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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' OPPOSITION TO 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 [erroneously identified by Defendant in D.E. 59-1 as Courtroom 6]

[Concurrently filed with Declaration of Joseph R. Deville and Plaintiffs' Statement of Genuine Disputes of Material Fact]
Action Filed: September 17, 2015
Pretrial Conf.: September 26, 2016
Trial: October 18, 2016

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Plaintiffs Bennion & Deville Fine Homes, Inc. ("B&D Fine Homes"), Bennion & Deville Fine Homes SoCal, Inc. ("B&D SoCal"), and Windermere Services Southern California, Inc. ("Services SoCal") (collectively, "Plaintiffs") hereby file this Opposition to Defendant Windermere Real Estate Services Company's ("WSC") Motion for Partial Summary Judgment for the reasons set forth below:

I. INTRODUCTION

On the eve of trial – and without any advance notice – WSC has filed a motion for partial summary judgment and scheduled a hearing date for October 17, 2016, just one day before the scheduled commencement of trial. Review of the motion quickly reveals that it is nothing more than an attempt by WSC to undermine Plaintiffs' trial preparation as the majority of the arguments raised in WSC's papers call into question disputed fact issues in the case. Tellingly, WSC's motion also raises arguments not identified in WSC's portion of the Proposed Pretrial Conference Order and therefore are waived. This type of gamesmanship should not be permitted and as a consequence WSC's motion should be summarily denied.

In the event the Court considers WSC's eleventh-hour motion, the arguments raised in the motion should still be rejected as follows:

First, WSC's attempt to bar portions of Plaintiffs' contract claims as untimely is in error as the conduct at issue occurred after September 17, 2011 and well within the applicable statutory limitations period. WSC's argument ignores California's well-settled doctrine of continuous accrual that allows Plaintiffs to recover damages for WSC's contract breaches within the statutory period even if WSC also had breached the contract outside the relevant period. *See Aryeh v. Canon Bus. Solutions, Inc.*, 55 Cal.4th 1185, 1198-99 (2013) (Under California law, "recurring invasions of the same right can each trigger their own statute of limitations" because each new breach provides all the elements of the claim.).

Because Plaintiffs only seek damages for the conduct of WSC within the statutory period, WSC's motion should be rejected.

Second, WSC's request for summary adjudication of the "key people" component of Services SoCal's contract claim is a hollow request without any factual support or legal argument. In fact, WSC's Memorandum of Points And Authorities fails to mention of advance WSC's request. Moreover, even if WSC had advanced legal and factual support for its position, the issue involves highly contested fact not appropriate for summary adjudication. Thus, the request must be denied.

Third, WSC seeks to dismiss a portion of Count 4 on the flawed premise that Services SoCal was not damaged as a result of WSC's efforts in "[s]oliciting Services SoCal's participation in offers and sales of franchises in California in violation of the franchise laws." [*See* First Amended Complaint ("FAC"), ¶ 170(c).] Procedurally, this argument should be outright rejected as it was not raised by WSC in its portion of the Proposed Pretrial Conference Order. [*See* D.E. 57-1, p. 90 of 95 ("The following law and motion matters and motions in limine, and no others, are pending or contemplated.").] Substantively, WSC's argument is flawed as it ignores the true harm suffered by Services SoCal and, instead, focuses solely on any lack of civil or criminal proceeding against Services SoCal to conclude that Services SoCal has not suffered harm. Because the issue that WSC focuses on is not conclusive of the issue of harm to Services SoCal, and Services SoCal has presented undisputed evidence that it has otherwise suffered harm as a result of WSC's conduct, WSC's motion should be denied.

Fourth, WSC's attempt to mischaracterize the relationship between itself and Services SoCal in an effort to avoid liability under the California Franchise Relations Act ("CFRA") is in error as the Area Representation Agreement governing the parties' relationship qualifies as both a "franchise" and "area franchise" under California law and is therefore protected by the CFRA. WSC's

arguments to the contrary evidence a fundamental misunderstanding of California's franchise laws and should be rejected.

In addition to being legally flawed, the arguments raised by WSC raise serious issues of material fact that are directly contradicted by the concurrently filed declaration of Joseph R. Deville ("Deville"). These types of factual disputes are not appropriate for resolution on a Rule 56 motion. For these reasons, set forth in detail below, Plaintiffs' respectfully request that the Court deny WSC's motion for partial summary judgment in its entirety.

II. ARGUMENT

A. Legal Standard On Summary Judgment

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). The party moving for summary judgment has both an initial burden of production and the ultimate burden of establishing that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). This burden is a "heavy" one. *Ambat v. City & County of San Francisco*, 757 F.3d 1017, 1031 (9th Cir. 2014). Where, as here, the moving party would have the burden at trial, the movant must establish "beyond controversy every essential element of its" claim. *Southern California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003).

In the event the moving party is able to meet its initial burden of showing there is no genuine issue of material fact, the opposing party has the burden of producing competent evidence to support its claim. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). All inferences drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Tolan v. Cotton*, 134 S.Ct. 1861, 1863 (2014).

