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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.

AND RELATED COUNTERCLAIMS

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

*Hon. Manual L. Real*

**PLAINTIFFS/COUNTER-  
DEFENDANTS' MEMORANDUM  
OF CONTENTIONS OF FACT AND  
LAW [L.R. 16-4]**

Courtroom: 8

Action Filed: September 17, 2015

Pretrial Conf.: September 19, 2016

Trial: October 18, 2016

1     **I. INTRODUCTION**

2             Plaintiffs and Counter-Defendants Bennion & Deville Fine Homes, Inc.  
3     ("B&D Fine Homes"), Bennion & Deville Fine Homes SoCal, Inc. ("B&D SoCal"),  
4     Windermere Services Southern California, Inc. ("Services SoCal"), (collectively,  
5     "Plaintiffs") and Counter-Defendants Robert L. Bennion and Joseph R. Deville (all  
6     collectively referred to as the "B&D Parties" herein) submit this Memorandum of  
7     Contentions of Fact and Law pursuant to C.D. Cal. L.R. 16-4.

8     **II. PLAINTIFFS' CLAIMS [L.R. 16-4.1(a)-(c)]**

9             **A. Summary of Plaintiffs' Claims [L.R.16-4.1(a)]**

10            Plaintiffs bring the following claims:

11            **Claim 1 – Breach of Contract:** WSC breached its Coachella Valley  
12     Franchise Agreement with B&D Fine Homes and Services SoCal.

13            **Claim 2 – Breach of the Implied Covenant of Good Faith and Fair**  
14     **Dealing:** WSC breached the implied covenant of good faith and fair dealing in its  
15     Coachella Valley Franchise Agreement with B&D Fine Homes and Services SoCal.

16            **Claim 3 – Breach of Contract:** WSC breached its Area Representation  
17     Agreement with Services SoCal.

18            **Claim 4 – Breach of the Implied Covenant of Good Faith and Fair**  
19     **Dealing:** WSC breached the implied covenant of good faith and fair dealing in its  
20     Area Representation Agreement with Services SoCal.

21            **Claim 5 – Breach of Contract:** WSC breached its SoCal Franchise  
22     Agreement with B&D SoCal and Services SoCal.

23            **Claim 6 – Breach of the Implied Covenant of Good Faith and Fair**  
24     **Dealing:** WSC breached the implied covenant of good faith and fair dealing in its  
25     SoCal Franchise Agreement with B&D SoCal and Services SoCal.

26            **Claim 7 – Violation of the California Franchise Relations Act:** Services  
27     SoCal brings a claim against WSC for violating California Business and Professions  
28     Code Section 20020 (the California Franchise Relations Act).

1        **B.    Elements Required To Establish Plaintiffs' Claims [L.R.16-4.1(b)]**

2        The elements required to establish Plaintiffs' claims are as follows:

3        **Claims 1, 3, 5 (Breach of Contract)**

- 4            1. The parties entered into a contract;
- 5            2. Plaintiffs did all or substantially all of the significant things that the
- 6                contract required them to do or were otherwise excused from
- 7                performance;
- 8            3. Defendant failed to do something the contract required it to do; and
- 9            4. Plaintiffs were harmed by Defendant's breach of contract.

10       CACI No. 303; *Richman v. Hartley*, 224 Cal.App.4th 1182, 1186 (2014).

11        **Claims 2, 4, 6 (Breach of the Implied Covenant of Good Faith and Fair**

12        **Dealing)**

- 13            1. The parties entered into a contract;
- 14            2. Plaintiffs did all or substantially all of the significant things that the
- 15                contract required them to do or were otherwise excused from
- 16                performance;
- 17            3. Defendant unfairly interfered with Plaintiffs' right to receive the
- 18                benefits of the contract; and
- 19            4. Plaintiffs were harmed by Defendant's breach of contract.

20       CACI No. 325; *Communale v. Traders & General Ins. Co.*, 50 Cal.2d 654, 658

21       (1958).

22        **Claim 7 (Violation of the California Franchise Relations Act)**

- 23            1. Franchisor terminated a franchise prior to the expiration of its term; and
- 24            2. Franchisor terminated without good cause.

25       "Good cause shall be limited to the failure of the franchisee to substantially comply

26       with the lawful requirements imposed upon the franchisee by the franchise

27       agreement after being given notice at least 60 days in advance of the termination and

28       a reasonable opportunity, which in no event shall be less than 60 days from the date

1 of the notice of noncompliance, to cure the failure.” Cal. Bus. & Prof. Code § 20020.

2 **C. Brief Description of Key Evidence In Support Of Plaintiffs’ Claims**

3 **[L.R.16-4.1(c)]**

4 **Claim 1 – Breach of Contract:** As the franchisor of the Windermere brand,  
5 WSC was obligated to make available for use by its franchisees and area  
6 representatives a fully functional Windermere franchise system. It is both the  
7 “system” and the brand that franchisees purchase at the time they contract with  
8 Windermere.

9 While WSC appears to have created a fully functional franchise system for  
10 use by its franchisees in the State of Washington – WSC’s home state – the system  
11 created by Windermere was not transferrable or applicable to franchisees operating  
12 in the State of California. For instance, the technology offered by Windermere to its  
13 franchisees and necessary for the day-to-day activities of real estate agents did not  
14 properly function in connection with California’s multiple listing real estate services  
15 (*i.e.*, the MLS) – the real estate directories relied upon by all real estate agents in  
16 California. Because of this, the B&D Parties were forced to create their own  
17 technology, use it in the operation of their businesses, and offer it to other  
18 Windermere franchisees in the region. WSC provided little or no support to its  
19 California affiliates other than allowing them to use the Windermere brand.  
20 Additionally, WSC failed to provide local and regional marketing and advertising  
21 support crucial to the success of any franchise system in a competitive marketplace.

