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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 SOCAL, INC., a  
17 California corporation, WINDERMERE  
18 SERVICES SOUTHERN  
19 CALIFORNIA, INC., a California  
20 corporation,

21 Plaintiffs,

22 v.

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

26 Defendant.

27 **AND RELATED COUNTERCLAIMS**  
28

Case No. 5:15-CV-01921 JCG  
*Hon. Jay C. Gandhi*

**THE B&D PARTIES' SEPARATE  
STATEMENT OF  
UNCONTROVERTED FACTS  
AND CONCLUSIONS OF LAW IN  
SUPPORT OF OPPOSITION TO  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

Date: March 1, 2018  
Time: 10:00 a.m.  
Courtroom: 6A

Action Filed: September 17, 2015  
Pretrial Conf.: None Set  
Trial: None Set

1 Plaintiffs and Counter-Defendants Bennion & Deville Fine Homes SoCal, Inc.  
 2 (“B&D SoCal”), Windermere Services Southern California, Inc. (“Services SoCal”),  
 3 Bennion & Deville Fine Homes, Inc. (“B&D Fine Homes”) and Counter-Defendants  
 4 Robert Bennion (“Bennion”) and Joseph Deville (“Deville”) hereby submit this  
 5 Separate Statement of Uncontroverted Facts and Conclusions of Law in support of  
 6 their Opposition to Motion for Partial Summary Judgment filed by  
 7 Defendant/Counterclaimant Windermere Real Estate Services Company (“WSC”).

	<b>WSC’s Allegedly Uncontroverted Facts and Evidence</b>	<b>B&amp;D Parties’ Response</b>
11 1.	12 On May 1, 2004, WSC and 13 Windermere Services Southern 14 California, Inc. [(“Services SoCal”)], an 15 entity owned by Bennion and Deville, 16 entered into the Area Representation 17 Agreement (“ARA”).	18 Undisputed.
19 2.	20 Section 4.2 of the ARA states that, in 21 the event either party elects to terminate 22 the ARA pursuant to Section 4.1(b), the 23 Terminated Party “will be paid an 24 amount equal to the fair market value of 25 the Terminated Party’s interest in the 26 Agreement (the ‘Termination 27 Obligation’), in accordance with the 28 provisions of this Agreement.	29 Undisputed as to the 30 portion of Section 4.2 of 31 the ARA stated. This, 32 however, is not the 33 complete language of 34 Section 4.2.
35 3.	36 Section 4.2 of the ARA states that the 37 Termination Obligation “will be 38 determined . . . without consideration of	39 Undisputed as to the 40 portion of Section 4.2 of 41 the ARA stated. This,

1		speculative factors including, however, is not the
2		specifically, future revenues.” complete language of
3		Section 4.2.
4	4.	Section 4.2 of the ARA states that the
5		Termination Obligation shall be
6		determined by looking “at the gross
7		revenues received under the [ARA]
8		during the twelve months preceding the
9		termination date from then existing
10		licensees that remain with or affiliate
11		with the Terminating Party.”
12	5.	Section 4.4 of the ARA states that
13		“Except as specifically provided herein
14		neither party will owe any obligation to
15		the other following termination of the
16		[ARA], except for final accounting and
17		settlement of any previously accrued
18		license fees . . . .”
19	6.	Following termination of the ARA on
20		September 30, 2015, Bennion &
21		Deville Fine Homes Inc. and Bennion
22		& Deville Fine Homes SoCal Inc. did
23		not remain with or affiliate with WSC.
24		Disputed. WSC engaged
25		in a series of conduct
26		during 2014 that resulted
27		in the constructive
28		termination of the ARA
		long before September
		30, 2015. <i>See</i> FAC, D.E.
		31, Counts 3 & 4; Decl.
		of Joseph R. Deville
		(“Deville Decl.”), ¶¶ 11,

	<b>B&amp;D Parties' Uncontroverted Facts and Evidence (sequentially numbered from WSC's facts for ease of reference)</b>	<b>Supporting Evidence</b>
7.	This lawsuit involves a series of franchise relationships. The ARA is not the only contract at issue.	FAC, D.E. 31, ¶¶ 15, 18.
8.	As the area representative, Services SoCal was tasked with two distinct responsibilities: (i) to offer and sell new Windermere real estate franchises in the Southern California region, and (ii) to provide certain support and auxiliary services to the new and existing Windermere franchisees in the Southern California region.	Decl. Jeffrey A. Feasby ("Feasby Decl."), D.E. 154-4, Ex. 1, §§ 2, 3.
9.	In exchange for these services, Services SoCal was to receive (i) 50% of all initial franchise fees paid by new and renewing franchisees in Southern	Feasby Decl., D.E. 154-4, Ex. 1, §§ 3, 10.