B. Plaintiffs' Contract Claims Are Timely

All of contract claims advanced by Plaintiffs are predicted entirely upon contractual breaches by WSC that occurred after September 17, 2011 and within the applicable limitations period. [*See* Cal. Civ. Pro. § 337(1); D.E. 1.] WSC's argument to the contrary ignores California's well-settled doctrine of continuous accrual.

Under California law, the general rule is that a cause of action arises "'when, under the substantive law, the wrongful act is done,' or the wrongful result occurs, and the consequent 'liability arises […].'" *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 397 (1999) (quoting 3 Witkin, Cal. Procedure, Actions, § 459, p. 580). However, where there is a continuing duty imposed on a party to a contract, California recognizes ***the continuous accrual theory to impose liability even if the initial breach occurred before the statutory period***. *Yamauchi v. Cotterman*, 84 F. Supp. 3d 993, 1013 (N.D. Cal. 2015) ("[T]he theory of continuous accrual supports recovery only for damages arising from those breaches falling within the limitations period."); *see also, Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.*, 116 Cal.App.4th 1375, 1388 (2004) ("Where there is a continuing wrong, […] the courts have applied what Justice Werdegar has termed a 'theory of continuous accrual.'").

Without application of the continuous accrual (or continuing violation) doctrine, parties would obtain immunity for a subsequent breach or long-standing non-performance of an ongoing duty. *Yamauchi v. Cotterman*, 84 F. Supp. 3d at 1013 (citing *Aryeh v. Canon Bus. Solutions, Inc.*, 55 Cal.4th 1185, 1198 (2013) ("The theory is a response to the inequities that would arise if the expiration of the limitations period following a first breach of duty or instance of misconduct were treated as sufficient to bar suit for any subsequent breach or misconduct; parties engaged in long-standing misfeasance would thereby obtain immunity in perpetuity from suit even for recent and ongoing misfeasance.") Thus, it is well

settled that under California law, "recurring invasions of the same right can each trigger their own statute of limitations" because each new breach provides all the elements of the claim. *Aryeh*, 55 Cal.4th at 1198-99; *see also Hogar Dulce Hogar v. Cmty. Dev. Comm'n*., 110 Cal.App.4th 1288, 1295 (2003) (finding plaintiff's allegation of breach within the statutory period of a continuing duty to provide services sufficient for claim to survive dispositive motion).

The Northern District case of *Rankin v. Glob. Tel*Link Corp*., 13-CV-01117-JCS, 2013 WL 3456949 (N.D. Cal. July 9, 2013), is instructive here. In that case, Rankin asserted contract claims against Global Tel*Link Corporation ("GTL") on the basis that "[t]hroughout the entire contract period," GTL was in breach for failing to provide the required phone system. *Id*. at *4. GTL moved to dismiss the contract claim as time-barred because the alleged breach started immediately after the parties entered into the contract in August 2008, more than four years before the lawsuit was initiated and outside the statutory period. *Id*. at *11. The Northern District Court – citing to the "theory of continuous accrual" – denied GTL's motion finding that ***Rankin's contract claims were timely as to conduct by GTL that occurred within the applicable limitations period notwithstanding any prior breach of GTL***. *Id*. at *12.

Consistent with the Northern District Court's ruling in *Rankin*, Plaintiffs in this case only seek damages for that conduct of WSC that occurred within the applicable limitations period – *i.e*., the four year period prior to the filing of the action on September 17, 2015. [*See* D.E. 1.] Despite this, WSC seeks dismissal of certain portions of Plaintiffs' contract claims on the flawed basis that WSC had first breached certain continuing contractual obligations more than more than four years before this action was filed. [D.E. 59-1, p. 6-7.] Again, WSC's argument is misguided. Plaintiffs only seek (and are entitled to) damages for conduct of WSC after September 17, 2011. The post-September 17, 2011 technological and system failures by WSC at issue in this lawsuit include, but are not limited to, the

following:

a. Properties listed by the Windermere Southern California agents often did not properly display (if at all) on WSC's website during the 2013 and 2014 time period (Declaration of Joseph R. Deville ("Decl. Deville"), ¶ 7(a), Ex. 1);

b. Open house announcement and listings did not properly appear on WSC's website and were therefore not properly syndicated to third-party websites during the 2013 and 2014 time period (Decl. Deville, ¶ 7(b), Ex. 2);

c. During the 2013 and 2014 time period, WSC's technology team was inexperienced at best, often causing numerous unnecessary delays to the syndication and visibility of Southern California real estate listings (Decl. Deville, ¶ 7(c), Ex. 3);

d. WSC's website and related technology regularly throughout the 2013 and 2014 time period experienced listing feed issues where entire neighborhoods would not be recognized in searches on WSC's website causing significant problems for Plaintiffs' agents and the agents of other Windermere franchisees in the Southern California region (Decl. Deville, ¶ 7(d));

e. WSC removed entire listings and/or pictures of real estate listings belonging to numerous Southern California during the 2013 to 2014 time period (Decl. Deville, ¶ 7(e), Ex. 4);

f. WSC experienced significant email migration and outage issues for those agents using the windermere.com email accounts, causing email to go down for days at a time during the 2013 year (Decl. Deville, ¶ 7(f));

g. The TouchCMA product introduced by WSC into the Southern California region in 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 (Decl. Deville, ¶ 7(g));

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 (Decl. Deville, ¶ 7(h)); and

i. The Trend Graphics program made available by WSC to its franchisees and agents in 2013 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 (Decl. Deville, ¶ 7(i)).

