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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*

**PLAINTIFFS' SEPARATE  
STATEMENT OF  
UNCONTROVERTED FACTS  
AND CONCLUSIONS OF LAW IN  
SUPPORT OF MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT**

Date: November 21, 2016

Time: 10:00 a.m.

Courtroom: 8

[Concurrently filed with Plaintiffs' Notice of Motion and Motion for Summary Judgment; Declarations of Joseph R. Deville, Eric Forsberg, and Kevin A. Adams; [Proposed] Order]

Action Filed: September 17, 2015

Pretrial Conf.: November 14, 2016

Trial: January 31, 2017

1 AND RELATED COUNTERCLAIMS

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

10 **UNCONTROVERTED MATERIAL FACTS**

11 12 13 14 15 16 17 18	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.
19 20 21 22 23 24	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’ relationships.	D.E. 16, ¶¶ 118-124, 133-139, 148-156.
25 26 27 28	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	D.E. 16, ¶¶ 158-164.

	<p>the Modification Agreement by failing to remain in the Windermere System for the five (5) year period mandated by the Modification Agreement.”</p>	
<p>4.</p>	<p>WSC’s fourth claim for relief relies entirely upon B&amp;D Fine Homes, B&amp;D SoCal and Services SoCal’s alleged breach of section 3(E) of the Modification Agreement. Section 3(E) provides that “B&amp;D covenant to remain as Windermere Real Estate franchisees for five years from the date of execution of this Agreement.”</p>	<p>Declaration of Robert J. Deville (“Deville Decl.”), ¶¶ 4-6, Ex. A (Modification Agreement), § 3(E).</p>
<p>5.</p>	<p>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&amp;D terminates its franchise with WSC prior to the expiration of five years from the date of execution of this Agreement by all Parties, the waiver and [monetary concessions provided for in the Modification Agreement] shall be prorated against the total elapsed years from said date [...].”</p>	<p>Deville Decl., ¶ 6, Ex. A (Modification Agreement), §§ 3(E) &amp; 3(F).</p>
<p>6.</p>	<p>The term “B&amp;D” is expressly defined in the first paragraph of the Modification Agreement to include <i>only</i></p>	<p>Deville Decl., ¶ 6, Ex. A (Modification Agreement), p. 1</p>

1	B&D Fine Homes and B&D SoCal.	
2	7.	Services SoCal is not included in the
3		definition of “B&D” and, instead, is
4		separately defined in the opening
5		paragraph of the Modification
6		Agreement as the “Area
7		Representative.”
8	8.	WSC’s breach of contract claim against
9		Services SoCal (Count II) identifies
10		four purported breaches of the parties’
11		Area Representation Agreement.
12	9.	The B&D Parties served WSC with a
13		deposition notice that identified a series
14		of deposition categories as permitted
15		under Rule 30(b)(6) of the Federal
16		Rules of Civil Procedure.
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23	10.	Category 46 of the B&D Parties’
24		deposition notice required WSC to
25		produce a corporate representative to
26		testify concerning “[t]he damages
27		[WSC] is claiming in this action.”
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		Deville Decl., ¶ 6, Ex. A (Modification Agreement), p. 1
		<i>See</i> FACC, ¶¶ 127-141.
		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.”).
		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.

<p>1 11. 2 3 4 5 6 7 8</p>	<p>In response to Category 46, WSC produced its CEO (Geoff Wood), CFO (Mark Oster), and General Counsel (Paul Drayna).</p>	<p>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.</p>
<p>9 12. 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28</p>	<p>Wood’s deposition transcript includes the following exchange:  Q. Now, Windermere has asserted various breach of contract claims against Mr. Bennion and Mr. Deville and their entities in this lawsuit. Are you aware of that?  A. I am.  Q. And Windermere is seeking damages in connection with each of those claims. Are you aware of that?  A. I am.  Q. And are you being presented to testify here as to those damages --  A. No.  Q. -- that are being sought?  A. The amount?  Q. Correct.  A. No.  Q. Who from Windermere will?</p>	<p>Adams Decl., ¶ 9, Ex. D (Wood Depo.), pp. 325:16 to 326:14.</p>

