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9	Attorneys for Plaintiffs and Counter-Defen	ndants
10	UNITED STATES I	DISTRICT COURT
11	CENTRAL DISTRIC	T OF CALIFORNIA
12	DENNION & DEVILLE EINE	Case No. 5:15-CV-01921 R (KKx)
13	BENNION & DEVILLE FINE HOMES, INC., a California	Hon. Manual L. Real
14	corporation, BENNION & DEVILLE	
15	FINE HOMES SOCAL, INC., a California corporation, WINDERMERE	REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS'
16	SERVICES SOUTHERN	SEPARATE STATEMENT OF
17	CALIFORNIA, INC., a California	UNCONTROVERTED FACTS
18	corporation,	AND CONCLUSIONS OF LAW; OPPOSITION TO DEFENDANT'S
19	Plaintiffs,	SEPARATE STATEMENT OF
20	V.	GENUINE DISPUTES
21	WINDERMERE REAL ESTATE	Date: November 21, 2016
22	SERVICES COMPANY, a Washington corporation; and DOES 1-10	Time: 10:00 a.m. Courtroom: 8
23		[Filed concurrently with Deals Duich
<ul><li>24</li><li>25</li></ul>	Defendant.	[Filed concurrently with Reply Brief; Objections to Declaration of Jeffrey A. Feasby]
26		Action Filed. Contamber 17, 2015
27		Action Filed: September 17, 2015 Pretrial Conf.: November 14, 2016
28		Trial: January 31, 2017

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Pursuant to Local Rule 56-1, Plaintiffs and Counter-Defendants Bennion & Deville Fine Homes SoCal, Inc. ("B&D SoCal"), Windermere Services Southern California, Inc. ("Services SoCal"), and Counter-Defendants Robert Bennion ("Bennion") and Joseph Deville ("Deville," collectively, the "Plaintiffs") hereby submit this (1) Reply to Defendant/Counterclaimant Windermere Real Estate Services Company's ("WSC") Opposition to Plaintiffs' Separate Statement of Uncontroverted Facts and Conclusions of Law, and (2) Opposition to WSC's Separate Statement of Genuine Disputes.

## **UNCONTROVERTED MATERIAL FACTS**

	<u>PLAINTIFFS'</u>	<b>DEFENDANT'S RESPONSE</b>
	UNCONTROVERTED FACTS	AND EVIDENCE
	AND SUPPORTING	
	<u>EVIDENCE</u>	
1.	WSC claims that Services SoCal	Undisputed.
	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."	
	D.E. 16 (the First Amended	
	Counterclaim), ¶ 130.	
2.	WSC claims that each of the B&D	Undisputed.
	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'	

1		relationships.	
2		D.E. 16, ¶¶ 118-124, 133-139, 148- 156.	
3	3.	As its fourth claim for relief, WSC	Undisputed.
4	J.	alleges that Services SoCal,	
5		Bennion & Deville Fine Homes,	
		Inc. ("B&D Fine Homes"), and B&D SoCal "breached the	
6		Modification Agreement by failing	
7		to remain in the Windermere	
8		System for the five (5) year period	
9		mandated by the Modification Agreement."	
10		D.E. 16, ¶¶ 158-164.	
11	4.	WSC's fourth claim for relief relies	Undisputed.
12	١٠	entirely upon B&D Fine Homes,	
		B&D SoCal and Services SoCal's	
13		alleged breach of section 3(E) of the Modification Agreement.	
14		Section 3(E) provides that "B&D	
15		covenant to remain as Windermere	
16		Real Estate franchisees for five	
17		years from the date of execution of this Agreement."	
18		Declaration of Robert J. Deville	
		("Deville Decl."), ¶¶ 4-6, Ex. A	
19		(Modification Agreement), § 3(E).	
20	5.	Breach of section 3(E) gives rise to	Undisputed.
21		the liquidated damages set forth in section 3(F) of the Modification	
22		Agreement. Section 3(F) provides	
23		that, "[i]n the event B&D	
24		terminates its franchise with WSC	
		prior to the expiration of five years from the date of execution of this	
25		Agreement by all Parties, the	
26		waiver and [monetary concessions	
27		provided for in the Modification	
28		Agreement] shall be prorated	
		against the total elapsed years from	

1		said date []."	
		Deville Decl., ¶ 6, Ex. A	
2		(Modification Agreement), §§ 3(E)	
3		& 3(F).	I Indianated
4	6.	The term "B&D" is expressly defined in the first paragraph of the	Undisputed.
5		Modification Agreement to include	
6		only B&D Fine Homes and B&D	
		SoCal.	
7		Deville Decl., ¶ 6, Ex. A	
8		(Modification Agreement), p. 1.	
9	7.	Services SoCal is not included in	Undisputed.
10		the definition of "B&D" and, instead, is separately defined in the	
		opening paragraph of the	
11		Modification Agreement as the	
12		"Area Representative."	
13		Deville Decl., ¶ 6, Ex. A	
14		(Modification Agreement), p. 1.	
15	8.	WSC's breach of contract claim	
		against Services SoCal (Count II) identifies four purported breaches	Counterclaim ("FACC") alleges three separate breaches as a part of
16		of the parties' Area Representation	its Count II. (FAC, ¶¶ 130, 131,
17		Agreement.	133.) Counter-defendants have
18		See FACC, ¶¶ 127-141.	improperly attempted to divide one
19			of those paragraphs into two distinct
			breaches, which is contrary to
20			WSC's allegations as set forth therein.
21	Plainti	ffs' Reply to No. 8: This does not cre	
22		derlying language of the Area Represe	_
23	II	uph 3, provides, in pertinent part: "Are	•
24	-	, courteous and efficient service, and	•
	II	ds of fair dealing and honesty when d	
25	II	ers of the Windermere System in order ion, quality image and goodwill built	
26		nark." [See D.E. 31-1, p. 16, § 3, ¶ 3.]	-
27	II	ions on Services SoCal – (1) to give p	
28		, and (2) to be governed by the highes	•
_0	honesty WSC incorrectly attempts to shoehorn these separate obligations into a		

