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12 Windermere Real Estate Services Company

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

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

20 Plaintiffs,

21 v.

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

24 Defendant.

25 **AND RELATED COUNTERCLAIMS**
26

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

Hon. Manual L. Real

**DECLARATION OF DAVID E.
HOLMES IN OPPOSITION TO
PLAINTIFFS AND COUNTER-
DEFENDANTS' MOTION TO
EXCLUDE THE TESTIMONY OF
DAVID E. HOLMES BASED ON
FRE 403, 702 AND DAUBERT**

Date: April 17, 2017

Time: 10:00 a.m.

Courtroom: 880

Complaint Filed: September 17, 2015

1 I, David E. Holmes, declare as follows:

2 1. I am an attorney who was licensed to practice law in the State of
3 California. My status with the State Bar changed to inactive in 2010 after I retired
4 from my firm in 2008. The statements in this declaration are based upon my
5 personal knowledge, and if called as a witness, I could testify competently thereto.

6 2. I graduated from the University of Southern California in 1966 and its
7 Law School in 1969. I practiced law in the domestic and international franchising
8 area beginning in 1975. I was certified as a Franchise and Distribution Law
9 Specialist by the State Bar of California's Board of Legal Specialization. I am an
10 expert on franchising standards and practices and have been designated and
11 appeared as an expert on such issues as set forth in the materials attached to report.

12 3. From 1975 to 1980 I was Associate General Counsel for International
13 House of Pancakes, where my responsibilities included legal aspects of multi-brand
14 franchise operations (including franchise disclosure), related training of marketing
15 and operations personnel, real estate matters and acquisitions/dispositions of various
16 units.

17 4. From 1980 through 1983 I was Vice President and Counsel for Century
18 21 Real Estate Corporation, where my duties covered franchise and other legal
19 compliance matters and related training, governmental relations, litigation
20 supervision, acquisitions, and system-wide legal training programs. Although
21 Century 21 did not utilize area representatives at that time, we did utilize
22 subfranchisors. In franchise arrangements, the duties of area representatives are
23 subfranchisors are substantially similar, with one of the major distinction being that
24 subfranchisors are empowered to negotiate and sell franchises while area
25 representatives are not.

26 5. Along with a partner, I owned and operated a subfranchise company in
27 Southern California, Fantastic Sam's, from 1983 to 1984.

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1 6. From 1985 to 2008, I was in private practice, specializing exclusively
2 in franchising, including structuring and development of new and established
3 franchise systems, system design, drafting of documents for registration and legal
4 compliance, management of litigation, franchise system negotiations and legal
5 aspects of system compliance, along with related training.

6 7. I was in private practice as a solo attorney from 1985 to 2001,
7 specializing in franchise law. From 2002 to late 2008, I was a Partner with Holmes
8 & Lofstrom, LLP, which represented businesses in a wide range of industries and
9 professions, and with a concentration in franchising. During my tenure, the firm's
10 clients were located throughout North America and abroad, and included mature
11 franchise systems, as well as new and beginning franchise companies.

12 8. I have been involved in the structuring and negotiation of international
13 expansion activities for American franchisors in a number of foreign markets, as
14 well as entry by foreign-based franchise systems into North America.

15 9. I have actively contributed to the International Franchise Association
16 (“IFA”) by serving on its Legal/Legislative and Franchise Relations committees,
17 including serving as a senior liaison. I have spoken and presented papers at IFA
18 Annual Conventions, Legal Symposia and other events, been a member of the IFA
19 Legal Symposium Task Force (which determines the content and speakers for each
20 year’s Legal Symposium), and authored various IFA publications (or portions),
21 including being a co-author of the IFA publication A Dispute Resolution Handbook
22 for Franchisees and Franchisors. In 2007, I assisted the IFA’s Franchise Relations
23 Committee and its Best Practices Product Review Task Force in updating their
24 materials. I moderated a panel discussion at the 2005 IFA Legal Symposium on
25 Franchise Disclosure and was a member of the IFA Supplier Forum Advisory
26 Board.

27 10. Shortly after adoption of the revised FTC Franchise Rule, I presented,
28 as part of an IFA panel, an educational program on the (then) most recent revisions

1 to the Federal Trade Commission Franchise Rule and its disclosure requirements. I
2 led various roundtables at IFA events, including at IFA Conventions and Legal
3 Symposia. I was also a chapter Editor for an American Bar Association monograph
4 on Earnings Claims. At the request of the IFA, I also prepared revisions to the
5 IFA's Handbooks on Best Practices in Transfers and Succession Planning.

6 11. I have presented papers and seminars at various IFA and other meetings
7 and seminars, in the United States and abroad, as well as conducting franchise law
8 training sessions for domestic and foreign franchise systems.

9 12. I have appeared at hearings before legislative and administrative bodies
10 in California and other states and have testified on the business and legal aspects of
11 franchising and the possible effects of proposed legislation and regulations.

12 13. I have been a guest speaker on various shows relating to franchising,
13 conducted numerous training sessions for franchisor personnel and franchisees, and
14 have been a regular speaker at educational seminars for franchisors and franchise
15 attorneys. In addition, I have often spoken on franchising and related matters at IFA
16 quarterly regional meetings.

17 14. I have been designated, and testified, as an expert witness on
18 franchising and franchise-related matters, in both federal and state courts as
19 reflected in the materials attached to my report in this case.

