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

BENNION & DEVILLE FINE  
HOMES, INC., a California  
corporation, BENNION & DEVILLE  
FINE HOMES SOCIAL, 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*

**DECLARATION OF JOSEPH R.  
DEVILLE IN SUPPORT OF  
PLAINTIFFS' OPPOSITION TO  
DEFENDANT'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

Action Filed: September 17, 2015

Pretrial Conf.: September 26, 2016

Trial: October 18, 2016

1 I, Joseph R. "Bob" Deville, state as follows:

2 1. I am a counter-defendant in the above-named action. I am also a co-owner of  
3 Bennion & Deville Fine Homes, Inc. ("B&D Fine Homes"), Bennion & Deville Fine  
4 Homes SoCal, Inc. ("B&D SoCal"), and Windermere Services Southern California, Inc.  
5 ("Services SoCal") (collectively, "Plaintiffs"), plaintiffs and counter-defendants in the  
6 lawsuit. Along with co-owner Robert Bennion, we are ultimately responsible for the  
7 conduct of Plaintiffs.

8 2. I have created this declaration in support of Plaintiffs' Opposition to  
9 Defendant Windermere Real Estate Services Company's ("WSC") Motion for Partial  
10 Summary Judgment (the "Opposition"). The statements in this declaration are based upon  
11 my personal knowledge, and if called as a witness, I could testify competently thereto.

12 3. Plaintiffs have asserted seven separate and distinct claims against WSC. The  
13 first six claims are contract claims arising out of the parties' multiple contractual  
14 relationships and the seventh claim concerns WSC's violation of the California Franchise  
15 Relations Act ("CFRA") for terminating the Area Representation Agreement with  
16 Services SoCal without proper notice or opportunity to cure.

17 4. I have reviewed WSC's motion for partial summary judgment. I understand  
18 that WSC has requested summary adjudication of various portions of Plaintiffs' contract  
19 claims for allegedly being brought outside the applicable statute of limitations and for  
20 Service SoCal's failure to identify damages for a portion of its claim. Additionally, I  
21 understand that WSC seeks summary adjudication of Service SoCal's CFRA claim in its  
22 entirety on the flawed premise that the Area Representation Agreement between WSC  
23 and Services SoCal does not qualify as a "franchise" or "area franchise" under the CFRA.  
24 While I understand from counsel that WSC's legal arguments are misguided, below I  
25 personally attest to the factual inaccuracies in WSC's motion.

26 **A. Plaintiffs' Claims Are Not Outside The Relevant Statutory Period**

27 5. As referenced above, WSC argues that the conduct giving rise to several of  
28 the contractual breaches advanced in Plaintiffs' First Amended Complaint (the "FAC")

1 occurred outside of the relevant statutory period. In particular, WSC attacks the following  
2 contract claims advanced by Plaintiffs:

- 3 a. Failing to provide the promised “variety of services” as set forth in the  
4 agreement and designed to enhance Plaintiffs’ “profitability” (Count  
5 1(a));
- 6 b. Failing to provide Plaintiffs with a viable “Windermere System” as  
7 defined in the agreement (Counts 1(b), 2(b), 3(b), 4(a), 5(a), 6(e));
- 8 c. Failing to provide adequate technology services and system in return  
9 for the excessive technology fees (Counts 2(a), 3(i), 6(a));
- 10 d. Failing to provide servicing support and guidance in connection with  
11 the marketing, promotion and administration of the Trademark and  
12 Windermere System (Counts 3(c), 5(b)); and
- 13 e. Failing to make available to Services SoCal competent “key people”  
14 necessary to assist Services SoCal in carrying out its obligations to  
15 offer and sell franchises as the Area Representative (Count 3(d)).

16 (*See Mtn.*, pp. 6-7.)

17 6. According to WSC’s motion, it failed to provide the required technology or  
18 viable “Windermere System” prior to the relevant statutory period. [D.E. 59-1, pp. 6-8.]  
19 Although WSC has breached certain portions of the parties’ agreements for year – and to  
20 some extent, outside of the relevant statutory period – the conduct giving rise to those  
21 breaches is not at issue in this case. Instead, Plaintiffs only seek damages for conduct of  
22 WSC after September 17, 2011.

