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

BENNION & DEVILLE FINE  
HOMES, INC., a California  
corporation, BENNION & DEVILLE  
FINE HOMES SOCAL, INC., a  
California corporation, WINDERMERE  
SERVICES SOUTHERN  
CALIFORNIA, INC., a California  
corporation,

Plaintiffs,

v.

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

Defendant.

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

*Hon. Manual L. Real*

**PLAINTIFFS’ STATEMENT OF  
GENUINE DISPUTES OF  
MATERIAL FACT IN OPPOSITION  
TO DEFENDANT WINDERMERE  
REAL ESTATE SERVICES  
COMPANY’S MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
AND STATEMENTS OF  
UNCONTROVERTED FACTS**

Courtroom: 8  
Action Filed: September 17, 2015  
Pretrial Conf.: September 19, 2016  
Trial: October 18, 2016

AND RELATED COUNTERCLAIMS

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Plaintiffs Bennion & Deville Fine Homes, Inc., Bennion & Deville Fine Homes SoCal, Inc., and Windermere Services Southern California, Inc. (hereinafter referred to as “B&D Parties”) hereby submit the following Statement of Genuine Disputes of Material Fact and Statement of Uncontroverted Facts in Opposition to Windermere Real Estate Services Company’s (“WSC”) Motion for Partial Summary Judgment pursuant to Central District of California Local Rule 56-2 as follows:

<b>WSC’s Allegedly Uncontroverted Facts and Evidence</b>	<b>B&amp;D Parties’ Response</b>
1. WSC and Bennion & Deville Fine Homes, Inc. (“B&D Fine Homes”), an entity owned by Bennion and Deville, entered into the Coachella Valley Franchise Agreement on August 1, 2001.	Undisputed.
2. In exchange for the license fees, WSC agreed to “provide a variety of services to [B&D Fine Homes] for the benefit of [B&D Fine Homes] and other licensees, designed to complement the real estate brokerage business activities of [B&D Fine Homes] and to enhance its profitability.”	Undisputed.
3. WSC also granted B&D Fine Homes the right to use the “Windermere System.”	Undisputed.
4. On May 1, 2004, WSC and Windermere Services Southern	Undisputed.

<p>1 2 3 4</p>	<p>California, Inc. (“Services SoCal”), an entity owned by Bennion and Deville, entered into the Area Representation Agreement.</p>	
<p>5 6 7 8 9</p>	<p>5. Pursuant to the Area Representation Agreement, WSC agreed to provide Services SoCal with a non-exclusive right to offer WSC licensees use of the “Windermere System.”</p>	<p>Undisputed.</p>
<p>10 11 12 13 14</p>	<p>6. WSC agreed to provide Services SoCal with “servicing support in connection with the marketing, promotion and administration of the Trademark and Windermere System.”</p>	<p>Undisputed.</p>
<p>15 16 17 18 19 20</p>	<p>7. WSC also agreed to make available to Services SoCal WSC’s “key people to the extent necessary to assist [Services SoCal] in carrying out its obligations as set forth in” the Area Representation Agreement.</p>	<p>Undisputed.</p>
<p>21 22 23 24 25 26 27</p>	<p>8. On March 29, 2011, WSC and Bennion &amp; Deville Fines Homes SoCal, Inc. (“B&amp;D Fine Homes SoCal”), another entity owned entirely by Bennion and Deville, entered into the Southern California Franchise Agreement.</p>	<p>Undisputed.</p>
<p>28</p>	<p>9. Like the Coachella Valley</p>	<p>Undisputed.</p>

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<p>Franchise Agreement, the Southern California Franchise Agreement granted B&amp;D Fine Homes SoCal a revocable and non-exclusive right to use the “Windermere System” in the conduct of real estate brokerage services.</p>	
<p>10. WSC agreed to “provide guidance” to B&amp;D Fine Homes SoCal with respect to the Windermere System.</p>	<p>Undisputed.</p>
<p>11. Plaintiffs claim that WSC never provided them with a viable Windermere System.</p>	<p>Disputed. WSC has included excerpts of Joseph R. Deville’s (“Deville”) deposition testimony with its moving papers. During Deville’s deposition, he testified that WSC failed to provide proper technology and a reliable franchise system throughout the majority of the parties’ relationship. While there were ebbs and flows in what WSC provided – or was promising to provide – Deville acknowledges that testimony is generally correct. (Declaration of Deville (“Decl. Deville”), ¶ 13.) However, those failures did not negate WSC’s obligation to provide Plaintiffs with adequate technology and a functioning system throughout the entire term of their relationship. After</p>

