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

15 BENNION & DEVILLE FINE
HOMES, INC., a California
16 corporation, BENNION & DEVILLE
FINE HOMES SOCAL, INC., a
17 California corporation, WINDERMERE
SERVICES SOUTHERN
18 CALIFORNIA, INC., a California
corporation,

19 Plaintiffs,

20 v.

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

24 Defendant.

Case No. 5:15-CV-01921-DFM

Hon. Douglas F. McCormick

**DEFENDANT AND COUNTER
CLAIMANT WINDERMERE REAL
ESTATE SERVICES COMPANY'S
OBJECTION TO B&D PARTIES'
PROPOSED SPECIAL
INSTRUCTION NO. 6 – MATERIAL
BREACH OF CONTRACT
REQUIRES DAMAGES AND
ALTERNATIVE PROPOSED
AMENDMENEED INSTRUCTION**

Courtroom: 6B

Complaint Filed: September 17, 2015

26 AND RELATED COUNTERCLAIMS
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1 Defendant and counterclaimant Windermere Real Estate Services Company
2 (“WSC”) objects to B&D Parties’ Proposed Special Instruction No. 6 – Material
3 Breach of Contract Requires Damages as unnecessary. However, to the extent the
4 Court is inclined to give the instruction, WSC respectfully submits the following
5 proposed amendment to the B&D Parties’ Proposed Special Instruction No. 6 –
6 Material Breach of Contract Requires Damages. There are two reasons for WSC’s
7 proposed amendment. First, the title used by the B&D Parties improperly conflates
8 “damages” with “harm.” Harm is much broader than damages – there can be harm
9 resulting from a breach of contract that may not be compensable through an award
10 of damages. Accordingly, if the Court does give this instruction, it should change
11 the title so that it is not misleading.

12 Second, the proposed instruction’s inclusion of “as a matter of law” is
13 confusing and unnecessary. The jury will likely have no idea what “as a matter of
14 law” means. Moreover, the Court will have already instructed the jury regarding the
15 fact that the instructions reflect the law.

16 Finally, additional clarification is required for the jury to properly understand
17 that a breach may be material even if it is not a complete breach of the agreement.
18 Accordingly, WSC proposes the language set forth in the second sentence of the
19 proposed instruction appearing on the following page.

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21 DATED: July 22, 2018 PEREZ VAUGHN & FEASBY INC.

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23 By: /s/ Jeffrey A. Feasby
24 John D. Vaughn
25 Jeffrey A. Feasby
26 Attorneys for
27 Windermere Real Estate Services Company
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1 **Windermere Real Estate Services Company's Proposed Amendment to B&D**
2 **Parties' Special Instruction No. 6 –**
3 **Material Breach of Contract Requires Harm**

4 A breach that does not cause any harm is not a material breach. Whether a
5 partial breach of a contract is material depends on the importance or seriousness
6 thereof and the extent to which the injured party will obtain the substantial benefit
7 which he could have reasonably anticipated.

8
9 Given as proposed _____

10 Given as modified _____

11 Refused _____

12 Withdrawn _____

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15 **Sources and Authorities**

- 16 • Viacom Int'l Inc. v. MGA Entm't, Inc., No. CV 15-9621-R, 2016 WL
17 7448142, at *1 (C.D. Cal. Aug. 11, 2016), aff'd, 727 F. App'x 441 (9th
18 Cir. 2018).

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