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

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

23 Plaintiffs,

24 v.

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

28 Defendant.

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

Hon. Manual L. Real

**REPLY TO DEFENDANTS’
OPPOSITION TO PLAINTIFFS’
SEPARATE STATEMENT OF
UNCONTROVERTED FACTS
AND CONCLUSIONS OF LAW;
OPPOSITION TO DEFENDANT’S
SEPARATE STATEMENT OF
GENUINE DISPUTES**

Date: November 21, 2016

Time: 10:00 a.m.

Courtroom: 8

*[Filed concurrently with Reply Brief;
Objections to Declaration of Jeffrey A.
Feasby]*

Action Filed: September 17, 2015

Pretrial Conf.: November 14, 2016

Trial: January 31, 2017

1 AND RELATED COUNTERCLAIMS

2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 Pursuant to Local Rule 56-1, Plaintiffs and Counter-Defendants Bennion &
4 Deville Fine Homes SoCal, Inc. (“B&D SoCal”), Windermere Services Southern
5 California, Inc. (“Services SoCal”), and Counter-Defendants Robert Bennion
6 (“Bennion”) and Joseph Deville (“Deville,” collectively, the “Plaintiffs”) hereby
7 submit this (1) Reply to Defendant/Counterclaimant Windermere Real Estate
8 Services Company’s (“WSC”) Opposition to Plaintiffs’ Separate Statement of
9 Uncontroverted Facts and Conclusions of Law, and (2) Opposition to WSC’s
10 Separate Statement of Genuine Disputes.
11

12 **UNCONTROVERTED MATERIAL FACTS**

	<u>PLAINTIFFS’ UNCONTROVERTED FACTS AND SUPPORTING EVIDENCE</u>	<u>DEFENDANT’S RESPONSE AND EVIDENCE</u>
17 18 19 20 21 22 23 24	1. 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.” D.E. 16 (the First Amended Counterclaim), ¶ 130.	Undisputed.
25 26 27 28	2. 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’	Undisputed.

1		relationships. D.E. 16, ¶¶ 118-124, 133-139, 148-156.	
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3	3.	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 by failing to remain in the Windermere System for the five (5) year period mandated by the Modification Agreement.” D.E. 16, ¶¶ 158-164.	Undisputed.
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11	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.” Declaration of Robert J. Deville (“Deville Decl.”), ¶¶ 4-6, Ex. A (Modification Agreement), § 3(E).	Undisputed.
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20	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	Undisputed.
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1		said date [...].” Deville Decl., ¶ 6, Ex. A (Modification Agreement), §§ 3(E) 2 3 & 3(F).	
4	6.	The term “B&D” is expressly 5 defined in the first paragraph of the 6 Modification Agreement to include 7 <i>only</i> B&D Fine Homes and B&D 8 SoCal. Deville Decl., ¶ 6, Ex. A (Modification Agreement), p. 1.	Undisputed.
9	7.	Services SoCal is not included in 10 the definition of “B&D” and, 11 instead, is separately defined in the 12 opening paragraph of the 13 Modification Agreement as the 14 “Area Representative.” Deville Decl., ¶ 6, Ex. A (Modification Agreement), p. 1.	Undisputed.
15	8.	WSC’s breach of contract claim 16 against Services SoCal (Count II) 17 identifies four purported breaches 18 of the parties’ Area Representation 19 Agreement. 20 <i>See</i> FACC, ¶¶ 127-141.	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.

21 **Plaintiffs’ Reply to No. 8:** This does not create a material issue of disputed fact.
22 The underlying language of the Area Representation Agreement at section 3,
23 paragraph 3, provides, in pertinent part: “Area Representative agrees to give
24 prompt, courteous and efficient service, and to be governed by the highest ethical
25 standards of fair dealing and honesty when dealing with the public and all
26 members of the Windermere System in order to preserve and enhance the identity,
27 reputation, quality image and goodwill built by WSC and the value of the
28 Trademark.” [See D.E. 31-1, p. 16, § 3, ¶ 3.] This language imposes two separate
obligations on Services SoCal – (1) to give prompt, courteous and efficient
service, and (2) to be governed by the highest ethical standards of fair dealing and
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
3 fact is immaterial to the underlying partial motion for summary judgment.