honesty. WSC incorrectly attempts to shoehorn these separate obligations into a

1	single breach. Even if WSC's interpretation of Services SoCal's obligations under		
2	section 3, paragraph 3 of the Area Representation Agreement are correct, such		
2	fact is immaterial to the underlying partial motion for summary judgment.		
3	9.	The B&D Parties served WSC with	Undisputed.
4		a deposition notice that identified a	
5		series of deposition categories as permitted under Rule 30(b)(6) of	
		the Federal Rules of Civil	
6		Procedure.	
7		Declaration of Kevin Adams	
8		("Adams Decl."), ¶ 4, Exs. A, B;	
9		see also, Id. at ¶ 5, Ex. 2 to the	
		deposition transcripts of Paul	
10		Drayna ("Drayna Depo."), Geoff	
11		Wood ("Wood Depo."), and Mark	
12	1.0	Oster ("Oster Depo.").  Category 46 of the B&D Parties'	Undisputed.
13	10.	deposition notice required WSC to	Charspated.
		produce a corporate representative	
14		to testify concerning "[t]he	
15		damages [WSC] is claiming in this	
16		action."	
17		Adams Decl., ¶ 14, Ex. A, p. 6; see	
		also, Id. at ¶ 5, Ex. 2 to the	
18		deposition transcripts of Drayna Depo., Wood Depo., and Oster	
19		Depo.	
20	11.	In response to Category 46, WSC	Undisputed.
21	11.	produced its CEO (Geoff Wood),	-
		CFO (Mark Oster), and General	
22		Counsel (Paul Drayna).	
23		Adams Decl., ¶ 45, Exs. C, G; see	
24		also, Id. at $\P$ 7, 13, Exs. 3, 127 to the deposition transcripts of Drayna	
25		Depo. and Wood Depo., and Ex.	
		127 to the deposition transcript of	
26		Oster Depo.	
27	12.	· · · · · · · · · · · · · · · · · · ·	Undisputed.
28	12:	includes the following exchange:	
		Q. Now, Windermere has	

1		asserted various breach of contract	
2		claims against Mr. Bennion and	
		Mr. Deville and their entities in this lawsuit. Are you aware of that?	
3		A. I am.	
4		Q. And Windermere is seeking	
5		damages in connection with each	
6		of those claims. Are you aware of	
7		that? A. I am.	
8		Q. And are you being presented	
		to testify here as to those damages -	
9		-	
10		A. No.	
11		Q that are being sought? A. The amount?	
12		Q. Correct.	
13		A. No.	
14		Q. Who from Windermere will?	
		A. Mark Oster.	
15		Q. Thank you. Mr. Oster is being presented by Windermere as	
16		the representative to testify as to	
17		the amount of damages that are	
18		being sought by Windermere in	
19		this case, correct?	
20		A. That's correct. Adams Decl., ¶ 9, Ex. D (Wood	
		Depo.), pp. 325:16 to 326:14.	
21	13.	Drayna deferred to Oster as the	Undisputed.
22		appropriate corporate	
23		representative of WSC to testify as	
24		to the damages being pursued by WSC in this action.	
25		Adams Decl., ¶ 10, Ex. E, (Drayna	
		Depo.), pp. 209:3-14, 406:8-24,	
26		426:3-15.	
27	14.	Consistent with the deposition	Undisputed.
28		testimony of Wood and Drayna, Oster testified unequivocally that	
		cotton toothirea anequivocally that	

I.			
1		he was being produced by WSC to	
2		testify as to the damages it was	
		pursuing in this action.  Adams Decl., ¶ 11, Ex. F (Oster	
3		Depo.), pp. 49:23-50:2, 113:10 to	
4		114:4.	
5	15.	When also I to identify WCC?	Disputed. Mr. Oster testified in
6	13.	damages, Oster testified as follows:	great detail about WSC's
7		Q. What are the damages that	damages. This is only a small
		Windermere is claiming in this	portion of his total testimony
8		action?	about WSC's damages. See e.g.,
9		A. The damages are the amounts due that we've already talked about	Feasby Decl. Ex. G, Oster Dep. pp. 21-24.
10		in approximation of \$1.3 million in	pp. 21 2 i.
11		the schedule previously provided.	
		Q. And outside of that schedule	
12		and potential interest that might	
13		flow from that August 23rd date	
14		until the time of payment, are there any other damages that	
15		Windermere is claiming in this	
16		action?	
		A. Not that I'm aware of.	
17		Adams Decl., Ex. F (Oster Depo.),	
18	DI : 4:	Oster Depo., pp. 113:10 to 114:4.	
19	l -	ffs' Reply to No. 15: Plaintiffs' identified as is reflected in the deposition trans	•
20	1	te as is reflected in the deposition trans , Oster Depo., pp. 113:10 to 114:4. Wi	-
		Oster's testimony concerning unrelate	_
21	1	d is immaterial to the underlying partia	_
22	16.	None of WSC's corporate	
23		representatives identified any harm	-
24		suffered by WSC in connection	expert identified damages
		with Service SoCal's alleged failures to "provide prompt,	sustained because of Windermere Services Southern California's
25		failures to "provide 'prompt, courteous and efficient service,"	("WSSC") failure to make best
26		or "deal 'fairly and honestly' with	efforts to collect fees from Fine
27		members of the Windermere	Homes and Fine Homes SoCal as
28		system."	required under the Area
		See e.g., Adams Decl., Exs. D, E, F	Representation Agreement.
	1		

1		(Drayna Depo., Wood Depo., Oster	(Feasby Decl. Ex. G, Oster Dep.
2		Depo.).	pp. 21-24; Docket No. 67 (Adams
2			Decl.) Ex. H, pp. 55, 61-65 of
3			206; Feasby Decl., Ex. B, § 3.) In
4			addition, WSC's franchising
			expert concluded that WSSC's
5			failure to collect fees owing by
6			Fine Homes and Fine Homes
			SoCal was a breach of industry
7			standards. (Docket No. 67
8			(Adams Decl.) Ex. H, pp. 105-106
9			of 206.) These breaches of
9			contract and failures to meet
10			industry standards breached
11			WSSC's obligation to provide
			prompt, courteous and efficient
12			service and to deal fairly and
13			honestly with members of the
1.4			Windermere system – to wit,
14			WSC.
15	Plainti	<b>ffs' Reply to No. 16:</b> WSC does not p	provide any evidence to contradict

Plaintiffs' Reply to No. 16: WSC does not provide any evidence to contradict this fact. Services SoCal's alleged failure to make best efforts to collect fees involves a separate and district contractual obligation in the Area Representation Agreement. [See D.E. 31-1, p. 16, § 3, ¶ 2 (requiring Services SoCal to collect fees owed by Windermere franchises in its region and to remit to WSC its share of those fees).] Any alleged damages for Services SoCal's purported failure to collect fees are not relevant to WSC claim that Service SoCal failed to "provide 'prompt, courteous and efficient service," or "deal 'fairly and honestly' with members of the Windermere system." Additionally, WSC's citation to and reliance upon its franchise expert's conclusions do not create a disputed issue of fact because (1) the franchise expert does not identify any damages to WSC for the alleged "breach of industry standards," and (2) the franchise expert's opinions as to the conduct of Services SoCal is irrelevant in light of the Court's finding that Services SoCal's relationship with WSC was not a franchise. [D.E. 66, p. 7.] Finally, as explained in detail in the concurrently filed Objections to the declaration of Jeffrey Feasby, Plaintiffs object to WSC's reliance upon Exhibit B to Mr. Feasby's declaration pursuant to Fed. R. Evid. 602, 901. Mr. Feasby does not lay the proper foundation for Exhibit B. Exhibit B is not deemed authentic and admissible by being attached to a complaint. See *Ellipsis*, *Inc.*, 2006 WL

