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11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

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

21 Plaintiffs,

22 v.

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

26 Defendant.

27 **AND RELATED COUNTERCLAIMS**
28

Case No. 5:15-CV-01921 R (KKx)
Hon. Manual L. Real

**PLAINTIFFS AND COUNTER-
DEFENDANTS' NOTICE OF
MOTION AND MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Date: November 21, 2016

Time: 10:00 a.m.

Courtroom: 8

[Concurrently filed with Declarations of Joseph R. Deville, Eric Forsberg, and Kevin Adams, Separate Statement of Uncontroverted Facts and Conclusions of Law, and [Proposed] Order]

Action Filed: September 17, 2015

Pretrial Conf.: November 14, 2016

Trial: January 31, 2017

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on Monday, November 21, 2016 at 10:00 a.m., or
3 as soon thereafter as the Motion may be heard at the United States District Court located
4 at 312 North Spring Street, Los Angeles, CA 90012, Courtroom 8, 2nd Floor, Plaintiffs
5 and Counter-Defendants Bennion & Deville Fine Homes SoCal, Inc. (“B&D SoCal”) and
6 Windermere Services Southern California, Inc. (“Services SoCal”), and Counter-
7 Defendants Robert Bennion (“Bennion”) and Joseph R. Deville (“Deville”) (collectively,
8 the “Moving Parties”) will and hereby do move this Court for Partial Summary Judgment
9 of the First Amended Counterclaim (“FACC”) filed by Defendant/ Counterclaimant
10 Windermere Real Estate Services Company (“WSC”) in the above-captioned action.

11 Partial summary judgment should be entered in favor of the Moving Parties on
12 each of the following independent issues:

13 **First**, partial summary judgment should be entered in favor of Services SoCal on
14 WSC claim for breach of the Modification Agreement (Count 4), in its entirety, because
15 the unambiguous language of the allegedly breached term does not apply to Services
16 SoCal.

17 **Second**, partial summary judgment should be entered in favor of Services SoCal
18 on two of WSC’s four claims for breach of the Area Representation Agreement (Count 2,
19 at paragraph 130 of the FACC) because the undisputed facts show that WSC was not
20 harmed in connection with these two alleged breaches.

21 **Third**, partial summary judgment should be entered in favor of each of the Moving
22 Parties on paragraphs 118-125 (Count 1), 133-140 (Count 2), and 148-156 (Count 3) of
23 the FACC because the undisputed facts show that the alleged conduct can only be
24 attributed to Bennion & Deville Fine Homes, Inc., and not to any of the Moving Parties.

25 This Motion is based upon (1) this Notice of Motion and Motion, (2) the
26 Memorandum of Points and Authorities, (3) the Proposed Order, (4) the Statement of
27 Uncontested Facts and Conclusions of Law, (5) the Declaration of Joseph R. Deville and
28 exhibits thereto, (6) the Declaration of Eric Forsberg and exhibit thereto, (7) the

1 Declaration of Kevin A. Adams and exhibits thereto, (8) all other pleadings and papers on
2 file in this action, and (9) upon such other matters as may be presented to the Court at the
3 time of the hearing.
4

5 Dated: October 24, 2016

MULCAHY LLP

7 By: /s/ Kevin A. Adams

8 Kevin A. Adams

9 *Attorneys for Defendants Charles*

10 *Bongiovanni and National Post-Acute Care*

11 *Continuum*
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiffs and Counter-Defendants Bennion & Deville Fine Homes SoCal, Inc.
3 (“B&D SoCal”), Windermere Services Southern California, Inc. (“Services SoCal”), and
4 Counter-Defendants Robert Bennion (“Bennion”) and Joseph Deville (“Deville”)
5 (collectively, the “Moving Parties”) hereby submit this Memorandum of Points and
6 Authorities in support of their Motion for Partial Summary Judgment of the First
7 Amended Counterclaim (“FACC”) filed by Defendant/Counterclaimant Windermere
8 Real Estate Services Company (“WSC”).

9 **I. INTRODUCTION**

10 The Moving Parties file this motion for partial summary judgment in preparation
11 for trial in an attempt to clean up and dispose of several of the flawed legal issues
12 confronting WSC’s breach of contract claims. The three discrete issues raised by this
13 motion are as follows:

14 **First**, WSC is erroneously pursuing a claim for breach of the Modification
15 Agreement (Count 4) against Services SoCal even though the unambiguous language of
16 the allegedly breached term does not govern the conduct of Services SoCal. Accordingly,
17 summary adjudication of Count 4 of the FACC should be entered in favor of Services
18 SoCal.

