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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.

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

Hon. Manual L. Real

**REPLY MEMORANDUM IN
SUPPORT OF PLAINTIFFS AND
COUNTER-DEFENDANTS'
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

*[Filed concurrently with Reply to
Defendant's Opposition to Statement of
Uncontroverted Facts & Conclusions of
Law & Opposition to Defendant's
Separate Statement of Genuine
Disputes; Objections to Declaration of
Jeff Feasby]*

Date: November 21, 2016

Time: 10:00 a.m.

Courtroom: 8

27 AND RELATED COUNTERCLAIMS

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

8 **I. INTRODUCTION**

9 WSC admits or fails to properly dispute the material facts showing that the Moving
10 Parties are entitled to partial summary judgment as a matter of law. The Moving Parties
11 have asked the Court to enter summary judgment on three distinct breach of contract
12 claims advanced by WSC in the FACC. In its Opposition, WSC abandons one of the
13 three contested breaches (breach of the Modification Agreement as to Services SoCal)
14 but continues to pursue the remaining two contested breaches (breach of the Area
15 Representation Agreement as set forth in paragraph 130 of the FACC, and breach of each
16 of the agreements as to each of the Moving Parties for misuse of the Windermere name
17 and mark). For the reasons set forth below, WSC fails to present any genuine dispute of
18 material facts in opposition to the Moving Parties’ motion. Accordingly, the Moving
19 Parties’ motion for partial summary judgment should be granted in its entirety.

20 **II. WSC DOES NOT OPPOSE SUMMARY JUDGMENT OF ITS CLAIM**
21 **AGAINST SERVICES SOCAL FOR BREACH OF THE MODIFICATION**
22 **AGREEMENT**

23 WSC’s fourth claim for relief alleges that Services SoCal, Bennion & Deville Fine
24 Homes, Inc. (“B&D Fine Homes”), and B&D SoCal “breached [Section 3(E) of] the
25 Modification Agreement by failing to remain in the Windermere System for the five (5)
26 year period mandated by the Modification Agreement.” (FACC, ¶¶ 158-164.) The
27 Moving Parties asked the Court to enter summary judgment in favor of Services SoCal on
28 this claim because the term that was allegedly breached – *i.e.*, section 3(E) of the

1 Modification Agreement – did not apply to Services SoCal. WSC now concedes this
2 point.

3 In its Opposition, WSC acknowledges that it has abandoned and is no longer
4 pursuing its claim for breach of the modification agreement as to Services SoCal. *See*
5 WSC’s Oppo., p. 1 fn 1 (“WSC hereby abandons any claim asserted in the FACC’s
6 Fourth Cause of Action that [Services SoCal] is liable under the liquidated damages
7 provision of the Modification Agreement.”). For this reason and the legal justification
8 advanced in the Moving Parties’ motion, summary adjudication of Count 4 of the FACC
9 should be entered in favor of Services SoCal.

10 **III. NO TRIABLE ISSUES OF FACT EXIST AS TO DAMAGE TO WSC FOR**
11 **THE BREACHES IDENTIFIED IN PARAGRAPH 130 OF THE FACC**

12 The Moving Parties seek summary judgment on a portion of WSC’s claim for
13 breach of the Area Representation Agreement against Services SoCal (Count II at ¶ 130)
14 because WSC has not shown that it was harmed by the alleged breach. More specifically,
15 WSC has not presented any evidence of damages in connection with its claim that
16 Services SoCal “breached the Area Representation Agreement by failing to provide
17 ‘prompt, courteous and efficient service’ to Windermere franchisees and by failing to
18 deal ‘fairly and honestly’ with members of the Windermere System.” (FACC, ¶ 130.)
19 Without evidence of damages, WSC’s claimed breach cannot survive summary judgment.

