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

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

Plaintiffs,

v.

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

Defendant.

AND RELATED COUNTERCLAIMS

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

Hon. Douglas F. McCormick

**[PROPOSED] SECOND AMENDED
FINAL PRETRIAL CONFERENCE
ORDER**

Courtroom: 6B

Trial Date: July 10, 2018

Complaint Filed: September 17, 2015

Pursuant to Local Rule 16-7 and this Court’s Orders of May 9, 2017 [D.E. 125] and April 19, 2018 [D.E. 166], Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion & Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc. (collectively, “Plaintiffs”) and Counter-Defendants Robert L. Bennion (“Bennion”) and Joseph R. Deville (“Deville”) (Plaintiffs, Bennion, and Deville are collectively referred to herein as the “B&D

1 Parties”), on the one hand, and Defendant/Counter-Claimant Windermere Real
2 Estate Services Company’s (“WSC”), on the other hand, by and through their
3 undersigned counsel, hereby lodge with the Court their [Proposed] Second Amended
4 Final Pretrial Conference Order.

5 Following pre-trial proceedings, pursuant to Fed. R. Civ. P. 16 and L.R. 16, IT
6 IS ORDERED:

7 **I. The Parties And Pleadings**

8 The parties to this action are as follows:

- 9 • Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc.,
10 Bennion & Deville Fine Homes SoCal, Inc., Windermere Services
11 Southern California, Inc.;
- 12 • Counter-Defendants Robert L. Bennion and Joseph R. Deville; and
- 13 • Defendant/Counter-Claimant Windermere Real Estate Services
14 Company.

15 Each of these parties has been served and has appeared. All other parties
16 named in the pleadings, including the DOES 1-10, and not identified in the
17 preceding paragraph are now dismissed.

18 The pleadings which raise the issues are:

- 19 • First Amended Complaint (“FAC”) dated November 16, 2015 [D.E.
20 31];
- 21 • First Amended Counterclaim (“FACC”) dated October 14, 2015 [D.E.
22 16];
- 23 • Order Granting Joint Stipulation for (i) Plaintiffs to File First
24 Amended Complaint, and (i) Counterclaimant Windermere Real
25 Estate Services Company to Voluntarily Dismiss Counts Five, Six,
26 and Seven of First Amended Counterclaim, dated November 12, 2015
27 [D.E. 30];
- 28 • Answer to Amended Counterclaim by Robert L. Bennion, Bennion

1 and Deville Fine Homes, Inc., Bennion and Deville Fine Homes
2 SoCal, Inc., and Windermere Services Southern California, Inc., dated
3 November 27, 2016 [D.E. 32];

- 4 • Answer to Amended Counterclaim by Joseph R. Deville, dated
5 December 14, 2015 [D.E. 37];
- 6 • Answer to Amended Complaint by WSC, dated December 7, 2015
7 [D.E. 34];
- 8 • Order Granting Defendant’s Motion for Partial Summary Judgment,
9 dated October 20, 2016 [D.E. 66];
- 10 • Order Granting In Part and Denying In Part Plaintiffs and Counter-
11 Defendants’ Motion for Partial Summary Judgment, dated November
12 30, 2016 [D.E. 75];
- 13 • Final Pretrial Conference Order, date November 15, 2016 [D.E. 79];
14 and
- 15 • Order re: Defendant’s Motion for Partial Summary Judgment, dated
16 April 11, 2018. [D.E. 164.]

17 **II. Subject Matter Jurisdiction & Venue**

18 Federal jurisdiction and venue are invoked upon the following grounds:

19 **A. Jurisdiction & Venue Over the FAC**

20 Plaintiffs contend that diversity jurisdiction exists under 28 U.S.C. § 1332
21 because the amount in controversy in the FAC exceeds the jurisdictional threshold
22 of \$75,000, and because the Plaintiffs are all California corporations and WSC is a
23 Washington corporation – thus, complete diversity exists.

24 Plaintiffs also contend that venue is also proper in this District in that WSC
25 is subject to personal jurisdiction in this District, a substantial part of the events
26 occurred in this District, and all parties specifically agreed to the Central District of
27 California pursuant to a forum selection clause contained within a contract that is
28 in dispute in this action. (*See* D.E. 31, Ex. G to FAC [Modification Agreement], §

1 9.)

2 **B. Jurisdiction & Venue Over the FACC**

3 WSC contends that supplemental jurisdiction exists over Bennion and
4 Deville because the FACC is a compulsory counterclaim under Rule 13(a) of the
5 Federal Rules of Civil Procedure and that this Court may exercise
6 supplemental/ancillary jurisdiction over Bennion and Deville pursuant to 28 USC §
7 1367(a).

8 Bennion contends that because this case was brought as a diversity action,
9 and he is a resident of the State of Washington, supplemental jurisdiction over him
10 cannot exist because such claims would destroy complete diversity. *See Exxon*
11 *Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 546 (2005) (Supplemental
12 jurisdiction under § 1367 does not apply to § 1332's complete diversity
13 requirement, "for incomplete diversity destroys original jurisdiction with respect to
14 all claims, leaving nothing to which supplemental claims can adhere.").

15 **III. Trial Estimate**

16 The trial is estimated to take 12 to 15 trial days.

17 **IV. Jury Trial**

18 The trial is to be a jury trial. The parties have submitted proposed jury
19 instructions [D.E. 175, 177], proposed voir dire [D.E. 171, 176] and proposed
20 special verdict forms. [D.E. 173, 174.].

21 **V. Admitted Facts And Stipulated Facts Subject To Objection**

22 The following facts are admitted and require no proof:

- 23 1. WSC is a Washington corporation with its principal place of business
24 in Seattle, Washington.
- 25 2. Bennion & Deville Fine Homes, Inc. is a California Corporation with
26 its principal place of business in Rancho Mirage, California.
- 27 3. Bennion & Deville Fine Homes SoCal, Inc. is a California
28 Corporation with its principal place of business in Rancho Mirage,

1 California.

2 4. Windermere Services Southern California, Inc. is a California
3 Corporation with its principal place of business in Rancho Mirage,
4 California.

5 5. Deville is a resident of the State of California.

6 6. WSC is the franchisor of the Windermere system of franchisees
7 providing real estate brokerage services to customers seeking to buy,
8 sell or lease real property.

9 7. The Plaintiffs are each owned and operated by Bennion and Deville.

10 8. Bennion and Deville are both experienced real estate brokers working
11 in the real estate industry since 1988 and 1971, respectively.

12 9. On August 1, 2001, Bennion, Deville, and their company Bennion &
13 Deville Fine Homes, Inc., on the one hand, and WSC, on the other
14 hand, entered into a “Windermere Real Estate License Agreement” for
15 the Coachella Valley (hereafter referred to as the “Coachella Valley
16 Franchise Agreement”).

17 10. On May 1, 2004, Bennion and Deville, on behalf of their entity
18 Windermere Services Southern California, Inc., on the one hand, and
19 WSC, on the other hand, entered into a “Windermere Real Estate
20 Services Company Area Representation Agreement for the State of
21 California” (the “Area Representation Agreement”).

22 11. On March 29, 2011, Windermere Services Southern California, Inc.,
23 Bennion, Deville, Bennion & Deville Fine Homes SoCal, Inc., and
24 WSC entered into the “Windermere Real Estate Franchise License
25 Agreement” (the “SoCal Franchise Agreement”).

26 12. On December 18, 2012, WSC and Plaintiffs amended the Coachella
27 Valley Franchise Agreement and the SoCal Franchise Agreement by
28 collectively entering into a document titled “Agreement Modifying

1 Windermere Real Estate Franchise License Agreement” (the
2 “Modification Agreement”).

- 3 13. A Windermere Real Estate Services Franchise Disclosure for
4 Southern California was never approved of by the California
5 Department of Business Oversight for the 2014 year.
- 6 14. On January 28, 2015, WSC General Counsel Paul Drayna sent a letter
7 to Deville announcing that WSC was “exercising its right to terminate
8 [the] Area Representation Agreement dated May 1, 2004, pursuant to
9 the 180-day notice provision of Paragraph 4.1,” and that Bennion and
10 Deville’s “rights and responsibilities as Area Representative will
11 terminate on Tuesday, July 28, 2015.”
- 12 15. On February 26, 2015, counsel for WSC, Charles D. Sirianni, sent a
13 letter to counsel for the B&D Parties announcing that “this letter
14 constitutes notice of WSC’s intent to terminate the Agreement with
15 cause due to WS SoCal’s material breach of the Agreement.
16 Specifically, WS SoCal has breached paragraphs 3, 10, and 11 of the
17 Agreement by failing to collect and/or remit license and technology
18 fees from licensees in WS SoCal’s area representation agreement.”
19 The letter further states that “[t]he Agreement will terminate on May
20 27, 2015 for cause unless WS SoCal cures its breach.”