22 WSC’s real estate technology was mostly inapplicable and unusable in the  
23 Southern California region. In exchange for the technology fees that WSC received  
24 it was obligated to provide certain technology services needed by the real estate  
25 franchises and their agents to post and manage real property listings and to otherwise  
26 carry out their real estate business. However, WSC’s technology was inferior.  
27 Examples of the shortcomings of WSC’s technology include the following:

- 28
  - Properties listed by the Windermere Southern California agents often

1 did not properly display (if at all) on WSC's websites;

- 2 • WSC's technology team was inexperienced at best, often causing  
3 numerous unnecessary delays to the posting and visibility of Southern  
4 California real estate listings;
- 5 • Repeated listing syndication problems for agents' listings on third-party  
6 websites, often resulting in extended disruption in the syndication (i.e.,  
7 publishing) of the listings of Bennion and Deville's agents; and
- 8 • The windermere.com website failed to display the listings and/or  
9 pictures of real estate listing belonging to numerous Southern  
10 California agents.

11 As such, Plaintiffs were forced to create and offer their own technology  
12 services at significant cost and expense. Despite the numerous shortcomings of  
13 WSC's technology services and even though Plaintiffs had to use their own  
14 technology services, Plaintiffs continued to pay their monthly, non-trivial  
15 technology fees in an amount that far exceeded the services provided.

16 In light of WSC's short comings as a franchisor, WSC breached Section 1 of  
17 the Coachella Valley Franchise Agreement by failing to provide the promised  
18 "variety of services" designed to enhance Plaintiffs' "profitability".

19 Similarly, WSC breached Section 2 by failing to provide Plaintiffs with a  
20 viable "Windermere System" as defined in the agreement. Again, WSC breached  
21 both sections 1 and 2 by failing to provide those services required by the agreement  
22 and necessary for the success of a franchisee in a competitive marketplace.

23 In addition to WSC's failure to provide a viable franchise system, WSC also  
24 failed to protect its brand from the counter-marketing campaign of Windermere  
25 Watch. Windermere Watch severely damaged the Windermere brand in Southern  
26 California. Starting around 2005, Gary Kruger, a disgruntled former Seattle  
27 Windermere client, and his associates initiated an anti-marketing campaign under the  
28 name "Windermere Watch," which was specifically designed to direct defamatory  
statements, materials, and focused conduct against Windermere, and its franchisees

1 and real estate agents via the website [www.windermerewatch.com](http://www.windermerewatch.com). The website has  
2 been (and continues to be) used by Kruger as a tool to generate and/or spread  
3 negative and derogatory articles and comments concerning Windermere's purported  
4 business practices, litigation, owners, executives, brokers, agents, and general  
5 participation in the real estate market.

6 Windermerewatch.com is utilized and designed by Kruger to maximize its  
7 search engine presence. As a result, when internet users search for Windermere on  
8 Google and other internet search engines, windermerewatch.com has appeared as  
9 one of the top search results – often ahead of Windermere's own website. The  
10 obvious (if not express) intent of Kruger is to use windermerewatch.com to turn  
11 potential clients, agents, and franchisees away from Windermere.

12 Although WSC was legally obligated under the terms of the Coachella Valley  
13 Franchise Agreement, the SoCal Franchise Agreement, and the Area Representative  
14 Agreement to take action to protect the Windermere System, trademark, and brand,  
15 and to prevent unfair competition against its franchisees and their businesses, WSC  
16 did virtually nothing to combat Windermere Watch's anti-Windermere marketing  
17 campaign in Southern California.

18 The Windermere Watch anti-marketing campaign has had a significant and  
19 monetarily damaging effect on Plaintiffs' businesses. Windermere's competitors  
20 incorporate information from the site in pitches to both agents and clients. WSC's  
21 failure to protect the brand in the face of the anti-marketing campaign regularly  
22 caused the loss of listings, clients, and agents.

23 Because of this, WSC breached Section 4 by failing to take necessary action  
24 (legal or otherwise) to prevent infringement of the Windermere trademark or the  
25 related unfair competition faced by Plaintiffs in the Southern California region as a  
26 result of the Windermere Watch websites. Similarly, WSC breached Section 3(A) of  
27 the Modification Agreement failing to make commercially reasonable efforts to  
28 curtail Windermere Watch and related attacks on the Windermere brand in Southern

1 California.

2 **Claim 2 – Breach of the Implied Covenant of Good Faith and Fair**

3 **Dealing:** WSC breached the implied covenant of good faith and fair dealing in its  
4 Coachella Valley Franchise Agreement with B&D Fine Homes and Services SoCal  
5 by:

- 6 • Failing to provide adequate technology services in return for the excessive  
7 technology fees;
- 8 • Failing to provide a viable Windermere System to the Southern California  
9 region. To the extent WSC provided service or assistance, it was worthless;
- 10 • Improperly recruiting Plaintiffs' sales agents and other employees to join  
11 WSC and other Windermere offices;
- 12 • Terminating Services SoCal as the Area Representative for the Southern  
13 California region and thereby negating Plaintiffs' 50% reduction in franchise  
14 fees owed to WSC under the Coachella Valley Franchise Agreement; and
- 15 • Terminating Services SoCal as the Area Representative for the Southern  
16 California region (as discussed below) and not providing a comparable  
17 replacement.

18 **Claim 3 – Breach of Contract:** WSC breached Section 2 of the Area  
19 Representation Agreement with Services SoCal by failing to provide Services SoCal  
20 with the uninterrupted right to offer Windermere franchised businesses in Southern  
21 California.

22 Under the Federal Trade Commission's ("FTC") Amended Franchise Rule,  
23 located at title 16, part 436 of the Code of Federal Regulations, a franchisor is  
24 required to disclose to prospective franchisees a franchise disclosure document  
25 ("FDD") that contains a copy of the form franchise agreement and twenty-three  
26 specific "Items" about the franchised business, including specific information about  
27 the franchisor's executives and managers, its relevant litigation history, the expected  
28 business of the franchisee, the costs and fees associated with the franchised business,

1 the financial wellbeing of the franchisor, and the conditions in which the franchise  
2 can be terminated or renewed, among other things. 16 C.F.R. § 436.