19 **Second**, WSC is erroneously pursuing four separate and distinct breaches of the
20 Area Representation Agreement (Count 2) against Services SoCal even though the
21 undisputed facts show that WSC was not harmed in connection with two of the four
22 breaches. Specifically, WSC claims that Services SoCal breached section 3 of the Area
23 Representation Agreement by failing to: (1) “provide ‘prompt, courteous and efficient
24 service’ to Windermere franchisees,” and (2) “deal ‘fairly and honestly’ with members of
25 the Windermere System.” (Statement of Uncontroverted Facts and Conclusions of Law
26 (“SUF”), ¶ 1.) Notwithstanding these claimed breaches, WSC’s deposition testimony,
27 damages expert, initial disclosures, and discovery responses each show that WSC was not
28 harmed by Services SoCal alleged failures to comply with the above language of section
3 of the Area Representation Agreement. Without corresponding damages, summary

1 adjudication as to these two alleged breaches at paragraph 130 in Count 2 of the FACC
2 should be entered in favor of Services SoCal.

3 **Third**, WSC has asserted breach of contract claims against each of the counter-
4 defendants – *i.e.*, Bennion, Deville, Services SoCal, B&D SoCal, and Bennion & Deville
5 Fine Homes, Inc. (“B&D Fine Homes”) (collectively, the “B&D Parties”) – for alleged
6 conduct that can only be attributed to B&D Fine Homes. WSC claims that each of the
7 B&D Parties continued to unlawfully use the Windermere name and mark on websites
8 and in domain names following the September 30, 2015 termination of the parties’
9 relationships. (SUF, ¶ 2.) However, the undisputed facts show that only B&D Fine
10 Homes – and *not* the Moving Parties – owned and controlled all of the websites and
11 domains at issue. Accordingly, summary adjudication of the corresponding breaches at
12 paragraphs 118-125, 133-140, 148-156 of the FACC should be entered in favor of the
13 Moving Parties.

14 For these reasons, set forth in detail below, the Moving Parties’ motion for partial
15 summary judgment should be granted and an order should be entered consistent with the
16 concurrently filed [Proposed] Order.

17 **II. THE LEGAL STANDARD FOR SUMMARY ADJUDICATION**

18 A motion for summary adjudication is governed by the same standard as a motion
19 for summary judgment; the motion shall be granted when “there is no genuine issue as to
20 any material fact, and the moving party is entitled to judgment as a matter of law.”

21 *Prepaid Teleconnect, Inc. v. City of Murrieta*, 2016 WL 1622609, at *2 (C.D. Cal. Apr.
22 21, 2016) (citing Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-
23 48 (1986). Summary adjudication of claims or issues “serves the purpose of speeding up
24 litigation by eliminating before trial matters wherein there is no genuine issue of fact.”
25 FRCP 56 (Notes of Advisory Committee on Rules – 1946 Amendment) (citing *Leonard*
26 *v. Socony-Vacuum Oil Co.* (C.C.A.7th, 1942) 130 F. (2d) 535; *Biggins v. Oltmer Iron*
27 *Works* (C.C.A.7th, 1946) 154 F.(2d) 214).

28 The Court may grant summary adjudication on “each claim or defense – or the part
of each claim or defense – on which summary judgment is sought.” Fed. R. Civ. P. 56(a).

1 Summary adjudication is proper when the papers before the Court show that “there is no
2 *genuine* dispute as to any *material* fact.” *Id.* (emphasis added); *see also Celotex Corp. v.*
3 *Catrett*, 477 U.S. 317, 322 (1986). A factual issue is “*genuine*” when there is sufficient
4 evidence such that a reasonable trier of fact could resolve the issue in the non-movant’s
5 favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is “*material*”
6 when its resolution might affect the outcome of the suit under the governing law, and is
7 determined by looking to the substantive law. *Id.* “Factual disputes that are irrelevant or
8 unnecessary will not be counted.” *Id.* at 249.

9 The party seeking summary adjudication bears the initial burden of demonstrating
10 the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317,
11 325 (1986). This burden can be satisfied by either (1) negating an essential element of the
12 nonmoving party’s claim or defense, or (2) showing that there is an absence of evidence
13 to support the nonmoving party’s case. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-
14 60 (1970); *Celotex Corp.*, 477 U.S. at 325.