1	A. Mark Oster.	
2	Q. Thank you. Mr. Oster is being	
3	presented by Windermere as the	
4	representative to testify as to the	
5	amount of damages that are being	
6	sought by Windermere in this case,	
7	correct?	
8	A. That's correct.	
9	13. Drayna deferred to Oster as the	Adams Decl., ¶ 10, Ex.
10	appropriate corporate representative of	E, (Drayna Depo.), pp.
11	WSC to testify as to the damages being	209:3-14, 406:8-24,
12	pursued by WSC in this action.	426:3-15.
13	14. Consistent with the deposition	Adams Decl., ¶ 11, Ex.
14	testimony of Wood and Drayna, Oster	F (Oster Depo.), pp.
15	testified unequivocally that he was	49:23-50:2, 113:10 to
16	being produced by WSC to testify as to	114:4.
17	the damages it was pursuing in this	
18	action.	
19	15. When asked to identify WSC's	Adams Decl., Ex. F
20	damages, Oster testified as follows:	(Oster Depo.), Oster
21	Q. What are the damages that	Depo., pp. 113:10 to
22	Windermere is claiming in this action?	114:4.
23	A. The damages are the amounts due	
24	that we've already talked about in	
25	approximation of \$1.3 million in the	
26	schedule previously provided.	
27	Q. And outside of that schedule and	
28	potential interest that might flow from	

1	that August 23rd date until the time of	
2	payment, are there any other damages	
3	that Windermere is claiming in this	
4	action?	
5	A. Not that I'm aware of.	
6	16. None of WSC's corporate	<i>See e.g., Adams Decl.,</i>
7	representatives identified any harm	Exs. D, E, F (Drayna
8	suffered by WSC in connection with	Depo., Wood Depo.,
9	Service SoCal's alleged failures to	Oster Depo.).
10	"provide 'prompt, courteous and	
11	efficient service,'" or "deal 'fairly and	
12	honestly' with members of the	
13	Windermere system."	
14	17. The deadline for WSC's corporate	<i>See Fed. R. Civ. Pro.</i>
15	representatives to make changes to their	30(e)(1).
16	deposition testimony has long passed.	
17	18. WSC designated Neil J. Beaton, a	Adams Decl., ¶¶ 16-17,
18	Certified Public Accountant, as an	Ex. H (WSC's Expert
19	expert witness in the case.	Witness Disclosure), p. 1,
20		¶ 1.
21	19. As part of Mr. Beaton's assignment, he	<i>Id.</i> , Ex. H, (WSC's
22	was asked by WSC to formulate "a	Expert Witness
23	preliminary opinion of the economic	Disclosure), exhibit 1, p.
24	damages that may have been incurred	4.
25	by WSC as a result of alleged violations	
26	of [the franchise agreements and Area	
27	Representation Agreement]."	
28	20. On September 16, 2016, WSC	Adams Decl., ¶¶ 16-17,

1		produced Mr. Beaton's expert witness report pursuant to Rule 26 of the Federal Rules of Civil Procedure.	Ex. H (WSC's Expert Witness Disclosure), p. 1, ¶ 1.
2	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 Disclosure), exhibit 1.
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4	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.
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6	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).
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8	24.	WSC's mandatory Rule 26(a) Initial Disclosure identified its damages at \$1,208,655.43.	Adams Decl., Ex. I (WSC's Initial Disclosures), p. 5.
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10	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.
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1	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).
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4	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.)
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11	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).
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18	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.
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27	30.	WSC did not produce any materials to suggest that they had been harmed in	Adams Decl., ¶ 25, Ex. K.
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1 2 3 4 5 6	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).	
7 8 9 10 11 12 13	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.
14 15 16 17 18 19 20	32. WSC alleges in the FACC that following the termination of the parties’ relationships on September 30, 2015, each of the B&D Parties 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.
21 22 23 24 25	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.
26 27 28	34. These blanket allegations then provide the sole basis for the “Tradename and Trademark Infringement” sections of	D.E. 16, ¶¶ 118-124, 133-139, 148-156.

1		each of WSC's breach of contract	
2		claims asserted in the FACC.	
3	35.	B&D Fine Homes is the registrant (and	Declaration of Eric
4		former owner) of each of the domains	Forsberg ("Forsberg
5		at issue in this lawsuit.	Decl."), ¶¶ 5-8.
6	36.	While in B&D Fine Home's possession,	Declaration of Joseph R.
7		those domains and related websites	Deville ("Deville
8		were directly controlled and managed	Decl."), ¶ 11; Forsberg
9		by employees of B&D Fine Home and	Decl., ¶¶ 6-8.
10		no one else.	
11	37.	During the time relevant to this	Deville Decl., ¶¶ 10-11;
12		litigation, B&D Fine Homes' Director	Forsberg Decl., ¶ 6.
13		of Technology, Eric Forsberg, managed	
14		and controlled all of the domains and	
15		websites owned by B&D Fine Homes.	
16	38.	Mr. Forsberg has also controlled all	Deville Decl., ¶ 11;
17		blogs owned and operated by B&D	Forsberg Decl., ¶ 10.
18		Fine Homes.	
19	39.	There have not been any websites	Deville Decl., ¶¶ 12-13;
20		owned or controlled by Services SoCal,	Forsberg Decl., ¶¶ 8-10.
21		B&D SoCal, Bennion, or Deville that	
22		utilized the Windermere name or	
23		marks.	
24	40.	Neither Services SoCal nor B&D SoCal	Deville Decl., ¶ 12.
25		control or operate any of the domains or	
26		websites at issue in this litigation.	
27	41.	Neither Bennion nor Deville have	Deville Decl., ¶ 13.
28		personally controlled or operated any	

