

1 **MULCAHY LLP**

2 James M. Mulcahy (SBN 213547)

3 *jmulcahy@mulcahyllp.com*

4 Kevin A. Adams (SBN 239171)

5 *kadams@mulcahyllp.com*

6 Four Park Plaza, Suite 1230

7 Irvine, California 92614

8 Telephone: (949) 252-9377

9 Facsimile: (949) 252-0090

10 *Attorneys for Plaintiffs and Counter-Defendants*

11 John D. Vaughn, State Bar No. 171801

12 Jeffrey A. Feasby, State Bar No. 208759

13 **PEREZ WILSON VAUGHN & FEASBY**

14 750 B Street, Suite 3300

15 San Diego, California 92101

16 Telephone: 619.702-8044

17 Facsimile: 619-460-0437

18 E-Mail: *vaughn@perezwilson.com*

19 *Attorneys for Defendant and Counterclaimant*

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

22 BENNION & DEVILLE FINE  
23 HOMES, INC., a California  
24 corporation, BENNION & DEVILLE  
25 FINE HOMES SOCAL, INC., a  
26 California corporation, WINDERMERE  
27 SERVICES SOUTHERN  
28 CALIFORNIA, INC., a California  
corporation,

Plaintiffs,

v.

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

Defendant.

Case No. 5:15-CV-01921-DFM

*Hon. Douglas F. McCormick*

**PROPOSED JOINT JURY  
INSTRUCTIONS AND  
OBJECTIONS**

Complaint Filed: September 17, 2015

Counterclaim Filed: October 13, 2015

**AND RELATED COUNTERCLAIMS**

Pursuant to Local Rule 51-1 and this Court’s Minute Order of 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., Counter-Defendants Robert L. Bennion and Joseph R. Deville (all collectively, the “B&D Parties”), and Defendant/Counter-Claimant Windermere Real Estate Services Company’s (“WSC”) respectfully submit the following list of jury instructions and objections for the above-captioned matter. The parties reserve the right to submit further and additional instructions as may be required by the Court’s ruling or the presentation of evidence at trial.

**INDEX OF JURY INSTRUCTIONS<sup>1</sup>**

**I. PRELIMINARY INSTRUCTIONS**

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2	Claims and Defenses	Modified Ninth Circuit Manual of Model Jury Instructions No. 1.5	
3	Multiple Parties	CACI No. 103	
4	Nonperson Party	Modified CACI No. 104	
5	What is Evidence?	Ninth Circuit Manual of Model Jury Instructions No. 1.9	
6	What is not Evidence?	Ninth Circuit Manual of	

<sup>1</sup> All proposed jury instructions are joint instructions unless otherwise stated in the title of the proposed instruction.

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		Model Jury Instructions No. 1.10	
7	Evidence for Limited Purpose	Ninth Circuit Manual of Model Jury Instructions No. 1.11	
8	Direct and Circumstantial Evidence	Ninth Circuit Manual of Model Jury Instructions No. 1.12	
9	Ruling on Objections	Ninth Circuit Manual of Model Jury Instructions No. 1.13	
10	Credibility of Witnesses	Ninth Circuit Manual of Model Jury Instructions No. 1.14	
11	Conduct of the Jury	Ninth Circuit Manual of Model Jury Instructions No. 1.15	
12	No Transcript Available to Jury	Ninth Circuit Manual of Model Jury Instructions No. 1.17	
13	Wealth of Parties	CACI No. 117	
14	Bias	CACI No. 113	
15	Liability of Corporations—Scope of Authority Not in Issue	Ninth Circuit Manual of Model Jury Instructions No. 4.2	
16	Taking Notes	Ninth Circuit Manual of Model Jury Instructions No. 1.18	
17	Bench Conferences and Recesses	Ninth Circuit Manual of Model Jury Instructions No. 1.20	

1	18	Outline of Trial	Ninth Circuit Manual of Model Jury Instructions No. 1.21	
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4 **II. INSTRUCTIONS ON EVIDENCE**