Each of the items identified above go to the heart of the technology and system shortcomings of WSC at issue in this case. Because they occurred within the relevant statutory period, WSC's request for summary adjudication should be denied.

It is also of note that each of technology breaches at issue in WSC's motion was WSC's failure to take any reasonable action to combat the negative internet marketing campaign of Windermere Watch after December 18, 2012. (Decl. Deville, ¶ 9.) The undisputed evidence shows that 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. (Decl. Deville, ¶ 9, Ex. 5.) Plaintiffs will be presenting evidence at trial that shows WSC failed to take any effort until – *at the earliest* – October 2013 to improve the search engine optimization of the websites for WSC and its franchisees and agents. (Decl. Deville, ¶ 10.) Even after the October 2013 date, the effort undertaken by WSC failed to satisfy its contractual obligations. As such, WSC's post-December 18, 2012 shortcomings with respect to Windermere Watch, on their own, are sufficient to allow each of Plaintiffs' contract claims get past WSC's Rule 56 motion.

In short, WSC cannot rely upon past breaches to immunize itself from any future noncompliance of its contractual obligations. As explained by the California Supreme Court in *Aryeh v. Canon Bus. Solutions, Inc.*, 55 Cal.4th 1185 (2013):

> The theory [of continuous accrual] is a response to the inequities that would arise if the expiration of the limitations period following a first breach of duty or instance of misconduct were treated as sufficient to bar suit for any subsequent breach or misconduct; parties engaged in long-standing misfeasance would thereby obtain immunity in perpetuity from suit even for recent and ongoing misfeasance.

Id. at 1198. Because Plaintiffs are permitted to pursue damages under the continual accrual for conduct of WSC during the relevant limitations period – notwithstanding the parties' prior conduct – WSC's motion for summary adjudication should be denied.

C. <u>WSC fails to identify any evidence or argument that Services SoCal's contract claim involving WSC's failure to provide "Key People" should be summarily adjudicated</u>

In what appears to be a throwaway argument, WSC has asked the Court to summarily adjudicate Services SoCal's breach of contract claim as it relates to WSC's failure to make available competent "key people" necessary to assist Services SoCal in carrying out its obligations to offer and sell franchises under the Area Representation Agreement. [D.E. 59, p. 2; FAC, ¶ 163(d).] WSC's Memorandum of Points and Authorities is silent on the topic and fails to advance and legal argument or factual evidence in support of its request. Accordingly, WSC's request should be summarily rejected.

Nonetheless, and in the unlikely event that the event the Court's considers WSC conclusory position, WSC's argument to dismiss the "key people" component of Services SoCal's contract claim should still be rejected as it involves

an issue of highly contested fact not appropriate for summary adjudication. As reflected in the concurrently filed declaration of Deville, representatives of WSC – most notably, WSC's General Counsel Paul Drayna – attempted to cover up WSC's failure to maintain the registration of the 2013 Southern California FDD by directing Services SoCal to offer prospective franchisees in the Southern California region the incorrect FDD containing terms that did not correspond to those extended to the prospective franchisees. (Decl. Deville, ¶ 14; Exs. 7-9.) These blatant violations of California's franchise laws were not apparent to representatives of Services SoCal who are not attorneys and relied entirely upon Drayna for support and guidance with respect to any legal issues involving WSC's FDD and franchise offering. (*Id*., ¶ 18.) Because WSC's General Counsel was considered a "key person" that Services SoCal relied upon (and was required to rely upon) in order to offer and sell franchises on behalf of WSC, WSC's failure to provide a competent General Counsel breached the "key people" requirement of the Area Representation Agreement. (*Id*.)

Moreover, Drayna was not the only "key people" at WSC directing Plaintiffs to unknowingly violate the franchise laws. WSC's President, Geoff Wood, was involved in the email exchanges instructing Plaintiffs that the Southern California FDD was mailed to the State of California "last week," and [i]n the mean time (*sic*) you may proceed with the Northern California [FDD] as we discussed." (Decl. Deville, ¶ 19, Ex. 9.) Wood – the President of a large national-wide franchisor – was also someone that Services SoCal needed to (and did) rely upon in offering WSC franchises in Southern California. (*Id*., ¶ 19.) Wood's failure to take any action to correct the erroneous direction of Drayna or stop Plaintiffs' from offering the Northern California FDD to Southern California prospects in violation of the CFIL further breached the "key people" provision in the Area Representation Agreement.

Drayna's and Wood's advice and counsel are a clear contradictions of the

law and could have subjected Services SoCal and it owners, Bennion and Deville, to civil and criminal liability under the CFIL. *See* Cal. Corp. Code §§ 31302, 31404, 31410, 31411. The harm that Services SoCal did face as a result of WSC's failure to provide "key people" is described in section D, below.

In short, Drayna's flawed representations to Plaintiffs concerning the substituted use of the incorrect FDD – and Wood's failure to take any action to correct the situation – constitutes a clear breach of WSC failure to provide to Services SoCal competent "key people to the extent necessary to assist Area Representative in carrying out its obligations as set forth in this Agreement." (Decl. Deville, Ex. 11, § 3.) Accordingly, WSC's motion as to its breach of the "key people" provision in the Area Representation Agreement should be denied.