15 Once this burden is met, the nonmoving party must set forth “specific facts
16 showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256. These facts,
17 however, must show more than the “mere existence of a scintilla of evidence”; rather,
18 “there must be evidence on which the jury could reasonably find for the [nonmoving
19 party].” *Id.* at 252. Conclusory and speculative testimony presented in opposition to the
20 summary judgment motion does not raise triable issues of fact necessary to overcome
21 summary judgment. *Thornhill Pub. Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir.
22 1979).

23 As explained below, the Court should grant the Moving Parties’ Motion for
24 Summary Adjudication because WSC does not set forth facts on these topics raised by
25 the Moving Parties that are sufficient to show genuine issues for trial.
26
27
28

1 **III. LEGAL ARGUMENT**

2
3 **A. Summary Adjudication Of Count 4 In The FACC Should Be Entered In**
4 **Favor Of Services SoCal Because The Term Of The Contract Allegedly**
5 **Breached Did Not Apply To Services SoCal**

6 As its fourth claim for relief, WSC alleges that Services SoCal, Bennion & Deville
7 Fine Homes, Inc. (“B&D Fine Homes”), and B&D SoCal “breached the Modification
8 Agreement by failing to remain in the Windermere System for the five (5) year period
9 mandated by the Modification Agreement.” (SUF, ¶ 3.) However, the unambiguous
10 language of the Modification Agreement clearly shows that the 5-year obligation cited by
11 WSC – *i.e.*, section 3(E) of the Modification Agreement – did not apply to Services
12 SoCal. Accordingly, summary adjudication of WSC’s fourth claim for relief should be
13 entered in favor of Services SoCal.

14 The basic principles of contract interpretation require that the plain language
15 within the four corners of the contract to first be examined to determine the mutual intent
16 of the contracting parties. *See, e.g., United States v. Clark*, 218 F.3d 1092, 1096 (9th Cir.
17 2000) (“Following traditional rules of contract interpretation, we must examine the plain
18 language of the term in the context of the document as a whole.”) In “cases of contracts,
19 language is to be given, if possible, its usual and ordinary meaning. The object is to find
20 out from the words used what the parties intended to do.” *U.S. v. Westlands Water Dist.*,
21 134 F. Supp. 2d 1111, 1134–35 (E.D. Cal. 2001) (internal citation omitted). As explained
22 below, the contract term at issue is unambiguous and unequivocally shows that Services
23 SoCal was not subject to the five-year term of the Modification Agreement.

24 WSC’s fourth claim for relief relies entirely upon B&D Fine Homes, B&D SoCal
25 and Services SoCal’s alleged breach of section 3(E) of the Modification Agreement.¹

26
27 ¹ Breach of section 3(E) gives rise to the liquidated damages set forth in section 3(F)
28 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

1 Section 3(E) provides that “**B&D** covenant to remain as Windermere Real Estate
2 franchisees for five years from the date of execution of this Agreement.” (SUF, ¶ 4
3 (emphasis added).) The term “**B&D**” is expressly defined in the first paragraph of the
4 Modification Agreement to include *only* B&D Fine Homes and B&D SoCal. (SUF, ¶ 6
5 (emphasis added).) Services SoCal is *not* included in the definition of “**B&D**” and,
6 instead, is separately defined in the opening paragraph of the Modification Agreement as
7 the “***Area Representative.***” (SUF, ¶ 7 (emphasis added).) The language of section 3(E) is
8 unambiguous; it does not govern the conduct of Services SoCal.

9 In contract actions, summary adjudication is appropriate if the contract or the
10 contract provision in question is unambiguous. *Castaneda v. Dura-Vent Corp.*, 648 F.2d
11 612, 619 (9th Cir.1981) (citing *Bear Brand Hosiery Co. v. Tights, Inc.*, 605 F.2d 723, 726
12 (4th Cir.1979)). Here, the five-year term identified in section 3(E) of the Modification
13 Agreement applied only to B&D Fine Homes and B&D SoCal – *i.e.*, “B&D” – and not
14 Services SoCal. WSC’s misguided attempt to hold Services SoCal liable for breach of a
15 contract provision that clearly did not pertain to Services SoCal is a legal issue that can
16 properly be disposed of on summary adjudication.

17 Accordingly, summary adjudication of Count 4 of the FACC should be entered in
18 favor of Services SoCal.

19
20 **B. WSC Cannot Show Any Harm For Services SoCal’s Alleged Breaches Of**
21 **Section 3 Of The Area Representation Agreement**

22 WSC’s breach of contract claim against Services SoCal (Count II) identifies four
23 purported breaches of the parties’ Area Representation Agreement. (SUF, ¶ 8.)
24 Specifically, WSC claims that Services SoCal breached the following sections of the
25 Area Representation Agreement:

26 **Breach 1:** Section 3 – “failing to provide ‘prompt, courteous and efficient
27

28 provided for in the Modification Agreement] shall be prorated against the total elapsed
years from said date [...]” (SUF, ¶ 5 (emphasis added).)