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22	24	Use of Requests for Admission [IF NECESSARY]	Ninth Circuit Manual of Model Jury Instructions No. 2.12	
25	25	Expert Opinion	Modified Ninth Circuit Manual of Model Jury Instructions No. 2.13	
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10  
11 DATED: June 11, 2018

**MULCAHY LLP**

12  
13 By: /s/ Kevin A. Adams  
14 Kevin A. Adams  
15 *Attorneys for Plaintiffs/Counter-*  
16 *Defendants Bennion & Deville Fine*  
17 *Homes, Inc., Bennion & Deville Fine*  
18 *Homes SoCal, Inc., Windermere*  
19 *Services Southern California, Inc.,*  
20 *and Counter-Defendants Robert L.*  
21 *Bennion and Joseph R. Deville*

22  
23 DATED: June 11, 2018

**PEREZ WILSON VAUGHN & FEASBY**

24 By: /s/ Jeffery Feasby  
25 Jeffery Feasby  
26 Attorneys for  
27 Windermere Real Estate Services Company  
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### 1.3 DUTY OF JURY

Members of the jury: You are now the jury in this case. It is my duty to instruct you on the law.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

At the end of the trial I will give you final instructions. It is the final instructions that will govern your duties.

Please do not read into these instructions, or anything I may say or do, that I have an opinion regarding the evidence or what your verdict should be.

Given as proposed \_\_\_\_\_

Given as modified \_\_\_\_\_

Refused \_\_\_\_\_

Withdrawn \_\_\_\_\_





1 Given as modified \_\_\_\_\_

2 Refused \_\_\_\_\_

3 Withdrawn \_\_\_\_\_

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**STATEMENT OF LAW**

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The B&D Parties contend that their proposed instruction more accurately and clearly expresses the parties' claims and defenses.

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1                   **WSC’s Proposed Instruction 1.5B CLAIMS AND DEFENSES**  
2                   **[MODIFIED]**

3                   To help you follow the evidence, I will give you a brief summary of the  
4                   positions of the parties:

5                   There are three plaintiffs and counter-defendants in this case: Windermere  
6                   Services Southern California, Inc., Bennion & Deville Fine Homes, Inc., and  
7                   Bennion & Deville Fine Homes SoCal, Inc. Plaintiff Windermere Services  
8                   Southern California, Inc. is a former area representative of Windermere for the  
9                   Southern California region. Plaintiffs Bennion & Deville Fine Homes, Inc. and  
                    Bennion & Deville Fine Homes SoCal, Inc. are former Windermere franchisees.

10                  The defendant and counterclaimant in this case is Windermere Real Estate  
11                  Services Company, also known as Windermere. Windermere is the franchisor of  
12                  the Windermere Real Estate franchise system.

13                  There are two additional counter-defendants in this case: Robert Bennion  
14                  and Joseph Deville who are the owners of the three plaintiffs.

15                  The three plaintiffs collectively filed suit against Windermere but their  
16                  claims are separate and distinct.

17                  Plaintiff Windermere Services Southern California, Inc. claims that  
18                  Windermere breached the express and implied terms of the parties’ Area  
19                  Representation Agreement.

20                  Plaintiffs Bennion & Deville Fine Homes, Inc. and Bennion & Deville Fine  
21                  Homes SoCal, Inc. claim that Windermere breached the express and implied terms  
22                  of their respective franchise agreements.

23                  Windermere denies each of the plaintiffs’ claims.

24                  Each of the plaintiffs has the burden of proving their respective claims.

25                  Windermere has filed counterclaims against Windermere Services Southern  
26                  California, Inc., Bennion & Deville Fine Homes, Inc., Bennion & Deville Fine  
27                  Homes SoCal, Inc., Mr. Bennion, and Mr. Deville. Mr. Bennion and Mr. Deville  
28                  are the owners of the three plaintiffs. Windermere claims that the counter-  
                    defendants breached their contracts with Windermere.

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Each of the counter-defendants deny Windermere's counterclaims.

Windermere has the burden of proof on its counterclaims.