D. Services SoCal Was Harmed By WSC's Failure To Comply With The Franchise Laws

Services SoCal's claim for breach of the implied covenant of good faith and fair dealing identifies ***five*** separate and distinct grounds in which WSC has deprived Services SoCal of many of the benefits of the Area Representation Agreement. (FAC, Court 4(a)-(e).) WSC now seeks summary adjudication of ***one*** of those ***five*** grounds. Specifically, WSC seeks summary adjudication of Services SoCal's claim for breach of the implied covenant of good faith and fair dealing for WSC efforts in "[s]oliciting Services SoCal's participation in offers and sales of franchises in California in violation of the franchise laws." (*See* FAC, ¶ 170(c).) WSC's argument is predicated upon the flawed position that Services SoCal had not suffered any harm for WSC's breach in light of Services SoCal's admissions during discovery that it "had not been subjected to criminal or civil liability for WSC's failure to comply with California franchise laws." (D.E. 59-1, p. 9.) Again, WSC's motion ignores the law and raises an issue of material fact not appropriate for summary adjudication. (*See* Appendix A to Local Rules, § 12.)

As a preliminary matter, WSC's argument as to Count 4 of the FAC for an

alleged failure to show damages was not raised by WSC in its portion of the Proposed Final Pretrial Conference Order and, therefore, should not be allowed to proceed. [*See* D.E. 57-1, p. 94:23-27; *see also*, D.E. 57-1, p. 91 (representation from WSC that "[t]he following law and motion matters and motions *in limine*, ***and no others***, are pending or contemplated.").] WSC's failure to identify this argument as part of a potential or pending law and motion matter it intended to raise precludes it from doing so at such a late juncture in the proceeding.

In the event the Court is still willing to consider WSC's argument, the argument should still be rejected as it ignores damages other than "criminal or civil liability" suffered by Services SoCal and because a material issue of fact exists regarding the actual harm that Services SoCal suffered as a result of WSC's solicitation of its participation in violation of the franchise laws.

Before addressing the relevant harm suffered by Services SoCal, it is important to first generally address the franchise disclosure laws at issue. In California, the offer and sale of franchises is heavily regulated by both state and federal law. Under the Federal Trade Commission's ("FTC") Amended Franchise Rule, located at title 16, part 436 of the Code of Federal Regulations, a franchisor is required to disclose to prospective franchisees a franchise disclosure document ("FDD") that contains a copy of the then form franchise agreement and twenty-three specific "Items" about the franchised business, including specific information about the franchisor's executives and managers, its relevant litigation history, the expected business of the franchisee, the costs and fees associated with the franchised business, the financial wellbeing of the franchisor, and the conditions in which the franchise can be terminated or renewed, among other things. 16 CFR 436.

The California Franchise Investment Law ("CFIL") builds upon the FTC's Amended Franchise Rule and serves as the primary vehicle for regulating the registration, offer, and sale of franchises in California. Under the CFIL, a

franchisor must register a franchise application – including its current FDD – with the California Department of Business Oversight ("DBO") before a franchise can be offered or sold within the state.[1] Cal. Corp. Code §§ 31110, 31119. A franchisor's California registration must be renewed, at a minimum, **every year**. Cal. Corp. Code § 31120.

Once the franchise application is properly registered with – and approved by – the DBO, the FDD, together with copies of all proposed agreements and other exhibits, must be provided to any prospective franchisee at least 14 days before the earlier of the day the franchisee executes the franchise agreement or pays the franchisor any consideration for the franchised business. Cal. Corp. Code § 31119(a).

These statutory registration and disclosure obligations are intended to assure that prospective franchisees have the information necessary to make an intelligent decision concerning the franchise offered, to prohibit the sale of franchises that would lead to fraud or a likelihood that the franchisor's promises would not be fulfilled, and to protect both the franchisor and franchisee by clarifying the parties' business relationship. *See* Cal. Corp. Code § 31001. **Failure to comply with these obligations can (*and will*) subject the franchisor, its principal executive officers and directors, and the sales agents to both civil and criminal liability**. *See* Cal. Corp. Code §§ 31302, 31404, 31410, 31411.

With that brief background on California's franchise and disclosure laws, the relevant facts before the Court are as follows: from May 1, 2004 through September 30, 2015, Services SoCal served as the Area Representative for WSC's franchise system in the Southern California region. (Decl. Deville, ¶ 22, Ex. 11.) As Area Representative, Services SoCal was contractually required to work with

[1] There are certain exemptions from California's registration obligations, but none of those apply to the facts of this case. *See*, *e.g.*, Cal. Corp. Code §§ 31101, 31106, 31108, 31109; 10 Cal. Code Regs. § 310.100.2.

WSC in offering and selling Windermere franchises to real estate brokerage businesses in Southern California, and to thereafter provide support for the franchised businesses. (*Id*., Ex. 11, § 2.)