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1	1207589, at *8; see also Szymankiewicz, 2005 WL 1154210, at *1; Willis, 2008		
	WL 821828, at *7. Also, WSC does not identify who produced the document in		
2	discovery, and the document does not bear the Moving Parties' Bates stamp. See		
3	Orr, 285 F.3d at 777 fn. 20, 21. Finally, WSC fails to cite to a transcript that		
4	authent	cicates Exhibit B. See Orr, 285 F.3d at	
	17.	The deadline for WSC's corporate	Undisputed.
5		representatives to make changes to	
6		their deposition testimony has long passed.	
7		See Fed. R. Civ. Pro. 30(e)(1).	
8	1.0	WSC designated Neil J. Beaton, a	Undisputed.
	18.	Certified Public Accountant, as an	Champarea.
9		expert witness in the case.	
10		Adams Decl., ¶¶ 16-17, Ex. H	
11		(WSC's Expert Witness	
		Disclosure), p. 1, ¶ 1.	
12	19.	As part of Mr. Beaton's	Undisputed.
13		assignment, he was asked by WSC	
14		to formulate "a preliminary opinion	
15		of the economic damages that may have been incurred by WSC as a	
		result of alleged violations of [the	
16		franchise agreements and Area	
17		Representation Agreement]."	
18		Id., Ex. H, (WSC's Expert Witness	
		Disclosure), exhibit 1, p. 4.	
19	20.	On September 16, 2016, WSC	Undisputed.
20		produced Mr. Beaton's expert	
21		witness report pursuant to Rule 26	
22		of the Federal Rules of Civil Procedure.	
		Adams Decl., ¶¶ 16-17, Ex. H	
23		(WSC's Expert Witness	
24		Disclosure), p. 1, ¶ 1.	
25	21.	The report is silent on any harm or	Disputed. Mr. Beaton identified
	21.	damage to WSC in connection with	damages sustained because of
26		Breach 1 or Breach 2 of the Area	Counter-Defendants failure to
27		Representation Agreement.	provide prompt, courteous and
28		Adams Decl., ¶¶ 16-18, Ex. H	•
		(WSC's Expert Witness	and honestly with members of the
	1		

I.			
1		Disclosure), exhibit 1.	Windermere system – to wit,
2			WSC – specifically relating to
			Counter-Defendants' failure to
3			collect and remit payment from
4			Counter-Defendants' real estate
5			franchises. (Docket No. 67
			(Adams Decl.) Ex. H, pp. 55, 61-65 of 206.)
6	Plainti	ffs' Reply to No. 21: WSC does not p	/
7		t. Nowhere in Mr. Beaton's report does	-
8	1	armed as a result of Services SoCal's a	
	courteo	ous and efficient service and to deal far	irly and honestly with members of
9	the Wii	ndermere system. (Adams Decl., ¶¶ 16	6-18, Ex. H (WSC's Expert Witness
10		sure), exhibit 1.) Services SoCal's alle	
11	1	fees involves a separate and district co	_
12	_	entation Agreement. [See D.E. 31-1, p to collect fees owed by Windermere fr	
13		ts share of those fees).]	anchises in its region and to remit to
	22.	Consistent with the deposition	Disputed. WSC's corporate
14	22.	testimony of Oster, Mr. Beaton	representatives and its damages
15		summarized WSC's "economic	expert identified damages
16		damages" to be related solely to	sustained because of Windermere
		"unpaid franchise fees" in the	Services Southern California's
17		amount of \$1,328,000.	("WSSC") failure to make best
18		Adams Decl., ¶ 18, Ex. H, (WSC's	
19		Expert Witness Disclosure), exhibit	Homes and Fine Homes SoCal as
		1, p. 5; Adams Decl., Ex. F (Oster Depo.), pp. 113:10 to 114:4.	required under the Area  Penrosontation Agraement
20		Depo.), pp. 113.10 to 114.4.	Representation Agreement. (Feasby Decl. Ex. G, Oster Dep.
21			pp. 21-24; Docket No. 67 (Adams
22			Decl.) Ex. H, pp. 55, 61-65 of
23			206; Feasby Decl., Ex. B, § 3.) In
			addition, WSC's franchising
24			expert concluded that WSSC's
25			failure to collect fees owing by
26			Fine Homes and Fine Homes
			SoCal was a breach of industry
27			standards. (Docket No. 67
28			(Adams Decl.) Ex. H, pp. 105-106 of 206.) These breaches of
			01 200.) These breaches 01

1	contract and failures to meet
2	industry standards breached
2	WSSC's obligation to provide
3	prompt, courteous and efficient
4	service and to deal fairly and
	honestly with members of the
5	Windermere system – to wit, WSC.
	Plaintiffs' Reply to No. 22: WSC does not provide any evidence to contradict
7	this fact. Services SoCal's alleged failure to make best efforts to collect fees
8	involves a separate and district contractual obligation in the Area Representation
9	Agreement. [See D.E. 31-1, p. 16, § 3, ¶ 2 (requiring Services SoCal to collect
	fees owed by Windermere franchises in its region and to remit to WSC its share of
10	those fees).] Any alleged damages for Services SoCal's purported failure to
11	collect fees are not relevant to WSC claim that Service SoCal failed to "provide
12	'prompt, courteous and efficient service,'" or "deal 'fairly and honestly' with
13	members of the Windermere system."  Additionally, WSC's citation to and reliance upon its franchise expert's
	conclusions do not create a disputed issue of fact because (1) the franchise expert
14	does not identify any damages to WSC for the alleged "breach of industry
15	standards," and (2) the franchise expert's opinions as to the conduct of Services
16	SoCal is irrelevant in light of the Court's finding that Services SoCal's
	relationship with WSC was not a franchise. [D.E. 66, p. 7.]
17	Finally, as explained in detail in the concurrently filed Objections to the
18	declaration of Jeffrey Feasby, Plaintiffs object to WSC's reliance upon Exhibit B to Mr. Feasby's declaration pursuant to Fed. R. Evid. 602, 901. Mr. Feasby does
19	not lay the proper foundation for Exhibit B. Exhibit B is not deemed authentic and
20	admissible by being attached to a complaint. See <i>Ellipsis</i> , <i>Inc.</i> , 2006 WL
21	1207589, at *8; see also <i>Szymankiewicz</i> , 2005 WL 1154210, at *1; Willis, 2008
	WL 821828, at *7. Also, WSC does not identify who produced the document in
22	discovery, and the document does not bear the Moving Parties' Bates stamp. See
23	Orr, 285 F.3d at 777 fn. 20, 21. Finally, WSC fails to cite to a transcript that
24	authenticates Exhibit B. See Orr, 285 F.3d at 774-75, fn. 12, 13.
24	23. The deadline for WSC to designate Undisputed.
25	any further expert witnesses or
26	reports has passed.
	D.E. 35; Fed. R. Civ. Pro.
27	26(a)(2)(D). WSC's mandatory Pula 26(a) Undiameted
28	24. WSC's mandatory Rule 26(a) Undisputed. Initial Disclosure identified its
	Initial Disclusure lucitified its