21 **VI. Admitted Facts Subject To Evidentiary Objection**

22 The following facts, though stipulated, shall be without prejudice to
23 evidentiary objections: None.

24 **VII. Parties’ Claims And Defenses**

25 **A. The B&D Parties’ Claims and Defenses:**

26 **1. Plaintiffs intend to pursue the following claims against**
27 **WSC:**

28 Claim 1: WSC breached the Coachella Valley Franchise

1 Agreement with Bennion & Deville Fine Homes, Inc.

2 Claim 2: WSC breached the Implied Covenant of Good Faith and
3 Fair Dealing incorporated within the Coachella Valley
4 Franchise Agreement with Bennion & Deville Fine
5 Homes, Inc.;

6 Claim 3: WSC breached the Area Representation Agreement with
7 Windermere Services Southern California, Inc.;

8 Claim 4: WSC breached the Implied Covenant of Good Faith and
9 Fair Dealing incorporated within the Area Representation
10 Agreement with Windermere Services Southern
11 California, Inc.;

12 Claim 5: WSC breached the SoCal Franchise Agreement with
13 Bennion & Deville Fine Homes SoCal, Inc.; and

14 Claim 6: WSC breached the Implied Covenant of Good Faith and
15 Fair Dealing incorporated within the SoCal Franchise
16 Agreement with Bennion & Deville Fine Homes SoCal,
17 Inc.

18 **2. The B&D Parties intend to pursue the following affirmative**
19 **defenses:**

20 Affirmative Defense 2: Waiver

21 Affirmative Defense 3: Estoppel

22 Affirmative Defense 4: Offset

23 Affirmative Defense 5: Justification

24 **3. The elements required to establish Plaintiffs' claims are:**

25 ***Claim 1: Breach of the Coachella Valley Franchise Agreement***

26 The elements for a breach of contract claim are: (1) the existence of the
27 contract; (2) performance by the plaintiff or excuse for nonperformance; (3) breach
28 by the defendant; and (4) damages. *Castro v. Wells Fargo Bank, N.A.*, 2012 WL

1 2077294, at *1 (C.D. Cal. June 6, 2012) (citing *First Commercial Mtg. Co. v.*
2 *Reece*, 89 Cal.App.4th 731, 108 Cal.Rptr.2d 23, 33 (Cal.Ct.App.2001)).

3 ***Claim 2: Breach of the Implied Covenant of Good Faith and Fair***
4 ***Dealing incorporated within the Coachella Valley Franchise***
5 ***Agreement***

6 The elements for a claim for breach of the implied covenant of food faith
7 and fair dealing are: (1) a contract between plaintiff and defendant, (2) plaintiff's
8 performance, (3) defendant's performance, (4) defendant's unfair interference with
9 plaintiff's right to receive the benefits of the contract, and (5) defendant's conduct
10 harmed plaintiff. *Walis v. Fernandez*, 2016 WL 1363428, at *3 (C.D. Cal. Apr. 4,
11 2016).

12 ***Claim 3: Breach of the Area Representation Agreement***

13 The elements for a breach of contract claim are: (1) the existence of the
14 contract; (2) performance by the plaintiff or excuse for nonperformance; (3) breach
15 by the defendant; and (4) damages. *Castro v. Wells Fargo Bank, N.A.*, 2012 WL
16 2077294, at *1 (C.D. Cal. June 6, 2012) (citing *First Commercial Mtg. Co. v.*
17 *Reece*, 89 Cal.App.4th 731, 108 Cal.Rptr.2d 23, 33 (Cal.Ct.App.2001)).

18 ***Claim 4: Breach of the Implied Covenant of Good Faith and Fair***
19 ***Dealing incorporated within the Area Representation Agreement***

20 The elements for a claim for breach of the implied covenant of food faith
21 and fair dealing are: (1) a contract between plaintiff and defendant, (2) plaintiff's
22 performance, (3) defendant's performance, (4) defendant's unfair interference with
23 plaintiff's right to receive the benefits of the contract, and (5) defendant's conduct
24 harmed plaintiff. *Walis v. Fernandez*, 2016 WL 1363428, at *3 (C.D. Cal. Apr. 4,
25 2016).

26 ***Claim 5: Breach of the SoCal Franchise Agreement***

27 The elements for a breach of contract claim are: (1) the existence of the contract;
28 (2) performance by the plaintiff or excuse for nonperformance; (3) breach by the
defendant; and (4) damages. *Castro v. Wells Fargo Bank, N.A.*, 2012 WL 2077294,
at *1 (C.D. Cal. June 6, 2012) (citing *First Commercial Mtg. Co. v. Reece*, 89

1 Cal.App.4th 731, 108 Cal.Rptr.2d 23, 33 (Cal.Ct.App.2001)).

2 ***Claim 6: Breach of the Implied Covenant of Good Faith and Fair***
3 ***Dealing incorporated within the SoCal Franchise Agreement***

4 The elements for a claim for breach of the implied covenant of food faith
5 and fair dealing are: (1) a contract between plaintiff and defendant, (2) plaintiff's
6 performance, (3) defendant's performance, (4) defendant's unfair interference with
7 plaintiff's right to receive the benefits of the contract, and (5) defendant's conduct
8 harmed plaintiff. *Walis v. Fernandez*, 2016 WL 1363428, at *3 (C.D. Cal. Apr. 4,
9 2016).

10 **4. The elements required to establish the B&D Parties' affirmative**
11 **defenses are:**

12 ***Affirmative Defense 1: Failure to State a Cause of Action***

13 The defense of failure to state a claim may be raised in any pleading under
14 Rule 7(a), by motion under Rule 12(c), or even at trial. Fed. R. Civ. P. 12(h)(2).
15 *Ear v. Empire Collection Authorities, Inc.*, 2012 WL 3249514, at *2 (N.D. Cal.
16 Aug. 7, 2012) (observing that failure to state a claim under Rule 12(b)(6) is the
17 “paradigmatic example of a negative defense . . . [but] is more appropriately raised
18 in motions to dismiss rather than” pleaded in the answer like an affirmative
19 defense). *See also, Ganley v. County of San Mateo*, 2007 WL 902551 at *3
20 (N.D.Cal. Mar. 22, 2007) (treating the failure to state a claim as an affirmative
21 defense).

22 ***Affirmative Defense 2: Waiver***

23 To successfully assert the affirmative defense of waiver, the B&D Parties
24 must prove must prove both of the following by clear and convincing evidence:

25 1. That WSC knew that certain members of the B&D Parties were
26 required by the Coachella Valley Franchise Agreement and SoCal Franchise
27 Agreement to pay fees by a specified date and to remain in the Windermere system
28 for a specified term; and

2. That WSC freely and knowingly gave up these rights to have the

1 B&D Parties perform these payment obligations in a timely manner and to remain
2 in the Windermere system for a specified term.

3 A waiver may be oral or written or may arise from conduct that shows that
4 WSC gave up that right.

5 If the B&D Parties prove that WSC gave up its right to the B&D Parties'
6 performance of the timely payment obligations under the contracts, then the B&D
7 Parties were not required to perform obligations within the timing confines of the
8 contracts.

9 Judicial Council of California Civil Jury Instruction ("CACI") No. 336 (Dec.
10 2015).

11 ***Affirmative Defense 3: Estoppel***

12 "The elements of the doctrine" of estoppel are "that (1) the party to be
13 estopped must be apprised of the facts; (2) he must intend that his conduct shall be
14 acted upon, or must so act that the party asserting the estoppel has a right to believe
15 it was so intended; (3) the other party must be ignorant of the true state of facts;
16 and (4) he must rely upon the conduct to his injury." *County of Los Angeles v. City*
17 *of Alhambra*, 27 Cal. 3d 184, 196 (1980) (citing *City of Long Beach v. Mansell*, 3
18 Cal. 3d 462, 488-89 (1970)).