3 The California Franchise Investment Law (“CFIL”) builds upon the FTC’s  
4 Amended Franchise Rule and serves as the primary vehicle for regulating the  
5 registration, offer, and sale of franchises in California. Under the CFIL, a franchisor  
6 must register a franchise application – including its current FDD – with the  
7 California Department of Business Oversight (“DBO”) before a franchise can be  
8 offered or sold within the state.<sup>7</sup> Cal. Corp. Code §§ 31110, 31119. A franchisor’s  
9 California registration must be renewed every year. Cal. Corp. Code § 31120. Once  
10 the franchise application is properly registered with – and approved by – the DBO,  
11 the FDD, together with copies of all proposed agreements and other exhibits, must  
12 be provided to any prospective franchisee at least 14 days before the earlier of the  
13 day the franchisee executes the franchise agreement or pays the franchisor any  
14 consideration for the franchised business. Cal. Corp. Code § 31119(a).

15 In 2013, WSC filed a franchise registration renewal for Northern California on  
16 April 19, 2013, but for unknown reasons, delayed in filing its Southern California  
17 franchise registration until June 17, 2013. Because of WSC’s late Southern  
18 California franchise registration filing, it was statutorily prohibited from offering or  
19 selling franchises in Southern California from April 21, 2013 to July 5, 2013, when  
20 the DBO approved of WSC’s June 17, 2013. Thereafter, in 2014, WSC elected not  
21 to renew its Southern California offering, thereby precluding Services SoCal from  
22 bringing on any new franchises after April 20, 2014.

23 WSC similarly breached Section 7 by failing to promptly and diligently  
24 commence and pursue the preparation and filing of all franchise registration filings  
25 required under California law and/or the United States of America and in particular  
26 failing to maintain the registration of the Southern California FDD. WSC breached  
27 Section 10 by depriving Services SoCal of its right to offer new Windermere  
28 franchises rendering it unable to collect initial franchise fees and continuing license



1 fees from new franchisees.

2 WSC breached Section 4.2 by failing to pay Services SoCal the termination  
3 fee – i.e. the fair market value of its interest in the Area Representation Agreement –  
4 following termination without cause.

5 WSC breached section 3 of Exhibit A by attempting to terminate the Area  
6 Representation Agreement under the pretense that Services SoCal was the  
7 “guarantor” of the franchise fees owed by the franchisees in the Southern California  
8 region. Under Section 3 of Exhibit A to the Area Representation agreement, it is  
9 specifically noted that Services SoCal would not be a guarantor.

10 WSC breached Section 2 by for failing to provide a viable “Windermere  
11 System” as defined in the agreement and discussed above. WSC breached Section 3  
12 by failing to provide servicing support in connection with the marketing, promotion  
13 and administration of the Trademark and Windermere System as described above.  
14 WSC breached Section 3 by failing to make available to Services SoCal competent  
15 “key people” necessary to assist Services SoCal in carrying out its obligations to  
16 offer and sell franchises as the Area Representative;

17 As discussed above, WSC breached Section 13 by failing to provide a  
18 technology system to support the operation and development of the franchise system  
19 in Southern California, and for unilaterally increasing the technology fees to  
20 amounts that on information and belief bear no relationship to the amounts actually  
21 spent on Windermere’s technology system.

#### 22 **Claim 4 – Breach of the Implied Covenant of Good Faith and Fair**

23 **Dealing:** WSC breached the implied covenant of good faith and fair dealing in its  
24 Area Representation Agreement with Services SoCal by:

- 25 • Failing to provide a viable Windermere System in the Southern  
26 California region. To the extent WSC provided service or assistance, it  
27 was worthless;
- 28 • Taking action to interfere with and damage many of the relationships

1 between Services SoCal and franchisees in the Southern California  
2 region;

- 3 • Soliciting Services SoCal's participation in offers and sales of  
4 franchises in violation of the franchise laws;
- 5 • Making effort to acquire Services SoCal's superior services and related  
6 technology; and
- 7 • Failing to act in good faith and conduct its business such that Plaintiffs  
8 received the benefits of being an Area Representative in the franchise  
9 system.

10 **Claim 5 – Breach of Contract:** WSC breached Section 1 of the SoCal  
11 Franchise Agreement with B&D SoCal and Services SoCal by failing to provide  
12 Plaintiffs with a viable "Windermere System" as defined in the agreement. WSC  
13 breached Section 3 by failing to provide the promised "guidance" to Plaintiffs with  
14 respect to the "Windermere System".

15 WSC breached Section 6 by failing to take necessary action (legal or  
16 otherwise) to prevent infringement of the Windermere trademark or the related  
17 unfair competition faced by Plaintiffs in the Southern California region as a result of  
18 the Windermere Watch websites. WSC similarly breached Section 3(A) of the  
19 Modification Agreement by failing to make commercially reasonable efforts to  
20 curtail Windermere Watch and related attacks on the Windermere brand in Southern  
21 California.

22 **Claim 6 – Breach of the Implied Covenant of Good Faith and Fair**  
23 **Dealing:** WSC breached the implied covenant of good faith and fair dealing in its  
24 SoCal Franchise Agreement with B&D SoCal and Services SoCal by:

- 25 • Failing to provide adequate technology services in return for the  
26 excessive technology fees;
- 27 • Failing to provide a viable Windermere System to the Southern  
28 California region. To the extent WSC provided service or assistance, it

1 was worthless;

- 2 • Improperly recruiting Plaintiffs' sales agents and other employees to
- 3 join WSC and other Windermere offices;
- 4 • Terminating Services SoCal as the Area Representative for the
- 5 Southern California region and thereby negating Plaintiffs' 50%
- 6 reduction in franchise fees owed to WSC under the SoCal Franchise
- 7 Agreement; and
- 8 • Terminating Services SoCal as the Area Representative for the
- 9 Southern California region and not providing a comparable
- 10 replacement.

11 **Claim 7 – Violation of the California Franchise Relations Act:** Services  
12 SoCal brings a claim against WSC for violating California Business and Professions  
13 Code Section 20020 (the California Franchise Relations Act). The California  
14 Franchise Relations Act ("CFRA"), at California Business & Profession Code §  
15 20020, precludes WSC from terminating the Area Representation Agreement absent  
16 "good cause." WSC's termination (constructive or by written notice) of the Area  
17 Representation Agreement without good cause violated § 20020 of the CFRA.