23 7. In particular, WSC failed to provide the following contractually required  
24 technology and “Windermere System” well after September 17, 2011:

- 25 a. Properties listed by the Windermere Southern California agents often  
26 did not properly display (if at all) on WSC’s website during the 2013  
27 and 2014 time period. A true and accurate copy of an email chain  
28 dated October 14, 2014 is a representative example of some of these  
problems is attached hereto as Exhibit 1;

- 1 b. Open house announcement and listings did not properly appear on  
2 WSC's website and were therefore not properly syndicated to third-  
3 party websites during the 2013 and 2014 time period. A true and  
4 accurate copy of an email from my staff to members of WSC's  
5 technology department, dated September 16, 2014, is a representative  
6 example of some of these problems is attached hereto as Exhibit 2;
- 7 c. During the 2013 and 2014 time period, WSC's technology team was  
8 inexperienced at best, often causing numerous unnecessary delays to  
9 the syndication and visibility of Southern California real estate  
10 listings. A true and accurate copy of an email from my staff to  
11 members of WSC's technology department, dated October 6, 2014, is  
12 a representative example of some of these problems is attached hereto  
13 as Exhibit 3;
- 14 d. WSC's website and related technology regularly throughout the 2013  
15 and 2014 time period experienced listing feed issues where entire  
16 neighborhoods would not be recognized in searches on WSC's  
17 website causing significant problems for Plaintiffs' agents and the  
18 agents of other Windermere franchisees in the Southern California  
19 region;
- 20 e. WSC removed entire listings and/or pictures of real estate listings  
21 belonging to numerous Southern California during the 2013 to 2014  
22 time period. A true and accurate copy of an email from my staff to  
23 agents in the Southern California region, dated September 24, 2014, is  
24 a representative example of some of these problems is attached hereto  
25 as Exhibit 4;
- 26 f. WSC experienced significant email migration and outage issues for  
27 those agents using the windermere.com email accounts, causing their  
28 email accounts to malfunction for days at a time during the 2014 year  
thereby precluding them from properly receiving and responding to  
client emails;
- g. The TouchCMA product introduced by WSC into the Southern  
California region in late 2013 failed to properly sweep the sold and  
pending listings in San Diego and Orange County rendering the  
technology worthless for agents in the region;

- h. The custom express templates WSC made available to real estate agents in Southern California throughout the relevant time period did not work as they were specific to the Pacific Northwest region and were not applicable to Southern California, rendering the templates worthless to Plaintiffs and their agents; and
- i. The Trend Graphics program made available by WSC to its franchisees and agents in 2013 and 2014 only worked for the Pacific Northwest and not in Southern California requiring Plaintiffs to go out and acquire licenses for their own use of a similar program.

8. Each of the items identified above occurred well within the relevant time period and go directly to the heart of the technology shortcomings of WSC at issue in this case.

9. Moreover, a substantial portion of the technology problem faced by us after December 2012 concerned WSC's failure to take any reasonable action to combat the negative internet marketing campaign of Windermere Watch. 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. A true and accurate copy of the Modification Agreement is attached hereto as Exhibit 5.

10. My employees and I are prepared to testify that WSC failed to make any real effort until – *at the earliest* – October 2013 to improve the search engine optimization of the websites for WSC and its franchisees and agents. Even after the October 2013 date, the effort undertaken by WSC was seriously lacking and failed to meet the "commercially reasonable" standard.

11. Plaintiffs have also asserted a series of breached based, in part, on WSC's failure to provide a viable "Windermere System" for the franchises in the Southern California region. The "Windermere System," as defined in each agreement, generally includes an obligation by WSC to provide the other contracting party with certain

1 “standards, methods, procedures, techniques, specifications and programs developed by  
2 WSC.” *See e.g.*, the opening Recitals to the Coachella Valley Franchise Agreement  
3 attached hereto as Exhibit 6.

4 12. This broad definition of “Windermere System” (drafted by WSC) suggests  
5 that all of the failed support and services of WSC described amounted to failures of the  
6 “Windermere System” as a whole in the Southern California region.

