of suite
22 250 after delay. While this has occurred, we are unaware that any mail has ever been
23 destroyed or permanently delayed.

24 11. After being made aware of the existence of the June 3 Letter and
25 Windermere's position that the document had been delivered to me, I personally and with
26 the assistance of a professional I.T. Specialist, performed a diligent and thorough search
27 of my laptop computer and server for any and all e-mails from Mr. Teather, Mr. Drayna
28 and Windermere. At this time, I also reviewed all physical copies of communication

1 that Windermere was not in breach of its obligations and/or that any discounted fees of
2 any form would offset the costs associated with Messrs. Bennion and Deville ongoing
3 SEO efforts combating the Windermere Watch is inaccurate. I made no such
4 representation.. There was no agreement that there would be no payment by Windermere
5 for future efforts undertaken by Messrs. Bennion and Deville. In addition to their
6 significant concern with the ongoing marketing problems created by the Windermere
7 Watch, Messrs. Bennion and Deville were very concerned regarding possible claims by
8 other franchisees regarding the same. There was no agreement as to any specific points
9 within the June 3 Letter. *(C) Reporting of Branches & Satellites:* This portion of the
10 June 3 Letter inaccurately states the opening of office locations. Specifically, satellite
11 office locations were previously opened based upon the ongoing dealings with
12 Windermere. The June 3, Letter correctly states that the parties agreed that all offices in
13 question were correctly classified as satellite offices though the parties discussed that up
14 to two full office locations in San Diego were planned by Messrs. Bennion and Deville.

15 14. Had there been a specific agreement between Messrs. Bennion and Deville
16 on the one hand and Windermere on the other hand regarding any of the issues contained
17 within the June 3 Letter, consistent with my custom and practice as well a previous action
18 with Windermere, I would have proposed the execution of a Release Agreement
19 specifically confirming such terms.

20
21 Executed this 28th day of November, 2016 at San Diego, California.

22
23
24 
25 _____
26 Robert J. Sunderland, Declarant
27
28