1		damages at \$1,208,655.43.	
2		Adams Decl., Ex. I (WSC's Initial	
		Disclosures), p. 5. WSC's Initial Disclosure is silent	Disputed. WSC has always
3	25.	on the source of these claimed	alleged that it was harmed by
4		damages; however, the figure	Counter-Defendants' failure to
5		identified is consistent with Oster	provide prompt, courteous and
6		and Mr. Beaton's damage	efficient service and to deal fairly
		calculations that were limited to	and honestly with members of the
7		franchise and related fees that are	Windermere system – to wit,
8		allegedly owed to WSC.	WSC – by among other things,
9		Adams Decl., ¶ 20, Ex. I (WSC's	failing and refusing to collect fees
10		Initial Disclosure), p. 5; Ex. F (Oster Depo.), pp. 113:10 to 114:4;	owed by Counter-Defendants' real estate franchises. WSC's
		Ex. H (WSC's Expert Witness	corporate representatives and its
11		Disclosure), exhibit 1, p. 5.	damages expert identified
12		<i>,,</i>	damages sustained because of this
13			conduct. (Feasby Decl. Ex. G,
14			Oster Dep. pp. 21-24; Docket No.
			67 (Adams Decl.) Ex. H, pp. 55,
15	Dlainti	ffs' Reply to No. 25: WSC's response	61-65 of 206.)
16	1	a triable issue of material fact. WSC is	
17	1	of contradicting the fact through evid	
18	1	to make best efforts to collect fees inv	
	contrac	tual obligation in the Area Representa	ation Agreement. [See D.E. 31-1, p.
19	-	, ¶ 2 (requiring Services SoCal to colle	-
20	1	ses in its region and to remit to WSC i	, = 0
21	_	es for Services SoCal's purported failu	
22	1	laim that Service SoCal failed to "pro", " or "deal 'fairly and honestly' with	
23	system.	· · · · · · · · · · · · · · · · · · ·	memoers of the windermere
	26.	WSC's Initial Disclosure makes no	Disputed. WSC has always
24	20.	reference to any damages in	alleged that it was harmed by
25		connection with Breach 1 or	Counter-Defendants' failure to
26		Breach 2.	deal fairly and honestly with
27		Adams Decl., ¶ 21, Ex. I (WSC's	members of the Windermere
		Initial Disclosure).	system, by among other things, failing and refusing to collect fees
28			owed by Counter-Defendants' real
	1		J :

			astata franchisas WCC's
1			estate franchises. WSC's
2			corporate representatives and its
			damages expert identified
3			damages sustained because of this
4			conduct. (Feasby Decl. Ex. G,
			Oster Dep. pp. 21-24; Adams
5			Decl. Ex. H.)
6		ffs' Reply to No. 26: WSC's response	
7		a triable issue of material fact. WSC is	1 0 0 1
/		of contradicting the fact through evid	
8		to make best efforts to collect fees inv	*
9		tual obligation in the Area Representa	_
		, ¶ 2 (requiring Services SoCal to colle	•
10		ses in its region and to remit to WSC	, = 0
11		es for Services SoCal's purported failu	
		laim that Service SoCal failed to "pro-	
12	service	"," or "deal 'fairly and honestly' with	members of the Windermere
13	system.		
14	27.	The B&D Parties issued a series of	Disputed. WSC is unable to
		document requests and	identify the designed intent of
15		interrogatories to WSC specifically	Counter-Defendants' written
16		designed to elicit information on	discovery requests.
		the amount of damages WSC is	
17		seeking the case and substantiation	
18		for those claimed damages.	
		Adams Decl., ¶¶ 22-25, Exs. J, K.)	
19	<u>Plainti</u>	ffs' Reply to No. 27: WSC's response	e is insufficient to create a triable
20	issue of	f material fact and otherwise irrelevan	t to the underlying motion.
21	28.	None of WSC's written responses	Disputed. WSC has always
		or documents produced support a	alleged that it was harmed by
22		claim for damages in connection	Counter-Defendants' failure to
23		with Breach 1 or Breach 2.	deal fairly and honestly with
		Id., see B&D Fine Homes	members of the Windermere
24		Document Production Request	system, by among other things,
25		Nos. 48 and 71 (Ex. J), and WSC's	failing and refusing to collect fees
26		corresponding written responses	owed by Counter-Defendants' real
		(Ex. K).	estate franchises. WSC's
27			corporate representatives and its
28			damages expert identified
			damages sustained because of this

1			conduct. (Feasby Decl. Ex. G,
2			Oster Dep. pp. 21-24; Adams
			Decl. Ex. H.)
3		ffs' Reply to No. 28: WSC's respons	
4	II .	a triable issue of material fact. WSC is	1 0 1
5	II .	of contradicting the fact through evid	<u> </u>
	II .	to make best efforts to collect fees inv	*
6	II .	etual obligation in the Area Representa , ¶ 2 (requiring Services SoCal to colle	_
7		ses in its region and to remit to WSC i	<u>-</u>
8	II .	es for Services SoCal's purported failu	/ <u> </u>
		laim that Service SoCal failed to "pro	
9		," or "deal 'fairly and honestly' with	
10	system	· · · · · · · · · · · · · · · · · · ·	
11	29.	The B&D Parties' discovery	Disputed. WSC has always
		requests sought the production of	alleged that it was harmed by
12		all materials that support each of	Counter-Defendants' failure to
13		the categories of damages being	deal fairly and honestly with
14		pursued by WSC in the FACC. In	members of the Windermere
		response, WSC made clear that the	system, by among other things,
15		only damages at issue are "for	failing and refusing to collect fees
16		unpaid franchise fees, technology fees, and the liquidated damages	owed by Counter-Defendants' real estate franchises. WSC's
17		owing under the Modification	corporate representatives and its
		Agreement."	damages expert identified
18		Id Eng I V	damages expert identified

Plaintiffs' Reply to No. 29: WSC's response is conclusory and insufficient to create a triable issue of material fact. WSC is attempting to argue its position instead of contradicting the fact through evidence. Services SoCal's alleged failure to make best efforts to collect fees involves a separate and district contractual obligation in the Area Representation Agreement. [See D.E. 31-1, p. 16, § 3, ¶ 2 (requiring Services SoCal to collect fees owed by Windermere franchises in its region and to remit to WSC its share of those fees).] Any alleged damages for Services SoCal's purported failure to collect fees are not relevant to WSC claim that Service SoCal failed to "provide 'prompt, courteous and efficient service," or "deal 'fairly and honestly' with members of the Windermere system."

damages sustained because of this

conduct. (Feasby Decl. Ex. G, Oster Dep. pp. 21-24; Adams

Id., Exs. J, K.