7 13. WSC has included excerpts of my deposition with its moving papers. During  
8 my deposition I testified that WSC failed to provide proper technology and a reliable  
9 franchise system throughout the majority of the parties’ relationship. While there were  
10 ebbs and flows in what WSC provided – or was promising to provide – my testimony is  
11 generally correct. However, those failures did not negate WSC’s obligation to provide us  
12 with adequate technology and a functioning system throughout the entire term of our  
13 relationship. After all, we continued to pay WSC significant technology fees throughout  
14 the term of our relationship with the understanding that technology that worked in our  
15 region would be provided. WSC continued to collect those fees and promise to correct  
16 any issues. In fact, there were instances where the technology shortcomings were  
17 corrected. However, this did not last. Plaintiffs now file suit for WSC’s breaches of the  
18 parties’ agreements in these areas after September 17, 2011.

19 **B. WSC Failed To Provide Services SoCal Its “Key People”**

20 14. WSC failed to timely register with the California Department of Business  
21 Oversight (“DBO”) is Franchise Disclosure Document for the Southern California  
22 Region in 2013. Representatives of WSC – most notably, WSC’s General Counsel Paul  
23 Drayna – attempted to cover up WSC’s failure to maintain the registration of the 2013  
24 Southern California Franchise Disclosure Document (“FDD”) by directing  
25 representatives of Services SoCal to offer prospective franchisees in the Southern  
26 California region the incorrect FDD containing terms that did not correspond to those  
27 extended to the prospective franchisees. True and accurate copies of emails from Drayna  
28 directing me to use the incorrect FDD are attached hereto as Exhibits 7, 8, 9.)



1           15. For instance, in early June 2013, I met with a prospective franchisee for the  
2 San Diego region and requested a copy of the current, registered FDD from WSC. Instead  
3 of advising me that the Southern California FDD had not yet been registered and offering  
4 an incorrect FDD to a prospective franchisee could expose me and others at Services  
5 SoCal personally to both civil and criminal liability, Drayna sent me an email on June 12,  
6 2013, instructing me to provide the prospect with the Northern California FDD –  
7 containing materially different terms – and that they could simply “swap out” the signed  
8 franchise agreement with the Southern California franchise agreement at a future time.  
9 (*See Ex. 7.*)

10           16. Drayna’s flawed legal instruction concerning the disclosure to prospective  
11 franchisees did not end there. On June 14, 2013, he sent another email to me stating that:

12           Your [Southern California FDD] renewal packet is going out today to the State of  
13 California for filing. We typically receive approval within two weeks. As soon as  
14 it is approved I will let you know, and upload it to [Windermere’s intranet]. In the  
15 meantime you can use the Northern California filing, which is already approved  
16 for this year, and which I sent to [Deville] earlier this week. We can use that one  
17 to sign up the new San Diego office as a temporary solution until the SoCal  
18 version is ready. Be sure to have them sign the Item 23 receipt (crossing off [the  
19 Northern California Area Representative’s] name and writing in [Deville’s]).

20 (*See Ex. 8.*)

21           17. As reflected in his email, Drayna conceded that the Southern California  
22 FDD registration packet had not yet been approved (or even received) by the DBO.  
23 Nonetheless, he continues to hide WSC’s breach of its obligation to maintain registration  
24 of the Southern California FDD by instructing Plaintiffs to provide prospective  
25 franchisees in San Diego the wrong FDD. (*See Ex. 9.*)

26           18. The illegalities of Drayna’s instruction was not readily apparent to me or  
27 other representatives of Services SoCal who are not attorneys and relied entirely upon  
28 Drayna for support and guidance with respect to any legal issues involving WSC’s FDD  
and franchise offering. Instead, Drayna was a “key” person that we relied upon (and  
needed to rely upon) in order to offer and sell franchises on behalf of WSC.