19 ***Affirmative Defense 4: Offset***

20 The burden is on the B&D Parties to show that they, or any one of them, are
21 entitled to an offset from WSC for any amounts owed to WSC. *See Jacobson v.*
22 *Persolve, LLC*, 2014 WL 4090809, at *9 (N.D. Cal. Aug. 19, 2014) (finding offset
23 to be a viable affirmative defense).

24 ***Affirmative Defense 5: Justification***

25 WSC's first, second, and third claims are barred in part because the B&D
26 Parties alleged failure to timely pay franchise and other fees was justified and were
27 fair and reasonable under all the circumstances based upon a balancing of all
28 factors related to the actions at issue.

1 WSC's fourth claim is barred in part because the B&D Parties' departure
2 from the Windermere system before the conclusion of their five-year term was
3 justified and was fair and reasonable under all the circumstances based upon a
4 balancing of all factors related to the actions at issue.

5 **5. In brief, the key evidence the B&D Parties rely on for each**
6 **claim and affirmative defense is:**

7 ***Claim 1 – Breach of the Coachella Valley Franchise Agreement***

8 WSC failed to protect its brand from the counter-marketing campaign of
9 Windermere Watch. Windermere Watch severely damaged the Windermere brand in
10 Southern California. Starting around 2005, Gary Kruger ("Kurger") – a disgruntled
11 former Seattle Windermere client – and his associates initiated an anti-marketing
12 campaign under the name "Windermere Watch," which was specifically designed to
13 direct defamatory statements, materials, and focused conduct against Windermere
14 and its franchisees and real estate agents via the website
15 www.windmerewatch.com and through various print materials. The website has
16 been (and continues to be) used by Kruger as a tool to generate and/or spread
17 negative and derogatory articles and comments concerning Windermere's purported
18 business practices, litigation, owners, executives, brokers, agents, and general
19 participation in the real estate market.

20 Windmerewatch.com is utilized and designed by Kruger to maximize its
21 search engine presence. As a result, during the relevant time period, when internet
22 users searched for Windermere on Google and other internet search engines,
23 windmerewatch.com appeared as one of the top search results – often ahead of
24 Windermere's own website. The obvious (if not express) intent of Kruger is to use
25 windmerewatch.com to turn potential clients, agents, and franchisees away from
26 Windermere in an effort to harm the business of WSC any anyone in business with
27 it.

28 Although WSC was legally obligated under the terms of the Coachella Valley

1 Franchise Agreement, the SoCal Franchise Agreement, and the Area Representative
2 Agreement to make “commercially reasonable efforts” to protect the Windermere
3 System, trademark, and brand, and to prevent unfair competition against its
4 franchisees and their businesses, WSC did virtually nothing to combat Windermere
5 Watch’s anti-Windermere marketing campaign in Southern California.

6 The Windermere Watch anti-marketing campaign has had a significant and
7 monetarily damaging effect on Plaintiffs’ businesses. Windermere’s competitors
8 incorporate information from the site in pitches to both agents and clients. WSC’s
9 failure to protect the brand in the face of the anti-marketing campaign caused the
10 loss of listings, clients, franchisees, and agents and, more specifically, caused B&D
11 Fine Homes and the other Plaintiffs to incur a non-trivial amount of money in an
12 effort to combat Windermere Watch without the assistance of WSC.

13 WSC breached Section 4 of the Coachella Valley Franchise Agreement by
14 failing to take necessary action (legal or otherwise) to prevent infringement of the
15 Windermere trademark or the related unfair competition faced by Plaintiffs in the
16 Southern California region as a result of the Windermere Watch websites and
17 mailing campaign. Similarly, WSC breached Section 3(A) of the Modification
18 Agreement failing to make commercially reasonable efforts to curtail Windermere
19 Watch and related attacks on the Windermere brand in Southern California.

20 WSC constructive termination of the Area Representation Agreement (as
21 discussed below) along with its direct breaches of the Coachella Valley Franchise
22 Agreement justified B&D Fine Homes’ discontinuation of payments to WSC under
23 the Coachella Valley Franchise Agreement and subsequent termination of that
24 agreement.

25 ***Claim 2 – Breach of the Implied Covenant of Good Faith and Fair***
26 ***Dealing***

27 WSC breached the implied covenant of good faith and fair dealing in its
28 Coachella Valley Franchise Agreement with Bennin & Deville File Homes, Inc.

1 (“B&D Fine Homes”) and Windermere Services Southern California, Inc. (“Services
2 SoCal”) by:

- 3 • Terminating Services SoCal as the Area Representative for the
4 Southern California region and thereby negating Plaintiffs’ 50%
5 reduction in franchise fees owed to WSC under the Coachella Valley
6 Franchise Agreement; and
- 7 • Terminating Services SoCal as the Area Representative for the
8 Southern California region (as discussed below) and not providing a
9 comparable replacement.

10 WSC’s termination of and interference with the Area Representation
11 Agreement (as discussed below) along with its direct breaches of the Coachella
12 Valley Franchise Agreement justified B&D Fine Homes’ discontinuation of
13 payments to WSC under the Coachella Valley Franchise Agreement.

14 ***Claim 3 – Breach of the Area Representation Agreement***

15 WSC breached Section 2 of the Area Representation Agreement with Services
16 SoCal by failing to provide Services SoCal with the uninterrupted right to offer
17 Windermere franchised businesses in Southern California.

18 Under the Federal Trade Commission’s (“FTC”) Amended Franchise Rule,
19 located at title 16, part 436 of the Code of Federal Regulations, a franchisor is
20 required to disclose to prospective franchisees a franchise disclosure document
21 (“FDD”) that contains a copy of the form franchise agreement and twenty-three
22 specific “Items” about the franchised business, including specific information about
23 the franchisor’s executives and managers, its relevant litigation history, the expected
24 business of the franchisee, the costs and fees associated with the franchised business,
25 the financial wellbeing of the franchisor, and the conditions in which the franchise
26 can be terminated or renewed, among other things. 16 C.F.R. § 436.

27 The California Franchise Investment Law (“CFIL”) builds upon the FTC’s
28 Amended Franchise Rule and serves as the primary vehicle for regulating the

1 registration, offer, and sale of franchises in California. Under the CFIL, a franchisor
2 must register a franchise application – including its current FDD – with the
3 California Department of Business Oversight (“DBO”) before a franchise can be
4 offered or sold within the state.⁷ Cal. Corp. Code §§ 31110, 31119. A franchisor’s
5 California registration must be renewed every year. Cal. Corp. Code § 31120. Once
6 the franchise application is properly registered with – and approved by – the DBO,
7 the FDD, together with copies of all proposed agreements and other exhibits, must
8 be provided to any prospective franchisee at least 14 days before the earlier of the
9 day the franchisee executes the franchise agreement or pays the franchisor any
10 consideration for the franchised business. Cal. Corp. Code § 31119(a).

11 In 2014, WSC elected not to renew its Southern California offering after
12 receiving Services SoCal’s audited financials, thereby precluding Services SoCal
13 from being able to legally offer or sell any new franchises in Southern California.
14 This conduct of WSC breached Section 2 of the Area Representation Agreement.

15 WSC similarly breached Section 7 by failing to promptly and diligently
16 commence and pursue the preparation and filing of all franchise registration filings
17 required under California law and/or the United States of America and in particular
18 failing to maintain the registration of the Southern California FDD consistent with
19 the parties’ course of dealing – *i.e.*, WSC was to register the FDD with the DBO
20 within a reasonable time after receipt of Services SoCal’s audited financial
21 statements.

22 WSC breached Section 10 by depriving Services SoCal of its right to offer
23 new Windermere franchises rendering it unable to collect initial franchise fees and
24 continuing license fees from new franchisees.

25 WSC breached Section 4 – and in particular, Section 4.2 – of the Area
26 Representation Agreement by failing to pay Services SoCal the termination fee – *i.e.*
27 the fair market value of its interest in the Area Representation Agreement –
28 following WSC’s termination of the Area Representation Agreement without cause.

1 Further, WSC breached Section 3 of Exhibit A by terminating the Area
2 Representation Agreement under the pretense that Services SoCal was the
3 “guarantor” of the franchise fees owed by the franchisees in the Southern California
4 region. Section 3 of Exhibit A specifically states that Services SoCal is not a
5 guarantor of the franchisees in its region.

6 ***Claim 4 – Breach of the Implied Covenant of Good Faith and Fair***
7 ***Dealing***

8 WSC breached the implied covenant of good faith and fair dealing in its Area
9 Representation Agreement with Services SoCal by:

- 10 • Taking action to interfere with and damage many of the relationships
11 between Services SoCal and franchisees in the Southern California
12 region; and
- 13 • Failing to act in good faith and conduct its business such that Plaintiffs
14 received the benefits of being an Area Representative in the franchise
15 system.