<sup>1</sup> The Declaration of Joseph R. Deville was submitted in connection with the B&D Parties' opposition to WSC's unsuccessful application for right to attach orders and orders for issuance of writs of attachment. Deville Decl., D.E. 73-2. For the convenience of the Court, this declaration will be submitted concurrently with Services SoCal's opposition to WSC's January 31, 2018, motion for partial summary judgment.

1		California, and (ii) 50% of all	
2		continuing royalties paid by all	
3		franchisees (new and existing) in	
4		Southern California.	
5	10.	The ARA was for a perpetual term and	Feasby Decl., D.E. 154-
6		could only be terminated consistent	4, Ex. 1, § 4.
7		with the “Term and Termination”	
8		language at Section 4 of the ARA.	
9	11.	WSC’s general counsel, Paul S.	Dec. of Kevin A. Adams
10		Drayna (“Drayna”), drafted the ARA.	(“Adams Decl.”), Ex. A,
11			42:24-43:14.
12	12.	Section 4.1(b) of the ARA provides	Feasby Decl., D.E. 154-
13		that either party may terminate the	4, Ex. 1, § 4.1(b).
14		ARA “upon one hundred eighty (180)	
15		days written notice to the other party.”	
16	13.	Termination of the ARA pursuant to	Feasby Decl., D.E. 154-
17		Section 4.1(b) triggers the	4, Ex. 1, § 4.2.
18		“Termination Obligation” identified in	
19		Section 4.2.	
20	14.	The Termination Obligation expressly	Feasby Decl., D.E. 154-
21		requires the terminating party to pay	4, Ex. 1, § 4.2.
22		the terminated party “an amount equal	
23		to the terminated party’s fair market	
24		value in the [ARA].”	
25	15.	The fair market value is calculated as	Feasby Decl., D.E. 154-
26		follows: “The fair market value of the	4, Ex. 1, § 4.2.
27		Terminated Party’s interest in the	
28		Agreement will be determined by	

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	<p>mutual agreement of the parties or, if unable to reach agreement, by each party selecting an appraiser and the two appraisers selecting a third appraisers. 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.”</p>	
16.	<p>The ARA, at Section 4.3, also identifies how the fair market value arrived at through the above methodology is to be paid by the terminating party to the terminated party.</p>	<p>Feasby Decl., D.E. 154-4, Ex. 1, § 4.3.</p>
17.	<p>Section 4.3 of the ARA states: “[t]he Termination Obligation shall be paid in monthly installments . . . . Monthly</p>	<p>Feasby Decl., D.E. 154-4, Ex. 1, § 4.3.</p>

1		installments in an amount equal to	
2		[25%] of the Continuing License Fees,	
3		if any, received by the terminating	
4		Party from licensees in the Region	
5		existing at the termination date and	
6		remaining with or affiliating with the	
7		Terminating Party.”	
8	18.	In 2014, WSC engaged in a series of	<i>See</i> FAC, D.E. 31,
9		conduct that breached both the express	Counts 3 & 4; Deville
10		and implied terms of the ARA.	Decl., ¶¶ 11, 62-78.
11	19.	Among other things, WSC breached	FAC, D.E. 31, Counts 3
12		the ARA by refusing, in August 2014	& 4; Feasby Decl., D.E.
13		and thereafter, to prepare and register	154-4, Ex. 1, §§ 2, 7, 10;
14		with the California Department of	Denville Decl., ¶¶ 62-68;
15		Business Oversight the franchise	Adams Decl., Ex. A, at
16		disclosure documents required by law	309:17-310:10.
17		and essential to Services SoCal’s	
18		operation as area representative.	
19	20.	WSC’s failure to register the franchise	FAC, D.E. 31, ¶ 116;
20		disclosure documents with the	Feasby Decl., D.E. 154-
21		California Department of Business	4, Ex. 1, §§ 3, 10;
22		Oversight deprived Services SoCal of	Denville Decl., ¶ 69;
23		its primary benefit under the ARA –	Adams Decl., Ex. A, at
24		<i>i.e.</i> , the initial franchise fees and	309:17-310:10.
25		royalty stream derived from new	
26		franchise sales.	
27	21.	By taking away Services SoCal’s	FAC, D.E. 31, ¶ 116;
28		ability to offer and sell new	Feasby Decl., D.E. 154-

