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

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

19 Plaintiffs,

20 v.

21 WINDERMERE REAL ESTATE  
22 SERVICES COMPANY, a Washington  
corporation; and DOES 1-10

23 Defendant.  
24

25 AND RELATED COUNTERCLAIMS  
26  
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Case No. 5:15-CV-01921-DFM

Hon. Douglas F. McCormick

**DEFENDANT AND COUNTER  
CLAIMANT WINDERMERE REAL  
ESTATE SERVICES COMPANY'S  
PROPOSED SPECIAL JURY  
INSTRUCTIONS**

Date: June 18, 2018

Time: 10:00 a.m.

Courtroom: 6B

Complaint Filed: September 17, 2015

1 Defendant and counterclaimant Windermere Real Estate Services Company  
2 respectfully submits the following proposed special jury instructions:

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1 **Windermere Real Estate Services Company's Special Jury Instruction No. 1 –**  
2 **Affirmative Defense: Third Party Actions**

3 Windermere Real Estate Services Company claims that it is not  
4 responsible for Bennion & Deville Fine Homes Inc., Bennion & Deville Fine Homes  
5 SoCal Inc., and Windermere Services Southern California, Inc.'s harm because of  
6 the later misconduct of third parties Gary Kruger and Windermere Watch.

7 To avoid legal responsibility for the harm, Windermere Real Estate  
8 Services Company must prove all of the following:

- 9 1. That Mr. Kruger and Windermere Watch's conduct occurred after the  
10 conduct of Windermere Real Estate Services Company;
- 11 2. That a reasonable person would consider Mr. Kruger and Windermere  
12 Watch's conduct as a highly unusual or an extraordinary response to  
13 the situation;
- 14 3. That Windermere Real Estate Services Company did not know and had  
15 no reason to expect that Mr. Kruger and Windermere Watch would act  
16 in an extraordinary and unusual manner; and
- 17 4. That the kind of harm resulting from Mr. Kruger and Windermere  
18 Watch's conduct was different from the kind of harm that could have  
19 been reasonably expected from Windermere Real Estate Services  
20 Company's conduct.

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**Sources and Authorities for Special Jury Instruction No. 1**

- CACI 439
- *Akins v. County of Sonoma*, 67 Cal.2d 185, 199 (1967).
- *Brewer v. Teano*, 40 Cal.App.4th 1024, 1031 (1997).
- *Chanda v. Federal Home Loans Corp.*, 215 Cal.App.4th 746, 755–756 (2013).
- *Lawson v. Safeway Inc.*, 191 Cal.App.4th 400, 417 (2010).
- *Hardison v. Bushnell*, 18 Cal.App.4th 22, 26 (1993).
- *Campodonico v. State Auto Parks, Inc.*, 10 Cal.App.3d 803, 807 (1970).

1 **Windermere Real Estate Services Company's Special Jury Instruction No. 2 –**  
2 **Affirmative Defense: Set-Off**

3 Windermere Real Estate Services Company claims that Bennion & Deville  
4 Fine Homes, Inc. and Bennion & Deville Fine Homes SoCal, Inc. owe money to  
5 Windermere Real Estate Services Company. If you find that Windermere Real  
6 Estate Services Company owes Bennion & Deville Fine Homes, Inc. or Bennion &  
7 Deville Fine Homes SoCal, Inc. any money based on the claims alleged against  
8 Windermere Real Estate Services Company, you must subtract from that amount  
9 any money Bennion & Deville Fine Homes, Inc. and Bennion & Deville Fine  
10 Homes SoCal, Inc. owe Windermere Real Estate Services Company.

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**Sources and Authorities for Special Jury Instruction No. 2**

- Cal. Code of Civ. Proc. Section 431.70.
- 2 Cal. Affirmative Def. § 44:1 (2d ed.).
- *Harrison v. Adams*, 20 Cal.2d 646, 648 (1942).
- *Jacobson v. Persolve, LLC*, 2015 WL 4090809, at \*9 (N.D. Cal., Aug. 19, 2014).

1 **Windermere Real Estate Services Company’s Special Jury Instruction No. 3 –**  
2 **Affirmative Defense: Unclean Hands**

3 Windermere Real Estate Services Company contends that the plaintiffs  
4 cannot recover on their breach of contract claims because of their “unclean hands.”  
5 The plaintiffs may be barred from recovering under the various agreements between  
6 the parties if they acted inequitably, unfairly, or deceitfully towards Windermere  
7 Real Estate Services Company in a way that immediately and necessary relates to  
8 the relief that the plaintiffs seek in this lawsuit. This is referred to as “unclean  
9 hands,” and is a defense that Windermere Real Estate Services Company contends  
10 precludes any recovery by the plaintiffs in this lawsuit.

11 There is no set formula for determining whether unclean hands applies in  
12 this lawsuit. Rather, you must consider and weigh all the facts and circumstances in  
13 view of the principles noted above to determine whether you believe that, on  
14 balance, the plaintiffs acted in such an unconscionable way towards Windermere  
15 Real Estate Services Company in the matters relating to the controversy between the  
16 plaintiffs and Windermere Real Estate Services Company that, in fairness, the  
17 plaintiffs should be denied the relief it seeks in this lawsuit.