20 WSC attempts to preserve its contract claim by arguing that its has “identified
21 damages sustained because of [Service SoCal’s] failure to make best efforts to collect
22 fees from [B&D Fine Homes] and [B&D SoCal] as required under the Area
23 Representation Agreement.” [D.E. 68-1, ¶¶ 6, 21, 22, 25, 26; D.E. 68, p. 2:22-25.)]
24 However, these damages identified by WSC arise from a separate and distinct obligation
25 under the Area Representation Agreement and not those obligations identified at
26 paragraph 130 of the FACC.

27 Paragraph 130 of the FACC identifies Services SoCal’s contractual obligations at
28 section 3, *paragraph 3* of the Area Representation Agreement. In particular, section 3,
paragraph 3 states that:

1 [Services SoCal] agrees to give prompt, courteous and efficient
2 service, and to be governed by the highest ethical standards of fair
3 dealing and honesty when dealing with the public and all members of
4 the Windermere System in order to preserve and enhance the identity,
5 reputation, quality image and goodwill built by WSC and the value of
6 the Trademark.

7 [FACC, Ex. F, § 3, ¶ 3.] This contract language did not require Service SoCal to collect
8 fees from franchisees, and instead, generally directed Service SoCal to deal efficiently,
9 fairly, and honestly with the public and members of the Windermere system. [*Id.*]

10 On the other hand, section 3, **paragraph 2** of the Area Representation Agreement
11 specifically required Services SoCal to collect fees owed by Windermere franchises and
12 to remit to WSC its share of those fees. [*See* FACC, Ex. F, § 3, ¶ 2.] WSC is aware of the
13 obligation imposed by section 3, paragraph 2 on Services SoCal and has separately pled
14 breach of this obligation in the FACC. (*See* FACC, ¶ 131 (Services SoCal “further
15 breached the Area Representation Agreement by failing and refusing to collect and remit
16 fees from Windermere franchisees, including from Defendants [sic] B&D Fine Homes
17 and WSSC [sic] themselves.”).) Notwithstanding these clearly distinct contractual
18 obligations at paragraphs 2 and 3 of the Area Representation Agreement, WSC now
19 argues that damages arising from Services SoCal’s alleged failure to collect fees – *i.e.*,
20 paragraph 2 – satisfies the damages element of its claim under paragraph 3. WSC’s
21 inability to show actual damages resulting from each alleged breach is fatal to WSC’s
22 claim.

23 To pursue multiple contract claims, WSC must show that appreciable and actual
24 damage resulted from each alleged breach. *See Aguilera v. Pirelli Armstrong Tire Corp.*,
25 223 F.3d 1010, 1015 (9th Cir.2000) (“Under California law, a breach of contract claim
26 requires a showing of appreciable and actual damage.”); *see also Roberts v. Los Angeles*
27 *County Bar Ass'n*, 105 Cal.App.4th 604, 617 (2003) (“Actual damage as opposed to mere
28 nominal damages is another essential element of a cause of action for breach of
contract.”). As reflected above, the damages identified by WSC relate solely to the breach
identified in paragraph 131 of the FACC and bear no relation to the breach identified in

1 paragraph 130. Because WSC’s alleged damages have no correlation to the claimed
2 breach at paragraph 130 of the FACC, summary judgment should be entered in favor of
3 Services SoCal.

4 In addition to identifying damages that have no relation to the claimed breach,
5 WSC also mistakenly cites to the report of its franchise expert in support of its argument.
6 WSC’s reliance on the franchise expert’s report to create a triable issue of fact should be
7 rejected on each of the following two grounds. First, WSC’s franchise expert does not
8 identify any damages or other harm to WSC as a result of Service SoCal’s alleged breach
9 of any provision of the Area Representation Agreement. Instead, the franchising expert
10 simply concludes that Service SoCal’s “failure to collect fees owing by [B&D Fine
11 Homes] and [B&D SoCal] was a breach of industry standard.” [D.E. 68, p. 2:26-28; D.E.
12 68-1, ¶¶ 16, 22, 25.] Whether or not this is true, this conclusory “breach of industry
13 standard” does nothing to create a triable issue of material fact in support of the damages
14 element of WSC’s contract claim. Second, even if the franchising expert had identified
15 some material harm to WSC, his opinions are no longer relevant to this dispute in light of
16 the Court’s prior ruling that Service SoCal did not qualify as a franchise or area franchise
17 under California’s franchise laws. [D.E. 66, p. 7.] Without a franchise relationship at
18 issue, a franchising expert’s opinions and conclusions as to the franchise “industry
19 standard” have no place in this lawsuit. On each of these two grounds, the Court should
20 ignore WSC’s repeated references to its franchise expert’s opinions as to the conduct of
21 Services SoCal.