Between April 21, 2013 and July 5, 2013, WSC's FDD for the Southern California region was not properly registered with the DBO. (*See* Decl. Deville, Ex. 12.) As a result, any offer or sale of a Windermere franchise in Southern California during this "dark" period would result in a violation of the CFIL. *See* Cal. Corp. Code §§ 31110, 31119. During the months of June and July 2013 – and notwithstanding this "dark" period in franchise sales – Drayna directed Services SoCal to offer and sell Windermere franchises using the incorrect FDD for the region. (*Id*., ¶ 25, Exs. 7-10.) Still during this "dark" period and at the continuing direction of Drayna, Deville met with a prospective franchisee for the Southern California region and provided that prospect with the incorrect FDD containing significantly different terms than those that would govern the prospective franchisee's relationship with WSC. (*Id*., ¶25.) This conduct can and has had negative ramifications to Services SoCal and could expose members of Services SoCal to both civil and criminal liability under the franchise laws. *See* Cal. Corp. Code §§ 31302, 31404, 31410, 31411.

As indicated above, WSC's motion does not dispute the improper direction and advice its representatives provided to Services SoCal; it does not directly dispute the franchise law violation that occurred as a result of the aforementioned conduct; and it does not dispute (*nor can it*) the civil and criminal liability that could befall Services SoCal and its representatives for the franchise law violations orchestrated by WSC. Instead, WSC argues that Services SoCal was *not damaged* by this conduct and, as a result, the related portion of Count 4 should be summarily adjudicated in favor of WSC. [D.E. 59-1, p. 9; *see* FAC, ¶ 170(c).]

In sole support of its argument that Services SoCal has not been damaged, WSC cites to Services SoCal's responses to WSC's Request for Admissions. [D.E.

59-1, p. 9.] In its responses, Services SoCal admits that, to date, it has not been subjected to any criminal or civil liability for the aforementioned franchise violations. [D.E. 59-3, Declaration of Jeffery A. Feasby, Ex. G.] Relying entirely on these admissions, WSC summarily concludes that the claim must be dismissed because SoCal has "*not been damaged*." [D.E. 59-1, p. 9.] Incredibly, WSC's analysis focuses only on the potential criminal and civil liability faced by Services SoCal and completely ignores the tangible damage and harm that Services SoCal has suffered as a result of WSC's conduct.

In particular, and as explained in more detail in the concurrently filed declaration of Deville, after learning that Drayna's direction violated the franchise laws, Services SoCal incurred significant costs and expense through the retention and work with legal counsel, along with other efforts and expenses, in an attempt to mitigate and potentially avoid any criminal, civil, or DBO action against Services SoCal and its principals as a result of the franchise law infractions directed by WSC. (Decl. Deville, ¶ 26.) These expenses incurred by Services SoCal are at issue in the case and are sufficient to overcome WSC's motion.

Because a material factual dispute exists concerning the harm suffered by Services SoCal in light of WSC's solicitation of Services SoCal to participate in offers and sales of franchises in violation of the franchise laws, WSC's motion for summary adjudication on this topic should be denied. [FAC, ¶ 170(c).]

E. WSC's Motion As To Count 7 Of The FAC Evidences A Fundamental Misunderstanding Of The California Franchise Laws And Raises Factual Disputes Not Appropriate For Summary Adjudication

Count 7 of the FAC arises out of WSC's violation of the CFRA for terminating the Area Representation Agreement without cause or opportunity to cure as required under the CFRA. *See* Cal. Bus. & Prof. Code § 20020. WSC now asks the Court to dispose of Count 7 in its entirety on the misconception that the

Area Representation Agreement does not qualify as a "franchise" or "subfranchise" under California law and is therefore not protected by the CFRA.[2] [D.E. 59-1, pp. 10-13.] As explained in detail below, WSC's arguments evidence a fundamental misunderstanding of what constitutes a "franchise" and "subfranchise" under California's franchise laws and should be summarily rejected. Moreover, the *de minimus* facts presented by WSC in support of its flawed arguments are directly contradicted by the concurrently filed declaration of Deville and present disputed material facts that are not appropriate for resolution on a Rule 56 motion. Accordingly, WSC's motion as to Count 7 of the FAC should be denied.

1. *There is a Material Dispute Regarding Services SoCal's Payment Of A Franchise Fee To WSC*

The CFIL was codified in 1971 making it the first franchise-specific law in the country. *See* Cal. Corp. Code §§ 31000 through 31516. Nine years later, the California legislature enacted the CFRA at Cal. Bus. & Prof. Code §§ 20000 through 20043. While the CFIL was designed to protect consumers at the onset of the franchise relationship concerning the disclosure and sale of the franchise offering, the CFRA regulates certain events following the formation of the franchise relationship, including renewal and termination. Cal. Corp. Code § 31001; s*ee e.g., Traumann v. Southland Corp.*, 858 F. Supp. 979, 984 (N.D. Cal. 1994); *Dameshghi v. Texaco Refining & Marketing, Inc.*, 3 Cal.App.4th 1262, 1283 (1992). At issue here is the ***termination*** of the Area Representation Agreement – ***not its formation***. Accordingly, the CFRA – and not the CFIL –

[2] The formal title of the parties' agreement as "Area Representation Agreement" and not "franchise agreement" is not germane to the issue of whether the agreement is a franchise under the law. *See e.g., Gentis v. Safeguard Bus. Sys., Inc.*, 71 Cal. Rptr. 2d 122 (Cal. App. 2d Dist. 1998) (manufacturer's "distribution agreements" found to be franchises).

controls.[3]

Under the CFRA, a "franchise" is defined as:

> [A] contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which:
>
> > A franchisee is granted the right to engage in a business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor; and
> >
> > The operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate; and
> >
> > ***The franchisee is required to pay, directly or indirectly, a franchise fee***.