1 service' to Windermere franchisees" (FACC, ¶ 130);

2 **Breach 2:** Section 3 – “failing to deal ‘fairly and honestly’ with members
3 of the Windermere System” (FACC, ¶ 130);

4 **Breach 3:** Section 3 – “failing and refusing to collect and remit fees from
5 Windermere franchisees, including from Defendants B&D Fine
6 Homes and WSSC themselves” (FACC, ¶ 131); and

7 **Breach 4:** Section 6 – “its continued, knowing and intentional misuse of
8 the Windermere name and trademarks following expiration/
9 termination of the Area Representation Agreement.”² (FACC, ¶
10 139.)

11 Although WSC has identified four separate breaches of the Area Representation
12 Agreement, it has only asserted damages in connection with Breach 3 and Breach 4 – ***not***
13 Breach 1 or Breach 2. As explained below, WSC’s deposition testimony, damages
14 expert’s report, initial disclosures, and discovery responses each show that WSC is only
15 pursuing damages in connection with past due franchise fees (Breach 3) and trademark
16 infringement (Breach 4). Alternatively, WSC does not identify any harm for Services
17 SoCal’s alleged breaches of the Area Representation Agreement for “failing to provide
18 ‘prompt, courteous and efficient service’” (Breach 1), or for “failing to deal ‘fairly and
19 honestly with members of the Windermere system’” (Breach 2). Without corresponding
20 damages, summary adjudication as to Breach 1 and Breach 2 of Count 2 should be
21 entered in favor of Services SoCal.

22 **1. WSC Must Show Actual Harm For Each Claimed Breach**

23 To prevail on a claim for breach of a particular provision in a contract, the plaintiff
24 must show that appreciable and actual damage resulted from that alleged breach. *See*
25 *Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1015 (9th Cir.2000) (“Under
26
27

28

² As discussed in Section II.C, below, the undisputed facts reveal that it was B&D Fine Homes – and ***not*** Services SoCal – that was the owner of the domain names that

1 California law, a breach of contract claim requires a showing of appreciable and actual
2 damage.”); *see also Roberts v. Los Angeles County Bar Ass'n*, 105 Cal.App.4th 604, 617
3 (2003) (“Actual damage as opposed to mere nominal damages is another essential
4 element of a cause of action for breach of contract.”). *See also, Buschman v. Anesthesia*
5 *Bus. Consultants LLC*, 42 F. Supp. 3d 1244, 1250–51 (N.D. Cal. 2014) (“The elements
6 for a breach of contract action under California law are: (1) the existence of a contract,
7 (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and (4)
8 damages to plaintiff as a result of the breach.”). As reflected below, WSC does not (*and*
9 *cannot*) show any harm in connection with Breach 1 or Breach 2 of the Area
10 Representation Agreement.

11 **2. WSC’s Corporate Representatives Did Not Identify Any Harm To**
12 **WSC In Connection With Breach 1 or Breach 2 Of The Area**
13 **Representation Agreement**

14 The B&D Parties served WSC with a deposition notice that identified a series of
15 deposition categories as permitted under Rule 30(b)(6) of the Federal Rules of Civil
16 Procedure. (SUF, ¶ 9.) Category 46 of the B&D Parties’ deposition notice required WSC
17 to produce a corporate representative to testify concerning “[t]he damages [WSC] is
18 claiming in this action.” (SUF, ¶ 10.) In response to Category 46, WSC produced its CEO
19 (Geoff Wood), CFO (Mark Oster), and General Counsel (Paul Drayna). (SUF, ¶ 11.)

20 Although all three individuals were designated to testify as WSC’s “corporate
21 representative” as to Category 46, during their depositions, both Wood and Drayna
22 deferred to Oster when questioned on WSC’s damages. For example, Wood’s deposition
23 transcript includes the following exchange:

24 Q. Now, Windermere has asserted various breach of contract claims against Mr.
25 Bennion and Mr. Deville and their entities in this lawsuit. Are you aware of
26 that?

27
28

give rise to WSC’s fourth alleged breach of the Area Representation Agreement. Thus,
this alleged breach should also be dismissed on summary judgment.