22 In sum, because the only damages identified by WSC have no relationship to the
23 alleged breaches in paragraph 130 to the FACC, WSC has failed to show a genuine issue
24 for trial. Accordingly, summary judgment of the breaches identified at paragraph 130 of
25 the FACC should be entered in favor of Services SoCal.

26 **IV. THERE ARE NO GENUINE ISSUES FOR TRIAL REGARDING USE OF**
27 **THE WINDERMERE MARKS BY THE MOVING PARTIES**

28 The Moving Parties have petitioned the Court to enter partial summary judgment
on WSC’s breach of contract claims alleging misuse of the Windermere name and mark

1 after September 30, 2015. (FACC, ¶¶ 118-124, 133-139, 148-156.) Summary judgment is
2 appropriate because the undisputed facts show that only B&D Fine Homes – and not the
3 Moving Parties – owned and controlled all of the websites and domains at issue in
4 WSC’s claims. Thus, there is no triable issue of material fact demonstrating that the
5 Moving Parties used the Windermere name or mark after September 30, 2015.

6 Although WSC capitulates to the overwhelming majority of the undisputed facts
7 advanced by the Moving Parties in support of partial summary judgment, it still opposes
8 summary judgment on multiple flawed grounds. Each of WSC’s grounds for opposition
9 should be rejected as set forth below.

10 **A. The Evidence Relied Upon By WSC Is Inadmissible**

11 The overwhelming majority of evidence WSC submitted in support of its
12 Opposition is inadmissible and should not be considered by the Court. WSC’s Opposition
13 relies exclusively upon the declaration testimony of WSC’s litigation counsel, Jeffrey
14 Feasby. [D.E. 68-2.] As explained in the Moving Parties’ concurrently filed Objection to
15 the Declaration of Jeffrey Feasby, exhibits A, B, C, H, I, J, K, L, M, and N are
16 inadmissible because Mr. Feasby lacks the personal knowledge necessary to establish the
17 authenticity and lay the proper foundation for these exhibits. [See D.E. 68-2.] Without
18 exhibits A, B, C, H, I, J, K, L, M, or N, or any other evidence in support of WSC’s
19 Opposition, WSC fails to show any disputed issues of material fact involving the Moving
20 Parties’ alleged misuse of the Windermere name and mark after September 30, 2015.
21 Accordingly, summary judgment on this issue should be entered in favor of the Moving
22 Parties.
23

24 **B. WSC’s New Allegations Of “Use” Of The Windermere Name And Mark**
25 **Are Not In The Pleadings Or Pretrial Submissions And Cannot Be Relied**
26 **Upon Now**

27 Even if the Court did consider the unauthenticated exhibits to Mr. Feasby’s
28 declaration, WSC’s allegation of misuse of the Windermere name and mark by the
Moving Parties is still appropriate for summary adjudication because the limited

1 allegations of “use” of the Windermere name and mark identified in WSC’s Opposition
2 are not identified in the pleadings or pretrial submissions, and should not be permitted
3 now.

4 Prior to WSC’s October 31, 2016 filing of its Opposition papers, it had never
5 previously alleged in this litigation any “use” by the Moving Parties (or B&D Fine
6 Homes) of the Windermere name or mark outside of the windermeresocal.com website
7 and B&D Fine Homes’ blog. Now, on the eve of trial in an effort to save its breach of
8 contract claims from summary adjudication, WSC advances several new alleged “uses”
9 of the Windermere name and mark not previously identified in the case. As explained
10 below, these new allegations of “use” of the Windermere name and mark not previously
11 pled by WSC or identified in WSC’s pretrial filings should not be considered by the
12 Court.

