

1 John D. Vaughn, State Bar No. 171801
E-Mail: vaughn@pvflaw.com
2 Jeffrey A. Feasby, State Bar No. 208759_
E-Mail: feasby@pvflaw.com
3 PEREZ VAUGHN & FEASBY Inc.
600 B Street, Suite 2100
4 San Diego, California 92101
Telephone: 619-784-3550
5 Facsimile: 619-460-0437

6 Jeffrey L. Fillerup, State Bar No. 120543
E-Mail: jeff.fillerup@dentons.com
7 Dentons US LLP
One Market Plaza Spear Tower
8 24th Floor
San Francisco, California 94105
9 Telephone: 415.356.4625
Facsimile: 619.267.4198

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11 Attorneys for Defendant and Counterclaimant
Windermere Real Estate Services Company

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

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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 Defendant.

24

25 **AND RELATED COUNTERCLAIMS**

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

Hon. Manuel L. Real

**DEFENDANT WINDERMERE
REAL ESTATE SERVICES
COMPANY'S OPPOSITION TO
PLAINTIFFS AND COUNTER-
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Date: November 21, 2016

Time: 10:00 a.m.

Courtroom: 8

1 Defendant and Counter-Claimant Windermere Real Estate Services Company
 2 (“WSC”) hereby submits this Separate Statement of Disputed Facts and Conclusions
 3 of Law in Opposition to Counter-Defendants’ Motion for Partial Summary Judgment
 4 of the First Amended Counterclaim (“FACC”) pursuant to Central District of
 5 California Local Rule 56-2.

	Counter-Defendants’ Allegedly Uncontroverted Facts and Evidence	WSC’s Response
1. 9 10 11 12 13 14 15 16	WSC claims that Services SoCal breached section 3 of the Area Representation Agreement by failing to: (1) “provide ‘prompt, courteous and efficient service’ to Windermere franchisees,” and (2) “deal ‘fairly and honestly’ with members of the Windermere System.”	Undisputed.
2. 17 18 19 20 21 22	WSC claims that each of the B&D Parties continued to unlawfully use the Windermere name and mark on websites and in domain names following the September 30, 2015 termination of the parties’ relationships.	Undisputed.
3. 23 24 25 26 27	As its fourth claim for relief, WSC alleges that Services SoCal, Bennion & Deville Fine Homes, Inc. (“B&D Fine Homes”), and B&D SoCal “breached the Modification Agreement	Undisputed.

1 2 3 4	by failing to remain in the Windermere System for the five (5) year period mandated by the Modification Agreement.”	
5 6 7 8 9 10 11 12 13	4. WSC’s fourth claim for relief relies entirely upon B&D Fine Homes, B&D SoCal and Services SoCal’s alleged breach of section 3(E) of the Modification Agreement. Section 3(E) provides that “B&D covenant to remain as Windermere Real Estate franchisees for five years from the date of execution of this Agreement.”	Undisputed.
14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	5. Breach of section 3(E) gives rise to the liquidated damages set forth in section 3(F) of the Modification Agreement. Section 3(F) provides that, “[i]n the event B&D terminates its franchise with WSC prior to the expiration of five years from the date of execution of this Agreement by all Parties, the waiver and [monetary concessions provided for in the Modification Agreement] shall be prorated against the total elapsed years from said date [...].”	Undisputed.

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6.	The term “B&D” is expressly defined in the first paragraph of the Modification Agreement to include <i>only</i> B&D Fine Homes and B&D SoCal.	Undisputed.
7.	Services SoCal is not included in the definition of “B&D” and, instead, is separately defined in the opening paragraph of the Modification Agreement as the “Area Representative.”	Undisputed.
8.	WSC’s breach of contract claim against Services SoCal (Count II) identifies four purported breaches of the parties’ Area Representation Agreement.	Disputed. The First Amended Counterclaim (“FACC”) alleges three separate breaches as a part of its Count II. (FAC, ¶¶ 130, 131, 133.) Counter-defendants have improperly attempted to divide one of those paragraphs into two distinct breaches, which is contrary to WSC’s allegations as set forth therein.
9.	The B&D Parties served WSC with a deposition notice that identified a series of deposition categories as permitted under Rule 30(b)(6) of the Federal Rules of Civil Procedure.	Undisputed.
10.	Category 46 of the B&D Parties’ deposition notice required WSC to produce a corporate representative to testify concerning “[t]he damages [WSC] is claiming in this action.”	Undisputed.