Given as proposed	_____
Given as modified	_____
Refused	_____
Withdrawn	_____

**CACI 103 – MULTIPLE PARTIES**

There are three plaintiffs and one counter-claimant in this trial. You should decide the case of each plaintiff and each counter-claimant separately as if it were a separate lawsuit. Each plaintiff and counter-claimant is entitled to separate consideration of its claims.

There is one defendant and five counter-defendants in this trial. You should decide the case against each defendant and each counter-defendant separately as if it were a separate lawsuit. Each defendant and counter-defendant is entitled to separate consideration of his or her own defenses.

Unless I tell you otherwise, all instructions apply to each plaintiff, counter-claimant, defendant, and counter-defendant.

Given as proposed	_____
Given as modified	_____
Refused	_____
Withdrawn	_____

**CACI 104 – NONPERSON PARTY [MODIFIED]**

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Several corporations are parties in this lawsuit. They are Bennion & Deville Fine Homes, Inc., Bennion & Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc., and Windermere Real Estate Services Company. Each of these entities is entitled to the same fair and impartial treatment that you would give to an individual. You must decide this case with the same fairness that you would use if you were deciding the case between individuals.

When I use words like “person” or “he” or “she” in these instructions to refer to a party, those instructions also apply to the corporate parties.

Given as proposed	_____
Given as modified	_____
Refused	_____
Withdrawn	_____

1 **1.9 WHAT IS EVIDENCE**

2 The evidence you are to consider in deciding what the facts are consists of:

- 3 1. the sworn testimony of any witness;
- 4
- 5 2. the exhibits that are admitted into evidence;
- 6
- 7 3. any facts to which the lawyers have agreed; and
- 8 4. any facts that I may instruct you to accept as proved.
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11 Given as proposed \_\_\_\_\_

12 Given as modified \_\_\_\_\_

13 Refused \_\_\_\_\_

14 Withdrawn \_\_\_\_\_

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1 **1.10 WHAT IS NOT EVIDENCE**

2 In reaching your verdict, you may consider only the testimony and exhibits  
3 received into evidence. Certain things are not evidence, and you may not consider  
4 them in deciding what the facts are. I will list them for you:

- 5 (1) Arguments and statements by lawyers are not evidence. The lawyers  
6 are not witnesses. What they may say in their opening statements,  
7 closing arguments and at other times is intended to help you interpret  
8 the evidence, but it is not evidence. If the facts as you remember them  
9 differ from the way the lawyers have stated them, your memory of  
10 them controls.
- 11 (2) Questions and objections by lawyers are not evidence. Attorneys have  
12 a duty to their clients to object when they believe a question is  
13 improper under the rules of evidence. You should not be influenced  
14 by the objection or by the court’s ruling on it.
- 15 (3) Testimony that is excluded or stricken, or that you are instructed to  
16 disregard, is not evidence and must not be considered. In addition  
17 some evidence may be received only for a limited purpose; when I  
18 instruct you to consider certain evidence only for a limited purpose,  
19 you must do so and you may not consider that evidence for any other  
20 purpose.
- 21 (4) Anything you may see or hear when the court was not in session is not  
22 evidence. You are to decide the case solely on the evidence received  
23 at the trial.

24 Given as proposed \_\_\_\_\_  
25 Given as modified \_\_\_\_\_  
26 Refused \_\_\_\_\_  
27 Withdrawn \_\_\_\_\_  
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1 **1.11 EVIDENCE FOR LIMITED PURPOSE**

2 Some evidence may be admitted only for a limited purpose.

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4 When I instruct you that an item of evidence has been admitted only for a  
5 limited purpose, you must consider it only for that limited purpose and not for any  
6 other purpose.

7 Given as proposed \_\_\_\_\_

8 Given as modified \_\_\_\_\_

9 Refused \_\_\_\_\_

10 Withdrawn \_\_\_\_\_

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1 **1.12 DIRECT AND CIRCUMSTANTIAL EVIDENCE**

2 Evidence may be direct or circumstantial. Direct evidence is direct proof of  
3 a fact, such as testimony by a witness about what that witness personally saw or  
4 heard or did. Circumstantial evidence is proof of one or more facts from which  
5 you could find another fact. You should consider both kinds of evidence. The law  
6 makes no distinction between the weight to be given to either direct or  
7 circumstantial evidence. It is for you to decide how much weight to give to any  
8 evidence.