Cal. Bus. & Prof. Code § 20001 (*emphasis added*). It is the emphasized "franchise fee" portion of the above statute that is at issue in WSC's pending motion.

According to WSC, the Area Representation Agreement does not constitute a franchise because Services SoCal did not pay a "franchise fee" to WSC at the time the parties entered into the agreement. [D.E. 59-1, pp. 10-12.] WSC's literal reading of "franchise fee" is far too narrow and is in stark contrast to the California legislature's broad definition and application of "franchise fee" under the law.[4] For

[3] While there are limited cross-references in the CFRA to the CFIL, the CFIL is inapplicable to the legal issues raised regarding WSC's termination of the Area Representation Agreement. Thus, WSC's numerous citations and references to the CFIL are misplaced and should be disregarded. [*See e.g.*, D.E. 59-1, pp. 10-13.]

[4] Courts are required to construe "the CFRA broadly to carry out legislative intent, that intent ... is to protect franchise investors, *i.e.* those who 'pay for the right to enter into a business.'" *1-800-Got Junk? LLC v. Super. Ct.*, 116 Cal. Rptr. 3d 923, 934 (Cal. App. 2d Dist. 2010), as modified (Nov. 19, 2010).

instance, the CFRA defines "franchise fee" to be:

> [A]ny 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, ***including, but not limited to, any such payment for such goods or services***.

Cal. Bus. & Prof. Code § 20007 (emphasis added). The CFRA's definition of "franchise fee" includes be any charge or fee paid by the franchisee to the franchisor, directly or indirectly, so long as the payment ***exceeds $100 during a twelve month period***. Cal. Bus. & Prof. Code, § 20007(d); *see Gentis, supra*, 60 Cal.App.4th at p. 1297; *Thueson v. U-Haul Intern., Inc.*, 50 Cal. Rptr. 3d 669, 673 (Cal. App. 1st Dist. 2006), as modified (Nov. 21, 2006) ("[California's] statutes set a low financial threshold for payments that may be considered franchise fees ($100 under the CFRA) and $500 annually under the CFIL.").

Additionally, to assist with the interpretation and implementation of California's franchise laws – including the definition and application of a "franchise fee" – the CFRA has expressly adopted any materials issued by the Commissioner of the California Department of Business Oversight (formerly the Department of Corporations) under the CFIL. *See Boat & Motor Mart v. Sea Ray Boats, Inc.*, 825 F.2d 1285, 1289 (9th Cir. 1987) (citing to Cal Bus. & Prof. Code § 20009). Included among these materials adopted by the CFRA is the "Commissioner's Release 3-F: When Does an Agreement Constitute a 'Franchise'" ("Release 3-F").

According to Release 3-F, payments to the franchisor that are considered nominally "optional" can constitute a franchise fee "if the franchisor intimates or suggests that the payment is essential for the successful operation of the business." Cal. Dept. Corp., Release 3-F, § 4(g) (1994). This is especially true with purportedly optional training seminars and advertising of the franchisor's brand. "[P]ayments required in the franchise agreement to be made by the franchisee for

advertising and promotion to enhance the good will of the franchisor's business, even though the advertising and promotion also benefits the franchisee's business, may be deemed a [franchise fee], especially where the agreement gives the franchisor discretion to determine the manner and content of the publicity." Cal. Dept. Corp., Release 3-F, § 4(h) (1994). **The Commission also expressly identifies any "[f]ees for advertising" and "[a] payment for training and school expenses" to constitute a "franchise fee" under the law**.[5] Cal. Dept. Corp., Release 3-F, § 4(i) (1994).

Here, Services SoCal has made numerous payments directly and indirectly to WSC over the course of the parties' eleven-year relationship that each independently satisfies the "franchise fee" requirement under the CFRA. Many of these payments are reflected in the concurrently filed declaration of Deville and include, but are not limited to, the following payments by Services SoCal to: (1) WSC, in the amount of $553.81, for various services provided by WSC to Services SoCal leading up to the parties' execution of the Area Representation Agreement on March 19, 2014 (Decl. Deville,, ¶ 27(a), Ex. 13); (2) WSC, in the amount of $990, for registration fees for Services SoCal's compelled attendance at a Windermere "Owner's Retreat" – a training event – in 2005 (*Id*., ¶ 27(b), Ex. 14); (3) WSC, in the amount of $1,313.62, for WSC employees to meet with Southern California franchisees on January 11, 2005 (*Id*., ¶ 27(c), Ex. 15); (4) WSC, in the amount of $423.98, for the transport of WSC employee Diane Peterson to Southern California on or around March 1, 2005 (*Id*., ¶ 27(d), Ex. 16); (5) third-party newspapers and other periodicals, in the amount of $950.00, for advertising of the

[5] Three opinion letters of the Commissioner of Corporations repeat that purchased or promotional materials can be a franchise fee if they are required or suggested as essential by the franchisor. *Boat & Motor Mart v. Sea Ray Boats, Inc*., 825 F.2d 1285, 1290 (*citing* Commissioner Opinion No. 71–49F, September 8, 1971; Opinion No. 73–7F, February 2, 1973; and Opinion No. 73–29F, July 18, 1973).