1	11.	In response to Category 46, WSC	Undisputed.
2		produced its CEO (Geoff Wood), CFO	
3		(Mark Oster), and General Counsel	
4		(Paul Drayna).	
5	12.	Wood's deposition transcript	Undisputed.
6		includes the following exchange:	
7		Q. Now, Windermere has asserted	
8		various breach of contract claims	
9		against Mr. Bennion and Mr. Deville	
10		and their entities in this lawsuit. Are	
11		you aware of that?	
12		A. I am.	
13		Q. And Windermere is seeking	
14		damages in connection with each of	
15		those claims. Are you aware of that?	
16		A. I am.	
17		Q. And are you being presented to	
18		testify here as to those damages --	
19		A. No.	
20		Q. -- that are being sought?	
21		A. The amount?	
22		Q. Correct.	
23		A. No.	
24		Q. Who from Windermere will?	
25		A. Mark Oster.	
26		Q. Thank you. Mr. Oster is being	
27		presented by Windermere as the	

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1	representative to testify as to the amount	
2	of damages that are being sought by	
3	Windermere in this case, correct?	
4	A. That's correct.	
5	13. Drayna deferred to Oster as the	Undisputed.
6	appropriate corporate representative of	
7	WSC to testify as to the damages being	
8	pursued by WSC in this action.	
9	14. Consistent with the deposition	Undisputed.
10	testimony of Wood and Drayna, Oster	
11	testified unequivocally that he was	
12	being produced by WSC to testify as to	
13	the damages it was pursuing in this	
14	action.	
15	15. When asked to identify WSC's	Disputed. Mr. Oster testified in
16	damages, Oster testified as follows:	great detail about WSC's
17	Q. What are the damages that	damages. This is only a small
18	Windermere is claiming in this action?	portion of his total testimony
19	A. The damages are the amounts due	about WSC's damages. <i>See e.g.</i> ,
20	that we've already talked about in	Feasby Decl. Ex. G, Oster Dep.
21	approximation of \$1.3 million in the	pp. 21-24.
22	schedule previously provided.	
23	Q. And outside of that schedule and	
24	potential interest that might flow from	
25	that August 23rd date until the time of	
26	payment, are there any other damages	
27	that Windermere is claiming in this	
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	<p>action?</p> <p>A. Not that I'm aware of.</p>	
<p>16.</p>	<p>None of WSC’s corporate representatives identified any harm suffered by WSC in connection with Service SoCal’s alleged failures to “provide ‘prompt, courteous and efficient service,’” or “deal ‘fairly and honestly’ with members of the Windermere system.”</p>	<p>Disputed. WSC’s corporate representatives and its damages expert identified damages sustained because of Windermere Services Southern California’s (“WSSC”) failure to make best efforts to collect fees from Fine Homes and Fine Homes SoCal as required under the Area Representation Agreement. (Feasby Decl. Ex. G, Oster Dep. pp. 21-24; Docket No. 67 (Adams Decl.) Ex. H, pp. 55, 61-65 of 206; Feasby Decl., Ex. B, § 3.) In addition, WSC’s franchising expert concluded that WSSC’s failure to collect fees owing by Fine Homes and Fine Homes SoCal was a breach of industry standards. (Docket No. 67 (Adams Decl.) Ex. H, pp. 105-106 of 206.) These breaches of contract and failures to meet industry standards breached WSSC’s obligation to provide prompt, courteous and efficient service and to deal fairly and honestly with members of the Windermere system – to wit, WSC.</p>
<p>17.</p>	<p>The deadline for WSC’s corporate representatives to make changes to their deposition testimony has long passed.</p>	<p>Undisputed.</p>