16 Moreover, WSC’s material breaches of the express and implied terms of the
17 Area Representation Agreement constructively terminated the Area Representation
18 Agreement during the time period August/September 2014.

19 ***Claim 5 – Breach of SoCal Franchise Agreement***

20 Consistent with those statements set forth in connection with Claim 1, above,
21 WSC likewise breached Section 6 of the SoCal Franchise Agreement by failing to
22 take necessary action (legal or otherwise) to prevent infringement of the Windermere
23 trademark or the related unfair competition faced by Plaintiffs in the Southern
24 California region as a result of the Windermere Watch websites, mailings, and other
25 conduct of Gary Kruger. WSC also breached Section 3(A) of the Modification
26 Agreement by failing to make commercially reasonable efforts to curtail
27 Windermere Watch and related attacks on the Windermere brand in Southern
28 California.

1 WSC constructive termination of the Area Representation Agreement (as
2 discussed above) along with its direct breaches of the SoCal Franchise Agreement
3 justified B&D SoCal's discontinuation of payments to WSC under the SoCal
4 Franchise Agreement and subsequent termination of that agreement.

5 ***Claim 6 – Breach of the Implied Covenant of Good Faith and Fair***
6 ***Dealing***

7 WSC breached the implied covenant of good faith and fair dealing in its
8 SoCal Franchise Agreement with B&D SoCal and Services SoCal by:

- 9 • Terminating Services SoCal as the Area Representative for the
10 Southern California region and thereby negating Plaintiffs' 50%
11 reduction in franchise fees owed to WSC under the SoCal Franchise
12 Agreement; and
- 13 • Terminating Services SoCal as the Area Representative for the
14 Southern California region and not providing a comparable
15 replacement.

16 WSC's termination of and interference with the Area Representation
17 Agreement (as discussed above) along with its direct breaches of the SoCal
18 Franchise Agreement justified B&D SoCal's discontinuation of payments to WSC
19 under the SoCal Franchise Agreement.

20 ***Affirmative Defense 2, 3, and 5 – Waiver, Estoppel, and***
21 ***Justification***

22 The B&D Parties' affirmative defenses of waiver, estoppel and justification
23 are predicated on the same core set of facts. Several of WSC's claims allege that
24 the B&D Parties failed to timely collect, pay or remit fees to WSC as required by
25 the corresponding contract. Over the course of the parties' fifteen-year
26 relationship, the payments submitted by the B&D Parties to WSC convinced with
27 the seasonal highs and lows of the business (the summer months being a slow time
28 for the B&D Parties' operations in the desert) and not consistent with the payment

1 terms in the contracts. Because WSC accepted (and even encouraged) this conduct
2 by the B&D Parties over such a protracted period of time, WSC is now precluded
3 from contradicting this established course of conduct through its assertion of
4 breach of contract claims to the contrary.

5 Finally, WSC's fourth claim for breach of the Modification Agreement is
6 barred because the B&D Parties' departure from the Windermere system prior to
7 the conclusion of the five-year term stated in the document was justified and was
8 fair and reasonable in light of the symbiotic relationship between the B&D Parties'
9 franchise agreement and the Area Representation Agreement and WSC's
10 termination (constructive or otherwise) of the Area Representation Agreement, and
11 WSC's corresponding breaches of the franchise agreements.

12 B. **WSC's Claims and Defenses:**

13 1. **WSC intends to pursue the following counterclaims against**
14 **the B&D Parties:**

15 Counterclaim 1: Bennion & Deville Fine Homes breached the
16 Coachella Valley Franchise Agreement with WSC

17 Counterclaim 2: Windermere Services Southern California, Inc.
18 breached the Area Representation Agreement with WSC;

19 Counterclaim 3: Bennion and Deville Fine Homes Southern
20 California, Inc. breached the Southern California
21 Franchise Agreement with WSC;

22 Counterclaim 4: B&D Find Homes and B&D SoCal breached the
23 Modification Agreement with WSC;

24 Counterclaim 8: Open Book Account; and

25 2. **WSC intends to pursue the following affirmative defenses:**

26
27 Affirmative Defense 5: Third Party Actions

28 Affirmative Defense 6: Waiver

1 Affirmative Defense 8: Set-Off

2 Affirmative Defense 10: Unclean Hands

3 Affirmative Defense 11: Estoppel

4 Affirmative Defense 22: Unjust Enrichment

5 **3. The elements required to establish WSC's claims are:**

6 ***Claim 1: Breach of the Coachella Valley Franchise Agreement***

7 The elements for a breach of contract claim are: (1) the existence of the
8 contract; (2) performance by WSC or excuse for nonperformance; (3) breach by
9 Bennion & Deville Fine Homes; and (4) damages. *Wall Street Network, Ltd. v.*
10 *New York Times Co.*, 164 Cal.App.4th 1171, 1178 (2008).

11 ***Claim 2: Breach of the Area Representation Agreement***

12 The elements for a breach of contract claim are: (1) the existence of the
13 contract; (2) performance by WSC or excuse for nonperformance; (3) breach by
14 Windermere Services Southern California; and (4) damages. *Wall Street Network,*
15 *Ltd. v. New York Times Co.*, 164 Cal.App.4th 1171, 1178 (2008).

16 ***Claim 3: Breach of the Southern California Franchise Agreement***

17 The elements for a breach of contract claim are: (1) the existence of the
18 contract; (2) performance by WSC or excuse for nonperformance; (3) breach by
19 Bennion & Deville Fine Homes Southern California; and (4) damages. *Wall Street*
20 *Network, Ltd. v. New York Times Co.*, 164 Cal.App.4th 1171, 1178 (2008).

21 ***Claim 4: Breach of the Modification Agreement***

22 The elements for a breach of contract claim are: (1) the existence of the
23 contract; (2) performance by WSC or excuse for nonperformance; (3) breach by
24 the B&D Parties; and (4) damages. *Wall Street Network, Ltd. v. New York Times*
25 *Co.*, 164 Cal.App.4th 1171, 1178 (2008).

26 ***Claim 8: Open Book Account***

27 The elements for an open book account common claim are: (1) WSC and the
28 B&D Parties had financial transactions; (2) WSC kept an account of the credits and
debits involved in the transactions; (3) that the B&D Parties owe WSC money on

1 the account; and (4) the amount of money the B&D Parties owe WSC. CACI
2 Instruction No. 372.

3 **4. The elements required to establish the WSC's affirmative**
4 **defenses are:**

5 ***Affirmative Defense 5: Third Party Actions***

6 To establish its affirmative defense of third party actions, WSC must prove
7 that third party actions, namely those of Mr. Kruger and Windermere Watch, were
8 the proximate cause of the injury the B&D Parties alleged incurred. *Schrimsher*
9 *v. Bryson*, 58 Cal. App. 3d 660, 664 (1976).

10 ***Affirmative Defense 6: Waiver***

11 To successfully assert the affirmative defense of waiver, WSC must prove
12 must prove both of the following by clear and convincing evidence:

13 1. That WSC agreed to undertake commercially reasonable efforts to
14 combat the effect of Windermere Watch on the B&D Parties' Business;

15 2. That the B&D Parties freely and knowingly agreed that WSC had
16 taken commercially reasonable efforts to combat the effects of Windermere Watch
17 on their business; and

18 3. That WSC detrimentally relied on the B&D Parties' agreement that all
19 commercially reasonable efforts had been taken WSC agreed to waive fees the
20 B&D Parties owed and extend the terms of a promissory note.

21 A waiver may be oral or written or may arise from conduct that shows that
22 the B&D Parties gave up that right.

23 If WSC proves that the B&D Parties gave up their right to any further
24 performance under the contracts, then WSC was not required to further perform
25 obligations.

26 Judicial Council of California Civil Jury Instruction ("CACI") No. 336 (Dec.
27 2015); *adidas-Am., Inc. v. Payless Shoesource, Inc.*, 546 F.Supp.2d 1029, 1074 (D.
28 Or. 2008).