1	30.	WSC did not produce any materials	Disputed. WSC has always
1	30.	to suggest that they had been	alleged that it was harmed by
2		harmed in connection with Service	Counter-Defendants' failure to
3		SoCal's alleged failures "to provide	deal fairly and honestly with
4		'prompt, courteous and efficient	members of the Windermere
		service" (Breach 1), or "to deal	system, by among other things,
5		'fairly and honestly with members	failing and refusing to collect fees
6		of the Windermere system"	owed by Counter-Defendants' real
7		(Breach 2).	estate franchises. WSC's
,		Adams Decl., ¶ 25, Ex. K.	corporate representatives and its
8			damages expert identified damages
9			sustained because of this
			conduct. (Feasby Decl. Ex. G,
10			Oster Dep. pp. 21-24; Adams
11	Dlaint	ffg? Donly to No. 20, WCC's magnetic	Decl. Ex. H.)
12		ffs' Reply to No. 30: WSC's response a triable issue of material fact. WSC is	
		of contradicting the fact through evid	
13		to make best efforts to collect fees inv	_
14		etual obligation in the Area Representa	-
15		•	
	16, § 3, ¶ 2 (requiring Services SoCal to collect fees owed by Windermere franchises in its region and to remit to WSC its share of those fees).] Any alleged		
16	damages for Services SoCal's purported failure to collect fees are not relevant to		
17		laim that Service SoCal failed to "pro-	
18		"," or "deal 'fairly and honestly' with	
	system	•	
19	31.	WSC continues to pursue its breach	Undisputed.
20	31.	of contract claims against each of	•
		the B&D Parties for allegedly	
21		misusing the Windermere name	
22		and mark on websites and in	
23		domain names following the	
		September 30, 2015 termination of	
24		the parties' relationships.	
25		D.E. 16, ¶¶ 118-124, 133-139, 148-	
26		156.	
	32.	WSC alleges in the FACC that	Disputed. In addition to these
27		following the termination of the	allegations, WSC alleged that
28		parties' relationships on September	Counter-Defendants intentionally
		30, 2015, each of the B&D Parties	misused the Windermere name

1		continued using the Windermere	and Trademark following the
		domain name	expiration/termination of the
2		(Windermeresocal.com), and used	Agreements. (D.E. 16, FACC ¶¶
3		the Windermere name and logo in	118-126, 133-141, 148-157.)
4		blogs.	
5		D.E. 16, ¶¶ 118-124, 133-139, 148- 156.	
	Plainti	ffs' Reply to No. 32: WSC's response	e is conclusory and insufficient to
6	1	triable issue of material fact. WSC is	
7	1	of contradicting the fact through evid	
8	1	fs allegedly misused the Windermere	
		their use of the Windermere domain	
9		the Windermere name and logo in bl	
10	148-15	6.]	
11	33.	WSC also separately alleges that	Undisputed.
12		Bennion, Deville, and B&D SoCal	
		refused to "surrender 314 domain	
13		names" that included the	
14		Windermere name. D.E. 16, ¶ 156.	
15	2.4	These blanket allegations then	Disputed. In addition to these
	34.	provide the sole basis for the	allegations, WSC alleged that
16		"Tradename and Trademark	Counter-Defendants intentionally
17		Infringement" sections of each of	I
18		WSC's breach of contract claims	and Trademark following the
19		asserted in the FACC.	expiration/termination of the
		D.E. 16, ¶¶ 118-124, 133-139, 148-	Agreements. (D.E. 16, FACC ¶¶
20	DI : 4	156.	118-126, 133-141, 148-157.)
21	·	ffs' Reply to No. 34: WSC's response	<u> </u>
22	1	a triable issue of material fact. WSC is of contradicting the fact through evid	
	1	fs allegedly misused the Windermere	
23	1	their use of the Windermere domain	
24	_	the Windermere name and logo in bl	
25	148-15		
26	35.	B&D Fine Homes is the registrant	Undisputed.
		(and former owner) of each of the	
27		domains at issue in this lawsuit.	
28		Declaration of Eric Forsberg	
		("Forsberg Decl."), ¶¶ 5-8.	

1	36.	While in B&D Fine Home's possession, those domains and	Disputed. Eric Forsberg testified that he did work for B&D Fine
2		related websites were directly	Homes SoCal and Services SoCal
3			in addition to his work for B&D
4		employees of B&D Fine Home and	` ·
5		no one else.	E, Forsberg Dep. pp. 16:19-17:2.)
		Declaration of Joseph R. Deville ("Deville Decl."), ¶ 11; Forsberg	
6		Decl., ¶¶ 6-8.	
7	Plainti	ffs' Reply to No. 36: WSC's response	se is insufficient to create a triable
8		f material fact. Mr. Forsberg testified	
9	1	and did some work for B&D SoCal a	· ·
	1 *	id Mr. Forsberg testify that he control	
10	I	g for anyone other than B&D Fine Ho	-
11		rg generally did work for the other Pla uted Fact No. 36.	minis does not contradict Plaintiffs
12	37.	During the time relevant to this	Undisputed.
13	3/.	litigation, B&D Fine Homes'	C 1.0.13 p 0.00 0.1
		Director of Technology, Eric	
14		Forsberg, managed and controlled	
15		all of the domains and websites	
16		owned by B&D Fine Homes.	
17		Deville Decl., ¶¶ 10-11; Forsberg Decl., ¶ 6.	
-	20	Mr. Forsberg has also controlled all	Undisputed.
18	38.	blogs owned and operated by B&D	Chaispatea.
19		Fine Homes.	
20		Deville Decl., ¶ 11; Forsberg Decl.,	
21		¶ 10.	
	39.	There have not been any websites	Undisputed.
22		owned or controlled by Services	
23		SoCal, B&D SoCal, Bennion, or	
24		Deville that utilized the Windermere name or marks.	
25		Deville Decl., ¶¶ 12-13; Forsberg	
		Decl., ¶¶ 8-10.	
26	40.	Neither Services SoCal nor B&D	Disputed. Eric Forsberg testified
27	1 70.	SoCal control or operate any of the	that he worked for B&D Fine
28		domains or websites at issue in this	Homes SoCal and Services SoCal
		litigation.	in addition to his work for B&D
	1		