1	18.	WSC designated Neil J. Beaton, a Certified Public Accountant, as an expert witness in the case.	Undisputed.
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4	19.	As part of Mr. Beaton's assignment, he was asked by WSC to formulate "a preliminary opinion of the economic damages that may have been incurred by WSC as a result of alleged violations of [the franchise agreements and Area Representation Agreement]."	Undisputed.
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11	20.	On September 16, 2016, WSC produced Mr. Beaton's expert witness report pursuant to Rule 26 of the Federal Rules of Civil Procedure.	Undisputed.
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15	21.	The report is silent on any harm or damage to WSC in connection with Breach 1 or Breach 2 of the Area Representation Agreement.	Disputed. Mr. Beaton identified damages sustained because of Counter-Defendants failure to provide prompt, courteous and efficient service and to deal fairly and honestly with members of the Windermere system – to wit, WSC – specifically relating to Counter-Defendants' failure to collect and remit payment from Counter-Defendants' real estate franchises. (Docket No. 67 (Adams Decl.) Ex. H, pp. 55, 61-65 of 206.)
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25	22.	Consistent with the deposition testimony of Oster, Mr. Beaton summarized WSC's "economic damages" to be related solely to "unpaid	Disputed. WSC's corporate representatives and its damages expert identified damages sustained because of Windermere Services Southern California's ("WSSC") failure to make best
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<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16</p>	<p>franchise fees” in the amount of \$1,328,000.</p>	<p>efforts to collect fees from Fine Homes and Fine Homes SoCal as required under the Area Representation Agreement. (Feasby Decl. Ex. G, Oster Dep. pp. 21-24; Docket No. 67 (Adams Decl.) Ex. H, pp. 55, 61-65 of 206; Feasby Decl., Ex. B, § 3.) In addition, WSC’s franchising expert concluded that WSSC’s failure to collect fees owing by Fine Homes and Fine Homes SoCal was a breach of industry standards. (Docket No. 67 (Adams Decl.) Ex. H, pp. 105-106 of 206.) These breaches of contract and failures to meet industry standards breached WSSC’s obligation to provide prompt, courteous and efficient service and to deal fairly and honestly with members of the Windermere system – to wit, WSC.</p>
<p>17 18 19</p>	<p>23. The deadline for WSC to designate any further expert witnesses or reports has passed.</p>	<p>Undisputed.</p>
<p>20 21 22</p>	<p>24. WSC’s mandatory Rule 26(a) Initial Disclosure identified its damages at \$1,208,655.43.</p>	<p>Undisputed.</p>
<p>23 24 25 26 27 28</p>	<p>25. WSC’s Initial Disclosure is silent on the source of these claimed damages; however, the figure identified is consistent with Oster and Mr. Beaton’s damage calculations that were limited to</p>	<p>Disputed. WSC has always alleged that it was harmed by Counter-Defendants’ failure to provide prompt, courteous and efficient service and to deal fairly and honestly with members of the Windermere system – to wit, WSC – by among other things,</p>

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	franchise and related fees that are allegedly owed to WSC.	failing and refusing to collect fees owed by Counter-Defendants’ real estate franchises. WSC’s corporate representatives and its damages expert identified damages sustained because of this conduct. (Feasby Decl. Ex. G, Oster Dep. pp. 21-24; Docket No. 67 (Adams Decl.) Ex. H, pp. 55, 61-65 of 206.)
26.	WSC’s Initial Disclosure makes no reference to any damages in connection with Breach 1 or Breach 2.	Disputed. WSC has always alleged that it was harmed by Counter-Defendants’ failure to deal fairly and honestly with members of the Windermere system, by among other things, failing and refusing to collect fees owed by Counter-Defendants’ real estate franchises. WSC’s corporate representatives and its damages expert identified damages sustained because of this conduct. (Feasby Decl. Ex. G, Oster Dep. pp. 21-24; Adams Decl. Ex. H.)
27.	The B&D Parties issued a series of document requests and interrogatories to WSC specifically designed to elicit information on the amount of damages WSC is seeking the case and substantiation for those claimed damages.	Disputed. WSC is unable to identify the designed intent of Counter-Defendants’ written discovery requests.