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	<p>all, Plaintiffs continued to pay WSC significant technology fees throughout the term of our relationship with the understanding that technology that worked in the Southern California region would be provided. WSC continued to collect those fees and promise to correct any issues. In fact, there were instances where the technology shortcomings were corrected. However, this did not last. (Decl. Deville, ¶ 13.) The broadly defined definition of “Windermere System” (drafted by WSC) suggests that all of the failed support and services of WSC – including those technological failures – amounted to failures of the “Windermere System” as a whole in the Southern California region. (Decl. Deville, ¶ 12.)</p>
<p>12. Plaintiffs claim that WSC never provided them with sufficient technology.</p>	<p>Disputed. WSC has included excerpts of Joseph R. Deville’s (“Deville”) deposition testimony with its moving papers. During Deville’s deposition, he testified that WSC failed to provide proper technology and a reliable franchise system throughout the majority of the parties’ relationship.</p>

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	<p>While there were ebbs and flows in what WSC provided – or was promising to provide – Deville acknowledges that testimony is generally correct. (Declaration of Deville (“Decl. Deville”), ¶ 13.) However, those failures did not negate WSC’s obligation to provide Plaintiffs with adequate technology and a functioning system throughout the entire term of their relationship. After all, Plaintiffs continued to pay WSC significant technology fees throughout the term of our relationship with the understanding that technology that worked in the Southern California region would be provided. WSC continued to collect those fees and promise to correct any issues. In fact, there were instances where the technology shortcomings were corrected. However, this did not last. (Decl. Deville, ¶ 13.)</p>
<p>13. Plaintiffs admitted that they have not been subjected to either criminal or civil liability arising out of WSC’s alleged failure to comply with California franchise laws.</p>	<p>Undisputed.</p>

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14. Services SoCal also did not pay a franchise fee to WSC.

Disputed. Services SoCal has made numerous payments directly and indirectly to WSC over the course of the parties' eleven-year relationship. Many of these payments include, but are not limited to, the following payments by Services SoCal to:

a. WSC, in the amount of \$553.81, for various services provided by WSC to Services SoCal leading up to the parties' execution of the Area Representation Agreement on March 19, 2014. True and accurate copies of the invoice and proof of payment to WSC are attached hereto as Exhibit 13;

b. WSC, in the amount of \$990, for registration fees for Service SoCal's compelled attendance at a Windermere "Owner's Retreat" – a training event – in 2005. True and accurate copies of the invoice and proof of payment to WSC are attached hereto as Exhibit 14;

c. WSC, in the amount of \$1,313.62, for WSC employees to meet with Southern California franchisees on January 11, 2005. True and accurate copies of the invoice and

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proof of payment to WSC are attached hereto as Exhibit 15;

d. WSC, in the amount of \$423.98, for the transport of WSC employee Diane Peterson to Southern California on or around March 1, 2005. True and accurate copies of the invoice and proof of payment to WSC are attached hereto as Exhibit 16;

e. third-party newspapers and other periodicals, in the amount of \$950.00, for advertising of the Windermere brand in Southern California on June 7, 2005. True and accurate copies of the invoice and proof of payment to the third-party newspaper are attached hereto as Exhibit 17;

f. third-party newspapers and other periodicals, in the amount of \$ 2771.88, to solicit new franchise owners on behalf of WSC on June 24, 2005. True and accurate copies of the invoice and proof of payment to the third-party newspaper are attached hereto as Exhibit 18; and