1 ***Affirmative Defense 8: Set-Off***

2 To establish its Set-Off affirmative defense, WSC will need to prove the
3 amounts the B&D Parties owe under the Coachella Valley Franchise Agreement,
4 the Southern California Franchise Agreement, and the Modification Agreement,
5 and offset those amounts against any alleged damages the B&D Parties incurred. 2
6 Cal. Affirmative Def. § 44:1 (2d ed.); *Harrison v. Adams*, 20 Ca1.2d 646, 648
7 (1942); *see also Jacobson v. Persolve, LLC*, 2014 WL 4090809, at *9 (N.D. Cal.
8 Aug. 19, 2014).

9 ***Affirmative Defense 10: Unclean Hands***

10 To prevail on its affirmative defense of unclean hands, WSC must show that
11 the B&D Parties did not “act fairly in the matter for which [they] seek a remedy.”
12 *Kendall-Jackson Winery, Ltd. v. Superior Court*, 76 Cal.App.4th 970, 978 (1999);
13 *see also Civ. Code § 3517* (“no one can take advantage of his own wrong”). If
14 the B&D Parties did not act fairly in their performance under the agreements, they
15 will be denied relief, regardless of the merits of their claim. *Id.*

16 ***Affirmative Defense 11: Estoppel***

17 “The elements of the doctrine” of estoppel are “that (1) the party to be
18 estopped must be apprised of the facts; (2) he must intend that his conduct shall be
19 acted upon, or must so act that the party asserting the estoppel has a right to believe
20 it was so intended; (3) the other party must be ignorant of the true state of facts;
21 and (4) he must rely upon the conduct to his injury.” *County of Los Angeles v. City*
22 *of Alhambra*, 27 Cal. 3d 184, 196 (1980) (citing *City of Long Beach v. Mansell*, 3
23 Cal. 3d 462, 488-89 (1970)).

24 ***Affirmative Defense 22: Unjust Enrichment***

25 To prove its affirmative defense of unjust enrichment, WSC will establish
26 that: (1) Plaintiffs received a benefit; and (2) unjust retained that benefit at the
27 expense of WSC. *In re ConAgra Foods Inc.*, 908 F. Supp. 2d 1090, 1113 (C.D.
28 Cal. 2012).

1 **4. In brief, the key evidence WSC relies on for each claim and**
2 **affirmative defense is:**

3 ***Counterclaim 1 – Breach of the Coachella Valley Franchise***
4 ***Agreement***

5 The following evidence supports WSC’s claim that Counter-defendants
6 breached the Coachella Valley Franchise Agreement: (1) WSC performed all of its
7 obligations pursuant to the Coachella Valley Franchise Agreement; (2) Windermere
8 Services Southern California, Inc. (“WSSC”) was the area representative and
9 services provider for Bennion & Deville Fine Homes, Inc. (“BDFH”), so any
10 allegedly unsatisfactory services were being provided by WSSC rather than WSC;
11 (3) BDFH agreed to pay WSC franchise fees, technology fees, late fees, and interest
12 pursuant to the Coachella Valley Franchise Agreement; (4) BDFH failed and
13 refused to pay franchise fees, technology fees, late fees, and interest since July 2014;
14 (5) BDFH terminated the Coachella Valley Franchise Agreement on September 30,
15 2015; (6) the Coachella Valley Franchise Agreement expressly prohibited BDFH
16 from continuing to use the Windermere trademark following termination of the
17 franchise agreement; (7) following their termination of the Coachella Valley
18 Franchise Agreement, BDFH continued to use, misuse, and misrepresent the
19 Windermere trademark by, among other things, using the “Windermere” name in
20 their URL, using the Windermere name and logo on their blog, and failing to
21 cooperate fully and in good faith with WSC to transfer URLs containing WSC’s
22 trademarks following termination of the Coachella Valley Franchise Agreement ;
23 and (8) Bennion and Deville personally guaranteed amounts owed under the
24 Coachella Valley Franchise Agreement.

25 ***Counterclaim 2 – Breach of the Area Representation Agreement***

26 The following evidence supports WSC’s claim that Counter-defendants
27 breached the Area Representation Agreement: (1) WSC performed all of its
28 obligations pursuant to the Area Representation Agreement; (2) as the area

1 representative, WSSC was required to collect and remit franchise fees, technology
2 fees, late fees, and interest from Southern California franchisees; (3) WSSC did not
3 make reasonable efforts to collect franchise fees, technology fees, late fees, and
4 interest from its related entities, BDFH and Bennion & Deville Fine Homes SoCal,
5 Inc. (“BDFH So Cal”); (4) WSC terminated the Area Representation Agreement for
6 cause on September 30, 2015; (5) the Area Representation Agreement expressly
7 prohibited Counter-defendants from continuing to use the Windermere trademark
8 following termination of the franchise agreement; and (6) following the termination
9 of the Area Representation Agreement, BDFH continued to use, misuse, and
10 misrepresent the Windermere trademark.

11 ***Counterclaim 3: Breach of Southern California Franchise Agreement***

12 The following evidence supports WSC’s claim that Counter-defendants
13 breached the Southern California Franchise Agreement: (1) WSC performed all of
14 its obligations pursuant to the Southern California Franchise Agreement; (2) WSSC
15 was the area representative and services provider for BDFH So Cal, so any allegedly
16 unsatisfactory services were being provided by WSSC rather than WSC; (3) BDFH
17 So Cal agreed to pay WSC franchise fees, technology fees, late fees, and interest
18 pursuant to the Southern California Franchise Agreement; (4) BDFH So Cal failed
19 and refused to pay franchise fees, technology fees, late fees, and interest since July
20 2014; (5) BDFH So Cal terminated the Southern California Franchise Agreement on
21 September 30, 2015; (6) the Southern California Franchise Agreement expressly
22 prohibited BDFH So Cal from continuing to use the Windermere trademark
23 following termination of the franchise agreement; (7) following their termination of
24 the Southern California Franchise Agreement, BDFH So Cal continued to use,
25 misuse, and misrepresent the Windermere trademark by, among other things, using
26 the “Windermere” name in their URL and using the Windermere name and logo on
27 their blog; and (8) Bennion and Deville personally guaranteed amounts owed under
28 the Southern California Franchise Agreement.

1 ***Counterclaim 4: Breach of Modification Agreement***

2 The following evidence supports WSC’s claim that BDFH and BDFH SoCal
3 breached the Modification Agreement: (1) Counter-Defendants executed the
4 Modification Agreement on December 18, 2012; (2) WSC performed all of its
5 obligations pursuant to the Modification Agreement; (3) pursuant to the
6 Modification Agreement, BDFH and BDFH SoCal agreed to remain part of the
7 Windermere System for five years; (4) BDFH and BDFH SoCal terminated their
8 franchise agreements on September 30, 2015, with more than two years remaining
9 on the five year term of the Modification Agreement; and (5) BDFH and BDFH
10 SoCal failed and refused to repay the pro-rata share of the amounts outstanding at
11 the time they terminated their franchise agreements.

12 ***Counterclaim 8: Open Book Account***

13 The following evidence supports WSC’s claim that Counter-defendants owe
14 WSC money pursuant to an Open Book Account: (1) Pursuant to the Coachella
15 Valley and Southern California Franchise Agreement, Counter-defendants agreed to
16 pay monthly franchise fees, technology fees, late fees, and interest; (2) Counter-
17 Defendants executed the Modification Agreement on December 18, 2012 pursuant
18 to which they agreed to repay the pro-rata amount of waived fees if they left the
19 Windermere System before December 18, 2017; (3) Counter-defendants failed to
20 make all necessary payments under these agreements; (4) WSC accounted for all
21 fees due and owing by Counter-Defendants; (5) Counter-defendants owe WSC a
22 sum certain that will be proven at trial.

23 ***Affirmative Defense 5: Third Party Actions***

24 Plaintiffs allege that WSC failed to take commercially reasonable actions to
25 counteract the impact of a negative marketing campaign conducted by a
26 disgruntled former customer, Mr. Kruger. In December 2012, WSC agreed to
27 discharge the approximately \$1 million debt owed by Plaintiffs and to make efforts
28 to address Mr. Kruger’s activities in exchange for Plaintiffs’ express contractual

1 commitment to remain Windermere franchisees for five (5) years. These
2 agreements were memorialized in the parties' December 18, 2012 Agreement
3 Modifying Windermere Real Estate Franchise License Agreements.