18 "Good cause shall be limited to the failure of the franchisee to substantially  
19 comply with the lawful requirements imposed upon the franchisee by the franchise  
20 agreement after being given notice at least 60 days in advance of the termination and  
21 a reasonable opportunity, which in no event shall be less than 60 days from the date  
22 of the notice of noncompliance, to cure the failure." Cal. Bus. & Prof. Code § 20020.  
23 WSC did not fulfill the requirements of this statute for showing good cause.

24 **III. DEFENDANT'S COUNTERCLAIMS AND AFFIRMATIVE**

25 **DEFENSES [L.R. 16-4.1(d)-(f)]**

26 **A. Summary of Defendant's Counterclaims and Affirmative Defenses**  
27 **[L.R.16-4.1(d)]**

28 Defendant and Counter-Claimant Windermere Real Estate Services

Company's ("WSC") bring the following counterclaims:

**Claim 1 – Breach of Contract:** WSC alleges that Bennion, Deville and B&D Fine Homes breached the Coachella Valley Franchise Agreement.

**Claim 2 – Breach of Contract:** WSC alleges that Services SoCal breached the Area Representation Agreement.

**Claim 3 – Breach of Contract:** WSC alleges that Bennion, Deville and B&D SoCal breached the SoCal Franchise Agreement.

**Claim 4 – Breach of Contract:** WSC alleges that B&D Fine Homes, Services SoCal and B&D SoCal breached the Modification Agreement.

**Claim 8 – Open Book Account:** WSC seeks payment against Bennion, Deville, Services SoCal, B&D SoCal and B&D Fine Homes for alleged debts.

**Affirmative Defense 1:** Failure to State a Cause of Action

**Affirmative Defense 2:** Uncertainty

**Affirmative Defense 3:** Statute of Limitations

**Affirmative Defense 4:** Parol Evidence Rule

**Affirmative Defense 5:** Intervening or Superseding Acts of Third Parties

**Affirmative Defense 6:** Waiver

**Affirmative Defense 7:** No Actual Loss

**Affirmative Defense 8:** Set-Off

**Affirmative Defense 9:** Detrimental Reliance

**Affirmative Defense 10:** Unclean Hands

**Affirmative Defense 11:** Estoppel

**Affirmative Defense 12:** Compliance with Applicable Laws

**Affirmative Defense 13:** Valid Business Purpose

**Affirmative Defense 14:** Apportionment

**Affirmative Defense 15:** Damages Not Ascertainable

**Affirmative Defense 16:** Full Performance

**Affirmative Defense 17:** Consent

1       **Affirmative Defense 18:** Discharge

2       **Affirmative Defense 19:** Fault of Plaintiffs

3       **Affirmative Defense 20:** Lack of Causation

4       **Affirmative Defense 21:** Good Faith

5       **Affirmative Defense 22:** Unjust Enrichment

6       **Affirmative Defense 23:** Conduct Privileged

7       **Affirmative Defense 24:** Conduct Justified

8       **Affirmative Defense 25:** Failure to Mitigate

9       **B.     Elements Required To Establish Defendant's Counterclaims**

10      **[L.R.16-4.1(e)]**

11       The elements required to establish Defendant's claims are as follows:

12       **Claims 1-4 (Breach of Contract)**

- 13           1. The parties entered into a contract;
- 14           2. Plaintiffs did all or substantially all of the significant things that the
- 15           contract required them to do or were otherwise excused from
- 16           performance;
- 17           3. Defendant failed to do something the contract required it to do; and
- 18           4. Plaintiffs were harmed by Defendant's breach of contract.

19      CACI No. 303; *Richman v. Hartley*, 224 Cal.App.4th 1182, 1186 (2014).

20       **Claim 8 (Open Book Account)**

- 21           1. The parties had financial transactions:
- 22           2. The plaintiff kept an account of the debits and credits involved in the
- 23           transactions;
- 24           3. The defendant owes plaintiff money on the account; and
- 25           4. The amount of money that defendant owed plaintiff.

26      CACI No. 372; *Robin v. Smith*, 132 Cal.App.2d 288, 291 (1955).

1           **C.     Brief Description of Key Evidence In Opposition to Counterclaims**

2     **[L.R.16-4.1(f)]**

3           **Claim 1 – Breach of Contract:** WSC alleges that Bennion, Deville and B&D  
4 Fine Homes breached the Coachella Valley Franchise Agreement by failing and  
5 refusing to pay required contractual fees to WSC. WSC claims that as of September  
6 30, 2015, the amount past due and owing to WSC under the Coachella Valley  
7 Franchise Agreement is \$629,968.64. However, Bennion, Deville and B&D Fine  
8 Homes’ obligation to pay these fees was excused by WSC’s failure to perform its  
9 concurrent obligations under the agreement. WSC’s breaches of the Coachella  
10 Valley Franchise Agreement (as reflected above) excused the performance of  
11 Bennion, Deville and B&D Fine Homes under the Coachella Valley Franchise  
12 Agreement.

13           WSC also alleges that Plaintiffs breached the Coachella Valley Franchise  
14 Agreement by their continued, knowing and intentional misuse of the Windermere  
15 name and Trademark following expiration/termination of the Coachella Valley  
16 Franchise Agreement on September 30, 2015. However, Plaintiffs quickly  
17 relinquished any Windermere trademarks following their exit of the Windermere  
18 brand. Due to the 15 year relationship of the parties, the brand Windermere was  
19 substantially intertwined with the real estate services offered by Bennion, Deville  
20 and B&D Fine Homes and these parties worked as quickly as commercially  
21 reasonable to distance themselves from the Windermere brand following the  
22 termination of the relationship. In any event, WSC was not harmed by any alleged  
23 continued use by Bennion, Deville and B&D Fine Homes of the Windermere mark  
24 following the termination of the parties’ relationship.