13 The FACC repeatedly alleges that the Moving Parties breached their contracts with
14 WSC because the Moving Parties, following the termination of the contracts on
15 September 30, 2015, “nevertheless continued their misuse of WSC’s intellectual property
16 by, among other things, *using their old domain name, windermeresocal.com, to display*
17 *their new website and using the Windermere name and logo on their blog, all in direct*
18 *competition with WSC.”* (FACC, ¶¶ 121, 136, 151 (emphasis added).) Outside of the
19 windermeresocal.com website and blog page, there are no other allegations of “use” of
20 the Windermere name and mark identified in the FACC.

21 Likewise, WSC’s allegations of “use” of the Windermere name and mark in its
22 [Proposed] Final Pretrial Conference Order and Memorandum of Contentions of Law and
23 Fact also are limited to the windermeresocal.com website and blog page. [*See* D.E. 52, p.
24 11:18-22 (“use” is limited to “using the ‘Windermere’ name in their URL and using the
25 Windermere name and logo on their blog”), p. 13:3-6 (same), p. 14:9-13 (same); D.E. 57-
26 1, pp. 27:26-28:1 (same), p. 28:23-26 (same), p. 29:11-15 (same).]

27 Now, for the first time, WSC claims that the Moving Party’s alleged “use” of the
28 Windermere name is expanded to also include: (1) B&D SoCal’s fictitious business name
identification reflected on the California Bureau of Real Estate website, (2) B&D Fine

1 Home’s fictitious business name identification reflected on the California Bureau of Real
2 Estate website, and (3) Service SoCal’s “active” entity status as reflected on the
3 California Secretary of State’s website. None of these new alleged “uses” should be
4 considered by the Court at this late stage in the litigation.

5 The Moving Parties object to WSC’s use of information reflected on the websites
6 of the California Bureau of Real Estate and the California Secretary of State as this
7 information is beyond the pleadings and would violate this Court’s Local Rules at 16-7.2
8 and 16-4.1. It is generally understood that the initial pleadings in a lawsuit are intended to
9 place an opposing party on notice of the claims and underlying factual basis for those
10 claims being sought. Moreover, as part of the [Proposed] Final Pretrial Order and
11 Memorandum of Contentions of Law and Fact, the parties are required to identify the
12 “key evidence” each party intends to rely upon in support of each of its claims. *See* L.R.
13 16-7.2, App. A (¶ 7); L.R. 16-4.1(c). Notwithstanding these Local Rules and pleading
14 requirements, WSC now relies upon unpled allegations that have not previously been
15 raised in this action. At no point before its Opposition filing did WSC identify the
16 Moving Party’s alleged use of the Windermere name and mark to include information
17 reflected on the websites of the California Bureau of Real Estate or the California
18 Secretary of State. It is far too late in the proceeding for WSC to rely upon these new
19 alleged uses of the Windermere name and mark now.

20 Accordingly, the Moving party’s object to WSC’s new allegations of “use” and the
21 corresponding printouts from the websites of the California Bureau of Real Estate and the
22 California Secretary of State. These arguments and items should not be considered by the
23 Court.

24
25 **C. Even If WSC’s New Allegations Of “Use” Were Considered By The**
26 **Court, They Still Do Not Present Genuine Issues For Trial**

27 As set forth in the moving papers, summary adjudication is appropriate when
28 “there is no genuine issue as to any material fact, and the moving party is entitled to
judgment as a matter of law.” *Prepaid Teleconnect, Inc. v. City of Murrieta*, 2016 WL

1 1622609, at *2 (C.D. Cal. Apr. 21, 2016) (citing Fed.R.Civ.P. 56(c); *Anderson v. Liberty*
2 *Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). As explained below, even if the Court did
3 consider WSC’s new identification of “use” by the Moving Parties of the Windermere
4 name and mark, these new facts still do not present any genuine issues of material fact for
5 trial.