<p>1 2 3 4 5 6 7 8 9 10</p>	<p>28. None of WSC’s written responses or documents produced support a claim for damages in connection with Breach 1 or Breach 2.</p>	<p>Disputed. WSC has always alleged that it was harmed by Counter-Defendants’ failure to deal fairly and honestly with members of the Windermere system, by among other things, failing and refusing to collect fees owed by Counter-Defendants’ real estate franchises. WSC’s corporate representatives and its damages expert identified damages sustained because of this conduct. (Feasby Decl. Ex. G, Oster Dep. pp. 21-24; Adams Decl. Ex. H.)</p>
<p>11 12 13 14 15 16 17 18 19 20</p>	<p>29. The B&D Parties’ discovery requests sought the production of all materials that support each of the categories of damages being pursued by WSC in the FACC. In response, WSC made clear that the only damages at issue are “for unpaid franchise fees, technology fees, and the liquidated damages owing under the Modification Agreement.”</p>	<p>Disputed. WSC has always alleged that it was harmed by Counter-Defendants’ failure to deal fairly and honestly with members of the Windermere system, by among other things, failing and refusing to collect fees owed by Counter-Defendants’ real estate franchises. WSC’s corporate representatives and its damages expert identified damages sustained because of this conduct. (Feasby Decl. Ex. G, Oster Dep. pp. 21-24; Adams Decl. Ex. H.)</p>
<p>21 22 23 24 25 26 27 28</p>	<p>30. WSC did not produce any materials to suggest that they had been harmed about Service SoCal’s alleged failures “to provide ‘prompt, courteous and efficient service’” (Breach 1), or “to deal ‘fairly and honestly with members of the Windermere system’” (Breach 2).</p>	<p>Disputed. WSC has always alleged that it was harmed by Counter-Defendants’ failure to deal fairly and honestly with members of the Windermere system, by among other things, failing and refusing to collect fees owed by Counter-Defendants’ real estate franchises. WSC’s corporate representatives and its damages expert identified</p>

1		damages sustained because of this
2		conduct. (Feasby Decl. Ex. G,
3		Oster Dep. pp. 21-24; Adams
4	31.	Undisputed.
5		WSC continues to pursue its
6		breach of contract claims against each
7		of the B&D Parties for allegedly
8		misusing the Windermere name and
9		mark on websites and in domain names
10		following the September 30, 2015
11	32.	Disputed. In addition to these
12		allegations, WSC alleged that
13		Counter-Defendants intentionally
14		misused the Windermere name
15		and Trademark following the
16		expiration/termination of the
17		Agreements. (D.E. 16, FACC ¶¶
18	33.	Undisputed.
19		WSC also separately alleges that
20		Bennion, Deville, and B&D SoCal
21		refused to “surrender 314 domain
22		names” that included the Windermere
23		name.
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25	34.	Disputed. In addition to these
26		allegations, WSC alleged that
27		Counter-Defendants intentionally
28		misused the Windermere name
		and Trademark following the