- 9 Given as proposed \_\_\_\_\_  
10 Given as modified \_\_\_\_\_  
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### 1.13 RULING ON OBJECTIONS

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2 There are rules of evidence that control what can be received into evidence.  
3 When a lawyer asks a question or offers an exhibit into evidence and a lawyer on  
4 the other side thinks that it is not permitted by the rules of evidence, that lawyer  
5 may object. If I overrule the objection, the question may be answered or the  
6 exhibit received. If I sustain the objection, the question cannot be answered, and  
7 the exhibit cannot be received. Whenever I sustain an objection to a question, you  
8 must ignore the question and must not guess what the answer might have been.

9 Sometimes I may order that evidence be stricken from the record and that  
10 you disregard or ignore that evidence. That means when you are deciding the case,  
11 you must not consider the stricken evidence for any purpose.

12 Given as proposed \_\_\_\_\_  
13 Given as modified \_\_\_\_\_  
14 Refused \_\_\_\_\_  
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## 1.14 CREDIBILITY OF WITNESSES

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2 In deciding the facts in this case, you may have to decide which testimony to  
3 believe and which testimony not to believe. You may believe everything a witness  
4 says, or part of it, or none of it.

5 In considering the testimony of any witness, you may take into account:

- 6 (1) the opportunity and ability of the witness to see or hear or know the  
7 things testified to;
- 8 (2) the witness's memory;
- 9 (3) the witness's manner while testifying;
- 10 (4) the witness's interest in the outcome of the case, if any;
- 11 (5) the witness's bias or prejudice, if any;
- 12 (6) whether other evidence contradicted the witness's testimony;
- 13 (7) the reasonableness of the witness's testimony in light of all the  
14 evidence; and
- 15 (8) any other factors that bear on believability.

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19 Sometimes a witness may say something that is not consistent with  
20 something else he or she said. Sometimes different witnesses will give different  
21 versions of what happened. People often forget things or make mistakes in what  
22 they remember. Also, two people may see the same event but remember it  
23 differently. You may consider these differences, but do not decide that testimony  
is untrue just because it differs from other testimony.

24 However, if you decide that a witness has deliberately testified untruthfully  
25 about something important, you may choose not to believe anything that witness  
26 said. On the other hand, if you think the witness testified untruthfully about some  
27 things but told the truth about others, you may accept the part you think is true and  
ignore the rest.

28 The weight of the evidence as to a fact does not necessarily depend on the

number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

Given as proposed \_\_\_\_\_

Given as modified \_\_\_\_\_

Refused \_\_\_\_\_

Withdrawn \_\_\_\_\_

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## 1.15 CONDUCT OF THE JURY

I will now say a few words about your conduct as jurors.

First, keep an open mind throughout the trial, and do not decide what the verdict should be until you and your fellow jurors have completed your deliberations at the end of the case.

Second, because you must decide this case based only on the evidence received in the case and on my instructions as to the law that applies, you must not be exposed to any other information about the case or to the issues it involves during the course of your jury duty. Thus, until the end of the case or unless I tell you otherwise:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, text messaging, or any internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, or any other forms of social media. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, the media or press, and the people involved in the trial, although you may notify your family and your employer that you have been seated as a juror in the case, and how long you expect the trial to last. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and report the contact to the court.

Because you will receive all the evidence and legal instruction you properly may consider to return a verdict: do not read, watch or listen to any news or media accounts or commentary about the case or anything to do with it, although I have no information that there will be news reports about this case; do not do any research, such as consulting dictionaries, searching the Internet, or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own. Do not visit or view any place discussed in this case, and do not use Internet programs or other

1 devices to search for or view any place discussed during the trial.  
2 Also, do not do any research about this case, the law, or the people  
3 involved—including the parties, the witnesses or the lawyers—until  
4 you have been excused as jurors. If you happen to read or hear  
5 anything touching on this case in the media, turn away and report it to  
6 me as soon as possible.