4 In or about February 2013, the parties, including at least two outside
5 attorneys, participated in a substantive conference call in order to address what
6 efforts should and should not be pursued to most effectively address Mr. Kruger's
7 activities and the Windermere Watch website. During this call, all parties,
8 including the outside attorneys, agreed that (1) litigation would be ineffectual; and
9 (2) no money would be paid to Mr. Kruger. Indeed, Deville was adamant that Mr.
10 Kruger not receive a single dime from WSC. Upon group discussion and
11 consideration, the parties agreed that the best solution was to engage in search
12 engine optimization efforts ("SEO") to improve their own online presence and thus
13 effectively "bury" or "push" the Windermere Watch website to later and less
14 relevant search engine pages. Because the Windermere Watch website was
15 targeting Plaintiffs, it was then determined that for any SEO efforts to be
16 successful, they would need to be undertaken by Plaintiffs pursuant to their own IT
17 platforms.

18 Later that year, during the summer of 2013, representatives of WSC flew
19 down to San Diego to meet with another franchisee and discuss what was being
20 done to address Mr. Kruger and his website. Bennion and Deville also attended
21 this meeting as they were the area representative for this franchisee. During the
22 meeting, Deville assured the franchisee that everything that could be done was
23 being done, but that the only practical solution/remedy was the ongoing SEO
24 efforts. This franchisee accepted Deville's position and, in fact, remains a
25 Windermere franchisee.

26 The balance on a \$501,000 personal loan taken by Bennion and Deville was
27 due and owing in full on March 1, 2014. At about that time, Bennion and Deville
28 requested a 36-month extension of the loan. They also claimed they had spent

1 significant sums on SEO efforts implementing the parties' agreed upon plan to
2 combat Windermere Watch and demanded reimbursement from WSC. In June
3 2014, WSC agreed, among other things, to extend the loan for 36 months and to
4 allow Plaintiffs to take a credit of \$85,280.00 against past due franchise fees then
5 due and owing to WSC as full reimbursement for the SEO and related Windermere
6 Watch efforts. In exchange for these accommodations, Plaintiffs agreed, as is
7 confirmed in June 3, 2014 correspondence, that WSC was not in breach of any
8 obligations owed to Plaintiffs, that there was nothing more that WSC could or
9 should be doing relative to Windermere Watch, and that Plaintiffs would bear the
10 expense of any SEO efforts moving forward.

11 ***Affirmative Defense 6: Waiver***

12 Plaintiffs knowingly waived their claim that WSC failed to make
13 commercially reasonable efforts to combat the effects of Windermere Watch on
14 their business. To succeed on its Waiver affirmative defense, WSC must prove
15 that Plaintiffs knew WSC was required to perform under the Modification
16 Agreement, and knowingly waived any further performance. CACI Instruction
17 No. 336.

18 In December 2012, WSC agreed to discharge the approximately \$1 million
19 debt owed by Plaintiffs and to make commercially reasonable efforts to address
20 Mr. Kruger's activities in exchange for Plaintiffs' express contractual commitment
21 to remain Windermere franchisees for five (5) years. These agreements were
22 memorialized in the parties' December 18, 2012 Agreement Modifying
23 Windermere Real Estate Franchise License Agreements.

24 In or about February 2013, the parties, including at least two outside
25 attorneys, participated in a substantive conference call in order to address what
26 efforts should and should not be pursued to most effectively address Mr. Kruger's
27 activities and the Windermere Watch website. During this call, all parties,
28 including the outside attorneys, agreed that (1) litigation would be ineffectual; and

1 (2) no money would be paid to Mr. Kruger. Indeed, Deville was adamant that Mr.
2 Kruger not receive a single dime from WSC. Upon group discussion and
3 consideration, the parties agreed that the best solution was to engage in SEO to
4 improve their own online presence and thus effectively “bury” or “push” the
5 Windermere Watch website to later and less relevant search engine pages. After
6 consultation with Bennion and Deville, WSC initially undertook the SEO efforts
7 with the help of its affiliated company, Windermere Solutions. However, as a
8 practical matter, it was soon determined that for any SEO efforts to be successful,
9 they would need to be undertaken by the B&D Parties pursuant to their own IT
10 platforms. This was entirely appropriate given Windermere Services Southern
11 California, Inc.’s obligations under the Area Representation Agreement.

12 Later that year, during the summer of 2013, representatives of WSC flew
13 down to San Diego to meet with another franchisee and discuss what was being
14 done to address Mr. Kruger and his website. Bennion and Deville also attended
15 this meeting as they were the area representative for this franchisee. During the
16 meeting, Deville assured the franchisee that everything that could be done was
17 being done, but that the only practical solution/remedy was the ongoing SEO
18 efforts. This franchisee accepted Deville’s position and, in fact, remains a
19 Windermere franchisee.

20 The balance on Bennion and Deville’s January 2009 \$501,000.00 personal
21 loan was due and owing in full on March 1, 2014. At about that time, Bennion and
22 Deville requested a 36-month extension of the loan. They also claimed they had
23 spent significant sums on SEO efforts implementing the parties’ agreed upon plan
24 to combat Windermere Watch and demanded reimbursement from WSC. In June
25 2014, WSC agreed, among other things, to extend the loan for 36 months and to
26 allow Plaintiffs to take a credit of \$85,280.00 against past due franchise fees then
27 due and owing to WSC as full reimbursement for the SEO and related Windermere
28 Watch efforts. In exchange for these accommodations, Plaintiffs agreed, as is

1 confirmed in June 3, 2014 correspondence, that WSC was not in breach of any
2 obligations owed to Plaintiffs, that there was nothing more that WSC could or
3 should be doing relative to Windermere Watch, and that Plaintiffs would bear the
4 expense of any SEO efforts moving forward. Consequently, Plaintiffs waived any
5 claim that WSC had not taken commercially reasonable efforts to combat the effect
6 of Windermere Watch on their business.

7 ***Affirmative Defense 8: Set-Off***

8 The B&D Parties owe WSC over \$1.2 million dollars in unpaid fees
9 pursuant to the agreements. Those amounts must be offset against any alleged
10 damages the B&D Parties suffered.

11 ***Affirmative Defense 10: Unclean Hands***

12 With regard to Windermere Watch, the filing of franchise disclosure
13 documents, and the use of WSC's trademarks following the termination of the
14 franchise agreements, principles of fairness dictate that Plaintiffs shall not recover
15 anything from these alleged wrongs.

16 In December 2012 WSC agreed to discharge the approximately \$1 million
17 debt owed by Plaintiffs and to make commercially reasonable efforts to address
18 Mr. Kruger's activities in exchange for Plaintiffs' express contractual commitment
19 to remain Windermere franchisees for five (5) years. These agreements were
20 memorialized in the parties' December 18, 2012 Agreement Modifying
21 Windermere Real Estate Franchise License Agreements.

22 In or about February 2013, the parties, including at least two outside
23 attorneys, participated in a substantive conference call in order to address what
24 efforts should and should not be pursued to most effectively address Mr. Kruger's
25 activities and the Windermere Watch website. During this call, all parties,
26 including the outside attorneys, agreed that (1) litigation would be ineffectual; and
27 (2) no money would be paid to Mr. Kruger. Indeed, Deville was adamant that Mr.
28 Kruger not receive a single dime from WSC. Upon group discussion and

1 consideration, the parties agreed that the best solution was to engage in SEO to
2 improve their own online presence and thus effectively “bury” or “push” the
3 Windermere Watch website to later and less relevant search engine pages. After
4 consultation with Bennion and Deville, WSC initially undertook the SEO efforts
5 with the help of its affiliated company, Windermere Solutions. However, as a
6 practical matter, it was soon determined that for any SEO efforts to be successful,
7 they would need to be undertaken by the B&D Parties pursuant to their own IT
8 platforms. This was entirely appropriate given Windermere Services Southern
9 California, Inc.’s obligations under the Area Representation Agreement.

10 Later that year, during the summer of 2013, representatives of WSC flew
11 down to San Diego to meet with another franchisee and discuss what was being
12 done to address Mr. Kruger and his website. Bennion and Deville also attended
13 this meeting as they were the area representative for this franchisee. During the
14 meeting, Deville assured the franchisee that everything that could be done was
15 being done, but that the only practical solution/remedy was the ongoing SEO
16 efforts. This franchisee accepted Deville’s position and, in fact, remains a
17 Windermere franchisee.

