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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. Manuel L. Real

REPLY IN SUPPORT OF DEFENDANT WINDERMERE REAL ESTATE SERVICES COMPANY'S NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: October 17, 2016
Time: 10:00 a.m.
Courtroom: 8

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I. INTRODUCTION

In hopes of creating a disputed issue of material fact, Plaintiffs rely entirely on the self-serving declaration from defendant Joseph R. Deville ("Deville Decl.") that is almost entirely inadmissible. The declaration contains improper arguments and conclusions, inadmissible hearsay, and lacks foundation for most all of the assertions made therein. The Court should sustain all of WSC's evidentiary objections field concurrently herewith and properly exclude those portions of the Deville Decl.

Without the inadmissible evidence on which it rests, Plaintiffs' opposition collapses. Their argument for the application of a continuous accrual theory is flawed and based on easily distinguishable cases. And, even if the Court entertains this theory, Plaintiffs did not present any admissible evidence of alleged breaches during the relevant time frame. Similarly, Plaintiffs did not present any admissible evidence of damages suffered as a result of WSC's alleged breaches of franchise law.

Finally, Plaintiffs have failed to submit any admissible evidence to create a genuine issue of material fact with regard to whether the Area Representation Agreement constituted a franchise. Even if the Court considered Plaintiffs' inadmissible "evidence," which it should not, that "evidence" does not create a genuine issue of material fact under California law.

For all of these reasons, and for those set forth in WSC's moving papers, WSC's Motion for Partial Summary Judgment should be granted in its entirety.

II. PLAINTIFFS' ADDITIONAL "EVIDENCE" IS INADMISSIBLE

Plaintiffs admitted that the vast majority of the facts identified in WSC's separate statement were undisputed. Plaintiffs attempted to dispute the remaining uncontroverted facts, and add additional facts, with the self-serving Deville Decl. That declaration is almost entirely inadmissible. Because the Court can only consider admissible evidence when ruling on motions for partial summary

judgment, the Deville Decl. cannot create a genuine issue of material fact that would warrant the denial of WSC's motion.

A trial court can only consider admissible evidence in ruling on a motion for summary judgment and may properly grant summary judgment when the non-moving party fails to support its opposition with admissible evidence. *See* Fed. R. Civ. Proc. 56(e); *Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir. 2002); *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988). Thus, in *Orr*, the Ninth Circuit affirmed a district court's decision to exclude, at summary judgment, evidence offered by the non-moving party on the grounds that the evidence was improperly authenticated and constituted hearsay. *See Orr*, 285 F.3d at 771 (affirming the entry of summary judgment against plaintiff based on the district court's finding "that most of the evidence submitted by Orr in support of her opposition to BOA's motion for summary judgment was inadmissible due to inadequate authentication and hearsay"); *see also Los Angeles News Service v. CBS Broadcasting, Inc.*, 305 F.3d 924, 935-36 (9th Cir. 2002) (holding that the district court did not abuse its discretion in excluding hearsay evidence and evidence that violated the best evidence rule in deciding a summary judgment motion), amended and superseded on other grounds, 313 F.3d 1093 (9th Cir.2002); *Groppi v. Barham*, 157 F. App'x. 10, 11-12 (9th Cir. 2005) ("The district court did not abuse its discretion in applying the best evidence rule to exclude Dr. Martin Keusten's declaration because Groppi failed to provide the records upon which the declaration was based and failed otherwise to explain their absence.")

To be considered by the Court, declarations or affidavits submitted in conjunction with a summary judgment motion must: (1) be made on personal knowledge; (2) set forth facts that would be admissible in evidence (i.e., no inadmissible hearsay or opinions); and (3) show the affiant or declarant is competent to testify to the matters stated. Fed. R. Civ. P. 56(c)(4). The Deville Decl. states that the "statements made in this declaration are based upon my personal

knowledge, and if called as a witness, I could testify competently thereto." (Docket No. 60 ¶ 2.) Such statements alone, however, are insufficient to establish personal knowledge and competency. That must be shown by the facts stated: i.e., the declaration must establish that the matters are known to the declarant personally, as distinguished from matters of opinion or matters based upon hearsay. *Bank Melli Iran v. Pahlavi*, 58 F3d 1406, 1412 (9th Cir. 1995) (declarations "on information and belief" entitled to no weight where declarant lacks personal knowledge). In fact, the Deville Decl. contradicts the general statement of personal knowledge on several occasions when he declares that he "understand[s] from counsel" and "my employees and I are prepared to testify that… ."