3 4 5 6 7 8 9 10 11	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. Declaration of Kevin Adams ("Adams Decl."), ¶ 4, Exs. A, B; <i>see also, Id.</i> at ¶ 5, Ex. 2 to the deposition transcripts of Paul Drayna ("Drayna Depo."), Geoff Wood ("Wood Depo."), and Mark Oster ("Oster Depo.).	Undisputed.
12 13 14 15 16 17 18 19	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." Adams Decl., ¶ 14, Ex. A, p. 6; <i>see also, Id.</i> at ¶ 5, Ex. 2 to the deposition transcripts of Drayna Depo., Wood Depo., and Oster Depo.	Undisputed.
20 21 22 23 24 25 26	11. In response to Category 46, WSC produced its CEO (Geoff Wood), CFO (Mark Oster), and General Counsel (Paul Drayna). Adams Decl., ¶ 45, Exs. C, G; <i>see also, Id.</i> at ¶ 7, 13, Exs. 3, 127 to the deposition transcripts of Drayna Depo. and Wood Depo., and Ex. 127 to the deposition transcript of Oster Depo.	Undisputed.
27 28	12. Wood's deposition transcript includes the following exchange: Q. Now, Windermere has	Undisputed.

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	<p>asserted various breach of contract claims against Mr. Bennion and Mr. Deville and their entities in this lawsuit. Are you aware of that?</p> <p>A. I am.</p> <p>Q. And Windermere is seeking damages in connection with each of those claims. Are you aware of that?</p> <p>A. I am.</p> <p>Q. And are you being presented to testify here as to those damages -</p> <p>-</p> <p>A. No.</p> <p>Q. -- that are being sought?</p> <p>A. The amount?</p> <p>Q. Correct.</p> <p>A. No.</p> <p>Q. Who from Windermere will?</p> <p>A. Mark Oster.</p> <p>Q. Thank you. Mr. Oster is being presented by Windermere as the representative to testify as to the amount of damages that are being sought by Windermere in this case, correct?</p> <p>A. That's correct.</p> <p>Adams Decl., ¶ 9, Ex. D (Wood Depo.), pp. 325:16 to 326:14.</p>	
13.	<p>Drayna deferred to Oster as the appropriate corporate representative of WSC to testify as to the damages being pursued by WSC in this action.</p> <p>Adams Decl., ¶ 10, Ex. E, (Drayna Depo.), pp. 209:3-14, 406:8-24, 426:3-15.</p>	Undisputed.
14.	<p>Consistent with the deposition testimony of Wood and Drayna, Oster testified unequivocally that</p>	Undisputed.

1 2 3 4	<p>he was being produced by WSC to testify as to the damages it was pursuing in this action.</p> <p>Adams Decl., ¶ 11, Ex. F (Oster Depo.), pp. 49:23-50:2, 113:10 to 114:4.</p>	
5 6 7 8 9 10 11 12 13 14 15 16 17 18	<p>15. When asked to identify WSC's damages, Oster testified as follows:</p> <p>Q. What are the damages that Windermere is claiming in this action?</p> <p>A. The damages are the amounts due that we've already talked about in approximation of \$1.3 million in the schedule previously provided.</p> <p>Q. And outside of that schedule and potential interest that might flow from that August 23rd date until the time of payment, are there any other damages that Windermere is claiming in this action?</p> <p>A. Not that I'm aware of.</p> <p>Adams Decl., Ex. F (Oster Depo.), Oster Depo., pp. 113:10 to 114:4.</p>	<p>Disputed. Mr. Oster testified in great detail about WSC's damages. This is only a small portion of his total testimony about WSC's damages. <i>See e.g.</i>, Feasby Decl. Ex. G, Oster Dep. pp. 21-24.</p>
<p>19 Plaintiffs' Reply to No. 15: Plaintiffs' identification of Mr. Oster's testimony is accurate as is reflected in the deposition transcript. Adams Decl., Ex. F (Oster Depo.), Oster Depo., pp. 113:10 to 114:4. WSC's identification of other portions of Mr. Oster's testimony concerning unrelated damages does not create a disputed fact and is immaterial to the underlying partial motion for summary judgment.</p>		
22 23 24 25 26 27 28	<p>16. 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><i>See e.g.</i>, Adams Decl., Exs. D, E, F</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.</p>

1 (Drayna Depo., Wood Depo., Oster
2 Depo.).