7 These rules protect each party’s right to have this case decided only on  
8 evidence that has been presented here in court. Witnesses here in court take an  
9 oath to tell the truth, and the accuracy of their testimony is tested through the trial  
10 process. If you do any research or investigation outside the courtroom, or gain any  
11 information through improper communications, then your verdict may be  
12 influenced by inaccurate, incomplete or misleading information that has not been  
13 tested by the trial process. Each of the parties is entitled to a fair trial by an  
14 impartial jury, and if you decide the case based on information not presented in  
15 court, you will have denied the parties a fair trial. Remember, you have taken an  
16 oath to follow the rules, and it is very important that you follow these rules.

17 A juror who violates these restrictions jeopardizes the fairness of these  
18 proceedings, and a mistrial could result that would require the entire trial process  
19 to start over. If any juror is exposed to any outside information, please notify the  
20 court immediately.

21 Given as proposed \_\_\_\_\_  
22 Given as modified \_\_\_\_\_  
23 Refused \_\_\_\_\_  
24 Withdrawn \_\_\_\_\_  
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**1.17 NO TRANSCRIPT AVAILABLE TO JURY**

I urge you to pay close attention to the trial testimony as it is given. During deliberations you will not have a transcript of the trial testimony.

Given as proposed \_\_\_\_\_

Given as modified \_\_\_\_\_

Refused \_\_\_\_\_

Withdrawn \_\_\_\_\_

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**CACI 117 – WEALTH OF PARTIES**

In reaching a verdict, you may not consider the wealth or poverty of any party. The parties’ wealth or poverty is not relevant to any of the issues that you must decide.

- Given as proposed \_\_\_\_\_
- Given as modified \_\_\_\_\_
- Refused \_\_\_\_\_
- Withdrawn \_\_\_\_\_

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**CACI 113 – BIAS**

Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.

As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party or witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, or socioeconomic status.

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.

- Given as proposed \_\_\_\_\_
- Given as modified \_\_\_\_\_
- Refused \_\_\_\_\_
- Withdrawn \_\_\_\_\_



## 1.18 TAKING NOTES

1  
2 If you wish, you may take notes to help you remember the evidence. If you  
3 do take notes, please keep them to yourself until you go to the jury room to decide  
4 the case. Do not let notetaking distract you. When you leave, your notes should be  
5 left in the [courtroom] [jury room] [envelope in the jury room]. No one will read  
6 your notes.

7 Whether or not you take notes, you should rely on your own memory of the  
8 evidence. Notes are only to assist your memory. You should not be overly  
9 influenced by your notes or those of other jurors.

10 Given as proposed \_\_\_\_\_  
11 Given as modified \_\_\_\_\_  
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1 **1.20 BENCH CONFERENCES AND RECESSES**

2 From time to time during the trial, it may become necessary for me to talk  
3 with the attorneys out of the hearing of the jury, either by having a conference at  
4 the bench when the jury is present in the courtroom, or by calling a recess. Please  
5 understand that while you are waiting, we are working. The purpose of these  
6 conferences is not to keep relevant information from you, but to decide how certain  
7 evidence is to be treated under the rules of evidence and to avoid confusion and  
8 error.

9 Of course, we will do what we can to keep the number and length of these  
10 conferences to a minimum. I may not always grant an attorney's request for a  
11 conference. Do not consider my granting or denying a request for a conference as  
12 any indication of my opinion of the case or of what your verdict should be.

13 Given as proposed \_\_\_\_\_  
14 Given as modified \_\_\_\_\_  
15 Refused \_\_\_\_\_  
16 Withdrawn \_\_\_\_\_  
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1 **1.21 OUTLINE OF TRIAL**

2 Trials proceed in the following way: First, each side may make an opening  
3 statement. An opening statement is not evidence. It is simply an outline to help you  
4 understand what that party expects the evidence will show. A party is not required  
5 to make an opening statement.

6 The plaintiff will then present evidence, and counsel for the defendant may  
7 cross-examine. Then the defendant may present evidence, and counsel for the  
8 plaintiff may cross-examine.