Similarly, evidentiary facts are required to support or oppose a summary judgment motion. Conclusory statements are not sufficient. *Marshall on Behalf of Marshall v. East Carroll Parish Hosp. Service Dist.,* 134 F.3d 319, 324 (5th Cir. 1998); *Lewis v. Philip Morris Inc.,* 355 F.3d 515, 533 (6th Cir. 2004) (non-movant must point to "more than mere speculation, conjecture or fantasy"); *National Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496, 502 (9th Cir. 1997) ("Conclusory allegations of collusion, without factual support, are insufficient to defeat summary judgment").

A court need not find a genuine issue of fact where the non-moving party's "self-serving" presentation puts forward "nothing more than a few bald, uncorroborated, and conclusory assertions rather than evidence." *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1159 (9th Cir. 2010). Specifically, a court may "disregard a self-serving declaration for purposes of summary judgment" when the declaration states "facts beyond the declarant's personal knowledge and "provide[s] no indication how [the declarant] knows [these facts] to be true." *SEC v. Phan*, 500 F.3d 895, 910 (9th Cir. 2007) (quotations omitted); *see also Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1063 (9th Cir. 2012) (declarations "must be made

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with personal knowledge; declarations not based on personal knowledge are inadmissible and cannot raise a genuine issue of material fact").

As detailed in WSC's Evidentiary Objections to the Declaration of Joseph R. Deville, filed concurrently herewith, 30 of the 37 paragraphs, and all but two of the exhibits attached thereto, are inadmissible and should not be considered for purposes of the present motion. These paragraphs lack foundation, contain improper and argumentative conclusions without the supporting foundational facts, contain inadmissible hearsay, fail to authenticate the attached exhibits, and attempt to provide improper secondary evidence.

Because the objectionable Deville Decl. is the only evidence Plaintiffs submitted in response to WSC's motion for partial summary judgment, WSC's motion should be granted.

III. PLAINTIFFS' ATTEMPT TO SAVE THEIR BREACH OF CONTRACT CLAIMS FAILS

A. Plaintiff Presents No Admissible Evidence of Breaches During the Relevant Time Period

Plaintiffs' opposition relies on paragraph 7 of the Deville Decl. in support of their argument that WSC allegedly breached the agreements during the relevant time frame. (Docket No. 60, pp. 6-7.) However, that paragraph and the exhibits attached thereto are inadmissible in their entirety.

The Deville Decl. does properly authenticate the documents it seeks to attach as exhibits one through four. Each of these exhibits purports to be email chains to and from various people, but the Deville Decl. does not authenticate these documents in any way. Simply attaching emails to a declaration does not provide the proper authentication. *See* Fed. R. Evid. 602, 901. There is no foundation in the Deville Decl. to establish that these documents are what they purport to be. Without such authentication, all of these emails should be excluded as inadmissible. Further, these emails contain inadmissible hearsay. Fed. R. Evid. 801, 802. Each of the

emails are out of court statements offered for the truth of the matter asserted therein. Consequently, even if Plaintiffs provided the proper authentication, the emails should all be excluded as inadmissible hearsay.

The remainder of paragraph 7 contains self-serving, conclusory statements made without the proper foundation. Paragraph 7(g), for example, states that the "TouchCMA product" WSC made available to its franchisees, "failed to properly sweep the sold and pending listings in San Diego and Orange County rendering the technology worthless for agents in the region." (Docket No. 30-1, ¶ 7(g).) There is no foundation laid for this conclusory statement. Deville does not state that he ever used the TouchCMA product, nor does he provide any other foundation for where he came by this opinion that technology was "worthless." Without the proper foundation, the conclusory arguments in paragraph 7 of the Deville Decl. should not be considered.