1 A. I am.

2 Q. And Windermere is seeking damages in connection with each of those
3 claims. Are you aware of that?

4 A. I am.
5

6 Q. And are you being presented to testify here as to those damages --

7 A. No.
8

9 Q. -- that are being sought?

10 A. The amount?

11 Q. Correct.
12

13 A. No.

14 Q. Who from Windermere will?

15 A. Mark Oster.
16

17 Q. Thank you. **Mr. Oster is being presented by Windermere as the**
18 **representative to testify as to the amount of damages that are**
19 **being sought by Windermere in this case, correct?**

20 A. **That's correct.**

21 (SUF, ¶ 12 (emphasis added).) Drayna similarly deferred to Oster as the appropriate
22 corporate representative of WSC to testify as to the damages being pursued by WSC in
23 this action. (SUF, ¶ 13.)

24 Consistent with the deposition testimony of Wood and Drayna, Oster testified
25 unequivocally that he was being produced by WSC to testify as to the damages it was
26 pursuing in this action. (SUF, ¶ 14.) When asked to identify these damages, Oster
27 testified as follows:
28

Q. What are the damages that Windermere is claiming in this action?

1
2 A. The damages are the amounts due that we've already talked about in
3 approximation of \$1.3 million in the schedule previously provided.

4 Q. And outside of that schedule and potential interest that might flow
5 from that August 23rd date until the time of payment, **are there any**
6 **other damages that Windermere is claiming in this action?**

7 A. **Not that I'm aware of.**

8 (SUF, ¶ 15 (emphasis added).) The damages identified by Oster concern Breach 3 –
9 reflecting past due franchise and related fees allegedly owed to WSC under the franchise
10 agreements with B&D Fine Homes and B&D SoCal. More importantly, Oster did not
11 identify any damages in connection with Breach 1 or Breach 2 of the Area Representation
12 Agreement. In fact, none of WSC's corporate representatives identified any harm
13 suffered by WSC in connection with Services SoCal's alleged failures to "provide
14 'prompt, courteous and efficient service,'" (Breach 1) or "deal 'fairly and honestly' with
15 members of the Windermere system" (Breach 2). (SUF, ¶ 16.)

16 The deadline for WSC's corporate representatives to make changes to their
17 deposition testimony has long passed. (SUF, ¶ 17; *see* Fed. R. Civ. Pro. 30(e)(1).)
18 Because these witnesses failed to identify any damages arising out of alleged Breach 1 or
19 Breach 2 of the Area Representation Agreement, summary adjudication of these alleged
20 breaches should be entered in favor of Services SoCal.

21 **3. WSC's Damages Expert Does Not Identify Any Harm To WSC In**
22 **Connection With Breach 1 Or Breach 2 Of The Area Representation**
23 **Agreement**

24 WSC designated Neil J. Beaton, a Certified Public Accountant, as an expert
25 witness in the case. (SUF, ¶ 18.) As part of Mr. Beaton's assignment, he was asked by
26 WSC to formulate "a preliminary opinion of the economic damages that may have been
27 incurred by WSC as a result of alleged violations of [the franchise agreements and Area
28 Representation Agreement]." (SUF, ¶ 19.) On September 16, 2016, WSC produced Mr.
Beaton's expert witness report pursuant to Rule 26 of the Federal Rules of Civil

1 Procedure. (SUF, ¶ 20.) The report is silent on any harm or damage to WSC in
2 connection with Breach 1 or Breach 2 of the Area Representation Agreement. (SUF, ¶
3 21.) Instead, and consistent with the deposition testimony of Oster, Mr. Beaton
4 summarized WSC’s “economic damages” to be related solely to “unpaid franchise fees”
5 in the amount of \$1,328,000. (SUF, ¶ 22.)

6 The deadline for WSC to designate any further expert witnesses or reports has
7 passed. (SUF, ¶ 23; *see* Fed. R. Civ. Pro. 26(a)(2)(D).) Mr. Beaton is the lone damages
8 expert that can be used by WSC in this case. (SUF, ¶ 18.) Mr. Beaton’s failure to
9 identify as part of his report any damages in connection with Breach 1 or Breach 2
10 precludes him from adding these items at a later date. Because Mr. Beaton has not
11 identified any damages in connection with these alleged breaches – and WSC has not
12 identified any other evidence of harm resulting from these alleged breaches – summary
13 adjudication of Breach 1 and Breach 2 of the Area Representation Agreement should be
14 entered in favor of Services SoCal.