25           **Claim 2 – Breach of Contract:** WSC alleges that Services SoCal breached  
26 the Area Representation Agreement by failing to provide “prompt, courteous and  
27 efficient service” to Windermere franchisees and by failing to deal “fairly and  
28 honestly” with members of the Windermere System. Services SoCal intends to

1 present evidence at trial to show that it went above and beyond in the support that it  
2 provided to the franchisees in the Southern California region and that WSC left these  
3 franchisees without any support or assistance other than the use of the deteriorating  
4 Windermere brand.

5 WSC alleges that Services SoCal breached the Area Representation  
6 Agreement by failing and refusing to collect and remit fees from Windermere  
7 franchisees, including from Defendants B&D Fine Homes and WSSC themselves.  
8 However, Services SoCal is not a guarantor of any of the fees. Section 3 of Exhibit  
9 A to the Area Representation Agreement explicitly states that "It is understood that  
10 the collection of fees will be the responsibility of Area Representative, but Area  
11 Representative will not be responsible for payment of uncollectable fees." The  
12 evidence will show that Services SoCal is not a guarantor of these payments by other  
13 franchisees in the region and took reasonable efforts to compel payment by the  
14 franchisees.

15 WSC alleges that Services SoCal breached the Area Representation  
16 Agreement by its continued, knowing and intentional misuse of the Windermere  
17 name and trademarks following expiration/termination of the Area Representation  
18 Agreement. However, the evidence will show that Services SoCal did not use the  
19 Windermere brand following the termination of the parties' agreement.

20 **Claim 3 – Breach of Contract:** WSC alleges that Bennion, Deville and B&D  
21 SoCal breached the SoCal Franchise Agreement by failing and refusing to pay  
22 required contractual fees to WSC since July 2014. WSC claims that as of September  
23 30, 2015, the amount past due and owing to WSC under the SoCal Franchise  
24 Agreement is \$192,630.22. However, Bennion, Deville and B&D Homes SoCal's  
25 obligation to pay these fees was excused by WSC's failure to perform its concurrent  
26 obligations under the agreement. However, Bennion, Deville and B&D SoCal's  
27 obligation to pay these fees was excused by WSC's failure to perform its concurrent  
28 obligations under the agreement. WSC's breaches of the SoCal Franchise

1 Agreement (as reflected above) excused the performance of Bennion, Deville and  
2 B&D SoCal under the SoCal Franchise Agreement.

3 WSC also alleges that Bennion, Deville and B&D SoCal breached the SoCal  
4 Franchise Agreement by their continued, knowing and intentional misuse of the  
5 Windermere name and Trademark following expiration/termination of the SoCal  
6 Franchise Agreement. However, Plaintiffs quickly relinquished any Windermere  
7 trademarks following their exit of the Windermere brand. Plaintiffs moved to  
8 establish their own brand, Bennion & Deville, immediately upon leaving  
9 Windermere. However, the evidence will show that Bennion, Deville and B&D  
10 SoCal did not use the Windermere brand following the termination of the parties'  
11 agreement.

12 **Claim 4 – Breach of Contract:** WSC alleges that B&D Fine Homes,  
13 Services SoCal and B&D SoCal breached the Modification Agreement by failing to  
14 remain with the Windermere System for the five (5) year period mandated by the  
15 Modification Agreement. WSC argues that B&D Fine Homes, Services SoCal and  
16 B&D SoCal are therefore required to repay to WSC a pro rata portion of the  
17 franchise fees waived under the Modification Agreement. WSC claims this amounts  
18 to \$386,056.57. However, B&D Fine Homes, Services SoCal and B&D SoCal's  
19 obligation to pay these fees was excused by WSC's failure to perform its concurrent  
20 obligations under the agreement. Moreover, WSC's termination of the Area  
21 Representation Agreement – and thereby terminating the franchise agreements –  
22 precluded the B&D Parties from remaining in the Windermere System. WSC cannot  
23 now claim breach of the agreement for conduct caused by WSC.

24 **Claim 8 – Open Book Account:** WSC seeks payment against Bennion,  
25 Deville, Services SoCal, B&D SoCal and B&D Fine Homes for alleged debts of  
26 \$1,208,655.43. However, Plaintiffs' obligation to pay any portions of these fees was  
27 excused by WSC's failure to perform its concurrent obligations under the applicable  
28 agreements. For the reasons set forth above, the B&D Parties' payments to WSC



1 were excused.

2 **D. Elements and Key Evidence In Opposition To Defendant's**  
3 **Affirmative Defenses [L.R.16-4.1(e)-(f)]**

4 **Affirmative Defense 1: Failure to State a Cause of Action.**

5 Failure to state a claim is not an affirmative defense. *E.g. Barnes v. AT & T*  
6 *Pension Ben. Plan-Nonbargained Program* (N.D. Cal. 2010) 718 F.Supp.2d 1167,  
7 1173; *Perez v. Gordon & Wong Law Group, P.C.* (N.D. Cal., Mar. 26, 2012, No. 11-  
8 CV-03323-LHK) 2012 WL 1029425, at \*11.

9 **Affirmative Defense 2: Uncertainty**

10 Uncertainty is not an affirmative defense. *E.g. G & G Closed Circuit Events,*  
11 *LLC v. Nguyen* (N.D. Cal., June 10, 2013, No. 5:12-CV-03068 EJD) 2013 WL  
12 2558151, at \*4; *J & J Sports Productions, Inc. v. Gidha* (E.D. Cal., Feb. 17, 2012,  
13 No. CIV S-10-2509 KJM) 2012 WL 537494, at \*3.

14 **Affirmative Defense 3: Statute of Limitations**

15 WSC has not specified which statute of limitations are applicable to what  
16 claims. Regardless, the evidence will show WSC attempted to string Plaintiffs along  
17 with regard to complying with its contractual obligations. As such, WSC will be  
18 unable to point to any certain date wherein it can state that the breaches occurred,  
19 were known and that the statute of limitations thereafter ran.