1		websites or domains since September	
2		30, 2015.	
3	42.	Pursuant to the B&D Parties' 30(b)(6)	Adams Decl., Ex. A
4		deposition notice, WSC was required to	(category 40); <i>see also</i>
5		produce a corporate representative	exhibit 2 to the Drayna
6		capable of testifying as to "[t]he B&D	Depo.
7		Parties' use of the Windermere name	
8		and trademark following the	
9		termination and/or expiration of their	
10		franchise agreements."	
11	43.	WSC produced its General Counsel,	Adams Decl., Exs. A, C;
12		Drayna, to testify on this topic.	<i>see also</i> exhibits 2 and
13			3 to the Drayna Depo.
14	44.	During Drayna's deposition, he testified	Adams Decl., Ex. E
15		that B&D Fine Homes was the "legal	(Drayna Depo.), p.
16		owner" of the websites and domains at	422:18-423:17.
17		issue in this litigation, and WSC is	
18		"unaware" of which, if any, of the B&D	
19		Parties controlled the websites and	
20		domain names after September 30,	
21		2015.	
22	45.	When specifically asked to identify the	Adams Decl., Ex. E
23		evidence in WSC's possession that	(Drayna Depo.), p.
24		suggests Services SoCal was	423:18-24.
25		responsible for the conduct at issue,	
26		Drayna responded, "[a]s of today, I	
27		don't know that we have -- that we have	
28		any evidence that discovery -- I think	

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	our investigation on that is continuing.”	
46.	<p>Drayna’s deposition transcript also includes the following similar exchange:</p> <p>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?</p> <p>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.</p> <p>Q. And you don't know who did it, so you just filed a claim for breach of contract against the Services entity?</p> <p>A. That was not the sole basis for the breach of contract claim against the Services company.</p> <p>Q. Is Windermere going to pursue that particular breach with respect to the domain name against the Services entity?</p>	Adams Decl., Ex. E (Drayna Depo.), pp. 424:9-425:10.

1	A. To the extent that it is supported	
2	by the facts as they are discovered, yes.	
3	Q. And what facts are those?	
4	[Objection by WSC's counsel]	
5	A. Yes, it was. I already said, as of	
6	today, we don't know who did what or	
7	when.	
8	47. Drayna testified that WSC maintained a	Adams Decl., Ex. E
9	similar lack of knowledge concerning	(Drayna Depo.), p.
10	the conduct of B&D SoCal, Bennion	426:3-427:13.
11	and Deville.	
12	48. When asked to identify the evidence	Adams Decl., Ex. E
13	that WSC has to show that Bennion,	(Drayna Depo.), p.
14	Deville, or B&D SoCal unlawfully used	426:20-25.
15	the Windermere domains after	
16	September 30, 2015, Drayna testified	
17	"[a]gain, I think there was some	
18	uncertainty of who did what and who	
19	worked for which entity."	
20	49. Drayna's deposition was completed on	Adams Decl., ¶ 10; D.E.
21	August 23, 2016, just six days before	35.
22	the discovery cutoff date of August 29,	
23	2016.	

**CONCLUSIONS OF LAW**

1. The term "B&D" used throughout the Modification Agreement is expressly defined in the first paragraph of the Modification Agreement to include

1 only B&D Fine Homes and B&D SoCal.

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

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

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

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

15 6. Without corresponding damages, Services SoCal’s alleged breaches of  
16 the Area Representation Agreement for “failing to provide ‘prompt, courteous and  
17 efficient service’” (Breach 1), or for “failing to deal ‘fairly and honestly with  
18 members of the Windermere system’” (Breach 2) fail as a matter of law.

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

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

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1           9.     There are no material facts to support WSC's contention that Services  
2 SoCal, B&D SoCal, Bennion or Deville owned or controlled any domain names  
3 that utilized the Windermere name or marks after September 30, 2015.

4  
5 Dated: October 24, 2016

**MULCAHY LLP**

6  
7 By:           /s/ Kevin A. Adams          

8           Kevin A. Adams

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

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