1           19. Drayna was not the only “key” representative of WSC directing us to  
 2 unknowingly violate the franchise laws. As is reflected in an email dated June 21, 2013,  
 3 Drayna included WSC’s President, Geoff Wood, in an email instructing Plaintiffs that the  
 4 Southern California FDD was mailed to the State of California “last week,” and [i]n the  
 5 mean time (*sic*) you may proceed with the Northern California [FDD] as we discussed.”  
 6 (*See* Ex. 9.) Wood – the President of a large national-wide franchisor – was also someone  
 7 that we relied upon for accurate information before offering WSC franchises in Southern  
 8 California. However, Wood did nothing to correct the misleading direction of Drayna or  
 9 stop us from offering the Northern California FDD to Southern California prospects in  
 10 violation of California’s franchise laws.

11           20. Drayna and Wood knew that the terms of the franchise agreement in the  
 12 offered FDD were materially different than those in the Southern California FDD, but  
 13 still instructed us to have the Southern California franchisees sign the incorrect agreement  
 14 “as is, even though it doesn’t yet reflect the terms [Services SoCal has] discussed with  
 15 them. Those terms will be shown in the new [Southern California FDD], and in the real  
 16 license agreement they will sign ASAP.” A true and accurate copy of an email exchange  
 17 between me and Drayna is attached hereto as Exhibit 10.

18           21. This was not the advice of the “key people” we expected WSC to provide us  
 19 as the Area Representative when entering into the Area Representation Agreement.

20 **C. Services SoCal Was Harmed As A Result Of WSC’s Franchise Violations**

21           22. From May 1, 2004 through September 30, 2015, Services SoCal served as  
 22 the Area Representative for WSC’s franchise system in the Southern California region. A  
 23 true and accurate copy of the Area Representation Agreement is attached hereto as  
 24 Exhibit 11.

25           23. As Area Representative, Services SoCal was contractually required to work  
 26 with WSC in offering and selling Windermere franchises to real estate brokerage  
 27 businesses in Southern California. (Ex. 11, § 2.) Between April 21, 2013 and July 5,  
 28 2013, WSC’s FDD for the Southern California region was not properly registered with



1 the DBO. A true and accurate copy of the DBO's publically available notice of late  
2 registration of the Windermere FDD for 2013 is attached hereto as Exhibit 12.

3 24. As reflected above, during the months of June and July 2013 – and  
4 notwithstanding this “dark” period in franchise sales – Drayna directed Services SoCal to  
5 offer and sell Windermere franchises using the incorrect FDD for the region. (See Exs. 7-  
6 10.)

7 25. Still during this “dark” period and at the direction of Drayna, I met with a  
8 prospective franchisee for the Southern California region and provided that prospect with  
9 the incorrect FDD containing significantly different terms than those that would govern  
10 the prospective franchisee's relationship with WSC.

11 26. My conduct – at the express direction of WSC's General Counsel – can and  
12 has had negative ramifications to Services SoCal. Outside of any potential civil or  
13 criminal liability, we have spent a non-trivial amount of time and money seeking to  
14 mitigate or avert any potential criminal, civil, or DBO action that our counsel has  
15 informed us we could be subject to for complying with Drayna's instruction as to  
16 franchise sales. This includes discussions with multiple attorneys, including franchise  
17 experts in litigation and transactional work, and preparing a defense to the potential  
18 liability that we face. Again, these amounts and time we have invested are not trivial and  
19 have resulted in a financial impact on Services SoCal.

20 **D. Payment Of A Franchise Fee**

21 27. As its fourth argument in the motion for partial summary judgment, WSC  
22 alleges that Services SoCal did not make any payments to WSC that would constitute a  
23 “franchise fee” under the law. WSC is incorrect. Services SoCal has made numerous  
24 payments directly and indirectly to WSC over the course of the parties' eleven-year  
25 relationship. Many of these payments include, but are not limited to, the following  
26 payments by Services SoCal to:

- 27 a. WSC, in the amount of \$553.81, for various services provided by WSC to  
28 Services SoCal leading up to the parties' execution of the Area

1 Representation Agreement on March 19, 2014. True and accurate copies of  
2 the invoice and proof of payment to WSC are attached hereto as Exhibit 13;

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

7 c. WSC, in the amount of \$1,313.62, for WSC employees to meet with  
8 Southern California franchisees on January 11, 2005. True and accurate  
9 copies of the invoice and proof of payment to WSC are attached hereto as  
10 Exhibit 15;

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

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

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

23 g. third-party auditors, in the amount of thousands of dollars each year  
24 throughout the course of the parties' relationship, preparing its audited  
25 financials at the request and direction of WSC to allow WSC to finalize its  
26 FDD.