20 **Affirmative Defense 4: Parol Evidence Rule**

21 The parol evidence rule generally prohibits the introduction of either oral or  
22 written extrinsic evidence to vary, alter, or add to the terms of an integrated written  
23 agreement. *In re Gaines' Estate*, 15 Cal.2d 255, 264–265, 100 P.2d 1055 (1940);  
24 *Duncan v. McCaffrey Group, Inc.*, 200 Cal.App.4th 346, 363, 133 Cal.Rptr.3d 280  
25 (2011).

26 **Affirmative Defense 5: Intervening or Superseding Acts of Third Parties**

27 An intervening cause which breaks the chain of causation from the original act  
28 is itself regarded as the proximate cause of the injury and relieves the original actor

1 of liability. *Schrimsher v. Bryson*, 58 Cal. App. 3d 660, 664 (Cal. App. 2d Dist.  
2 1976). However, lack of causation is merely a denial of an element of the claims,  
3 therefore is not an affirmative defense. *Joe Hand Promotions, Inc. v. Davis*, 2012  
4 WL 4803923, at \*4 (N.D. Cal. Oct. 9, 2012).

#### 5 **Affirmative Defense 6: Waiver**

6 Waiver is an “intentional relinquishment of a known right with knowledge of  
7 its existence and the intent to relinquish it.” *adidas-Am., Inc. v. Payless Shoesource,*  
8 *Inc.*, 546 F.Supp.2d 1029, 1074 (D. Or. 2008). There is no evidence to establish that  
9 Plaintiffs relinquished or otherwise waived any contractual rights.

#### 10 **Affirmative Defense 7: No Actual Loss**

11 “A defense which demonstrates that plaintiff has not met its burden of proof  
12 as to an element plaintiff is required to prove is not an affirmative defense.”  
13 *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir.2002). On the  
14 other hand, “[a]n affirmative defense, under the meaning of Federal Rule of Civil  
15 Procedure 8(c), is a defense that does not negate the elements of the plaintiff’s  
16 claim, but instead precludes liability even if all of the elements of the plaintiff’s  
17 claim are proven.” *Roberge v. Hannah Marine Corp.*, No. 96–1691, 1997 WL  
18 468330, at \*3 (6th Cir.1997). Claiming that plaintiffs have not suffered an actual  
19 loss goes to the element of damages.

#### 20 **Affirmative Defense 8: Set-Off**

21 Set-off is an equitable doctrine under which a defendant may offset sums  
22 owing to the plaintiff against sums owing from plaintiff to defendant, with the result  
23 that the offsetting amounts are cancelled and the defendant is obligated to pay  
24 plaintiff only the net amount, if any. 2 Cal. Affirmative Def. § 44:1 (2d ed.);  
25 *Harrison v. Adams*, 20 Cal.2d 646, 648 (1942); *California Canning Peach Growers*  
26 *v. Williams*, 11 Cal.2d 233, 240-41 (1938). As described in Plaintiffs’ claims, there  
27 is significant evidence of damages and harm. WSC is not entitled to a set-off as it  
28 will be unable to establish its claims.

1           **Affirmative Defense 9: Detrimental Reliance**

2           Detrimental reliance is subsumed by the estoppel affirmative defense. *In re*  
3 *Marino*, 813 F.2d 1562, 1566 (9th Cir. 1987); *Kinzli v. City of Santa Cruz*, 539  
4 F.Supp. 887, 902 (N.D.Cal.1982). The elements of a cause of action for promissory  
5 estoppel are (1) a promise made by a defendant to one or more of the plaintiffs that  
6 is clear and unambiguous in its terms; (2) reasonable and foreseeable reliance on  
7 that promise by the plaintiff or plaintiffs to whom it was made; and (3) damage to  
8 that plaintiff or plaintiffs due to reliance on the promise. 2 Cal. Affirmative Def. §  
9 34:16 (2d ed.).

10           **Affirmative Defense 10: Unclean Hands**

11           The elements of unclean hands are that the defendant must demonstrate that  
12 the plaintiff's conduct is inequitable and that the conduct relates to the subject  
13 matter of its claims. *Emco v. Obst*, 2004 WL 1737355, \*4, no. CV 03-6432 (C.D.  
14 Cal. May 7, 2004); *Fuddruckers v. Doc's B.R. Others*, 826 F.2d 837, 847 (9th Cir.  
15 1987).

16           **Affirmative Defense 11: Estoppel**

17           Estoppel requires that "the party to be estopped must be apprised of the facts;  
18 the other party must be ignorant of the true state of facts, the party to be estopped  
19 must have intended that its conduct be acted upon, or so act that the other party had a  
20 right to believe that it was so intended; and the other party must rely on the conduct  
21 to its prejudice." *Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates,*  
22 *Inc.*, 115 Cal. App. 4th 1145, 1165-1166 (Cal. App. 2d Dist. 2004).

23           **Affirmative Defense 12: Compliance with Applicable Laws**

24           To adequately plead compliance with applicable laws as an affirmative  
25 defense, a party must provide notice as to what applicable laws and state and federal  
26 regulations were followed and what claims are barred by the alleged compliance.  
27 *Cervantes v. Cemex, Inc.*, No. 1:12-CV-01932-LJO, 2014 WL 6090414, at \*6 (E.D.  
28 Cal. Nov. 13, 2014) (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). WSC has not

1 done so here.

2 **Affirmative Defense 13: Valid Business Purpose**

3 “A defense which demonstrates that plaintiff has not met its burden of proof  
4 as to an element plaintiff is required to prove is not an affirmative defense.”

5 *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir.2002). On the  
6 other hand, “[a]n affirmative defense, under the meaning of Federal Rule of Civil  
7 Procedure 8(c), is a defense that does not negate the elements of the plaintiff’s  
8 claim, but instead precludes liability even if all of the elements of the plaintiff’s  
9 claim are proven.” *Roberge v. Hannah Marine Corp.*, No. 96–1691, 1997 WL  
10 468330, at \*3 (6th Cir.1997). WSC’s claim of a valid business purpose presumably  
11 goes to whether Plaintiffs satisfied the elements of breach of the implied covenant  
12 of good faith and fair dealing.