Without any admissible evidence of alleged breaches during the relevant time frame, Plaintiffs' claims that WSC failed to provide adequate technology or a viable Windermere System are barred by the applicable statute of limitations.

B. <u>The Continuous Accrual Theory is Inapplicable to Plaintiffs' Claims</u>

Plaintiffs' argument also fails to provide a basis for the Court to deny the motion. Confusingly, Plaintiffs initially state they dispute that WSC never provided them with a viable Windermere System or adequate technology, but go on to "acknowledge that testimony is generally correct." (Docket No. 60-3, pp. 4-6, Nos. 11, 12.) Even though they admit the fact is uncontroverted, Plaintiffs claim this is a disputed fact because they know it is critical to their claim. If, as they admit, WSC never provided them with a viable "Windermere System" or adequate technology, their claims accrued outside of the relevant time frame and WSC is entitled to partial summary judgment on the claims identified in the motion.

Plaintiffs attempt to salvage their untimely claims by arguing that the theory of continuous accrual allows them to recover for alleged breaches during the four

year preceding the filing of their complaint.[1] (Docket No. 60, p. 4.) This theory fails because the alleged breaches (failure to provide a viable Windermere System and adequate technology) are not divisible into discrete activities, making the case law on which they rely inapposite.

At issue in this motion are Plaintiffs' claims that WSC failed to provide a viable Windermere System and failing to provide adequate technology.[2] (Docket No. 31, pp. 38-46.) As Plaintiffs acknowledge, the Windermere System included, among other things, "the standards, methods, procedures, techniques, specifications and programs developed by WSC for the establishment, operation and promotion of independently owned real estate brokerage offices, as those standards, methods, procedures, techniques, specifications and programs may be added to, changed, modified, withdrawn or otherwise revised by WSC." (Ex. B, § 1.7.) Plainly, the "Windermere System," as defined in the agreements and agreed upon by the parties, is not a divisible contractual obligation. Provision of the Windermere System was not continuous in a way that allowed discrete breaches to occur at different times.

The Ninth Circuit has addressed a similar contractual commitment and determined that the continuous accrual theory did not apply. *Ancala Holdings, LLC v. Price*, 220 F. App'x. 569 (9th Cir. 2007) involved the management of a golf course. The plaintiff alleged that the defendants had continuously failed "to operate the golf course as a premium private country club" since 1991, and had known about that breach since 1991. *Id.* at 572. Because the claim was not filed until

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[1] Plaintiffs cite to their Complaint for the proposition that their contract claims are "predicted [sic] entirely upon contractual breaches by WSC" within the applicable limitations period. (Docket No. 60, p. 4.) Plaintiffs' Complaint is not their operative pleading, and their First Amended Complaint does not limit their claims to alleged breaches occurring after September 17, 2011. (*See e.g.* Docket No. 31, ¶¶ 148-154.)

[2] In its notice of motion, WSC inadvertently included a reference to Plaintiffs' claim that WSC failed to make "key people" available. WSC is not challenging that allegation with the present motion.

2000, the district court determined the claims were time barred, and the Court of Appeals affirmed. *Id.* at 573. The plaintiff in *Ancala* argued that "every day [defendants] failed to operate the golf course as a premium private country club, a new cause of action accrued." *Id.* at 572. Applying Arizona law, which recognizes the same continuous accrual theory Plaintiffs assert here, the court determined that "while the breach continued to accrue because [defendants] failed to cure the initial breach, it was not 'continuous' in the sense that a separate and discrete obligation to operate the golf course in a certain manner accrued each day." *Id.* at 572-73. The same is true here. Plaintiffs allege that WSC never provided a viable Windermere System, dating back to 2001. They were aware of this breach at the time, or at least since 2004. (Docket No. 59-2, No. 11.)[3] And, WSC's agreement to provide Plaintiffs with the Windermere System did not create a separate and distinct obligation to provide certain technology or other process that accrued each day.