6 The SoCal Franchise Agreement required B&D SoCal to “immediately discontinue
7 all use of the Trademark, the name ‘Windermere,’ [and] all variations of the name”
8 following the termination of the agreement. [*See* D.E. 31-1, Ex. D, § 9.] WSC claims that
9 the above provision has been breached by B&D SoCal. (FACC, ¶¶ 151-154.) To
10 overcome summary judgment of the claimed breach, WSC must show a genuine issue of
11 fact regarding B&D SoCal’s alleged continued use of the Windermere name or mark. The
12 California Bureau of Real Estate webpage printout relied upon by WSC does not create a
13 genuine issue of fact for trial.

14 In an effort to show a disputed issue of material fact, WSC relies exclusively upon
15 a printout from the California Bureau of Real Estate’s website identifying the Bureaus’
16 license information on B&D SoCal.¹ [D.E. 68-2, pp. 141-143.] According to the printout,
17 B&D SoCal has had the fictitious business name “Windermere Real Estate SoCal”
18 “active” with the Bureau since May 17, 2011. [*See* D.E. 68-2, p. 142, Ex. M.] While this
19 printout shows that B&D SoCal filed the fictitious business name back in May 2011 –
20 while licensed to do so under its agreement with WSC – the printout does not show that
21 B&D SoCal has operated under the fictitious business name since the termination of its
22 right to do so. Without any evidence of actual use by B&D SoCal of the Windermere
23 name after September 30, 2015, WSC has failed to identify a material issue of disputed
24 fact. Without more, partial summary judgment should be entered in favor of B&D SoCal.

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27 ¹ WSC has also provided a printout from the California Bureau of Real Estate’s
28 website identifying the license information for B&D Fine Homes. [D.E. 68-2, pp. 137-
141, Ex. L.] However, because B&D Fine Homes is not one of the Moving Parties for
purposes of the partial summary judgment motion, the Bureau’s information on B&D
Fine Homes is not at issue here.

1 WSC’s identification of a disputed fact concerning Services SoCal’s use of the
2 Windermere name is equally flawed. Similar to the SoCal Franchise Agreement, the Area
3 Representation Agreement required Services SoCal to discontinue use of the Windermere
4 name following termination of the agreement. [See D.E. 31-1, Ex. B, § 6.] In an attempt
5 to show that Services SoCal continues to use the Windermere name, WSC has submitted
6 a printout of the corporation status of Services SoCal as is reflected on the website of the
7 California Secretary of State. [D.E. 68-2, p. 145, Ex. N.] Review of the printout reveals
8 that Service SoCal – *i.e.*, “Windermere Services Southern California, Inc.” – continues to
9 be an “active” entity. [*Id.*] This should not be a surprise as Services SoCal would lack
10 standing to pursue its claims against WSC had it been dissolved or rendered inactive. *See*
11 *Mongols National Motorcycle Club, Inc. V. City of Lancaster*, 145 Cal.Rptr.3d 122
12 (Cal.Ct.App.2010). Still, however, the Secretary of State printout, by itself, does not
13 show that Services SoCal is actually using the Windermere name – only that the entity
14 has been registered with the Secretary of State since January 1, 2004. [D.E. 68-2, p. 145,
15 Ex. N.] No other evidence of use has been submitted by WSC.

16 Because the only material issue of use identified by WSC involves the use of the
17 Windermere name and mark on the windermeresocal.com website and blog – both owned
18 and controlled by B&D Fine Homes – WSC has not shown a disputed issue of material
19 fact as to the Moving Parties. Accordingly, partial summary judgment of WSC’s claims
20 for breach of contract involving use of the Windermere name and mark should be entered
21 in favor of each of the Moving Parties.

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1 **V. CONCLUSION**

2 For all the foregoing reasons, the Moving Parties respectfully request that the
3 Court grant their motion for partial summary judgment and enter partial summary
4 judgment in favor of the Moving Parties.

5 Dated: November 7, 2016

MULCAHY LLP

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7 By: /s/ Kevin A. Adams

8 Kevin A. Adams

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

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