13 **Affirmative Defense 14: Apportionment**

14 “A defense which demonstrates that plaintiff has not met its burden of proof  
15 as to an element plaintiff is required to prove is not an affirmative defense.”

16 *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir.2002).

17 Claiming that a third party has caused the harm or damages suffered by Plaintiffs is  
18 not an affirmative defense but instead goes to whether Plaintiffs were harmed by  
19 WSC’s breach of contract.

20 **Affirmative Defense 15: Damages Not Ascertainable**

21 Section 3301 of the California Civil Code states that “[n]o damages can be  
22 recovered for a breach of contract which are not clearly ascertainable in both their  
23 nature and origin.” Cal. Civ. Code § 3301. “Where the fact of damages is certain, the  
24 amount of damages need not be calculated with absolute certainty. The only  
25 requirement is that a reasonable basis of computation be used, and the result reached  
26 can be a reasonable approximation.” *Acree v. General Motors Acceptance*  
27 *Corporation*, 92 Cal.App.4th 385, 398 (2001). Rather than an affirmative defense,  
28 this purported defense goes to whether Plaintiffs were harmed by WSC’s breach of

1 contract.

2 **Affirmative Defense 16: Full Performance**

3 A denial of allegations in the complaint is not a proper affirmative defense.  
4 *See Landmark Equity Fund, II, LLC v. Arias*, No. 1:15-CV-00202-JLT, 2015 WL  
5 4228906, at \*7 (E.D. Cal. July 10, 2015) (citing *Solis v. Couturier*, 2009 U.S. Dist.  
6 LEXIS 63271 at \*8–9, 2009 WL 2022343 (E.D.Cal. July 8, 2009) (holding that full  
7 performance is not a proper affirmative defense to a breach of contract claim).

8 **Affirmative Defense 17: Consent**

9 To prevail on the affirmative defense of consent, a defendant must prove that  
10 the plaintiff consented in advance to conduct of which it now complains. *Am. Nat.*  
11 *Bank v. Stanfill*, 205 Cal. App. 3d 1089, 1093 (Ct. App. 1988). WSC cannot do so  
12 here as to any of its' claims.

13 **Affirmative Defense 18: Discharge**

14 Claiming that WSC has performed by discharging its obligations is not an  
15 affirmative defense. A denial of allegations in the complaint is not a proper  
16 affirmative defense. *See Landmark Equity Fund, II, LLC v. Arias*, No. 1:15-CV-  
17 00202-JLT, 2015 WL 4228906, at \*7 (E.D. Cal. July 10, 2015) (citing *Solis v.*  
18 *Couturier*, 2009 U.S. Dist. LEXIS 63271 at \*8–9, 2009 WL 2022343 (E.D.Cal. July  
19 8, 2009) (holding that full performance is not a proper affirmative defense to a  
20 breach of contract claim).

21 **Affirmative Defense 19: Fault of Plaintiffs**

22 WSC's conclusory claim that Plaintiffs have been damaged by their own  
23 conduct is not an affirmative defense. Instead, this allegation goes to whether the  
24 elements of damages and causation have been met. *See Zivkovic v. S. California*  
25 *Edison Co.*, 302 F.3d 1080, 1088 (9th Cir.2002) ("A defense which demonstrates  
26 that plaintiff has not met its burden of proof as to an element plaintiff is required to  
27 prove is not an affirmative defense.")  
28

1           **Affirmative Defense 20: Lack of Causation**

2           Lack of causation is merely a denial of an element of the claims, therefore is  
3 not an affirmative defense. *Joe Hand Promotions, Inc. v. Davis*, 2012 WL 4803923,  
4 at \*4 (N.D. Cal. Oct. 9, 2012).

5           **Affirmative Defense 21: Good Faith**

6           WSC's claim that it acted in good faith and did not contribute to the alleged  
7 damages suffered by Plaintiffs goes to the element of causation. Lack of causation is  
8 merely a denial of an element of the claims, therefore is not an affirmative defense.  
9 *Joe Hand Promotions, Inc. v. Davis*, 2012 WL 4803923, at \*4 (N.D. Cal. Oct. 9,  
10 2012).

11           **Affirmative Defense 22: Unjust Enrichment**

12           The elements of unjust enrichment are: (1) receipt of a benefit; and (2) unjust  
13 retention of the benefit at the expense of another. *In re ConAgra Foods Inc.*, 908 F.  
14 Supp. 2d 1090, 1113 (C.D. Cal. 2012).

15           **Affirmative Defense 23: Conduct Privileged**

16           A privilege is a legal right to do a thing without suffering any legal liability  
17 for doing it. 2 Cal. Affirmative Def. § 41:21 (2d ed.) WSC has failed to point to any  
18 authority for its actions. Further, to the extent that WSC is arguing its conduct was  
19 not a breach or in compliance with the law, these go to elements of Plaintiffs' claims  
20 rather than being an affirmative defense.

21           **Affirmative Defense 24: Conduct Justified**

22           To show that conduct was justified, a party must show that it was justified in  
23 acting as defendant did and in making the statements and representations defendant  
24 made to the persons to whom the statements and representations were made. 2 Cal.  
25 Affirmative Def. § 41:21 (2d ed.) WSC has failed to point to any legal justification  
26 for its actions. Further, to the extent that WSC is arguing its conduct was not a  
27 breach or in compliance with the law, these go to elements of Plaintiffs' claims  
28 rather than being an affirmative defense.

1           **Affirmative Defense 25: Failure to Mitigate**

2           Generally, a plaintiff may not recover damages that could have been avoided  
3 if reasonable and appropriate mitigation efforts within the plaintiff's means had been  
4 taken. *Steelduct Co. v. Henger-Seltzer Co.*, 26 Cal.2d 634, 649 (1945). Plaintiffs'  
5 damages in this matter follow attempts to mitigate the harm by combating  
6 Windermere Watch and create their own technology systems. Consequently, WSC  
7 cannot establish any failure to mitigate.

8 **IV. ANTICIPATED EVIDENTIARY ISSUES [L.R. 16-4.1(h)]**

9           The B&D Parties expect to file several motions in limine to exclude WSC  
10 from offering facts or argument not produced during discovery or pled in this case.