(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.

15 **Plaintiffs' Reply to No. 16:** WSC does not provide any evidence to contradict
16 this fact. Services SoCal's alleged failure to make best efforts to collect fees
17 involves a separate and distinct contractual obligation in the Area Representation
18 Agreement. [See D.E. 31-1, p. 16, § 3, ¶ 2 (requiring Services SoCal to collect
19 fees owed by Windermere franchises in its region and to remit to WSC its share of
20 those fees).] Any alleged damages for Services SoCal's purported failure to
21 collect fees are not relevant to WSC claim that Service SoCal failed to "provide
22 'prompt, courteous and efficient service,'" or "deal 'fairly and honestly' with
23 members of the Windermere system."
24 Additionally, WSC's citation to and reliance upon its franchise expert's
25 conclusions do not create a disputed issue of fact because (1) the franchise expert
26 does not identify any damages to WSC for the alleged "breach of industry
27 standards," and (2) the franchise expert's opinions as to the conduct of Services
28 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

1 1207589, at *8; see also *Szymankiewicz*, 2005 WL 1154210, at *1; Willis, 2008
 2 WL 821828, at *7. Also, WSC does not identify who produced the document in
 3 discovery, and the document does not bear the Moving Parties' Bates stamp. See
 4 Orr, 285 F.3d at 777 fn. 20, 21. Finally, WSC fails to cite to a transcript that
 authenticates Exhibit B. See Orr, 285 F.3d at 774-75, fn. 12, 13.

17.	The deadline for WSC's corporate representatives to make changes to their deposition testimony has long passed. <i>See</i> Fed. R. Civ. Pro. 30(e)(1).	Undisputed.
18.	WSC designated Neil J. Beaton, a Certified Public Accountant, as an expert witness in the case. Adams Decl., ¶¶ 16-17, Ex. H (WSC's Expert Witness Disclosure), p. 1, ¶ 1.	Undisputed.
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]." <i>Id.</i> , Ex. H, (WSC's Expert Witness Disclosure), exhibit 1, p. 4.	Undisputed.
20.	On September 16, 2016, WSC produced Mr. Beaton's expert witness report pursuant to Rule 26 of the Federal Rules of Civil Procedure. Adams Decl., ¶¶ 16-17, Ex. H (WSC's Expert Witness Disclosure), p. 1, ¶ 1.	Undisputed.
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. Adams Decl., ¶¶ 16-18, Ex. H (WSC's Expert Witness	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

1 2 3 4 5 6	Disclosure), exhibit 1.	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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Plaintiffs’ Reply to No. 21: WSC does not provide any evidence to contradict this fact. Nowhere in Mr. Beaton’s report does he even suggest that WSC has been harmed as a result of Services SoCal’s alleged failure to provide prompt, courteous and efficient service and to deal fairly and honestly with members of the Windermere system. (Adams Decl., ¶¶ 16-18, Ex. H (WSC’s Expert Witness Disclosure), exhibit 1.) Services SoCal’s alleged failure to make best efforts to collect fees involves a separate and distinct 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).]

14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	22. Consistent with the deposition testimony of Oster, Mr. Beaton summarized WSC’s “economic damages” to be related solely to “unpaid franchise fees” in the amount of \$1,328,000. Adams Decl., ¶ 18, Ex. H, (WSC’s Expert Witness Disclosure), exhibit 1, p. 5; Adams Decl., Ex. F (Oster Depo.), pp. 113:10 to 114:4.	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
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		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.
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Plaintiffs' Reply to No. 22: 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 distinct 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 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 discovery, and the document does not bear the Moving Parties' Bates stamp. See *Orr*, 285 F.3d at 777 fn. 20, 21. Finally, WSC fails to cite to a transcript that authenticates Exhibit B. See *Orr*, 285 F.3d at 774-75, fn. 12, 13.