27 28. Each of these payments had to be made by Services SoCal to acquire and  
28 maintain the rights under the Area Representation Agreement.

1           29. Additionally, Services SoCal made an initial \$35,000 payment to Mark  
2 Ewing – an affiliate of WSC – to purchase the rights to serve as the area representative  
3 for the Southern California region. We understood that Mr. Ewing was affiliated with  
4 WSC at the time the payments were made to him at WSC’s direction.

5 **E. Services SoCal Qualifies As An “Area Franchise”**

6           30. As explained above, Services SoCal has made significant investments in its  
7 area representation business in the form of franchisee recruitment (*i.e.*, “sales”), training,  
8 and support.

9           31. The Area Representation Agreement makes clear that Services SoCal was  
10 unequivocally granted the right to *negotiate* the sale of Windermere franchises on behalf  
11 of WSC. (*See* Ex. 11.) This right is identified in the opening Recitals to the Area  
12 Representation Agreement, which provides that “WSC desires to expand its operations  
13 and licenses into [Southern California] and to have Area Representative offer licenses to  
14 use the Trademark in [Southern California...].” (*Id.*, Recital A.) Similarly, Section 2 of  
15 the Area Representation Agreement expressly granted Services SoCal “the non-exclusive  
16 right to offer Windermere licenses to real estate brokerage business to use the  
17 [Windermere] Trademark and the Windermere System in [Southern California] in  
18 accordance with the terms of the Windermere License Agreement.” (*Id.*, § 2.) Also,  
19 Section 3 of the agreement identified one of Service SoCal’s responsibilities to include  
20 “marketing Windermere licenses in the Region.” (*Id.*, § 2.) In other words, Services  
21 SoCal was much more than a referral agent to WSC as suggested in WSC’s papers.

22           32. Moreover, not only did WSC have the contractual right to offer the sale of  
23 Windermere franchises with prospective franchisees, but it actually *did* negotiate the  
24 franchise sales and even signed – along with WSC and the respective franchisee – each of  
25 the franchise agreements entered into by franchisees in Southern California.

26           33. By way of example, in May 2013, Deville, on behalf of Services SoCal,  
27 negotiated the sale of Windermere franchised businesses to prospective franchisees in the  
28 San Diego region. True and accurate copies of several of my emails with the prospective

1 franchisee and WSC negotiating the terms of the franchise are attached hereto as Exhibits  
2 19, 20, 21.

3 34. During this process, I negotiated terms with the prospective franchisees that  
4 were different than those WSC later desired to offer the prospects. Additionally, I refused  
5 to offer the terms proposed by WSC and the franchise agreement entered into by the  
6 parties ultimately reflected those terms I negotiated.

7 35. I also executed the franchise agreements signed by franchisees in the region  
8 rendering Services SoCal a party to each agreement. A true and accurate copy of a  
9 franchise agreement I signed on behalf of Services SoCal is attached hereto as Exhibit 22.

10 36. Finally, WSC's suggestion that Services SoCal was no more than a "sales  
11 agent" of WSC ignores the contents of the Area Representation Agreement. Services  
12 SoCal was doing far more in the franchise sales process than merely referring potential  
13 franchisees and receiving a referral bonus from the transaction. Instead, Services SoCal  
14 was thoroughly engaged in the entire sales process including the negotiation and  
15 execution of all franchise agreements in the region. (See Ex. 22.) Services SoCal would  
16 then train and support the franchisees in the region as a subfranchisor of WSC. WSC's  
17 suggestion to the contrary is in error.

18 37. For these factual reasons and those legal arguments set forth in Plaintiffs'  
19 Opposition, WSC's motion should be dismissed in its entirety.

20 I declare under penalty of perjury under the laws of the United States of America  
21 that the foregoing is true and correct and that this Declaration was executed this 26th day  
22 of September, 2016 in Rancho Mirage, California.

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Bob Deville