The two cases on which Plaintiffs primarily rely are easily distinguishable. *Aryeh v. Canon Bus. Solutions, Inc.*, 55 Cal.4th 1185 (2013) involved an Unfair Competition Law claim brought under California Business and Professions Code section 17200 regarding the provision of copying services. Specifically, the plaintiff in *Aryeh* alleged that on 17 separate occasions, some of which occurred during the applicable time period, the defendant had improperly charged for test copies. *Id.* at 1190. Because these were discrete, divisible violations, the California Supreme Court held that the plaintiff could seek damages for the violations that occurred during the applicable limitations period. *Id.* at 1202. Similarly, *Rankin v. Glob. Tel*Link Corp.*, 13-CV-01117-JCS, 2013 WL 3456949 (N.D. Cal. July 9, 2013) involved the provision of telephone services at a correctional facility. The plaintiff

[3] In Plaintiffs' "Statement of Genuine Disputes of Material Facts," they assert a number of irrelevant, additional facts in hopes of fabricating some non-existent factual dispute. Most of these additional facts are inadmissible evidence from the Deville Decl. and should not be considered by the Court. The rest of these facts are irrelevant for purposes of determining WSC's motion.

there alleged, among other things, specific interruptions to the telephone service at the correctional facility. *Id.* at *12. Because these were specific, severable breaches, the plaintiff was allowed to seek recovery for the alleged breaches during the relevant time frame.

In contrast to the separable obligations at issue in *Aryeh* and *Rankin*, Plaintiffs' claim that WSC failed to ever provide a viable Windermere System is not divisible. Provision of the "Windermere System" and undefined technology is not analogous to discrete copying charges or interruptions in telephone service. It is much more akin to the agreement to manage a golf course as a premium private country club at issue in *Ancala*. Plaintiffs were aware of these alleged breaches since at least 2004, sat on them until 2015, and now seek damages. These are exactly the sort of stale claims statutes of limitations are designed to weed out.

IV. PLAINTIFFS OFFER NO ADMISSIBLE DAMAGES EVIDENCE

Plaintiffs admit that it has not been subject to any criminal or civil liability on account of WSC's alleged franchise law violations. (Docket No. 60, p. 14.) They argue, however, that they were damaged because they "incurred significant costs and expenses" to mitigate any potential liability. (*Id.*) This argument is unsupported by any admissible evidence.

Paragraph 26 of the Deville Declaration, which contains the alleged evidence upon which this new damages theory is based, is inadmissible. The paragraph starts out with the inadmissible and self-serving conclusion that WSC's conduct "can and has had negative ramifications to Services SoCal." (Docket No. 60-1, ¶ 26.) The declaration goes on to improperly argue that Services SoCal "spent a non-trivial amount of time and money seeking to mitigation or avert any potential" liability. (Docket No. 60-1, ¶ 26.) However, the declaration does not offer any foundation for this assertion or present any admissible evidence of the actual amounts spent attempting to mitigate this supposed liability. As detailed in WSC's Evidentiary

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Objections filed concurrently herewith, paragraph 26 consists entirely of improper, conclusory arguments and lacks any foundation whatsoever.

When paragraph 26 of the Deville Declaration is excluded, Plaintiffs are left with no evidence of any damage suffered as a result of WSC's alleged violation of franchise law. Consequently, WSC is entitled to summary judgment as to that portion of Plaintiffs' Fourth Claim for Relief.

V. WSC IS ENTITLED TO SUMMARY JUDGMENT ON THE FAC'S SEVENTH CAUSE OF ACTION

Plaintiffs contend that WSC's motion is based upon a "fundamental misunderstanding of California franchise laws." However, the parties largely agree on what provisions of the CFIL and CFRA govern the determination of whether the Area Representation Agreement constitutes a franchise[4] and the application of Commissioner's Release 3-F – "When Does An Agreement Constitute a 'Franchise'?" – to that determination. What the parties disagree about is (1) the proper interpretation of those authorities; and (2) whether the admissible evidence submitted by Plaintiffs in opposition to the motion creates an issue of material fact. As set forth below, Plaintiffs' contentions regarding the law are directly contradicted by the relevant statutes and authorities. Moreover, Plaintiffs have failed to present any admissible evidence to create a genuine issue of material fact that would warrant the denial of WSC's motion.