23.	The deadline for WSC to designate any further expert witnesses or reports has passed. D.E. 35; Fed. R. Civ. Pro. 26(a)(2)(D).	Undisputed.
24.	WSC's mandatory Rule 26(a) Initial Disclosure identified its	Undisputed.

	damages at \$1,208,655.43. Adams Decl., Ex. I (WSC’s Initial Disclosures), p. 5.	
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 franchise and related fees that are allegedly owed to WSC. Adams Decl., ¶ 20, Ex. I (WSC’s Initial Disclosure), p. 5; Ex. F (Oster Depo.), pp. 113:10 to 114:4; Ex. H (WSC’s Expert Witness Disclosure), exhibit 1, p. 5.	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, 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.)
Plaintiffs’ Reply to No. 25: 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 distinct 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.”		
26.	WSC’s Initial Disclosure makes no reference to any damages in connection with Breach 1 or Breach 2. Adams Decl., ¶ 21, Ex. I (WSC’s Initial Disclosure).	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.)
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Plaintiffs' Reply to No. 26: 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 distinct 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."

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. Adams Decl., ¶¶ 22-25, Exs. J, K.)	Disputed. WSC is unable to identify the designed intent of Counter-Defendants' written discovery requests.
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Plaintiffs' Reply to No. 27: WSC's response is insufficient to create a triable issue of material fact and otherwise irrelevant to the underlying motion.

28.	None of WSC's written responses or documents produced support a claim for damages in connection with Breach 1 or Breach 2. <i>Id.</i> , see B&D Fine Homes Document Production Request Nos. 48 and 71 (Ex. J), and WSC's corresponding written responses (Ex. K).	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
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		conduct. (Feasby Decl. Ex. G, Oster Dep. pp. 21-24; Adams Decl. Ex. H.)
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Plaintiffs’ Reply to No. 28: 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 distinct 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.”

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.” <i>Id.</i> , Exs. J, K.	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.)
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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 distinct 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.”

<p>1 2 3 4 5 6 7 8 9 10 11</p>	<p>30. WSC did not produce any materials to suggest that they had been harmed in connection with 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). Adams Decl., ¶ 25, Ex. K.</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>12 Plaintiffs' Reply to No. 30: WSC's response is conclusory and insufficient to 13 create a triable issue of material fact. WSC is attempting to argue its position 14 instead of contradicting the fact through evidence. Services SoCal's alleged 15 failure to make best efforts to collect fees involves a separate and district 16 contractual obligation in the Area Representation Agreement. [See D.E. 31-1, p. 17 16, § 3, ¶ 2 (requiring Services SoCal to collect fees owed by Windermere 18 franchises in its region and to remit to WSC its share of those fees).] Any alleged 19 damages for Services SoCal's purported failure to collect fees are not relevant to 20 WSC claim that Service SoCal failed to "provide 'prompt, courteous and efficient 21 service,'" or "deal 'fairly and honestly' with members of the Windermere 22 system."</p>		
<p>20 21 22 23 24 25 26</p>	<p>31. WSC continues to pursue its breach of contract claims against each of the B&D Parties for allegedly misusing the Windermere name and mark on websites and in domain names following the September 30, 2015 termination of the parties' relationships. D.E. 16, ¶¶ 118-124, 133-139, 148-156.</p>	<p>Undisputed.</p>
<p>27 28</p>	<p>32. WSC alleges in the FACC that following the termination of the parties' relationships on September 30, 2015, each of the B&D Parties</p>	<p>Disputed. In addition to these allegations, WSC alleged that Counter-Defendants intentionally misused the Windermere name</p>

1 2 3 4 5	continued using the Windermere domain name (Windermeresocal.com), and used the Windermere name and logo in blogs. D.E. 16, ¶¶ 118-124, 133-139, 148-156.	and Trademark following the expiration/termination of the Agreements. (D.E. 16, FACC ¶¶ 118-126, 133-141, 148-157.)
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Plaintiffs’ Reply to No. 32: 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. WSC does not identify how Plaintiffs allegedly misused the Windermere name and Trademark other than through their use of the Windermere domain name (windermeresocal.com), and through the Windermere name and logo in blogs. [D.E. 16, ¶¶ 118-124, 133-139, 148-156.]