Windermere brand in Southern California on June 7, 2005 (*Id*., ¶ 27(e), Ex. 17); (6) third-party newspapers and other periodicals, in the amount of $ 2771.88, to solicit new franchise owners on behalf of WSC on June 24, 2005 (*Id*., ¶ 27(f), Ex. 18); and (7) third-party auditors, in the amount of thousands of dollars each year throughout the course of the parties' relationship, preparing its audited financials at the request and direction of WSC to allow WSC to finalize its FDD. Each of these payments was made by Services SoCal to acquire and/or maintain the rights under the Area Representation Agreement and independently satisfies the "franchise fee" requirement as defined by the CFRA and the Commissioner. (Decl. Deville, ¶ 28.)

Additionally, and notwithstanding WSC's argument to the contrary, Services SoCal's $35,000 payment to Mark Ewing – an affiliate of WSC – to purchase the rights to serve as the area representative for the Southern California region also satisfies the "franchise fee" element of the claim. (Decl. Deville, ¶ 19.) WSC's conclusory and unsubstantiated argument that Mr. Ewing could not have been an affiliate of WSC because he "had contracted with WSC" is a nonstarter and unsupported by law. At a minimum, this raises a factual issue as to Mr. Ewing's status as an affiliate of WSC that makes summary adjudication of the "franchise fee" issue improper.

WSC's reliance upon *Thueson v. U-Haul Intern., Inc*., 144 Cal.App.4th 664 (Cal. App. 1st Dist. 2006), as modified (Nov. 21, 2006), is misplaced. In *Thueson*, the California Appellate Court conclusively found that "[n]othing was paid or invested in for the dealership." *Id*. at p. 670. The limited and nominal expenses paid by the appellant for a telephone line and computer equipment were either forwarded on to the telephone service provider or constituted nothing more than "ordinary business expenses" outside the scope of a "franchise fee." *Id*. 674-675. Moreover, the appellant testified that a representative of the appellee only "implied" that the computer equipment was required, and that it was actually purchased and used by the appellant at his election at a later point in the parties'

relationship. *Id*. at 674. Based on these facts, the appellate court found that the appellant "made no required contribution of capitol, made no unrecoverable investment in the franchisor, was not required to purchase any inventory, and was not required to purchase services from U-Haul in order to become a dealer." *Id*. at 676. More importantly, the appellate court found that the appellant "***placed none of his own funds, even the de minimum amounts required under the CFIL and CFRA, at risk in exchange for the dealership***." *Id*. (emphasis added). Accordingly, the appellate court concluded that the payments made by the appellant did not qualify as a disguised franchise fee under the CFRA and CFIL.

As reflected above, the contributions by Services SoCal into its area representation business far exceeded those of the appellant in *Thueson* – both at the onset of the parties' relationship and throughout the eleven-year term of the relationship. (*See* Decl. Deville, ¶ 27, Ex. 13-18.) Services SoCal paid sums to WSC and third-parties for marketing and training, paid for WSC's employees to visit the Southern California region, and paid a substantial sum to an affiliate of WSC to acquire the area representation rights for Southern California. (*Id*.) Services SoCal risked capital and made numerous unrecoverable investments in Windermere for the right to do business as the Area Representative. Accordingly, the appellate court's decision in *Thueson* is not applicable to the "franchise fee" issue in this case.

Because Services SoCal made nonrefundable payments directly or indirect to WSC in excess of $100 in order to serve as the Area Representative in the Southern California region, Services SoCal has satisfied the "franchise fee" element of its CFRA claim. Accordingly, WSC's motion for summary adjudication should be rejected.

2. *The Area Representation Agreement Also Qualifies As An "Area Franchise" Subject To The Protections Of The CFRA*

In addition to qualifying as a "franchise" as set forth above, the Area

Representation Agreement between WSC and Services SoCal also separately qualifies as an "area franchise," further subjecting the agreement to the termination protections of the CFRA.

The CFRA expressly defines ***"franchise"*** *to include* ***"area franchise."*** Cal. Bus. & Prof. Code § 20006 (emphasis added). Thus, an area franchise will be subject to all of the protections of the CFRA even if it does not otherwise satisfy the definition of a "franchise" as set forth in Section 20001 of the CFRA. An "area franchise" is defined as "any contract or agreement between a franchisor and a ***subfranchisor*** whereby the subfranchisor is granted the right, for consideration given in whole or in part for such right, **to *sell or negotiate* the sale of a franchise** in the name or on behalf of the franchisor." *Id*. § 20004 (emphasis added). Finally, a "***subfranchisor***" is simply defined as any "person to whom an area franchise is granted." *Id*. § 20005 (emphasis added).