9 After the evidence has been presented, I will instruct you on the law that  
10 applies to the case and the attorneys will make closing arguments.

11 After that, you will go to the jury room to deliberate on your verdict.

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13 Given as proposed \_\_\_\_\_

14 Given as modified \_\_\_\_\_

15 Refused \_\_\_\_\_

16 Withdrawn \_\_\_\_\_

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**CACI 200 OBLIGATION TO PROVE—MORE  
LIKELY TRUE THAN NOT TRUE**

A party must persuade you, by the evidence presented in court, that what he or she is required to prove is more likely to be true than not true. This is referred to as “the burden of proof.”

After weighing all of the evidence, if you cannot decide that something is more likely to be true than not true, you must conclude that the party did not prove it. You should consider all the evidence, no matter which party produced the evidence.

In criminal trials, the prosecution must prove that the defendant is guilty beyond a reasonable doubt. But in civil trials, such as this one, the party who is required to prove something need prove only that it is more likely to be true than not true.

- Given as proposed \_\_\_\_\_
- Given as modified \_\_\_\_\_
- Refused \_\_\_\_\_
- Withdrawn \_\_\_\_\_

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1 **B&D Parties Proposed Instruction CACI 205 FAILURE TO EXPLAIN OR**  
2 **DENY EVIDENCE**

3 If a party failed to explain or deny evidence against it when it could  
4 reasonably be expected to have done so based on what it knew, you may consider  
5 its failure to explain or deny in evaluating that evidence.

6 It is up to you to decide the meaning and importance of the failure to explain  
7 or deny evidence against the party.

8 Given as proposed \_\_\_\_\_  
9 Given as modified \_\_\_\_\_  
10 Refused \_\_\_\_\_  
11 Withdrawn \_\_\_\_\_

12  
13 **STATEMENT OF LAW AND DIRECTIONS FOR USE**

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15 This instruction should be given only if there is a failure to deny or explain a  
16 fact that is material to the case.

17 **Sources and Authority**

- 18 • Failure to Explain or Deny. California Evidence Code § 413.

19 **Secondary Sources**

20 3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, § 129

21 7 Witkin, California Procedure (5th ed. 2008) Trial, § 302

22 Cotchett, California Courtroom Evidence, § 11.04 (Matthew Bender)

23 48 California Forms of Pleading and Practice, Ch. 551, Trial, § 551.93[3]  
24 (Matthew Bender)

25 4 California Trial Guide, Unit. 90, Closing Argument, § 90.30[2] (Matthew  
26 Bender)

27 California Judges Benchbook: Civil Proceedings—Trial (2d ed.) § 12.10 (Cal  
28 CJER 2010)



## **2.2 STIPULATIONS OF FACT**

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2       The parties have agreed to certain facts [to be placed in evidence as Exhibit  
3 \_\_\_] [that will be read to you]. You must therefore treat these facts as having been  
4 proved.  
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1           **2.4 DEPOSITION IN LIEU OF LIVE TESTIMONY [IF NECESSARY]**

2           A deposition is the sworn testimony of a witness taken before trial. The  
3 witness is placed under oath to tell the truth and lawyers for each party may ask  
4 questions. The questions and answers are recorded. When a person is unavailable  
5 to testify at trial, the deposition of that person may be used at the trial.

6           The deposition of [*name of witness*] was taken on [*date*]. Insofar as possible,  
7 you should consider deposition testimony, presented to you in court in lieu of live  
8 testimony, in the same way as if the witness had been present to testify.

9           Do not place any significance on the behavior or tone of voice of any person  
10 reading the questions or answers.

11 Given as proposed           \_\_\_\_\_

12 Given as modified           \_\_\_\_\_

13 Refused                        \_\_\_\_\_

14 Withdrawn                    \_\_\_\_\_

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**2.9 IMPEACHMENT EVIDENCE—WITNESS**

The evidence that a witness lied under oath on a prior occasion may be considered, along with all other evidence, in deciding whether or not to believe the witness and how much weight to give to the testimony of the witness and for no other purpose.