18 In order to prove unclean hands, Windermere Real Estate Services  
19 Company must prove the following three things by clear and convincing evidence:

- 20 1. The plaintiffs’ conduct was inequitable or in bad faith;
- 21 2. The plaintiffs’ conduct is directly related to the subject matter of its  
22 claims; and
- 23 3. Windermere Real Estate Services Company has clean hands, or in  
24 other words, Windermere Real Estate Services Company’s conduct  
25 was in good faith.

26 If you find that Windermere Real Estate Services Company has proven  
27 that the plaintiffs have come into court with “unclean hands,” and that their “unclean  
28 hands” are related to this case, you may deny the plaintiffs relief on their claims.

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**Sources and Authorities for Special Jury Instruction No. 3**

- *Levi Strauss & Co. v. Shilon*, 121 F.3d 1309, 1313 (9th Cir. 1997)
- *Fuddruckers, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837, 847 (9th Cir. 1987).
- *Kendall-Jackson Winery, Ltd. v. Superior Court*, 76 Cal.App.4th 970, 978 (1999)
- Cal. Civ. Code § 3517.



1 **Windermere Real Estate Services Company’s Special Jury Instruction No. 4 –**  
2 **Affirmative Defense: Estoppel**

3 Windermere Real Estate Services Company claims the plaintiffs are barred  
4 or prevented from asserting some or all of their claims against Windermere Real  
5 Estate Services Company. The word “estoppel” means barring or preventing  
6 someone from taking a position that is inconsistent with an earlier position where  
7 doing so would be unfair. In this case, Windermere Real Estate Services Company  
8 contends that the plaintiffs should be barred from claiming that Windermere Real  
9 Estate Services Company did not take commercially reasonable actions to stop Mr.  
10 Kruger and Windermere Watch’s negative marketing campaign because they  
11 previously agreed that Windermere Real Estate Services Company had taken all  
12 commercially reasonable actions and no further action was required.

13 To prove that the plaintiffs are estopped from asserting their claims against  
14 Windermere Real Estate Services Company, Windermere Real Estate Services  
15 Company must prove by a preponderance of evidence the following three things:

- 16 1. The plaintiffs, through misleading words, conduct, or silence, led  
17 Windermere Real Estate Services Company to reasonably infer that the  
18 plaintiffs did not intend for Windermere Real Estate Services Company  
19 to undertake any additional efforts to stop Mr. Kruger and Windermere  
20 Watch’s negative marketing campaign;
- 21 2. Windermere Real Estate Services Company reasonably relied on the  
22 plaintiffs’ conduct; and
- 23 3. Due to Windermere Real Estate Services Company’s reliance,  
24 Windermere Real Estate Services Company will be materially harmed  
25 if the plaintiffs are allowed to proceed with their claims now.

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**Sources and Authorities for Special Jury Instruction No. 4**

- *County of Los Angeles v. City of Alhambra*, 27 Cal.3d 184, 196 (1980).
- *City of Long Beach v. Mansell*, 3 Cal.3d 462, 488-89 (1970).

1 **Windermere Real Estate Services Company’s Special Jury Instruction No. 5 –**  
2 **Affirmative Defense: Unjust Enrichment**

3 Windermere Real Estate Services Company claims the plaintiffs are barred  
4 or prevented from asserting some or all of their claims against Windermere Real  
5 Estate Services Company because the plaintiffs were “unjustly enriched” by their  
6 prior agreement that Windermere Real Estate Services Company had taken  
7 commercially reasonable efforts to combat the effects of Mr. Kruger and  
8 Windermere Watch’s negative marketing campaign. In this case, Windermere Real  
9 Estate Services Company contends that the plaintiffs should be barred from  
10 claiming that Windermere Real Estate Services Company did not take commercially  
11 reasonable actions to stop Mr. Kruger and Windermere Watch’s negative marketing  
12 campaign because they previously agreed that Windermere Real Estate Services  
13 Company had taken all commercially reasonable actions and had benefited from that  
14 agreement when Windermere Real Estate Services Company reimbursed plaintiffs  
15 for certain amounts and extended the repayment deadline for a loan that had been  
16 extended to Messrs. Bennion and Deville.

17 To prove that the plaintiffs were unjustly enriched and cannot assert their  
18 claims against Windermere Real Estate Services Company, Windermere Real Estate  
19 Services Company must prove by a preponderance of evidence the following two  
20 things:

- 21 1. The plaintiffs received a benefit from agreeing that Windermere Real  
22 Estate Services Company had taken commercially reasonable efforts;  
23 and
- 24 2. The plaintiffs unjustly retained that benefit at the expense of  
25 Windermere Real Estate Services Company.

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**Sources and Authorities for Special Jury Instruction No. 5**

- *In re ConAgra Foods, Inc.*, 908 F. Supp. 2d 1090, 1113 (C.D. Cal. 2012).
- *Peterson v. Cellco Partnership*, 164 Cal.App.4th 1583, 1593 (2008)