Services SoCal's relationship with WSC qualifies as that of a "subfranchisor" thereby negating Services SoCal's need to satisfy the "franchise fee" requirement in order to obtain "franchise" protections under the CFRA. This dynamic is explained by the Commissioner in Rule 3-F as follows:

> "Consideration" for purposes of an [subfranchisor] is not limited to the payment of a fee […]. Instead, "consideration" is construed to mean any payment or other legal consideration. Accordingly, an expenditure required on account for sales and technical assistance, or training and supervision, constitutes "consideration" for purposes of the statutory definition.

See Rule 3-F, § II.

As explained above and in the concurrently filed declaration of Deville, Services SoCal has made significant investments in its area representation business in the form of franchisee recruitment (*i.e*., "sales"), training, and supervision. (*See e.g*., Decl. Deville, ¶ 27.) In fact, a plain review of the language of the Area Representation Agreement reveals that the sole purpose of Services SoCal as Area

Representative of WSC is to solicit prospective franchisees and train and support existing franchisees in the Southern California region. (Decl. Deville, Ex. 11.) It is this exact role between Services SoCal and WSC that the California legislature and the Commissioner contemplated when defining an "area franchise" under the CFRA.

In an effort to overcome Services SoCal's role as subfranchisor, WSC argues that Services SoCal could not ***sell*** franchises without first gaining WSC's approval. [*See* D.E. 59-1, p. 13; Decl. Deville, Ex. 11 ("Licenses offered will in all cases be subject to the approval of WSC and will be granted and issued by WSC to the licensee.").] However, because the applicable statute in the CFRA states that a subfranchisor is someone that has the right to "***sell or negotiate***" the sale of a franchise, Services SoCal inability to "***sell***" a franchise without gaining WSC's prior approval is not dispositive of the issue. As reflected below, the undisputed facts show that Services SoCal had the right to negotiate and did negotiate the sale of franchises on behalf of WSC.

The Area Representation Agreement makes clear that Services SoCal was unequivocally granted the right to ***negotiate*** the sale of Windermere franchises on behalf of WSC. (Decl. Deville, ¶ 31, Ex. 11.) This right is identified in the opening Recitals to the Area Representation Agreement, which provides that "WSC desires to expand its operations and licenses into [Southern California] and to have Area Representative offer licenses to use the Trademark in [Southern California…]."[6] (Decl. Deville, Ex. 11, Recital A.) Similarly, Section 2 of the Area Representation Agreement expressly granted Services SoCal "the non-exclusive right to offer Windermere licenses to real estate brokerage business to use the [Windermere]

[6] There is no dispute that the term "Windermere licenses" as used in the Area Representation Agreement is interchangeable with the term "Windermere franchises" for purposes of contract interpretation.

Trademark and the Windermere System in [Southern California] in accordance with the terms of the Windermere License Agreement." (*Id*., Ex. 11, § 2.) Also, Section 3 of the agreement identified one of Services SoCal's responsibilities to include "marketing Windermere licenses in the Region." (*Id*.) These contractual rights extend much further than those of a referral agent as suggested in WSC's papers. [D.E. 59-1, p. 13.]

Moreover, not only did Services SoCal have the contractual right to offer the sale of Windermere franchises with prospective franchisees, but it actually ***did*** negotiate the franchise sales and even signed – along with WSC and the respective franchisee – each of the franchise agreements entered into by franchisees in Southern California. (Decl. Deville, ¶ 32, Exs. 19-21.) By way of example, in May 2013, Deville, on behalf of Services SoCal, negotiated the sale of Windermere franchised businesses to prospective franchisees in the San Diego region. (Decl. Deville, ¶ 34.) During this process, Deville negotiated terms with the prospective franchisees that were different than those WSC later desired to offer the prospects. (*Id*.) Deville refused to offer the terms proposed by WSC and the franchise agreement entered into by the parties ultimately reflected those negotiated by Deville and the franchisees. (*Id*., Ex. 22.) The emails attached to the concurrently filed declaration of Deville unequivocally show that not only did Services SoCal dictate the terms of the franchise agreements the franchisees in their region would enter into, but they also show that WSC permitted Services SoCal to set the terms. (Decl. Deville, Exs. 19-21.)

Finally, WSC's suggestion that Services SoCal was no more than a "sales agent" of WSC ignores the contents of the Area Representation Agreement and the parties' conduct and is therefore without merit. The evidence presented by Services SoCal reveals that it was doing far more in the franchise sales process than merely referring potential franchisees and receiving a referral bonus from the transaction. Instead, Services SoCal was thoroughly engaged in the entire sales process

including the negotiation and execution of all franchise agreements in the region. Services SoCal would then train and support the franchisees in the region as a subfranchisor of WSC. It is undisputed that the conduct of Services SoCal was far more than that of a referral agent as suggested by WSC.[7]

Because the Area Representation Agreement separately qualifies as an area franchise – and is therefore subject to the same protections as a "franchise" under the CFRA – WSC's motion for summary adjudication of Services SoCal's CFRA claim should be rejected.

III. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court deny WSC's motion for partial summary judgment in its entirety.

Dated: September 26, 2016

MULCAHY LLP

By: /s/ Kevin A. Adams
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[7] WSC's reliance upon the CFIL at Cal Corp. Code § 31008.5 is misplaced as the CFRA controls unlawful terminations of franchises and area franchises like that at issue in this case, and not the CFIL.