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[4] As noted in WSC's moving papers, "[t]he CFIL protects consumers in the sale of franchises, and the CFRA regulates certain events after the franchise relationship has been formed." *Thueson v. U-Haul International, Inc.,* 144 Cal.App.4th 664, 667, n. 1 (2006) citing *Gentis v. Safeguard Business Systems, Inc*., 60 Cal.App.4th 1294, 1298 (1998). Plaintiffs contend that only the CFRA applies because they are challenging the manner in which WSC terminated the Area Representation Agreement. However, in order for the CFRA to govern the termination of the agreement, there must have been a franchise in the first instance. Therefore, the CFIL and the CFRA both have application to the issues raised in WSC's motion.

A. The Relevant Authorities Establish that Plaintiffs Did Not Pay a Franchise Fee

Plaintiffs' opposition is based on their apparent contention that any amounts Services SoCal had to expend as a part of its business constituted "franchise fees." Such a broad interpretation is not supported by relevant case law or Release 3-F. Tellingly, Plaintiffs do not cite to a single case that holds that any such payments constitute a "franchise fee" under the CFRA. In fact, there are none. To the contrary, as set forth in *Thueson*, only payments made for "***the right to enter into a business***" constitute franchise fees under the CFRA. *Thueson*, 144 Cal.App.4th at 672-673 (emphasis added). Thus, in *Thueson*, the Court of Appeal affirmed the trial court's holding that payments made to U-Haul to cover the costs of a telephone line and charges for computer equipment purchased from U-Haul under a separate agreement "represented nothing more than ordinary business expenses and not an investment required by U–Haul ***for the right to operate a dealership***, and that 'Ordinary business expenses do not constitute such an investment or franchise fee.' " *Id.* at 675 (emphasis added). Therefore, as set forth more fully below, the amounts purportedly paid by Services SoCal related to its operations as Area Representative did not constitute "franchise fees." As such, the Area Representation Agreement did not constitute a franchise.

Plaintiffs also argue that payments made to "***maintain*** the rights under the Area Representation Agreement" constitute franchise fees. (Document No. 60, p. 19, ll. 6-7 [emphasis added].) However, Plaintiffs cannot cite to a single authority in which it is held or stated that payments made to "maintain" the rights under an agreement can constitute a franchise fee. In fact, Plaintiffs' argument is directly contradicted by the express language of the CFRA and Release 3-F, both of which provide that a " '[f]ranchise fee means any fee or charge that a franchisee or subfranchisor is required to pay or agrees to pay ***for the right to enter into a business*** under a franchise agreement." Corp. Code § 31011; Release 3-F, § 4(1)

[emphasis added]. Accordingly, a "franchise fee" can only be an amount paid for the ***right*** to enter into a franchise business. Amounts paid after that right has been obtained – which in this case was obtained without the payment of fee (Docket No. 59-2, No. 14) – are, by definition, not franchise fees.

Therefore, Plaintiffs' interpretation of the relevant authorities is contrary to the relevant California statute, Release 3-F, and relevant case law. The Court should reject Plaintiffs' novel and unsupported interpretation of authority, and should apply the relevant authorities as cited herein and as set forth in WSC's moving papers. Under those authorities, WSC is entitled to summary judgment on Plaintiffs' Seventh Cause of Action.