18 The balance on Bennion and Deville’s January 2009 \$501,000.00 personal
19 loan was due and owing in full on March 1, 2014. At about that time, Bennion and
20 Deville requested a 36-month extension of the loan. They also claimed they had
21 spent significant sums on SEO efforts implementing the parties’ agreed upon plan
22 to combat Windermere Watch and demanded reimbursement from WSC. In June
23 2014, WSC agreed, among other things, to extend the loan for 36 months and to
24 allow Plaintiffs to take a credit of \$85,280.00 against past due franchise fees then
25 due and owing to WSC as full reimbursement for the SEO and related Windermere
26 Watch efforts. In exchange for these accommodations, Plaintiffs agreed, as is
27 confirmed in June 3, 2014 correspondence, that WSC was not in breach of any
28 obligations owed to Plaintiffs, that there was nothing more that WSC could or

1 should be doing relative to Windermere Watch, and that Plaintiffs would bear the
2 expense of any SEO efforts moving forward.

3 Finally, Plaintiffs continued to use, misuse, and misappropriate WSC's
4 trademarks after they terminated the franchise agreements. WSC made multiple
5 demands that Plaintiffs cease and desist their misuse of WSC trademarks, but
6 Plaintiffs continued to misuse the marks in direct contravention of the express
7 requirements of the franchise agreements.

8 ***Affirmative Defense 11: Estoppel***

9 Plaintiffs agreed that all commercially efforts had been taken to combat the
10 effects of Windermere Watch, and any delay in filing required franchise disclosure
11 documents was caused by Plaintiffs' failure to timely provide audited financial
12 statements. Consequently, Plaintiffs are estopped from seeking any damages
13 regarding either Windermere Watch or franchise disclosure documents.

14 In December 2012 WSC agreed to discharge the approximately \$1 million
15 debt owed by Plaintiffs and to make commercially reasonable efforts to address
16 Mr. Kruger's activities in exchange for Plaintiffs' express contractual commitment
17 to remain Windermere franchisees for five (5) years. These agreements were
18 memorialized in the parties' December 18, 2012 Agreement Modifying
19 Windermere Real Estate Franchise License Agreements.

20 In or about February 2013, the parties, including at least two outside
21 attorneys, participated in a substantive conference call in order to address what
22 efforts should and should not be pursued to most effectively address Mr. Kruger's
23 activities and the Windermere Watch website. During this call, all parties,
24 including the outside attorneys, agreed that (1) litigation would be ineffectual; and
25 (2) no money would be paid to Mr. Kruger. Indeed, Deville was adamant that Mr.
26 Kruger not receive a single dime from WSC. Upon group discussion and
27 consideration, the parties agreed that the best solution was to engage in SEO to
28 improve their own online presence and thus effectively "bury" or "push" the

1 Windermere Watch website to later and less relevant search engine pages. After
2 consultation with Bennion and Deville, WSC initially undertook the SEO efforts
3 with the help of its affiliated company, Windermere Solutions. However, as a
4 practical matter, it was soon determined that for any SEO efforts to be successful,
5 they would need to be undertaken by the B&D Parties pursuant to their own IT
6 platforms.

7 Later that year, during the summer of 2013, representatives of WSC flew
8 down to San Diego to meet with another franchisee and discuss what was being
9 done to address Mr. Kruger and his website. Bennion and Deville also attended
10 this meeting as they were the area representative for this franchisee. During the
11 meeting, Deville assured the franchisee that everything that could be done was
12 being done, but that the only practical solution/remedy was the ongoing SEO
13 efforts. This franchisee accepted Deville's position and, in fact, remains a
14 Windermere franchisee.

15 The balance on Bennion and Deville's January 2009 \$501,000.00 personal
16 loan was due and owing in full on March 1, 2014. At about that time, Bennion and
17 Deville requested a 36-month extension of the loan. They also claimed they had
18 spent significant sums on SEO efforts implementing the parties' agreed upon plan
19 to combat Windermere Watch and demanded reimbursement from WSC. In June
20 2014, WSC agreed, among other things, to extend the loan for 36 months and to
21 allow Plaintiffs to take a credit of \$85,280.00 against past due franchise fees then
22 due and owing to WSC as full reimbursement for the SEO and related Windermere
23 Watch efforts. In exchange for these accommodations, Plaintiffs agreed, as is
24 confirmed in June 3, 2014 correspondence, that WSC was not in breach of any
25 obligations owed to Plaintiffs, that there was nothing more that WSC could or
26 should be doing relative to Windermere Watch, and that Plaintiffs would bear the
27 expense of any SEO efforts moving forward.

28 ***Affirmative Defense 22: Unjust Enrichment***

1 Plaintiffs consented to the actions taken in response to Mr. Kruger's
2 negative marketing campaign, and consequently are now estopped from arguing
3 they were somehow damaged by the very conduct they previously consented to. In
4 December 2012 WSC agreed to discharge the approximately \$1 million debt owed
5 by Plaintiffs and to make efforts to address Mr. Kruger's activities in exchange for
6 Plaintiffs' express contractual commitment to remain Windermere franchisees for
7 five (5) years. These agreements were memorialized in the parties' December 18,
8 2012 Agreement Modifying Windermere Real Estate Franchise License
9 Agreements.

10 In or about February 2013, the parties, including at least two outside
11 attorneys, participated in a substantive conference call in order to address what
12 efforts should and should not be pursued to most effectively address Mr. Kruger's
13 activities and the Windermere Watch website. During this call, all parties,
14 including the outside attorneys, agreed that (1) litigation would be ineffectual; and
15 (2) no money would be paid to Mr. Kruger. Indeed, Deville was adamant that Mr.
16 Kruger not receive a single dime from WSC. Upon group discussion and
17 consideration, the parties agreed that the best solution was to engage in SEO to
18 improve their own online presence and effectively "bury" or "push" the
19 Windermere Watch website to later and less relevant search engine pages. After
20 consultation with Bennion and Deville, WSC initially undertook the SEO efforts
21 with the help of its affiliated company, Windermere Solutions. However, as a
22 practical matter, it was soon determined that for any SEO efforts to be successful,
23 they would need to be undertaken by the B&D Parties pursuant to their own IT
24 platforms.

25 Later that year, during the summer of 2013, representatives of WSC flew
26 down to San Diego to meet with another franchisee and discuss what was being
27 done to address Mr. Kruger and his website. Bennion and Deville also attended
28 this meeting as they were the area representative for this franchisee. During the

1 meeting, Deville assured the franchisee that everything that could be done was
2 being done, but that the only practical solution/remedy was the ongoing SEO
3 efforts. This franchisee accepted Deville's position and, in fact, remains a
4 Windermere franchisee.

5 The balance on Bennion and Deville's January 2009 \$501,000.00 personal
6 loan was due and owing in full on March 1, 2014. At about that time, Bennion and
7 Deville requested a 36-month extension of the loan. They also claimed they had
8 spent significant sums on SEO efforts implementing the parties' agreed upon plan
9 to combat Windermere Watch and demanded reimbursement from WSC. In June
10 2014, WSC agreed, among other things, to extend the loan for 36 months and to
11 allow Plaintiffs to take a credit of \$85,280.00 against past due franchise fees then
12 due and owing to WSC as full reimbursement for the SEO and related Windermere
13 Watch efforts. In exchange for these accommodations, Plaintiffs agreed, as is
14 confirmed in June 3, 2014 correspondence, that WSC was not in breach of any
15 obligations owed to Plaintiffs, that there was nothing more that WSC could or
16 should be doing relative to Windermere Watch, and that Plaintiffs would bear the
17 expense of any SEO efforts moving forward.

18 Plaintiffs were unjustly enriched by the agreement in June 2014. WSC
19 agreed to extend the term of the \$501,000 personal loan and allowed Plaintiffs to
20 take a credit of \$85,280 in fees to offset the costs of their SEO efforts, all in
21 exchange for Plaintiffs' agreements that WSC had fulfilled its contractual
22 obligations as it relates to Mr. Kruger's negative marketing campaign.