1	Infringement” sections of each of	expiration/termination of the
2	WSC’s breach of contract claims	Agreements. (D.E. 16, FACC ¶¶
3	asserted in the FACC.	118-126, 133-141, 148-157.)
4	35. B&D Fine Homes is the	Undisputed.
5	registrant (and former owner) of each of	
6	the domains at issue in this lawsuit.	
7	36. While in B&D Fine Home’s	Disputed. Eric Forsberg testified
8	possession, those domains and related	that he did work for B&D Fine
9	websites were directly controlled and	Homes SoCal and Services SoCal
10	managed by employees of B&D Fine	in addition to his work for B&D
11	Home and no one else.	Fine Homes. (Feasby Decl., Ex.
12	37. During the time relevant to this	E, Forsberg Dep. pp. 16:19-17:2.)
13	litigation, B&D Fine Homes’ Director	
14	of Technology, Eric Forsberg, managed	Undisputed.
15	and controlled all of the domains and	
16	websites owned by B&D Fine Homes.	
17	38. Mr. Forsberg has also controlled	Undisputed.
18	all blogs owned and operated by B&D	
19	Fine Homes.	
20	39. There have not been any websites	Undisputed.
21	owned or controlled by Services SoCal,	
22	B&D SoCal, Bennion, or Deville that	
23	utilized the Windermere name or marks.	
24	40. Neither Services SoCal nor B&D	Disputed. Eric Forsberg testified
25	SoCal control or operate any of the	that he worked for B&D Fine
26	domains or websites at issue in this	Homes SoCal and Services SoCal
27	litigation.	in addition to his work for B&D
28		Fine Homes. (Feasby Decl., Ex.
		E, Forsberg Dep. pp. 16:19-17:2.)

<p>1 2 3 4 5 6 7</p>	<p>41. Neither Bennion nor Deville have personally controlled or operated any websites or domains since September 30, 2015.</p>	<p>Disputed. Bennion and Deville personally guaranteed performance of B&D Fine Homes and B&D Fine Homes SoCal’s performance under the Franchise Agreements, including the use of WSC Trademarks and the “Windermere” name following termination of the Agreements. (Feasby Decl., Ex. I.)</p>
<p>8 9 10 11 12 13 14 15 16</p>	<p>42. Pursuant to the B&D Parties’ 30(b)(6) deposition notice, WSC was required to produce a corporate representative capable of testifying as to “[t]he B&D Parties’ use of the Windermere name and trademark following the termination and/or expiration of their franchise agreements.”</p>	<p>Undisputed.</p>
<p>17 18 19</p>	<p>43. WSC produced its General Counsel, Drayna, to testify on this topic.</p>	<p>Disputed. In addition to Mr. Drayna, WSC produced Robert Sherrell to testify as a corporate representative on this topic. (Adams Decl. Ex. G.)</p>
<p>20 21 22 23 24 25 26 27 28</p>	<p>44. During Drayna’s deposition, he testified that B&D Fine Homes was the “legal owner” of the websites and domains at issue in this litigation, and WSC is “unaware” of which, if any, of the B&D Parties controlled the websites and domain names after September 30, 2015.</p>	<p>Disputed. Mr. Drayna testified that Counter-Defendants breached the Agreements by continuing to use the “Windermere” name after termination of the Agreements, and that he was unaware which entity had control over the domain names registered to B&D Fine Homes. (Adams Decl. Ex. E, Drayna Dep., pp. 422-423.)</p>

1 2 3 4 5 6 7 8 9 10 11	45. When specifically asked to identify the evidence in WSC's possession that suggests Services SoCal was responsible for the conduct at issue, Drayna responded, "[a]s of today, I don't know that we have -- that we have any evidence that discovery -- I think our investigation on that is continuing."	Disputed. Mr. Drayna testified that WSC was aware that B&D Fine Homes was the registered owners of the subject domain names, but also testified that WSC was still investigating which entity or employee was responsible for continuing to use the "Windermere" name after termination of the Agreements. Further, Mr. Forsberg testified that he worked for B&D Fine Homes SoCal and Services SoCal. (Adams Decl. Ex. E, Drayna Dep. pp. 422-425; Feasby Decl. Ex. F, Forsberg Dep. pp. 16:19-17:2.)
12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27	46. Drayna's deposition transcript also includes the following similar exchange: Q. But as you sit here, you cannot identify any specific instances or evidence of a representative of Services using the Windermere domain names after September 30, 2015, correct? A. We know what -- again, as I believe I already said, we know that somebody had to do something on or around September 30, 2015 that resulted in web traffic to WindermereSoCal.com being redirected somewhere else, and we don't know who did that.	Undisputed.