g. third-party auditors, in the amount of thousands of dollars each



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	<p>year throughout the course of the parties’ relationship, preparing its audited financials at the request and direction of WSC to allow WSC to finalize its FDD.</p> <p>Each of these payments had to be made by Services SoCal to acquire and maintain the rights under the Area Representation Agreement. (Decl. Deville, ¶¶ 27-28.)</p>
<p>15. Mark Ewing was an independent third party who had contracted with WSC, he was not an affiliate of WSC.</p>	<p>Disputed. Services SoCal made an initial \$35,000 payment to Mark Ewing – an affiliate of WSC – to purchase the rights to serve as the area representative for the Southern California region. Plaintiffs understood that Mr. Ewing was affiliated with WSC at the time the payments were made to him at WSC’s direction. (Decl. Deville, ¶ 29.)</p>
<p>16. The amounts paid by Services SoCal were paid to Mr. Ewing in order to purchase from him the right to receive the revenue he had been receiving from the Carlsbad, Escondido, and Solana Beach locations.</p>	<p>Disputed in part. Services SoCal purchased the right to serve as Area Representative in the Southern California region, something Mr. Ewing previously held. A portion of those rights concerning the revenue for the Carlsbad, Escondido, and Solana Beach locations. (<i>See generally</i>, Decl.</p>

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	<p>Deville, Ex. 11, the Area Representation Agreement.)</p>
<p>17. Services SoCal did not have the right to sell or negotiate the sale of franchises for WSC.</p>	<p>Disputed. The Area Representation Agreement makes clear that Services SoCal was unequivocally granted the right to negotiate the sale of Windermere franchises on behalf of WSC. (Decl. Deville, ¶ 31, Ex. 11.) This right is identified in the opening Recitals to the Area Representation Agreement, which provides that “WSC desires to expand its operations and licenses into [Southern California] and to have Area Representative offer licenses to use the Trademark in [Southern California...].” (Decl. Deville, Ex. 11, Recital A.) Similarly, Section 2 of the Area Representation Agreement expressly granted Services SoCal “the non-exclusive right to offer Windermere licenses to real estate brokerage business to use the [Windermere] Trademark and the Windermere System in [Southern California] in accordance with the terms of the Windermere License Agreement.” (<i>Id.</i>, Ex. 11, § 2.)</p>

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Also, Section 3 of the agreement identified one of Services SoCal’s responsibilities to include “marketing Windermere licenses in the Region.” (Id.) These contractual rights extend much further than those of a referral agent as suggested in WSC’s papers. [D.E. 59-1, p. 13.]

Moreover, not only did Services SoCal have the contractual right to offer the sale of Windermere franchises with prospective franchisees, but it actually did negotiate the franchise sales and even signed – along with WSC and the respective franchisee – each of the franchise agreements entered into by franchisees in Southern California. (Decl. Deville, ¶ 32, Exs. 19-21.) By way of example, in May 2013, Deville, on behalf of Services SoCal, negotiated the sale of Windermere franchised businesses to prospective franchisees in the San Diego region. (Decl. Deville, ¶ 34.) During this process, Deville negotiated terms with the prospective franchisees that were different than those WSC later desired to offer the prospects. (Id.) Deville

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	<p>refused to offer the terms proposed by WSC and the franchise agreement entered into by the parties ultimately reflected those negotiated by Deville and the franchisees. (<i>Id.</i>, Ex. 22.) The emails attached to the concurrently filed declaration of Deville unequivocally show that not only did Services SoCal dictate the terms of the franchise agreements the franchisees in their region would enter into, but they also show that WSC permitted Services SoCal to set the terms. (Decl. Deville, Exs. 19-21.)</p>
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<b>The B&amp;D Parties' Asserted Facts and Evidence (sequentially numbered from WSC's facts for ease of reference)</b>	
18. Plaintiffs only seek (and are entitled to) damages for conduct of WSC after September 17, 2011.	(Decl. Deville, ¶ 7, Exs. 1-4.)
19. Each of technology breaches at issue in WSC's motion was WSC's failure to take any reasonable action to combat the negative internet marketing campaign of Windermere Watch after December 18, 2012.	(Decl. Deville, ¶ 9.)