1	Windermere franchises, WSC	4, Ex. 1, §§ 3, 10;
2	constructively terminated the ARA.	Deville Decl., ¶¶ 62-68;
3		Adams Decl., Ex. A, at
4		309:17-310:10.
5	22. WSC breached Section 4.1(b) of the	FAC, D.E. 31, ¶ 117;
6	ARA by terminating the ARA without	Deville Decl., ¶¶ 62-68;
7	first providing 180 days written notice	Adams Decl., Ex. A, at
8	of termination.	309:17-310:10.
9	23. WSC breached Section 2 of the ARA	FAC, D.E. 31, ¶ 163(a);
10	by failing to provide Services SoCal	Deville Decl., ¶¶ 62-68;
11	with the uninterrupted right to offer	Adams Decl., Ex. A, at
12	Windermere franchised businesses in	309:17-310:10.
13	Southern California.	
14	24. WSC breached Section 7 of the ARA	FAC, D.E. 31, ¶¶ 163(f)-
15	by failing to (i) prepare and file all	(g); Deville Decl., ¶¶ 62-
16	franchise registration materials	68; Adams Decl., Ex. A,
17	required under the law, and (ii)	at 309:17-310:10.
18	maintain the registration of a franchise	
19	disclosure document for the Southern	
20	California region	
21	25. WSC breached Section 10 of the ARA	FAC, D.E. 31, ¶ 163(h);
22	by depriving Services SoCal of its right	Deville Decl., ¶¶ 62-68;
23	to offer new Windermere franchises	Adams Decl., Ex. A, at
24	rendering it unable to collect initial	309:17-310:10.
25	franchise fees and continuing license	
26	fees from new franchisees	
27	26. WSC's conduct during 2014 also	FAC, D.E. 31, ¶¶ 170(b),
28	breached the implied covenant of good	(d), (e); Deville Decl., ¶¶



1		faith and fair dealing in the ARA	62-68; Adams Decl., Ex.
2		because it acted in a way that thwarted	A, at 309:17-310:10.
3		Services SoCal's ability to receive the	
4		benefits of being an area representative	
5		in the Windermere franchise system	
6	27.	On January 28, 2015, WSC sent a letter	FAC, D.E. 31, ¶ 134;
7		to Services SoCal announcing that	Deville Decl., ¶¶ 134,
8		WSC was "exercising its right to	Ex. V.
9		terminate [the] Area Representation	
10		Agreement [...] pursuant to the 180-	
11		day notice provision of Paragraph 4.1."	
12	28.	Because WSC had already	FAC, D.E. 31, ¶¶ 134-35;
13		constructively terminated the ARA,	Deville Decl., ¶¶ 62-68;
14		Services SoCal contends that the	Adams Decl., Ex. A, at
15		January 28, 2015 termination letter has	309:17-310:10.
16		no legal effect.	
17	29.	Services SoCal alleges that WSC	FAC, D.E. 31, 163(e).
18		breached Section 4.2 of the ARA by	
19		terminating the ARA under Section	
20		4.1(b) without complying with the	
21		Termination Obligation – <i>i.e.</i> , the	
22		payment of fair market value of	
23		Services SoCal's interest in the ARA –	
24		identified in Section 4.2.	
25	30.	On January 31, 2018, WSC filed this	Adams Decl., ¶¶ 5, 6;
26		Motion without first meeting and	D.E. 154.
27		conferring with counsel for the B&D	
28		Parties.	

1	31.	On February 2, 2018, the B&D Parties' counsel wrote to WSC's counsel requesting that WSC withdraw its motion for failure to meet and confer as required by Local Rule 7-3.	Adams Decl., ¶ 7, Ex. B.
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6	32.	WSC's counsel refused to withdraw the motion unless the B&D Parties "would like to stipulate to the relief sought in the motion."	Adams Decl., ¶ 7, Ex. B.
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10	33.	Franchisees B&D Fine Homes and B&D SoCal did not depart the Windermere system until September 30, 2015, and well after the ARA was terminated.	D.E. 154-3 (Declaration of Paul Drayna, ¶¶ 7-8.)
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15  
16 Dated: February 8, 2018

**MULCAHY LLP**

17  
18 By: /s/ Kevin A. Adams

19 Kevin A. Adams

20 *Attorneys for Plaintiffs and Counter-*  
21 *Defendants*