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<p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p>	<p>47. Drayna testified that WSC maintained a similar lack of knowledge concerning the conduct of B&D SoCal, Bennion and Deville.</p>	<p>Disputed. Mr. Drayna testified that employees worked for multiple Counter-Defendant entities, making it difficult to determine which entity was responsible for which conduct. (Adams Decl. Ex. E, Drayna pp. 426-427.)</p>
<p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p>	<p>48. When asked to identify the evidence that WSC has to show that Bennion, Deville, or B&D SoCal unlawfully used the Windermere</p>	<p>Disputed. Mr. Drayna testified that employees worked for multiple Counter-Defendant entities, making it difficult to determine which entity was responsible for which conduct.</p>

1	domains after September 30, 2015,	(Adams Decl. Ex. E, Drayna Dep.
2	Drayna testified “[a]gain, I think there	pp. 426-427.)
3	was some uncertainty of who did what	
4	and who worked for which entity.”	
5	49. Drayna’s deposition was	Undisputed.
6	completed on August 23, 2016, just six	
7	days before the discovery cutoff date of	
8	August 29, 2016.	
9	WSC’s Additional Facts	Supporting Evidence
10	(sequentially numbered from	
11	Counter-Defendants facts for ease of	
12	reference).	
13	50. The Coachella Valley Franchise	Feasby Decl., Ex. A, Coachella
14	Agreement, the Southern California	Valley Franchise Agreement § 7;
15	Franchise Agreement, and the Area	Ex. B Area Representation
16	Representation Agreement (collectively	Agreement § 6; Ex. C, Southern
17	the “Agreements”) required Counter-	California Franchise Agreement §
18	Defendants, upon termination of the	9.
19	Agreements to discontinue all use of	
20	WSC’s trademarks, the “Windermere”	
21	name, and all variations thereof.	
22	51. Bennion and Deville personally	Feasby Decl., Ex. H.
23	guaranteed B&D Fine Homes’	
24	performance under the Coachella Valley	
25	Franchise Agreement.	
26	52. Bennion and Deville personally	Feasby Decl., Ex. C, Southern
27	guaranteed B&D Fine Homes SoCal’s	California Franchise Agreement,
28		Appendix 2.

1		Performance under the Southern California Franchise Agreement.	
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3	53.	The modification of the personal guaranty pursuant to the Modification Agreement applied only to amounts owed under the Franchise Agreements prior to April 1, 2012, did not modify the guarantee of performance, and did not affect the guarantee of performance or payment after April 1, 2012.	Feasby Decl. Ex. K, Modification Agreement § 3(G).
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11	54.	B&D Fine Homes is still using the fictitious business names “Windermere Real Estate Coachella Valley” and “Windermere Real Estate Southern California.”	Feasby Decl. Ex. L.
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16	55.	B&D Fine Homes SoCal is still using the fictitious business name “Windermere Real Estate SoCal.”	Feasby Decl. Ex. M.
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19	56.	Services SoCal is still an active corporation using the name “Windermere Services Southern California Inc.” with its principle place of business at 71691 Highway 111, Rancho Mirage, CA 92270.	Feasby Decl. Ex. N.
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25	57.	71691 Highway 111, Rancho Mirage, CA 92270 is an address used by B&D Fine Homes.	Feasby Decl. Ex. K, Modification Agreement § 13.
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CONCLUSIONS OF LAW

1. The term “B&D” used throughout the Modification Agreement is expressly defined in the first paragraph of the Modification Agreement to include only B&D Fine Homes and B&D SoCal.

WSC’s Response: Undisputed.