1		Deville Decl., ¶ 12.	Fine Homes. (Feasby Decl., Ex. E, Forsberg Dep. pp. 16:19-17:2.)
2	Plainti	ffs' Reply to No. 40: WSC's respons	
3	issue of material fact. Mr. Forsberg testified that he was employed by B&D Fine		
4	Homes and did some work for B&D SoCal and Services SoCal. However, at no		
	1 -	id Mr. Forsberg testify that he control	-
5		working for anyone other than B&D Fi	1
6	1	rsberg generally did work for the other	r Plaintiffs does not contradict
7		fs' Undisputed Fact No. 40.  Neither Bennion nor Deville have	Disputed Pennion and Daville
8	41.	personally controlled or operated	Disputed. Bennion and Deville personally guaranteed
		any websites or domains since	performance of B&D Fine Homes
9		September 30, 2015.	and B&D Fine Homes SoCal's
10		Deville Decl., ¶ 13.	performance under the Franchise
11			Agreements, including the use of
12			WSC Trademarks and the
			"Windermere" name following termination of the Agreements.
13			(Feasby Decl., Ex. I.)
14	Plainti	ffs' Reply to No. 41: As explained in	
15	Objecti	ons to the declaration of Jeffrey Feast	by, Plaintiffs object to WSC's
16	reliance upon Exhibit I to Mr. Feasby's declaration pursuant to Fed. R. Evid. 602,		
17	1	Ir. Feasby's declaration does not lay the	
	1	oes not identify who produced the docent does not bear the Moving Parties'	• .
18	1	tamp, and therefore cannot be authent	* '
19	1	ed by a party-opponent. See Orr, 285	
20	1	ails to cite to the page and line in the t	
21	1	I. See Orr, 285 F.3d at 774-75, fn. 12	
22		ails to cite to any admissible disputed  Pursuant to the B&D Parties'	Undisputed.
	42.	30(b)(6) deposition notice, WSC	Ondisputed.
23		was required to produce a	
24		corporate representative capable of	
25		testifying as to "[t]he B&D Parties'	
26		use of the Windermere name and	
27		trademark following the termination and/or expiration of	
28		their franchise agreements."	
۷۵		Adams Decl., Ex. A (category 40);	

1		see also exhibit 2 to the Drayna	
		Depo.	
2	43.	WSC produced its General	<u> </u>
3		Counsel, Drayna, to testify on this	
4		topic.	Sherrell to testify as a corporate
5		Adams Decl., Exs. A, C; see also	representative on this topic.
		exhibits 2 and 3 to the Drayna	(Adams Decl. Ex. G.)
6	Plainti	Depo.  ffs' Reply to No. 43: WSC's response	e is insufficient to create a triable
7		f material fact.	o is mournelent to create a triable
8			
9	44.	During Drayna's deposition, he	Disputed. Mr. Drayna testified
		testified that B&D Fine Homes was	that Counter-Defendants breached
10		the "legal owner" of the websites	the Agreements by continuing to
11		and domains at issue in this litigation, and WSC is "unaware"	use the "Windermere" name after
12		of which, if any, of the B&D	termination of the Agreements, and that he was unaware which
13		Parties controlled the websites and	entity had control over the domain
		domain names after September 30,	names registered to B&D Fine
14		2015.	Homes. (Adams Decl. Ex. E,
15		Adams Decl., Ex. E (Drayna	Drayna Dep., pp. 422-423.)
16	<b>5</b> 1 4 .4	Depo.), p. 422:18-423:17.	
17	l —	ffs' Reply to No. 44: WSC's respons	
		f material fact. The testimony cited by fs' Undisputed Fact No. 44.	Mr. Drayna does not contradict
18		When specifically asked to identify	Disputed Mr Drayna testified
19	45.	the evidence in WSC's possession	
20		that suggests Services SoCal was	Fine Homes was the registered
21		responsible for the conduct at issue,	owners of the subject domain
		Drayna responded, "[a]s of today, I	names, but also testified that WSC
22		don't know that we have that we	was still investigating which entity
23		have any evidence that discovery –	or employee was responsible for
24		I think our investigation on that is continuing."	continuing to use the "Windermere" name after
25		Adams Decl., Ex. E (Drayna	termination of the Agreements.
		Depo.), p. 423:18-24.	Further, Mr. Forsberg testified that
26			he worked for B&D Fine Homes
27			SoCal and Services SoCal.
28			(Adams Decl. Ex. E, Drayna Dep.
			pp. 422-425; Feasby Decl. Ex. F,

1		Forsberg Dep. pp. 16:19-17:2.)
		ffs' Reply to No. 45: WSC's response is insufficient to create a triable
2		f material fact. The testimony cited by Mr. Drayna does not contradict
3		fs' Undisputed Fact No. 45. Further, Mr. Forsberg testified that he was
4	1 -	red by B&D Fine Homes and did some work for B&D SoCal and Services  However, at no point did Mr. Forsbarg testify that he controlled or
5		However, at no point did Mr. Forsberg testify that he controlled or d the websites at issue while working for anyone other than B&D Fine
		The representation that Mr. Forsberg generally did work for the other
6		fs does not contradict Plaintiffs' Undisputed Fact No. 45.
7	46.	Drayna's deposition transcript also Undisputed.
8		includes the following similar
9		exchange:
10		Q. But as you sit here, you cannot identify any specific
		instances or evidence of a
11		representative of Services using the
12		Windermere domain names after
13		September 30, 2015, correct?
14		A. We know what again, as I
15		believe I already said, we know
16		that somebody had to do something
		on or around September 30, 2015
17		that resulted in web traffic to
18		WindermereSoCal.com being redirected somewhere else, and we
19		don't know who did that.
20		Q. And you don't know who did
21		it, so you just filed a claim for
		breach of contract against the
22		Services entity?  A. That was not the sole basis
23		for the breach of contract claim
24		against the Services company.
25		Q. Is Windermere going to
26		pursue that particular breach with
27		respect to the domain name against
		the Services entity?  A. To the extent that it is
28		supported by the facts as they are
		± ± 1