23 **VIII. Evidence of Issues Remaining To Be Tried**

24 **The B&D Parties' Statement**

25 The B&D Parties reserve all rights to amend the following pending the
26 outcome of pending motions and/or the resolution of any motions in limine:
27
28

1 1. Whether B&D Fine Homes can prove by a preponderance of the
2 evidence that it performed its obligations under the Coachella Valley Franchise
3 Agreement, or was excused from performance;

4 2. Whether B&D SoCal can prove by a preponderance of the evidence that
5 it performed its obligations under the SoCal Franchise Agreement, or was excused
6 from performance;

7 3. Whether Services SoCal can prove by a preponderance of the evidence
8 that it performed its obligations under the Area Representation Agreement, or was
9 excused from performance;

10 4. Whether the B&D Parties can prove by a preponderance of the evidence
11 that WSC failed to take necessary action to prevent infringement of the Windermere
12 trademark by Windermere Watch;

13 5. Whether the B&D Parties can prove by a preponderance of the evidence
14 that WSC failed to make “commercially reasonable” efforts to curtail Windermere
15 Watch’s negative marketing campaign;

16 6. Whether WSC has waived or is otherwise precluded from pursuing the
17 liquidated damages provided for in Section 3(F) of the Modification Agreement in
18 light of its breaches of the franchise agreements and Area Representation
19 Agreement;

20 7. Whether the B&D Parties can prove by a preponderance of the evidence
21 that WSC improperly terminated the Area Representation Agreement without proper
22 notice or opportunity to cure;

23 8. Whether WSC provided a comparable area representative for the
24 Southern California region after terminating Services SoCal’s status as the area
25 representative;

26 9. Whether the B&D Parties can prove by a preponderance of the evidence
27 that WSC failed to provide Services SoCal with the uninterrupted right to offer
28 Windermere franchises in Southern California;

1 10. Whether the B&D Parties can prove by a preponderance of the evidence
2 that WSC failed to timely register the Southern California Franchise Disclosure
3 Document following receipt of Services SoCal's audited financials in July 2014;

4 11. Whether the B&D Parties can prove by a preponderance of the evidence
5 that WSC terminated the Area Representation Agreement without cause, and in
6 doing so, was obligated to pay Services SoCal the fair market value of that business;

7 12. The value (fair market or otherwise) of the Area Representation
8 Agreement;

9 13. Whether the B&D Parties can prove by a preponderance of the evidence
10 that WSC failed to promptly and diligently commence and pursue the preparation
11 and filing of all franchise registration filings required under California and/or federal
12 law;

13 14. Whether WSC's termination of the Area Representations Agreement
14 was done under the pretense that Services SoCal was the guarantor of the franchise
15 fees owed by the franchisees in Southern California region;

16 15. Whether WSC interfered with the relationships between Services SoCal
17 and Windermere franchisees within the Southern California region;

18 16. Whether the B&D Parties can prove by a preponderance of the evidence
19 that WSC failed to act in good faith and to conduct its business such that Plaintiffs
20 received the benefits of their agreements with WCS;

21 17. Whether the B&D Parties can prove by a preponderance of the evidence
22 that B&D Fine Homes and B&D SoCal were justified in terminating the franchise
23 agreements in light of WSC's termination of the Area Representation Agreement
24 thereby negating B&D Fine Homes and B&D SoCal's 50% reduction in franchise
25 fees that was central to the continued franchise relationships;

26 18. Whether the B&D Parties were commercially justified in their efforts to
27 discontinue use of the Windermere mark after September 30, 2015;

28 19. Whether the B&D Parties were justified in discontinuing payment

1 under the franchise agreements in light of WSC's prior breaches of the franchise
2 agreements; and

3 20. Damages to B&D Fine Homes for WSC's breaches of the Coachella
4 Valley Franchise Agreement;

5 21. Damages to B&D SoCal for WSC's breaches of the SoCal Franchise
6 Agreement;

7 22. Damages to Services SoCal for WSC's breaches of the Area
8 Representation Agreement;

9 23. Whether the B&D Parties are entitled to attorneys' fees and costs as
10 provided for in the contracts.

11 **WSC's Statement**

12 WSC reserves the right to amend and supplement the following pending
13 outcome of any pending motions and/or motions in limine:

14 1. Whether WSC can prove by a preponderance of the evidence that it
15 performed its obligations under the Coachella Valley Franchise
16 Agreement, or was excused by performance;

17 2. Whether WSC can prove by a preponderance of the evidence that the
18 B&D Parties breached their obligation to, among other things, pay
19 franchise fees pursuant to the Coachella Valley Franchise Agreement;

20 3. The amount of damage WSC incurred pursuant to the B&D Parties
21 breach of the Coachella Valley Franchise Agreement;

22 4. Whether WSC can prove by a preponderance of the evidence that it
23 performed its obligations under the Area Representation Agreement, or
24 was excused by performance;

25 5. Whether WSC can prove by a preponderance of the evidence that the
26 B&D Parties breached their obligations pursuant to the Area
27 Representation Agreement;

28 6. The amount of damage WSC incurred pursuant to the B&D Parties

1 breach of the Area Representation Agreement;

2 7. Whether WSC can prove by a preponderance of the evidence that it
3 performed its obligations under the Southern California Franchise
4 Agreement, or was excused by performance;

5 8. Whether WSC can prove by a preponderance of the evidence that the
6 B&D Parties breached their obligation to, among other things, pay
7 franchise fees pursuant to the Southern California Franchise
8 Agreement;

9 9. The amount of damage WSC incurred pursuant to the B&D Parties
10 breach of the Southern California Franchise Agreement;

11 10. Whether WSC can prove by a preponderance of the evidence that it
12 performed its obligations under the Modification Agreement, or was
13 excused by performance;

14 11. Whether WSC can prove by a preponderance of the evidence that the
15 BDFH and BDFH SoCal breached their obligations pursuant to the
16 Modification Agreement;

17 12. The amount of damage WSC incurred pursuant to BDFH and BDFH
18 SoCal's breach of the Modification Agreement;

19 13. Whether WSC can prove by a preponderance of the evidence that the
20 B&D Parties waived any claim that WSC failed to take commercially
21 reasonable efforts to curtail the negative marketing campaign of
22 Windermere Watch;

23 14. Whether WSC was entitled to terminate the Area Representation
24 Agreement for cause based on the B&D Parties' failure to collect and
25 remit all franchise fees owed by franchisees in their area;

26 15. Whether WSC was entitled to terminate the Area Representation
27 Agreement for cause based on the B&D Parties' failure to provide
28 adequate services to franchisees in their area;

1 16. Whether WSC is entitled to attorneys' fees and costs as provided in the
2 agreements.

3 **IX. Statements Regarding Discovery**

4 Discovery is complete.

5 **X. Disclosures and Exhibits**

6 The parties have disclosed their respective witnesses and agreed to make
7 available at trial all of their respective employees that have been identified in the
8 witness lists filed with the Court.

9 The parties' will file a combined joint exhibit list on Friday, May 26, 2017.
10 Unless all parties agree that an exhibit shall be withdrawn, all exhibits will be
11 admitted without objection at trial except those objections identified by the parties
12 in their joint exhibit list.

13 **XI. Witnesses**

14 The parties originally filed their respective witness lists with the Court on
15 August 29, 2016. [D.E. 50, 53.]The B&D Parties have since submitted an
16 Amended Witness List. [D.E. 128.] WSC objects to the B&D Parties' Amended
17 Witness List. No witnesses other than those identified in the parties' respective
18 witness lists will be permitted to testify (other than solely for impeachment).

19 Each party intending to preserve evidence by way of deposition testimony
20 has marked such depositions in accordance with L.R. 16-2.7. For this purpose, the
21 following depositions shall be lodged with the Clerk as required by L.R. 32-1:

22 None.

23 **XII. Law And Motion Matters**

24 The following law and motion matters and motions *in limine*, and no others,
25 are pending or contemplated:

26 **The B&D Parties' Law and Motion Matters**

27 a.

28 2. Contemplated Motions

1 a. The Plaintiffs’ motion for judgment as a matter of law on their
2 claims, WSC’s counterclaims, and the B&D Parties affirmative
3 defenses.

4 **WSC’s Law and Motion Matters**

5 1. Contemplated Motions

6 a. WSC’s motion to judgment as a matter of law on its
7 counterclaims, the B&D Parties’ claims, and the B&D Parties’
8 affirmative defenses.

9 **XIII. Bifurcation**

10 Bifurcation of the following issues for trial is ordered: None.

11 **XIV. Final Pretrial Conference Order Statement**

12 The foregoing admissions having been made by the parties, and the parties
13 having specified the foregoing issues remaining to be litigated, this Final Pretrial
14 Conference Order shall supersede the pleadings and govern the course of trial of
15 this case, unless modified to prevent manifest injustice.

16
17 Dated:

18
19
20

Hon. Douglas F. McCormick
United States District Judge

21
22 Approved as to form and content:

23
24 **MULCAHY LLP**

25
26 By: /s/ Kevin A. Adams
Kevin A. Adams

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6
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