<p>1 2 3 4 5 6 7</p>	<p>20. On December 18, 2012, the parties modified their rights and obligations under each of the agreements thereby requiring WSC to immediately make a “commercially reasonable” effort to combat Windermere Watch.</p>	<p>(Decl. Deville, ¶ 9, Ex. 5.)</p>
<p>8 9 10 11 12</p>	<p>21. WSC failed to take any effort until – <i>at the earliest</i> – October 2013 to improve the search engine optimization of the websites for WSC and its franchisees and agents.</p>	<p>(Decl. Deville, ¶ 10.)</p>
<p>13 14 15 16 17 18 19 20 21 22 23</p>	<p>22. Representatives of WSC – most notably, WSC’s General Counsel Paul Drayna – attempted to cover up WSC’s failure to maintain the registration of the 2013 Southern California FDD by directing Services SoCal to offer prospective franchisees in the Southern California region the incorrect FDD containing terms that did not correspond to those extended to the prospective franchisees.</p>	<p>(Decl. Deville, ¶ 14; Exs. 7-9.)</p>
<p>24 25 26 27 28</p>	<p>23. These blatant violations of California’s franchise laws were not apparent to representatives of Services SoCal who are not attorneys and relied entirely upon Drayna for support and</p>	<p>(<i>Id.</i>, ¶ 18.)</p>

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<p>guidance with respect to any legal issues involving WSC’s FDD and franchise offering.</p>	
<p>24. Because WSC’s General Counsel was considered a “key person” that Services SoCal relied upon (and was required to rely upon) in order to offer and sell franchises on behalf of WSC, WSC’s failure to provide a competent General Counsel breached the “key people” requirement of the Area Representation Agreement.</p>	<p>(<i>Id.</i>)</p>
<p>25. Drayna was not the only “key people” at WSC directing Plaintiffs to unknowingly violate the franchise laws. WSC’s President, Geoff Wood, was involved in the email exchanges instructing Plaintiffs that the Southern California FDD was mailed to the State of California “last week,” and [i]n the mean time (<i>sic</i>) you may proceed with the Northern California [FDD] as we discussed.”</p>	<p>(Decl. Deville, ¶ 19, Ex. 9.)</p>
<p>26. Wood – the President of a large national-wide franchisor – was also someone that Services SoCal needed to (and did) rely upon in offering WSC franchises in Southern California.</p>	<p>(<i>Id.</i>, ¶ 19.)</p>

<p>1 2 3 4 5</p>	<p>27. From May 1, 2004 through September 30, 2015, Services SoCal served as the Area Representative for WSC’s franchise system in the Southern California region.</p>	<p>(Decl. Deville, ¶ 22, Ex. 11.)</p>
<p>6 7 8 9 10 11 12</p>	<p>28. As Area Representative, Services SoCal was contractually required to work with WSC in offering and selling Windermere franchises to real estate brokerage businesses in Southern California, and to thereafter provide support for the franchised businesses.</p>	<p>(<i>Id.</i>, Ex. 11, § 2.)</p>
<p>13 14 15 16</p>	<p>29. Between April 21, 2013 and July 5, 2013, WSC’s FDD for the Southern California region was not properly registered with the DBO.</p>	<p>(<i>See</i> Decl. Deville, Ex. 12.)</p>
<p>17 18 19 20 21 22 23 24 25 26 27</p>	<p>30. As a result, any offer or sale of a Windermere franchise in Southern California during this “dark” period would result in a violation of the CFIL. <i>See</i> Cal. Corp. Code §§ 31110, 31119. During the months of June and July 2013 – and notwithstanding this “dark” period in franchise sales – Drayna directed Services SoCal to offer and sell Windermere franchises using the incorrect FDD for the region.</p>	<p>(<i>Id.</i>, ¶ 25, Exs. 7-10.)</p>
<p>28</p>	<p>31. Still during this “dark” period and</p>	<p>(<i>Id.</i>, ¶25.)</p>

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at the continuing direction of Drayna, Deville met with a prospective franchisee for the Southern California region and provided that prospect with the incorrect FDD containing significantly different terms than those that would govern the prospective franchisee’s relationship with WSC.