11 **V. ANTICIPATED ISSUES OF LAW [L.R. 16-4.1(i)]**

12           The B&D Parties anticipate that WSC will attempt to argue that the Area  
13 Representation Agreement did not create a franchise relationship between WSC  
14 and Services SoCal as provided for in the California Franchise Investment Laws.  
15 In the event that WSC does indeed take this position, the B&D Parties intend to  
16 show that it is directly contracted by the California statute and related case law.

17 **VI. BIFURCATION OF ISSUES [L.R. 16-4.3]**

18           The Parties do not request that any issues be bifurcated.

19 **VII. JURY TRIAL [L.R. 16-4.4]**

20 **A. Issues Triable To The Jury**

21           The Parties both timely demanded a jury trial on all issues triable to a jury in  
22 their respective First Amended Complaint and First Amended Counterclaim. The  
23 following issues are triable to the jury:

- 24           1. Breach of contract under the theories set forth by the Parties. CACI No.  
25 303. This also subsumes Defendant's Affirmative Defense 4: Parol Evidence Rule;  
26 Affirmative Defense 5: Intervening or Superseding Acts of Third Parties;  
27 Affirmative Defense 7: No Actual Loss; Affirmative Defense 14: Apportionment;  
28 Affirmative Defense 15: Damages Not Ascertainable; Affirmative Defense 16: Full

Performance; Affirmative Defense 18: Discharge; Affirmative Defense 19: Fault of Plaintiffs; Affirmative Defense 20: Lack of Causation

2. Breach of the implied covenant of good faith and fair dealing. CACI No. 325.

3. Violation of the California Franchise Relations Act. This also subsumes Defendant's Affirmative Defense 12: Compliance with Applicable Laws

4. Open book account. CACI No. 372.

5. The following affirmative defenses Affirmative Defense 3: Statute of Limitations (CACI 338); and Affirmative Defense 25: Failure to Mitigate (CACI 358).

**B. Issues Triable To The Court**

The following issues are triable to the Court:

1. Defendant's equitable affirmative defenses<sup>1</sup>: Affirmative Defense 6: Waiver; Affirmative Defense 8: Set-Off; Affirmative Defense 9: Detrimental Reliance; Affirmative Defense 10: Unclean Hands; Affirmative Defense 11: Estoppel; Affirmative Defense 13: Valid Business Purpose; Affirmative Defense 17: Consent; Affirmative Defense 21: Good Faith; Affirmative Defense 22: Unjust Enrichment; Affirmative Defense 23: Conduct Privileged; and Affirmative Defense 24: Conduct Justified.

2. Any remaining affirmative defenses set forth by the Parties.

**VIII. ATTORNEYS' FEES [L.R. 16-4.4]**

Plaintiffs and WSC seek attorneys' fees and costs incurred in this action pursuant to Section 11 of the Coachella Valley Franchise Agreement, Section 21 of the Area Representation Agreement, Section 13 of the SoCal Franchise Agreement and Section 7 of the Modification Agreement.

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<sup>1</sup> See generally *Granite State Ins. Co. v. Smart Modular Techs., Inc.*, 76 F.3d 1023, 1027 (9th Cir. 1996) ("A litigant is not entitled to have a jury resolve a disputed affirmative defense if the defense is equitable in nature.")



1 **IX. ABANDONED CLAIMS OR ISSUES**

2 The B&D Parties do not intend to abandon any claims or issues.

3  
4 DATED: August 29, 2016

**MULCAHY LLP**

5  
6 By: /s/ James M. Mulcahy

7 James M. Mulcahy

8 Kevin A. Adams

9 *Attorneys for Plaintiffs/Counter-*

10 *Defendants Bennion & Deville Fine*

11 *Homes, Inc., Bennion & Deville Fine*

12 *Homes SoCal, Inc., Windermere*

13 *Services Southern California, Inc.,*

14 *and Counter-Defendants Robert L.*

15 *Bennion and Joseph R. Deville*

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STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address 4 Park Plaza, Suite 1230, Irvine, CA 92614.

On August 29, 2016, I served document(s) described as **PLAINTIFFS/COUNTER-DEFENDANTS' MEMORANDUM OF CONTENTIONS OF FACT AND LAW [L.R. 16-4]** on the following person at the addresses and/or facsimile number below:

Pérez Wilson Vaughn & Feasby  
John Vaughn  
750 B. Street, 33<sup>rd</sup> Floor  
San Diego, CA 92101  
vaughn@perezwilson.com

- ☐ VIA FACSIMILE – Based on an agreement by the parties to accept service by fax transmission, I faxed the documents from a fax machine in Irvine, California, with the number 949-252-0090, to the parties and/or attorney for the parties at the facsimile transmission number(s) shown herein. The facsimile transmission was reported as complete without error by a transmission report, issued by the facsimile transmission upon which the transmission was made, a copy of which is attached hereto.
- ☒ BY ELECTRONIC SERVICE – Based on a court order or agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed herein on the above referenced date. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.
- ☐ BY MAIL - I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day, with postage thereon fully prepaid, at Irvine, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- ☐ BY CERTIFIED MAIL - I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day, with postage thereon fully prepaid, at Irvine, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- ☐ BY FEDERAL EXPRESS – I am readily familiar with the firm's practice of collection and processing correspondence for Federal Express. Under that practice it would be deposited

1 with Federal Express on that same day in the ordinary course of business for overnight  
2 delivery with delivery costs thereon fully prepaid by sender, at Irvine, California.

3 [ ] BY MESSENGER SERVICE – I served the documents by placing them in an envelope or  
4 package addressed to the persons at the addresses listed herein and providing them to a  
5 professional messenger service for service. A declaration by the messenger service will be  
6 filed separately.

7 I declare under penalty of perjury under the laws of the State of California and the United  
8 States of America that the above is true and correct.

9 Executed on **August 29, 2016** at Irvine, California.

10 By: /s/ Barbara Calvert  
11 Barbara Calvert  
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