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Given as modified \_\_\_\_\_

Refused \_\_\_\_\_

Withdrawn \_\_\_\_\_

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**2.11 USE OF INTERROGATORIES [IF NECESSARY]**

Evidence [was] presented to you in the form of answers of one of the parties to written interrogatories submitted by the other side. These answers were given in writing and under oath before the trial in response to questions that were submitted under established court procedures. You should consider the answers, insofar as possible, in the same way as if they were made from the witness stand.

Given as proposed \_\_\_\_\_

Given as modified \_\_\_\_\_

Refused \_\_\_\_\_

Withdrawn \_\_\_\_\_

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**2.12 USE OF REQUESTS FOR ADMISSION [IF NECESSARY]**

Evidence was presented to you in the form of admissions to the truth of certain facts. These admissions were given in writing before the trial, in response to requests that were submitted under established court procedures. You must treat these facts as having been proved.

- Given as proposed \_\_\_\_\_
- Given as modified \_\_\_\_\_
- Refused \_\_\_\_\_
- Withdrawn \_\_\_\_\_

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**2.13 EXPERT OPINION [MODIFIED]**

You have heard testimony from Peter Wrobel, Neal Beaton, and David Holmes who testified to opinions and the reasons for their opinions. This opinion testimony is allowed, because of the education or experience of these witness.

Such opinion testimony should be judged like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering each witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

- Given as proposed \_\_\_\_\_
- Given as modified \_\_\_\_\_
- Refused \_\_\_\_\_
- Withdrawn \_\_\_\_\_

1       **CACI 220 EXPERTS—QUESTIONS CONTAINING ASSUMED FACTS**

2               The law allows expert witnesses to be asked questions that are based on  
3 assumed facts. These are sometimes called “hypothetical questions.”

4               In determining the weight to give to the expert's opinion that is based on the  
5 assumed facts, you should consider whether the assumed facts are true.

6  
7 Given as proposed               \_\_\_\_\_

8 Given as modified               \_\_\_\_\_

9 Refused                               \_\_\_\_\_

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1 **CACI 221 CONFLICTING EXPERT TESTIMONY**

2 If the expert witnesses disagreed with one another, you should weigh each  
3 opinion against the others. You should examine the reasons given for each opinion  
4 and the facts or other matters that each witness relied on. You may also compare  
5 the experts' qualifications.

6 Given as proposed \_\_\_\_\_

7 Given as modified \_\_\_\_\_

8 Refused \_\_\_\_\_

9 Withdrawn \_\_\_\_\_

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1           **2.14 CHARTS AND SUMMARIES NOT RECEIVED IN EVIDENCE**

2           Certain charts and summaries not admitted into evidence have been shown  
3 to you in order to help explain the contents of books, records, documents, or other  
4 evidence in the case. Charts and summaries are only as good as the underlying  
5 evidence that supports them. You should, therefore, give them only such weight as  
6 you think the underlying evidence deserves.

7 Given as proposed                   \_\_\_\_\_

8 Given as modified                   \_\_\_\_\_

9 Refused                               \_\_\_\_\_

10 Withdrawn                           \_\_\_\_\_

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1                   **CACI 215 EXERCISE OF A COMMUNICATION PRIVILEGE**

2                   Parties have an absolute right not to disclose what they told their attorney in  
3 confidence because the law considers this information privileged. Do not consider,  
4 for any reason at all, the fact that a party does not disclose what they told their  
5 attorney. Do not discuss that fact during your deliberations or let it influence your  
6 decision in any way.

7 Given as proposed                   \_\_\_\_\_

8 Given as modified                   \_\_\_\_\_

9 Refused                                   \_\_\_\_\_

10 Withdrawn                               \_\_\_\_\_

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1       **CACI 300 BREACH OF CONTRACT—INTRODUCTION [MODIFIED]**

2       There are several breach of contract claims at issue in this case. Each will be  
3       summarized below:

4       **Number 1.**

5  
6       Windermere Services Southern California, Inc. claims that it and Windermere  
7       entered into an Area Representation Agreement that allowed Windermere Services  
8       Southern California, Inc. to serve as Windermere’s area representative for the  
9       Southern California region.