20 15. During 2003-2004, I served my second term as Co-Chair of the
21 California State Bar Franchise Law Committee (the "FLC"), where I drafted (and
22 oversaw the drafting of) the most extensive changes to the California Franchise
23 Investment Law since its original enactment. During that time, I was the primary
24 liaison between the Franchise Law Committee and senior staff of the Department of
25 Corporations, including working with the Department on new legislation and
26 revisions to the Department's policies and procedures with respect to franchise
27 registration and disclosure matters, as well as negotiating the final form of the bill
28 with state legislative staff.

1 16. In the Summer of 2010, I was invited to serve on the State Bar
2 Franchise Law Committee once again. In that capacity, I primarily focus on
3 regulatory and statutory matters, and currently sits on the FLC's Development
4 Agent, Trade Shows and Negotiated Sales Subcommittees, and a subcommittee
5 dealing with possible required financial performance representations.

6 17. I continue to be involved in other projects for the FLC, including the
7 formulation of new legislation and the drafting of affirmative legislative and
8 regulatory proposals and related discussions with regulatory officials, most recently
9 involving the regulation of franchise area developers. I served on a subcommittee of
10 the Franchise Law Committee in a proposed general re-writing and modernization
11 of substantial portions of the California Franchise Investment Law, as well as
12 possible revisions to the California Franchise Relations Act and the California Seller
13 Assisted Marketing Plan law.

14 18. For the 2013-2014 State Bar year, I was again appointed as Co-Chair of
15 the State Bar Franchise Law Committee.

16 19. In October of 2004, I was selected to serve on the Executive Committee
17 of the Business Law Section of the State Bar and served, among other duties, as the
18 primary liaison between the Franchise Law Committee and the Executive
19 Committee, as well as Secretary of the Executive Committee.

20 20. In October of 2006, I was appointed to the newly formed State Bar
21 Franchise and Distribution Law Advisory Commission as its Vice-Chair. That
22 Commission was charged with developing and administering standards and
23 procedures for certifying California lawyers as franchise and distribution law
24 specialists, the first bar association in the country to do so. In 2007 I became that
25 Commission's Chair and had overall responsibility for the accomplishment of its
26 objectives, and into September of 2009 served that Commission as its former Chair.
27 I was also a member of the State Bar's Board of Legal Specialization, to which the

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1 Commission reports, and served on the New Specialties Subcommittee of the Board
2 of Legal Specialization.

3 21. Effective in September of 2009, I was appointed to the State Bar's
4 Board of Legal Specialization, which administers all certified legal specialties in
5 California, including franchise and distribution law, and also served as Chair of its
6 Examination Committee. I was the Chair of the Board of Legal Specialization for
7 the 2012-2013 Bar year, having previously been its Vice Chair, and for 2013-2014
8 served as Immediate Past Chair and Advisor to that body.

9 22. I was also the Executive Editor of a special California Continuing
10 Education of the Bar (CEB) publication: California Franchise Law and Practice,
11 published in 2009, 2011 and 2013. CEB is a joint University of California - State
12 Bar program, founded in 1947. In addition, I have been a member of the State Bar-
13 CEB Business & Intellectual Property Law Advisory Committee, which advises
14 CEB with respect to publications, continuing legal education programs and other
15 matters.

16 23. I was a member for many years of the American Bar Association's
17 Franchising Forum, served on the American Association of Franchisees and
18 Dealers' (AAFD) Fair Franchising Standards Committee, and assisted that
19 committee in the drafting of portions of their Fair Franchising Standards.

20 24. I have also been a member of the American Arbitration Association's
21 (AAA) Franchise Advisory Panel, which advised the AAA regarding arbitration
22 policies and personnel and have taught upper division and graduate level classes on
23 business law at The California State University, Long Beach.

24 25. I have been selected by my peers as a "legal eagle" in the franchising
25 community, as part of Franchise Times' Annual Legal Eagle recognition program,
26 and have been also listed in The International Who's Who of Franchise Lawyers.

27 26. With specific regard to the use of area representatives in the franchise
28 model, prior to my retirement, a number of my (and our firm's) clients and

1 prospective clients used or considered the use of area representative and/or similar
2 franchise distribution models. In that connection, I counseled such clients regarding
3 both the legal and business aspects of, and issues relating to, the use of such
4 alternative distribution structures, in both a domestic and international context.

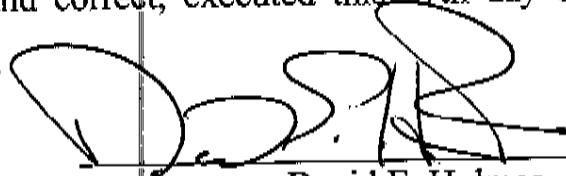
5 27. At Century 21, we used a nation-wide subfranchising model, which is
6 similar to an area representative structure in many operational and other regards.

7 28. I have attended, and on some occasions spoken at, IFA Legal
8 Symposia, annual conventions and other meetings. At such meetings, I and other
9 practitioners discussed various franchise distribution models including area
10 representatives, and the legal and practical issues related thereto.

11 29. Similarly, I regularly attended the ABA Franchise Forum, where I
12 participated in discussions with other practitioners regarding our and our client's
13 experiences regarding area representatives and related franchise distribution models.

14 30. Finally, during my service on the State Bar Franchise Law Committee
15 and the Franchise and Distribution Law Advisory Commission, I participated in
16 such discussions with other practitioners, sharing our and our clients' common
17 experiences regarding the area representative model.

18 I declare under penalty of perjury under the laws of the United States of
19 America that the forgoing is true and correct, executed this 27th day of March,
20 2016, at San Luis Obispo, California.



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22 David E. Holmes
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