32. After learning that Drayna’s direction violated the franchise laws, Services SoCal incurred significant costs and expense through the retention and work with legal counsel, along with other efforts and expenses, in an attempt to mitigate and potentially avoid any criminal, civil, or DBO action against Services SoCal and its principals as a result of the franchise law infractions directed by WSC.

33. Services SoCal has made numerous payments directly and indirectly to WSC over the course of the parties’ eleven-year relationship that each independently satisfies the “franchise fee” requirement under the CFRA.

(Decl. Deville, ¶ 26.)

(Decl. Deville, ¶ 27, Exs. 13-18.)



<p>1 2 3 4 5 6 7</p>	<p>34. Each of these payments was made by Services SoCal to acquire and/or maintain the rights under the Area Representation Agreement and independently satisfies the “franchise fee” requirement as defined by the CFRA and the Commissioner.</p>	<p>(Decl. Deville, ¶ 28.)</p>
<p>8 9 10 11 12 13 14</p>	<p>35. Services SoCal’s \$35,000 payment to Mark Ewing – an affiliate of WSC – to purchase the rights to serve as the area representative for the Southern California region also satisfies the “franchise fee” element of the claim.</p>	<p>(Decl. Deville, ¶ 19.)</p>
<p>15 16 17 18 19 20 21 22</p>	<p>36. Services SoCal paid sums to WSC and third-parties for marketing and training, paid for WSC’s employees to visit the Southern California region, and paid a substantial sum to an affiliate of WSC to acquire the area representation rights for Southern California.</p>	<p>(See Decl. Deville, ¶ 27, Ex. 13-18.)</p>
<p>23 24 25 26 27 28</p>	<p>37. The Area Representation Agreement makes clear that Services SoCal was unequivocally granted the right to <i>negotiate</i> the sale of Windermere franchises on behalf of WSC.</p>	<p>(Decl. Deville, ¶ 31, Ex. 11.)</p>

<p>1 2 3 4 5 6 7 8 9</p>	<p>38. This right is identified in the opening Recitals to the Area Representation Agreement, which provides that “WSC desires to expand its operations and licenses into [Southern California] and to have Area Representative offer licenses to use the Trademark in [Southern California...].”</p>	<p>(Decl. Deville, Ex. 11, Recital A.)</p>
<p>10 11 12 13 14 15 16 17 18 19</p>	<p>39. Similarly, Section 2 of the Area Representation Agreement expressly granted Services SoCal “the non-exclusive right to offer Windermere licenses to real estate brokerage business to use the [Windermere] Trademark and the Windermere System in [Southern California] in accordance with the terms of the Windermere License Agreement.”</p>	<p>(<i>Id.</i>, Ex. 11, § 2.)</p>
<p>20 21 22 23</p>	<p>40. Also, Section 3 of the agreement identified one of Services SoCal’s responsibilities to include “marketing Windermere licenses in the Region.”</p>	<p>(<i>Id.</i>)</p>
<p>24 25 26 27 28</p>	<p>41. Services SoCal <i>did</i> negotiate the franchise sales and even signed – along with WSC and the respective franchisee – each of the franchise agreements entered into by franchisees</p>	<p>(Decl. Deville, ¶ 32, Exs. 19-21.)</p>

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<p>in Southern California.</p>	
<p>42. By way of example, in May 2013, Deville, on behalf of Services SoCal, negotiated the sale of Windermere franchised businesses to prospective franchisees in the San Diego region.</p>	<p>(Decl. Deville, ¶ 34.)</p>
<p>43. During this process, Deville negotiated terms with the prospective franchisees that were different than those WSC later desired to offer the prospects.</p>	<p>(<i>Id.</i>)</p>
<p>44. Deville refused to offer the terms proposed by WSC and the franchise agreement entered into by the parties ultimately reflected those negotiated by Deville and the franchisees.</p>	<p>(<i>Id.</i>, Ex. 22.)</p>
<p>45. The emails attached to the concurrently filed declaration of Deville unequivocally show that not only did Services SoCal dictate the terms of the franchise agreements the franchisees in their region would enter into, but they also show that WSC permitted Services SoCal to set the terms.</p>	<p>(Decl. Deville, Exs. 19-21.)</p>

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DATED: September 26, 2016

**MULCAHY LLP**

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