1		discovered, yes.	
		Q. And what facts are those?	
2		[Objection by WSC's counsel]	
3		A. Yes, it was. I already said, as	
4		of today, we don't know who did	
		what or when.	
5		Adams Decl., Ex. E (Drayna	
6		Depo.), pp. 424:9-425:10.	
7	47.	Drayna testified that WSC	-
		maintained a similar lack of	1 0
8		knowledge concerning the conduct	-
9		of B&D SoCal, Bennion and	entities, making it difficult to
		Deville.	determine which entity was
10		Adams Decl., Ex. E (Drayna	responsible for which conduct.
11		Depo.), p. 426:3-427:13.	(Adams Decl. Ex. E, Drayna pp. 426-427.)
12	<u>Plainti</u>	ffs' Reply to No. 47: WSC's response	,
13		f material fact. The testimony cited by	
	Plaintif	fs' Undisputed Fact No. 47.	
14	48.	When asked to identify the	Disputed. Mr. Drayna testified
15		evidence that WSC has to show	that employees worked for
16		that Bennion, Deville, or B&D	multiple Counter-Defendant
		SoCal unlawfully used the	entities, making it difficult to
17		Windermere domains after	determine which entity was
18		September 30, 2015, Drayna	responsible for which conduct.
19		testified "[a]gain, I think there was some uncertainty of who did what	,
20		and who worked for which entity."	pp. 120 127.)
21		Adams Decl., Ex. E (Drayna	
		Depo.), p. 426:20-25.	
22	<u>Plainti</u>	ffs' Reply to No. 48: WSC's response	e is insufficient to create a triable
23		f material fact. The testimony cited by	Mr. Drayna does not contradict
24	Plaintif	fs' Undisputed Fact No. 48.	
	49.	Drayna's deposition was completed	Undisputed.
25		on August 23, 2016, just six days	
26		before the discovery cutoff date of	
		August 29, 2016.	
27		Adams Decl., ¶ 10; D.E. 35.	
28			
I	1		

<b>PLAINTIFFS' OPPOSITION</b>	TO WSC'S "ADDITIONAL FACTS"

1

2	PLAINTIFFS' OPPOSITION TO WSC'S "A		SC'S "ADDITIONAL FACTS"
3		WSC'S IDENTIFICATION OF	PLAINTIFFS' RESPONSES &
		"ADDITIONAL FACTS" &	SUPPORTING EVIDENCE
4		SUPPORTING EVIDENCE	
5	50.	The Coachella Valley Franchise	Disputed. As explained in detail in
6		Agreement, the Southern California	the concurrently filed Objections to
7		Franchise Agreement, and the Area	the declaration of Jeffrey Feasby,
		Representation Agreement	Plaintiffs object to WSC's reliance
8		(collectively the "Agreements") required Counter-Defendants, upon	upon Exhibit C to Mr. Feasby's declaration pursuant to Fed. R.
9		termination of the Agreements to	Evid. 602, 901. Mr. Feasby's
10		discontinue all use of WSC's	declaration does not lay the proper
11		trademarks, the "Windermere"	foundation for Exhibit C. WSC does
		name, and all variations thereof.	not identify who produced the
12		Feasby Decl., Ex. A, Coachella	document in discovery, and the
13		Valley Franchise Agreement § 7;	document does not bear Plaintiffs' Bates stamp; in fact it bears WSC's
14		Ex. B Area Representation Agreement § 6; Ex. C, Southern	Bates stamp, and therefore cannot
15		California Franchise Agreement §	be authenticated on the grounds that
		9.	it was produced by a party-
16			opponent. See Orr, 285 F.3d at 777
17			fn. 20, 21. Furthermore, WSC fails
18			to cite to the page and line in the
19			transcript that allegedly
20			authenticates Exhibit C. <i>See Orr</i> , 285 F.3d at 774-75, fn. 12, 13. In
			light of Plaintiffs' objections, WSC
21			fails to identify any material facts in
22			support of its position.
23	51.	Bennion and Deville personally	Disputed. As explained in detail in
24		guaranteed B&D Fine Homes'	the concurrently filed Objections to
		performance under the Coachella Valley Franchise Agreement.	the declaration of Jeffrey Feasby, Plaintiffs object to WSC's reliance
25		Feasby Decl., Ex. H.	upon Exhibit H to Mr. Feasby's
26		2 2000 9 20000, 2000 110	declaration pursuant to Fed. R.
27			Evid. 602, 901. Mr. Feasby's
28			declaration does not lay the proper
_ 5			foundation for Exhibit H. WSC

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16	52.	guaranteed B&D Fine Homes SoCal's Performance under the Southern California Franchise Agreement. Feasby Decl., Ex. C, Southern	does not identify who produced the document in discovery, and the document does not bear Plaintiffs' Bates stamp; in fact it bears WSC's Bates stamp, and therefore cannot be authenticated on the grounds that it was produced by a party-opponent. See Orr, 285 F.3d at 777 fn. 20, 21. Furthermore, WSC fails to cite to the page and line in the transcript that allegedly authenticates Exhibit H. See Orr, 285 F.3d at 774-75, fn. 12, 13. In light of Plaintiffs' objections, WSC fails to identify any material facts in support of its position.  Disputed. As explained in detail in the concurrently filed Objections to the declaration of Jeffrey Feasby, Plaintiffs object to WSC's reliance upon Exhibit C to Mr. Feasby's declaration pursuant to Fed. R.
		SoCal's Performance under the	the declaration of Jeffrey Feasby,
15		Agreement.	upon Exhibit C to Mr. Feasby's
16		-	-
17		California Franchise Agreement, Appendix 2.	Evid. 602, 901. Mr. Feasby's declaration does not lay the proper
18		rippelialit 2.	foundation for Exhibit C. WSC does
19			not identify who produced the
20			document in discovery, and the document does not bear Plaintiffs'
21			Bates stamp; in fact it bears WSC's
22			Bates stamp, and therefore cannot be authenticated on the grounds that
23			it was produced by a party-
			opponent. See Orr, 285 F.3d at 777
24			fn. 20, 21. Furthermore, WSC fails to cite to the page and line in the
25			transcript that allegedly
26			authenticates Exhibit C. See Orr,
27			285 F.3d at 774-75, fn. 12, 13. In
28			light of Plaintiffs' objections, WSC fails to identify any material facts in
	<u> </u>	<u> </u>	ians to identify any material facts in

1			support of its position.
	53.	1	Disputed. As explained in detail in
2		guaranty pursuant to the	the concurrently filed Objections to
3		Modification Agreement applied	the declaration of Jeffrey Feasby,
4		only to amounts owed under the	Plaintiffs object to WSC's reliance
		Franchise Agreements prior to	upon Exhibit C to Mr. Feasby's
5		April 1, 2012, did not modify the	declaration pursuant to Fed. R.
6		guarantee of performance, and did	Evid. 602, 901. Mr. Feasby's
7		not affect the guarantee of performance or payment after April	declaration does not lay the proper foundation for Exhibit K. Exhibit K
8		1, 2012.	is not deemed authentic and
		Feasby Decl. Ex. K, Modification	admissible by being attached to a
9		Agreement § 3(G).	complaint. See Ellipsis, Inc., 2006
10			WL 1207589, at *8; see also
11			Szymankiewicz, 2005 WL 1154210,
12			at *1; Willis, 2008 WL 821828, at
			*7. WSC does not identify who
13			produced the document in
14			discovery, and the document does not bear the Moving Party's Bates
15			stamp; in fact it bears WSC's Bates
			stamp, and therefore, cannot be
16			authenticated as a document
17			produced by a party-opponent. See
18			Orr, 285 F.3d at 777 fn. 20, 21.
			Furthermore, WSC fails to cite to
19			the page and line in the transcript
20			that authenticates Exhibit K. See
21			Orr, 285 F.3d at 774-75, fn. 12, 13.
22			In light of Plaintiffs' objections, WSC fails to identify any material
			facts in support of its position.
23	54.	B&D Fine Homes is still using the	Disputed. As explained in detail in
24	-	fictitious business names	the concurrently filed Objections to
25		"Windermere Real Estate	the declaration of Jeffrey Feasby,
26		Coachella Valley" and	Plaintiffs object to WSC's reliance
		"Windermere Real Estate Southern	upon Exhibit C to Mr. Feasby's
27		California."	declaration pursuant to Fed. R.
28		Feasby Decl. Ex. L.	Evid. 602, 901. Mr. Feasby's
			declaration does not lay the proper