11 12 13 14	33. WSC also separately alleges that Bennion, Deville, and B&D SoCal refused to “surrender 314 domain names” that included the Windermere name. D.E. 16, ¶ 156.	Undisputed.
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15 16 17 18 19 20	34. These blanket allegations then provide the sole basis for the “Tradename and Trademark Infringement” sections of each of WSC’s breach of contract claims asserted in the FACC. D.E. 16, ¶¶ 118-124, 133-139, 148-156.	Disputed. In addition to these allegations, WSC alleged that Counter-Defendants intentionally misused the Windermere name and Trademark following the expiration/termination of the Agreements. (D.E. 16, FACC ¶¶ 118-126, 133-141, 148-157.)
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Plaintiffs’ Reply to No. 34: 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. WSC does not identify how Plaintiffs allegedly misused the Windermere name and Trademark other than through their use of the Windermere domain name (windermeresocal.com), and through the Windermere name and logo in blogs. [D.E. 16, ¶¶ 118-124, 133-139, 148-156.]

26 27 28	35. B&D Fine Homes is the registrant (and former owner) of each of the domains at issue in this lawsuit. Declaration of Eric Forsberg (“Forsberg Decl.”), ¶¶ 5-8.	Undisputed.
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1	36.	While in B&D Fine Home's possession, those domains and related websites were directly controlled and managed by employees of B&D Fine Home and no one else. Declaration of Joseph R. Deville ("Deville Decl."), ¶ 11; Forsberg Decl., ¶¶ 6-8.	Disputed. Eric Forsberg testified that he did work for B&D Fine Homes SoCal and Services SoCal in addition to his work for B&D Fine Homes. (Feasby Decl., Ex. E, Forsberg Dep. pp. 16:19-17:2.)
7	<u>Plaintiffs' Reply to No. 36:</u> WSC's response is insufficient to create a triable issue of material fact. Mr. Forsberg testified that he was employed by B&D Fine Homes and did some work for B&D SoCal and Services SoCal. However, at no point did Mr. Forsberg testify that he controlled the websites at issue while working for anyone other than B&D Fine Homes. The representation that Mr. Forsberg generally did work for the other Plaintiffs does not contradict Plaintiffs' Undisputed Fact No. 36.		
12	37.	During the time relevant to this litigation, B&D Fine Homes' Director of Technology, Eric Forsberg, managed and controlled all of the domains and websites owned by B&D Fine Homes. Deville Decl., ¶¶ 10-11; Forsberg Decl., ¶ 6.	Undisputed.
18	38.	Mr. Forsberg has also controlled all blogs owned and operated by B&D Fine Homes. Deville Decl., ¶ 11; Forsberg Decl., ¶ 10.	Undisputed.
22	39.	There have not been any websites owned or controlled by Services SoCal, B&D SoCal, Bennion, or Deville that utilized the Windermere name or marks. Deville Decl., ¶¶ 12-13; Forsberg Decl., ¶¶ 8-10.	Undisputed.
26	40.	Neither Services SoCal nor B&D SoCal control or operate any of the domains or websites at issue in this litigation.	Disputed. Eric Forsberg testified that he worked for B&D Fine Homes SoCal and Services SoCal in addition to his work for B&D