2. Services SoCal is not included in the definition of “B&D” and, instead, is separately defined in the opening paragraph of the Modification Agreement as the “Area Representative.”

WSC’s Response: Undisputed.

3. As a matter of law, Services SoCal is not subject to the five (5) year period set forth in Section 3(E) of the Modification Agreement.

WSC’s Response: Undisputed.

4. WSC has not identified any appreciable and actual damage for Services SoCal’s alleged breach of Section 3 of the Area Representation Agreement for “failing to provide ‘prompt, courteous and efficient service’ to Windermere franchisees.” (FACC, ¶ 130.)

WSC’s Response: Undisputed.

5. WSC has not identified any appreciable and actual damage for Services SoCal’s alleged breach of Section 3 of the Area Representation Agreement for “failing to deal ‘fairly and honestly’ with members of the Windermere System.” (FACC, ¶ 130.)

WSC’s Response: Disputed. WSC has identified harm caused by Counter-Defendants’ failure to provide prompt, courteous and efficient service and failure to deal fairly and honestly with members of the Windermere system,

1 by among other things, failing and refusing to collect fees owed by Counter-
2 Defendants' real estate franchises. WSC's corporate representatives and its
3 damages expert identified damages sustained because of this conduct and
4 WSSC's failure to meet industry standards. (Feasby Decl. Ex. G, Oster Dep.
5 pp. 21-24; Adams Decl. Ex. H.)
6

7 6. Without corresponding damages, Services SoCal's alleged breaches of
8 the Area Representation Agreement for "failing to provide 'prompt, courteous and
9 efficient service'" (Breach 1), or for "failing to deal 'fairly and honestly with
10 members of the Windermere system'" (Breach 2) fail as a matter of law.

11 **WSC's Response:** Disputed. WSC has identified harm caused by Counter-
12 Defendants' failure to provide prompt, courteous and efficient service and
13 failure to deal fairly and honestly with members of the Windermere system,
14 by among other things, failing and refusing to collect fees owed by Counter-
15 Defendants' real estate franchises. WSC's corporate representatives and its
16 damages expert identified damages sustained because of this conduct and
17 WSSC's failure to meet industry standards. (Feasby Decl. Ex. G, Oster Dep.
18 pp. 21-24; Adams Decl. Ex. H.)
19

20 7. WSC's failure to provide a computation of damages for Breach 1 and
21 Breach 2 of the Area Representation Agreement prior to the discovery cutoff
22 precludes it from doing so now.

23 **WSC's Response:** Disputed. WSC has identified harm caused by Counter-
24 Defendants' failure to provide prompt, courteous and efficient service and
25 failure to deal fairly and honestly with members of the Windermere system,
26 by among other things, failing and refusing to collect fees owed by Counter-
27 Defendants' real estate franchises. WSC's corporate representatives and its
28 damages expert identified damages sustained because of this conduct and

1 WSSC’s failure to meet industry standards. (Feasby Decl. Ex. G, Oster Dep.
2 pp. 21-24; Adams Decl. Ex. H.)
3

4 8. The undisputed facts show that, at all times relevant, B&D Fine Homes
5 – and not the other B&D Parties – owned and controlled all of the websites and
6 domains that are the subject of WSC’s breach of contract claims, Counts 1 through 3
7 at paragraphs 118-124, 133-139, 148-156 of the FACC.

8 **WSC’s Response:** Disputed. Eric Forsberg testified that he worked for all
9 B&D Parties, including Services SoCal and B&D Fine Homes SoCal, while he was
10 in control of the subject domain names. (Feasby Decl., Ex. E, Forsberg Dep. pp.
11 16:19-17:2.) Further, Bennion and Deville personally guaranteed performance
12 under the Franchise Agreements. (Feasby Decl. Exs. H-J.) Finally, B&D Fine
13 Homes, Services SoCal, and B&D Fine Homes SoCal are all currently using the
14 “Windermere” name in violation of the Agreements. (Feasby Decl. Exs. L-N.)

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