15 **4. WSC’s Initial Disclosures Do Not Identify Any Damage To WSC In**
16 **Connection With Breach 1 Or Breach 2 Of The Area Representation**
17 **Agreement**

18 Under Federal Rule of Civil Procedure 26(a), a party must – without awaiting a
19 discovery request – provide to the opposing party a computation of damages, along with
20 evidentiary material upon which the computation is based. WSC’s mandatory Rule 26(a)
21 Initial Disclosure identified its damages at \$1,208,655.43. (SUF, ¶ 24.) While WSC’s
22 Initial Disclosure is silent on the source of these claimed damages, the figure identified is
23 consistent with Oster and Mr. Beaton’s damage calculations that were limited to
24 franchise and related fees that are allegedly owed to WSC. (SUF, ¶ 25.) More
25 importantly, the Initial Disclosure makes no reference to any damages in connection with
26 Breach 1 or Breach 2. (SUF, ¶ 26.)

27 Rule 26(e) requires supplemental disclosures if that party later learns that its initial
28 disclosures were incomplete or incorrect, or as otherwise ordered by the Court. WSC has
made no effort to supplement its initial disclosures to include additional damages in

1 connection with Breach 1 or Breach 2. Moreover, Federal Rule of Civil Procedure Rule
2 37(c)(1) provides that if a party fails to provide any information required by Rule 26(a),
3 that party cannot use that information at trial unless the failure was substantially justified
4 or is harmless.³ Under these rules, even if WSC was harmed by all of Services SoCal's
5 alleged breaches of the Area Representation Agreement, WSC's failure to provide a
6 computation of damages prior to the discovery cutoff precludes it from doing so now. To
7 permit such conduct would allow WSC to engage in trial by surprise and not permit
8 Services SoCal the opportunity to evaluate the evidence before trial. This cannot be
9 allowed.

10 Because WSC failed to identify as part of its Rule 26(a) Initial Disclosure any
11 damages or damage computations in connection with Breach 1 or Breach 2, summary
12 adjudication of these breaches should be entered in favor of Services SoCal.

13 **5. WSC's Written Discovery Responses Do Not Identify Any Damage**
14 **To WSC In Connection With Breach 1 Or Breach 2 Of The Area**
15 **Representation Agreement**

16 The B&D Parties issued a series of document requests and interrogatories to WSC
17 specifically designed to elicit information on the amount of damages WSC is seeking the
18 case and substantiation for those claimed damages. (SUF, ¶ 27.) None of WSC's written
19 responses or documents produced support a claim for damages in connection with Breach
20 1 or Breach 2. (SUF, ¶ 28.) Illustrative of this point are the following document requests
21 from the B&D Parties to WSC and WSC's corresponding objections and responses:

22 **REQUEST FOR PRODUCTION NO. 48:**

23 All Documents Relating to the damages asserted by You in the FACC.

24 **RESPONSE TO REQUEST FOR PRODUCTION NO. 48:**

25 WSC objects to this request on each of the grounds set forth in the General
26 Objections set forth above, each of which is incorporated by this reference.

27
28 ³ To avoid exclusion under Rule 37, the nondisclosing party bears the burden of
proving that its failure to disclose the required information was substantially justified or
harmless. *Torres v. City of L.A.*, 548 F.3d 1197, 1213 (9th Cir.2008).

1 WSC further objects to this request on the grounds that it violates Rule
2 34(b)(1)(A) in that it does not describe the documents sought with
reasonable particularity.

3 Subject to and without waiving the foregoing objections, WSC responds as
4 follows: **WSC will produce documents sufficient to show the amounts
5 owed by the B&D Parties for unpaid franchise fees, technology fees, and
6 the liquidated damages owing under the Modification Agreement.**

7 **REQUEST FOR PRODUCTION NO. 71:**

8 All Documents, Communications and correspondence that describe and/or
9 support each category and each claim for damages claimed in the FACC.

10 **RESPONSE TO REQUEST FOR PRODUCTION NO. 71:**

11 WSC objects to this request on each of the grounds set forth in the General
12 Objections set forth above, each of which is incorporated by this reference.
13 WSC further objects to this request on the grounds that it violates Rule
34(b)(1)(A) in that it does not describe the documents sought with
reasonable particularity.