1	Deville Decl., ¶ 12.	Fine Homes. (Feasby Decl., Ex. E, Forsberg Dep. pp. 16:19-17:2.)
2 3 4 5 6	<p>Plaintiffs’ Reply to No. 40: WSC’s response is insufficient to create a triable issue of material fact. Mr. Forsberg testified that he was employed by B&D Fine Homes and did some work for B&D SoCal and Services SoCal. However, at no point did Mr. Forsberg testify that he controlled or operated the websites at issue while working for anyone other than B&D Fine Homes. The representation that Mr. Forsberg generally did work for the other Plaintiffs does not contradict Plaintiffs’ Undisputed Fact No. 40.</p>	
7 8 9 10 11 12 13 14	<p>41. Neither Bennion nor Deville have personally controlled or operated any websites or domains since September 30, 2015. Deville Decl., ¶ 13.</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>
15 16 17 18 19 20 21	<p>Plaintiffs’ Reply to No. 41: As explained in detail in the concurrently filed Objections to the declaration of Jeffrey Feasby, Plaintiffs object to WSC’s reliance upon Exhibit I to Mr. Feasby’s declaration pursuant to Fed. R. Evid. 602, 901. Mr. Feasby’s declaration does not lay the proper foundation for Exhibit I. WSC does not identify who produced the document in discovery, and the document does not bear the Moving Parties’ 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. <i>See Orr</i>, 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 I. <i>See Orr</i>, 285 F.3d at 774-75, fn. 12, 13. In light of Plaintiffs’ objections, WSC fails to cite to any admissible disputed facts.</p>	
22 23 24 25 26 27 28	<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.” Adams Decl., Ex. A (category 40);</p>	<p>Undisputed.</p>

1		<i>see also</i> exhibit 2 to the Drayna Depo.	
2	43.	WSC produced its General Counsel, Drayna, to testify on this topic. Adams Decl., Exs. A, C; <i>see also</i> exhibits 2 and 3 to the Drayna Depo.	Disputed. In addition to Mr. Drayna, WSC produced Robert Sherrell to testify as a corporate representative on this topic. (Adams Decl. Ex. G.)
3	Plaintiffs' Reply to No. 43: WSC's response is insufficient to create a triable issue of material fact.		
4	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. Adams Decl., Ex. E (Drayna Depo.), p. 422:18-423:17.	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.)
5	Plaintiffs' Reply to No. 44: WSC's response is insufficient to create a triable issue of material fact. The testimony cited by Mr. Drayna does not contradict Plaintiffs' Undisputed Fact No. 44.		
6	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." Adams Decl., Ex. E (Drayna Depo.), p. 423:18-24.	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,

Plaintiffs' Reply to No. 45: WSC's response is insufficient to create a triable issue of material fact. The testimony cited by Mr. Drayna does not contradict Plaintiffs' Undisputed Fact No. 45. Further, Mr. Forsberg testified that he was employed by B&D Fine Homes and did some work for B&D SoCal and Services SoCal. However, at no point did Mr. Forsberg testify that he controlled or operated the websites at issue while working for anyone other than B&D Fine Homes. The representation that Mr. Forsberg generally did work for the other Plaintiffs does not contradict Plaintiffs' Undisputed Fact No. 45.

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.

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

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

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

A. To the extent that it is supported by the facts as they are

Undisputed.

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

PLAINTIFFS’ OPPOSITION TO WSC’S “ADDITIONAL FACTS”

	<u>WSC’S IDENTIFICATION OF “ADDITIONAL FACTS” & SUPPORTING EVIDENCE</u>	<u>PLAINTIFFS’ RESPONSES & SUPPORTING EVIDENCE</u>
50.	The Coachella Valley Franchise Agreement, the Southern California Franchise Agreement, and the Area Representation Agreement (collectively the “Agreements”) required Counter-Defendants, upon termination of the Agreements to discontinue all use of WSC’s trademarks, the “Windermere” name, and all variations thereof. Feasby Decl., Ex. A, Coachella Valley Franchise Agreement § 7; Ex. B Area Representation Agreement § 6; Ex. C, Southern California Franchise Agreement § 9.	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. Evid. 602, 901. Mr. Feasby’s declaration does not lay the proper foundation for Exhibit C. WSC 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. <i>See Orr</i> , 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 C. <i>See Orr</i> , 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.
51.	Bennion and Deville personally guaranteed B&D Fine Homes’ performance under the Coachella Valley Franchise Agreement. Feasby Decl., Ex. H.	Disputed. As explained in detail in the concurrently filed Objections to the declaration of Jeffrey Feasby, Plaintiffs object to WSC’s reliance upon Exhibit H to Mr. Feasby’s declaration pursuant to Fed. R. Evid. 602, 901. Mr. Feasby’s declaration does not lay the proper foundation for Exhibit H. WSC