B. <u>The Evidence Upon Which Plaintiffs Rely is Inadmissible and Should Not Be Considered by the Court in Determining the Motion</u>

In their opposition to WSC's motion for partial summary judgment on the FAC's Seventh Cause of Action, Plaintiffs rely on paragraphs 19, 27, 28, and 29, and corresponding Exhibits 13-18 of the Deville Decl. in an attempt to create genuine issues of material fact regarding whether Services SoCal paid a "franchise fee." (*See* Docket No. 60, p. 18, l. 9 – p. 19, l. 18; Docket No. 60-3, Nos. 14, 15, pp. 7-9.) However, all of that evidence is inadmissible. As set forth in the evidentiary objections filed concurrently herewith:

- Paragraph 19 is inadmissible because it is nothing more than improper argument and conclusions and it lacks foundation;
- Paragraph 27 is inadmissible because it is nothing more than improper argument and conclusions and it lacks foundation;
- Paragraph 28 is inadmissible because it is nothing more than improper argument and conclusions and it lacks foundation;
- Paragraph 29 is inadmissible because it is nothing more than improper argument and conclusions and it lacks foundation; and

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- Exhibits 13-18 are inadmissible because they are not properly authenticated and they contain inadmissible hearsay.

As noted above, opposing declarations containing improper arguments and conclusions and those lacking adequate foundation cannot create genuine issues of material fact. Thus, this inadmissible evidence cannot be considered for purposes of determining WSC's motion. As a result, there is no issue of material fact regarding whether Services SoCal paid a franchise fee for the rights provided to it in the Area Representation Agreement – it did not (Docket No. 59-2, No. 14). Therefore, WSC is entitled to summary judgment on the Seventh Cause of Action because it is undisputed that Services SoCal did not pay a franchise fee for the rights provided to it under the Area Representation Agreement.

C. Plaintiffs' "Evidence" Does Not Create a Genuine Issue of Material Fact

Even if the Court were to consider Plaintiffs' "evidence" in opposition to WSC's motion, there is no genuine issue of material fact regarding whether Services SoCal paid a franchise fee. Specifically, Plaintiffs list amounts paid for (1) services provided by WSC prior to the execution of the Area Representation Agreement; (2) registration fees for "compelled attendance" at an owner' retreat; (3) WSC employees to meet with Southern California franchisees; (4) transportation of a WSC employee; (5) advertising; (6) and auditors. However, none of the "evidence" submitted by Plaintiffs establishes that any of the payments it has listed were "required" as a part of the Area Representation Agreement. As noted in Release 3-F:

> In the absence of an obligation or a condition in the franchise agreement compelling action on the franchisee's part, or the necessity for undertaking such obligation in order to successfully operate the business, voluntary payments are not 'required' under the agreement and, therefore, are not included within the statutory definition of 'franchise fee.' Also, voluntary payments, presumably, are not made for the right to enter into a franchised business and for that reason do not come within the definition. However, while a truly optional payment is not a franchise fee, a payment by a franchisee, though nominally optional, may in reality be essential; this is especially so if

> the franchisor intimates or suggests that the payment is essential for the successful operation of the business.

Release 3-F, §4(7). Here, the amounts noted were voluntarily paid or were paid after Services SoCal had already secured its rights under the agreement. As set forth above, such payments do not constitute franchise fees under California law.

Finally, Plaintiffs contend that the $35,000 payment from Services SoCal to Mark Ewing constituted a franchise fee because Mr. Ewing was an affiliate of WSC. However, the only "evidence" submitted in support of this contention is the Deville Decl., in which he states that "[w]e understood that Mr. Ewing was affiliated with WSC at the time the payments were made to him at WSC's direction."[5] (Docket No. 60-1, ¶ 29, Docket No. 60-3, No. 15, p. 9.) What Plaintiffs "understood" is not evidence. Therefore, WSC's evidence – the deposition testimony of Geoffrey Wood that Mr. Ewing was an independent third party (Docket No. 59-2, Nos. 15, 16) – that Mr. Ewing was not an affiliate of WSC and that the amounts paid to him were to purchase his right to receive payments from those identified San Diego branches is the only admissible evidence presented regarding this claim. *See* https://en.oxforddictionaries.com/definition/affiliate (defining affiliate as "A person or organization officially attached to a larger body.")

Therefore, there is no genuine issue of material fact as to whether Services SoCal paid a franchise fee under California law. It did not. As a result, WSC is entitled to summary judgment on the FAC's Seventh Cause of Action.