14 Subject to and without waiving the foregoing objections, WSC responds as
15 follows: **WSC will produce documents sufficient to show the amounts
16 owed by the B&D Parties for unpaid franchise fees, technology fees, and
17 the liquidated damages owing under the Modification Agreement.**

18 (SUF, ¶ 28.) The B&D Parties' discovery requests unequivocally sought the production
19 of all materials that support each of the categories of damages being pursued by WSC in
20 the FACC. In response, WSC made clear that the only damages at issue are "for unpaid
21 franchise fees, technology fees, and the liquidated damages owing under the Modification
22 Agreement." (SUF, ¶ 29.) Thereafter, and consistent with its written responses, WSC did
23 not produce any materials to suggest that they had been harmed in connection with
24 Services SoCal's alleged failures "to provide 'prompt, courteous and efficient service'"
25 (Breach 1), or "to deal 'fairly and honestly with members of the Windermere system'"
26 (Breach 2). (SUF, ¶ 30.)

27 As stated above, to prevail on each of its breach of contract claims, WSC must
28 prove quantifiable damages resulting from each of the breaches identified. The
undisputed facts show that WSC failed to produce any evidence of damages concerning

1 Breach 1 or Breach 2 of the Area Representation Agreement. Instead, the evidence shows
2 that all of the alleged damages sustained by WSC in connection with its relationships
3 with the B&D Parties arose from other breaches identified in the FACC.

4 Because WSC does not (*and cannot*) show damages in connection with Breach 1
5 or Breach 2, summary adjudication of those alleged breaches should be entered in favor
6 of Services SoCal.

7
8 **C. WSC Cannot Support Its Breach Of Contract Claims As To Bennion,**
9 **Deville, Services SoCal And B&D SoCal For Alleged Misuse Of The**
10 **Windermere Name And Trademarks**

11 The undisputed facts show that, at all times relevant, B&D Fine Homes – and *not*
12 the other B&D Parties – owned and controlled all of the websites and domains that are
13 the subject of WSC’s breach of contract claims (Counts 1 through 3). Nonetheless, WSC
14 continues to pursue its blanket breach of contract claims against each of the B&D Parties
15 for allegedly misusing the Windermere name and mark on websites and in domain names
16 following the September 30, 2015 termination of the parties’ relationships. (SUF, ¶ 31.)
17 As explained below, because WSC does not have any factual support for these alleged
18 breaches by Bennion, Deville, Services SoCal or B&D SoCal, summary adjudication of
19 WSC’s contract claims should be entered in favor of these parties.

20 **1. Relevant Factual Background**

21 WSC loosely alleges in the FACC that following the termination of the parties’
22 relationships on September 30, 2015, each of the B&D Parties continued using the
23 Windermere domain name (Windermersocal.com), and used the Windermere name and
24 logo in blogs. (SUF, ¶ 32.) WSC also separately alleges that Bennion, Deville, and B&D
25 SoCal refused to “surrender 314 domain names” that included the Windermere name.
26 (SUF, ¶ 33.) These blanket allegations then provide the sole basis for the “Tradename and
27 Trademark Infringement” sections of each of WSC’s breach of contract claims asserted in
28 the FACC. (SUF, ¶ 34.)

1 The facts relevant to WSC’s claims are straightforward and undisputed. B&D Fine
2 Homes is the registrant (and former owner) of each of the domains at issue in this
3 lawsuit. (SUF, ¶ 35.) While in B&D Fine Home’s possession, those domains and related
4 websites were directly controlled and managed by employees of B&D Fine Home and no
5 one else. (SUF, ¶ 36.) Most recently, and during the time relevant to this litigation, B&D
6 Fine Homes’ Director of Technology, Eric Forsberg, managed and controlled all of the
7 domains and websites owned by B&D Fine Homes. (SUF, ¶ 37.) Mr. Forsberg has also
8 controlled all blogs owned and operated by B&D Fine Homes. (SUF, ¶ 38.)

9 Alternatively, there have not been any websites owned or controlled by Services
10 SoCal, B&D SoCal, Bennion, or Deville that utilized the Windermere name or marks
11 prior to or following the September 30, 2015 termination date. (SUF, ¶ 39.) No
12 employees of Services SoCal or B&D SoCal control or operate any of the domains or
13 websites at issue. (SUF, ¶ 40.) And, neither Bennion nor Deville have personally
14 controlled or operated any websites or domains since September 30, 2015. (SUF, ¶ 41.)
15 These facts have not been (*and cannot be*) disputed by WSC.