1			foundation for Exhibit K. Exhibit K
			is not deemed authentic and
2			admissible by being attached to a
3			complaint. See Ellipsis, Inc., 2006
4			WL 1207589, at *8; see also
			Szymankiewicz, 2005 WL 1154210,
5			at *1; Willis, 2008 WL 821828, at
6			*7. WSC does not identify who
7			produced the document in discovery, and the document does
8			not bear the Moving Party's Bates
			stamp; in fact it bears WSC's Bates
9			stamp, and therefore, cannot be
10			authenticated as a document
11			produced by a party-opponent. See
			<i>Orr</i> , 285 F.3d at 777 fn. 20, 21.
12			Furthermore, WSC fails to cite to
13			the page and line in the transcript
14			that authenticates Exhibit K. <i>See Orr</i> , 285 F.3d at 774-75, fn. 12, 13.
15			In light of Plaintiffs' objections,
			WSC fails to identify any material
16			facts in support of its position.
17	55.	B&D Fine Homes SoCal is still	Disputed. As explained in detail in
18		using the fictitious business name	the concurrently filed Objections to
19		"Windermere Real Estate SoCal."	the declaration of Jeffrey Feasby,
		Feasby Decl. Ex. M.	Plaintiffs object to WSC's reliance
20			upon Exhibit C to Mr. Feasby's declaration pursuant to Fed. R.
21			Evid. 602, 801, 805, and 901. Mr.
22			Feasby's declaration does not lay
23			the proper foundation for Exhibit
			M. WSC's counsel has personal
24			knowledge that he printed the page,
25			but not as to the contents of the
26			website the page was printed from
27			or the accuracy of the information displayed on the page printed. The
			fact that it is a printout from the
28			website of a state agency does not
			ment of the state

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	56.	Services SoCal is still an active corporation using the name "Windermere Services Southern California Inc." with its principle	deem it <i>per se</i> authentic, and, without more, is thus inadmissible. Fed R. Evid. 902; <i>see Jimena v. UBS AG Bank, Inc.</i> , No. 1:07-CV-00367 OWW, 2011 WL 2551413, at *4 (E.D. Cal. June 27, 2011) (holding that e-mails not authenticated or admissible where declarant attested to having read and printed them); <i>see also In re Homestore.com, Inc. Sec. Litig.</i> , 347 F. Supp. 2d 769, 782–83 (C.D. Cal. 2004) (finding that print-out of website did not bear indicia of reliability for self-authenticating documents under FRE 902); <i>San Luis v. Badgley</i> , 136 F. Supp. 2d 1136, 1146 (E.D. Cal. 2000) (denying judicial notice request for print-out of federal website with real-time monitoring data for failure to show reliability and admissibility). In light of Plaintiffs' objections, WSC fails to identify any material facts in support of its position.  Disputed. As explained in detail in the concurrently filed Objections to the declaration of Jeffrey Feasby, Plaintiffs object to WSC's reliance
20	J0.	corporation using the name "Windermere Services Southern	the concurrently filed Objections to the declaration of Jeffrey Feasby,
22		place of business at 71691	upon Exhibit C to Mr. Feasby's
23		Highway 111, Rancho Mirage, CA 92270.	declaration pursuant to Fed. R. Evid. 602, 801, 805, and 901. Mr.
24		Feasby Decl. Ex. N.	Feasby's declaration does not lay
25		,	the proper foundation for Exhibit N.
26			WSC's counsel has personal
			knowledge that he printed the page,
27			but not as to the contents of the website. The fact that it is a print
28			out of a state agency website does

1			not deem it <i>per se</i> authentic, and is
2			thus inadmissible. Fed R. Evid. 902;
			see also Jimena, 2011 WL 2551413,
3			at *4; see also In re
4			Homestore.com, Inc. Sec. Litig., 347
5			F. Supp. 2d at 782–83; San Luis,
			136 F. Supp. 2d at 1146. In light of Plaintiffs' objections, WSC fails to
6			identify any material facts in
7			support of its position.
8	57.	71691 Highway 111, Rancho	Disputed. As explained in detail in
		Mirage, CA 92270 is an address	the concurrently filed Objections to
9		used by B&D Fine Homes.	the declaration of Jeffrey Feasby,
10		Feasby Decl. Ex. K, Modification	Plaintiffs object to WSC's reliance
11		Agreement § 13.	upon Exhibit C to Mr. Feasby's
12			declaration pursuant to Fed. R.
			Evid. 602, 901. Mr. Feasby's declaration does not lay the proper
13			foundation for Exhibit K. Exhibit K
14			is not deemed authentic and
15			admissible by being attached to a
16			complaint. See Ellipsis, Inc., 2006
			WL 1207589, at *8; see also
17			Szymankiewicz, 2005 WL 1154210,
18			at *1; Willis, 2008 WL 821828, at
19			*7. WSC does not identify who
			produced the document in discovery, and the document does
20			not bear the Moving Party's Bates
21			stamp; in fact it bears WSC's Bates
22			stamp, and therefore, cannot be
23			authenticated as a document
			produced by a party-opponent. See
24			Orr, 285 F.3d at 777 fn. 20, 21.
25			Furthermore, WSC fails to cite to
26			the page and line in the transcript that authenticates Exhibit K. See
27			Orr, 285 F.3d at 774-75, fn. 12, 13.
			In light of Plaintiffs' objections,
28			WSC fails to identify any material

1				facts in support of its position.
2				
3	Dated:	November 7, 2016		MULCAHY LLP
4			ъ.	/-/ T/ - : A A J
5			Ву:	/s/ Kevin A. Adams Kevin A. Adams
<ul><li>6</li><li>7</li></ul>				Attorneys for Plaintiffs and Counter- Defendants
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