D. <u>The Area Representation Agreement is Not an "Area Franchise"</u>

Plaintiffs' final argument is that the Area Representation Agreement is an "area franchise" under the CFRA. An "area franchise" under the CFRA is similarly defined as a "subfranchise" under the CFIL. *Cf.* Cal. Bus. & Prof. Code § 20004

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[5] As set forth above and in the evidentiary objections filed concurrently herewith, this portion of the Deville Decl. is inadmissible argument and conclusions and lacks proper foundation and, as such, cannot create a genuine issue of material fact.

with Cal. Corp. Code § 31008.5 (both require the right given, "for consideration given in whole or in part for [that/such] right, to sell or negotiate the sale of franchises in the name or on behalf of the franchisor."). In support of this argument, Plaintiffs rely upon a tortured interpretation of otherwise clear provisions of the Area Representation Agreement and the inadmissible evidence set forth in paragraphs 27, 31, 32, and 34, and corresponding Exhibits 19-21[6] of the Deville Decl. As detailed in the Evidentiary Objections filed concurrently herewith, the evidence on which Plaintiffs rely for this proposition is inadmissible for the following reasons:

- Paragraph 27 is inadmissible because it is nothing more than improper argument and conclusions and it lacks foundation;
- Paragraph 31 is inadmissible because it is nothing more than improper argument and it is inadmissible testimony regarding the contents of a document;
- Paragraph 32 is inadmissible because it is nothing more than improper argument and conclusions and it lacks foundation;
- Paragraph 34 is inadmissible because it is nothing more than improper argument and conclusions and it lacks foundation; and
- Exhibits 19-21 are inadmissible because are not properly authenticated.

As established above, this inadmissible "evidence" cannot create any genuine issues of material fact.

With regard to Plaintiffs' misinterpretation of the Area Representation Agreement, the provisions upon which Plaintiffs rely do not support their argument that the Area Representation Agreement provided them the right to negotiate the sale of Windermere franchises. For instance, Recital A merely identifies WSC's

[6] Plaintiffs also rely on Exhibit 11 and 22 to the Deville Decl. While WSC does not object to these exhibits, they do not create an issue of material fact as set forth more fully below.

desire to expand into the "Region"[7] and to enlist Services SoCal's assistance with offering franchises in the Region. (Docket No. 59-3, Ex. B.) However, it did not grant Services SoCal the right to sell or negotiate the sale of WSC franchises.

Similarly, although Section 2 grants Services SoCal the non-exclusive right to offer licenses in the Region and Section 3 tasked Services SoCal with, among other things, the responsibility to market WSC franchises in the Region, those rights are limited to only those sales and negotiations approved by WSC: "Licenses offered [by Services SoCal] will in all cases be subject to the approval of WSC and will be granted and issued by WSC to the licensee." (*See* Docket No. 59-2, No. 17.) This provision prevented Services SoCal from negotiating any terms of a franchise with a prospective franchisee without WSC's approval. Therefore, Services SoCal did not have the right to independently sell or negotiate the sale of WSC franchises. Rather, such negotiations could only take place with WSC's approval. In this regard, Service SoCal was nothing more than a sales representative. Therefore, the Area Representation Agreement did not constitute an "area franchise" under the CFRA or a "subfranchise" under the CFIL. *See* Cal. Corp. Code § 31008.5 ["A contract or agreement which is a franchise does not become a subfranchise merely because under its terms a person is granted the right to receive compensation for referrals to a franchisor or subfranchisor or to receive compensation for acting as a sales representative on their behalf."].

For all of these reasons, and for those set forth in WSC's moving papers, WSC is entitled to judgment on the FAC's Seventh Cause of Action as a matter of law.

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[7] Section 1.5 of the agreement defines "Region" as the State of California.

VI. CONCLUSION

For the reasons stated above and in WSC's moving papers, WSC's Motion for Partial Summary Judgment should be granted in its entirety.

DATED: October 3, 2016

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