16 Pursuant to the B&D Parties’ 30(b)(6) deposition notice, WSC was required to
17 produce a corporate representative capable of testifying as to “[t]he B&D Parties’ use of
18 the Windermere name and trademark following the termination and/or expiration of their
19 franchise agreements.” (SUF, ¶ 42.) Again, WSC produced its General Counsel, Drayna,
20 to testify on this topic. (SUF, ¶ 43.) During Drayna’s deposition, he testified that B&D
21 Fine Homes was the “legal owner” of the websites and domains at issue in this litigation,
22 and WSC is “unaware” of which, if any, of the B&D Parties controlled the websites and
23 domain names after September 30, 2015 (SUF, ¶ 44.) When specifically asked to identify
24 the evidence in WSC’s possession that suggests Services SoCal was responsible for the
25 conduct at issue, Drayna responded, “[a]s of today, I don’t know that we have -- that
26 we have any evidence that discovery – I think our investigation on that is
27
28

1 **continuing.**⁴ (SUF, ¶ 45 (emphasis added).) Drayna's deposition transcript also includes
2 the following similar exchange:

3 Q. But as you sit here, you cannot identify any specific instances or evidence
4 of a representative of Services using the Windermere domain names after
5 September 30, 2015, correct?

6 A. We know what -- again, as I believe I already said, we know that
7 somebody had to do something on or around September 30, 2015 that
8 resulted in web traffic to WindermereSoCal.com being redirected
9 somewhere else, and *we don't know who did that*.

10 Q. And you don't know who did it, so you just filed a claim for breach of
11 contract against the Services entity?

12 A. That was not the sole basis for the breach of contract claim against the
13 Services company.

14 Q. Is Windermere going to pursue that particular breach with respect to the
15 domain name against the Services entity?

16 A. To the extent that it is supported by the facts as they are discovered, yes.

17 Q. And what facts are those?

18 [Objection by WSC's counsel]
19

20 A. Yes, it was. *I already said, as of today, we don't know who did what or*
21 *when*.

22 (SUF, ¶ 46.)

23 Drayna testified that WSC maintained a similar lack of knowledge concerning the
24 conduct of B&D SoCal, Bennion and Deville. (SUF, ¶ 47.) For example, when asked to
25 identify the evidence that WSC has to show that Bennion, Deville, or B&D SoCal
26 unlawfully used the Windermere domains after September 30, 2015, Drayna testified
27

28 ⁴ Drayna's deposition was taken on August 23, 2016, just six days before the
discovery cutoff date of August 29, 2016. (SUF, ¶ 49.)

1 “[a]gain, I think there was some uncertainty of who did what and who worked for which
2 entity.” (SUF, ¶ 48.) It is evident from Drayna’s testimony – testifying as WSC’s
3 designated corporate representative – that WSC does not have any factual support to
4 show that Services SoCal, B&D SoCal, Bennion or Deville engaged in any of the alleged
5 conduct after September 30, 2015.

6 As explained below, each of WSC’s alleged contractual breaches – consisting of
7 paragraphs 118-125, 133-140, and 148-156 of the FACC – lack factual support allowing
8 for summary adjudication in favor of Services SoCal, B&D SoCal, Bennion and Deville.

9 **2. There Is No Genuine Issue As To Any Material Fact Involving**
10 **WSC’s Contract Claims For The Alleged Use Of The Windermere**
11 **Name and Trademark**

12 As stated above, summary adjudication is appropriate when “there is no genuine
13 issue as to any material fact, and the moving party is entitled to judgment as a matter of
14 law.” *Prepaid Teleconnect, Inc. v. City of Murrieta*, 2016 WL 1622609, at *2 (C.D. Cal.
15 Apr. 21, 2016) (citing Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
16 247-48 (1986)). Here, the undisputed facts reveal that the websites and domains relied
17 upon by WSC to support its contract claims against all of the B&D Parties were solely
18 owned and operated by B&D Fine Homes. Accordingly, there is no evidence to suggest
19 that any of the other counter-defendants – Services SoCal, B&D SoCal, Bennion or
20 Deville – engaged in any of the alleged conduct for which WSC now complains.

21 Because there are no facts to suggest that Services SoCal, B&D SoCal, Bennion or
22 Deville used the Windermere name or marks after September 30, 2015, summary
23 adjudication of WSC’s contract claims should be entered in favor of Services SoCal,
24 B&D SoCal, Bennion and Deville.

25 ///

26 ///

27 ///

1 **IV. CONCLUSION**

2 For all the foregoing reasons, the B&D Parties respectfully request that the Court
3 grant their Motion for Summary Adjudication and enter summary adjudication on these
4 issues in favor of the B&D Parties.

5
6 Dated: October 24, 2016

MULCAHY LLP

7
8 By: /s/ Kevin A. Adams

9 Kevin A. Adams

10 *Attorneys for Plaintiffs and Counter-*
11 *Defendants*
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