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		<p>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. <i>See Orr</i>, 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. <i>See Orr</i>, 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.</p>
52.	<p>Bennion and Deville personally guaranteed B&D Fine Homes SoCal's Performance under the Southern California Franchise Agreement. Feasby Decl., Ex. C, Southern California Franchise Agreement, Appendix 2.</p>	<p>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. Evid. 602, 901. Mr. Feasby's declaration does not lay the proper foundation for Exhibit C. WSC 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. <i>See Orr</i>, 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 C. <i>See Orr</i>, 285 F.3d at 774-75, fn. 12, 13. In light of Plaintiffs' objections, WSC fails to identify any material facts in</p>

		support of its position.
<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p>	<p>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).</p>	<p>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. Evid. 602, 901. Mr. Feasby’s declaration does not lay the proper foundation for Exhibit K. Exhibit K is not deemed authentic and admissible by being attached to a complaint. <i>See Ellipsis, Inc.</i>, 2006 WL 1207589, at *8; <i>see also Szymankiewicz</i>, 2005 WL 1154210, at *1; <i>Willis</i>, 2008 WL 821828, at *7. WSC does not identify who produced the document in discovery, and the document does not bear the Moving Party’s Bates stamp; in fact it bears WSC’s Bates stamp, and therefore, cannot be authenticated as a document produced by a party-opponent. <i>See Orr</i>, 285 F.3d at 777 fn. 20, 21. Furthermore, WSC fails to cite to the page and line in the transcript that authenticates Exhibit K. <i>See Orr</i>, 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.</p>
<p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p>	<p>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.</p>	<p>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. Evid. 602, 901. Mr. Feasby’s declaration does not lay the proper</p>

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		<p>foundation for Exhibit K. Exhibit K is not deemed authentic and admissible by being attached to a complaint. <i>See Ellipsis, Inc.</i>, 2006 WL 1207589, at *8; <i>see also Szymankiewicz</i>, 2005 WL 1154210, at *1; <i>Willis</i>, 2008 WL 821828, at *7. WSC does not identify who produced the document in discovery, and the document does not bear the Moving Party’s Bates stamp; in fact it bears WSC’s Bates stamp, and therefore, cannot be authenticated as a document produced by a party-opponent. <i>See Orr</i>, 285 F.3d at 777 fn. 20, 21. Furthermore, WSC fails to cite to the page and line in the transcript that authenticates Exhibit K. <i>See Orr</i>, 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.</p>
55.	B&D Fine Homes SoCal is still using the fictitious business name “Windermere Real Estate SoCal.” Feasby Decl. Ex. M.	<p>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. Evid. 602, 801, 805, and 901. Mr. Feasby’s declaration does not lay the proper foundation for Exhibit M. WSC’s counsel has personal knowledge that he printed the page, but not as to the contents of the website the page was printed from or the accuracy of the information displayed on the page printed. The fact that it is a printout from the website of a state agency does not</p>

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		<p>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.</p>
56.	<p>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.</p>	<p>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. Evid. 602, 801, 805, and 901. Mr. Feasby’s declaration does not lay the proper foundation for Exhibit N. WSC’s counsel has personal knowledge that he printed the page, but not as to the contents of the website. The fact that it is a print out of a state agency website does</p>

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

facts in support of its position.

Dated: November 7, 2016

MULCAHY LLP

By: /s/ Kevin A. Adams
Kevin A. Adams
*Attorneys for Plaintiffs and Counter-
Defendants*

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