10       Windermere Services Southern California, Inc. claims that Windermere breached  
11       the following sections of this contract:

- 12           i.    Section 2, for failing to provide Services SoCal with the uninterrupted  
13           right to offer Windermere franchised businesses in Southern California;
- 14           ii.   Section 4.2, for failing to pay Services SoCal the termination fee  
15           following termination without cause;
- 16           iii.   Section 7, for failing to promptly and diligently commence and pursue  
17           the preparation and filing of all franchise registration filings required  
18           under California law and/or the United States of America;
- 19           iv.    Section 7, for failing to maintain the registration of the Southern  
20           California FDD;
- 21           v.    Section 10, for depriving Services SoCal of its right to offer new  
22           Windermere franchises rendering it unable to collect initial franchise fees  
23           and continuing license fees from new franchisees; and
- 24           vi.    Exhibit A, § 3, by attempting to terminate the Area Representation  
25           Agreement under the pretense that Services SoCal was the “guarantor” of  
26           the franchise fees owed by the franchisees in the Southern California  
27           region.

28       Windermere Services Southern California, Inc. also claims that Windermere’s  
29       breach of this contract caused harm to Windermere Services Southern California,  
30       Inc. for which Windermere should pay.

1 Windermere denies each of the above breaches.

2  
3 **Number 2.**

4 Bennion & Deville Fine Homes, Inc. claims that it and Windermere entered into a  
5 franchise agreement allowing Bennion & Deville Fine Homes, Inc. to be a  
6 Windermere franchisee.

7 Bennion & Deville Fine Homes, Inc. claims that Windermere breached the  
8 following sections of this contract, as amended:

- 9 i. Section 4, for failing to take necessary action (legal or otherwise) to  
10 prevent infringement of the Windermere trademark or the related unfair  
11 competition faced by Plaintiffs in the Southern California region as a  
12 result of the Windermere Watch websites; and  
13 ii. Section 3(A) of the Modification Agreement, for failing to make  
14 commercially reasonable efforts to curtail Windermere Watch and related  
15 attacks on the Windermere brand in Southern California.

16 Bennion & Deville Fine Homes, Inc. also claims that Windermere's breach of this  
17 contract caused harm to Windermere Services Southern California, Inc. for which  
18 Windermere should pay.

19 Windermere denies each of the above breaches.

20 **Number 3.**

21 Bennion & Deville Fine Homes SoCal, Inc. claims that it and Windermere entered  
22 into a franchise agreement allowing Bennion & Deville Fine Homes SoCal, Inc. to  
23 be a Windermere franchisee.

24 Bennion & Deville Fine Homes SoCal, Inc. claims that Windermere breached the  
25 following sections of this contract, as amended:

- 26 i. Section 6, for failing to take necessary action (legal or otherwise) to  
27 prevent infringement of the Windermere trademark or the related unfair  
28 competition faced by Plaintiffs in the Southern California region as a  
result of the Windermere Watch websites; and

1           ii. Section 3(A) of the Modification Agreement, for failing to make  
2           commercially reasonable efforts to curtail Windermere Watch and related  
3           attacks on the Windermere brand in Southern California.

4           Bennion & Deville Fine Homes SoCal, Inc. also claims that Windermere's breach  
5           of this contract caused harm to Windermere Services Southern California, Inc. for  
6           which Windermere should pay.

7           Windermere denies each of the above breaches.

8           In response to each of the plaintiffs' claims above, Windermere asserts the  
9           affirmative defenses of third party actions, waiver, set-off, unclean hands, estoppel,  
10          and unjust enrichment.

11          **Number 4.**

12          Windermere claims that it is in a contractual relationship with each of the  
13          plaintiffs. Windermere also claims that plaintiffs' principals, Robert Bennion and  
14          Joseph Deville, are guarantors of those contracts.

15          Windermere claims that Bennion & Deville Fine Homes, Inc. and Bennion &  
16          Deville Fine Homes SoCal, Inc. breached their respective franchise contracts by  
17          failing to pay the amounts due under the contracts and for improper use of the  
18          Windermere trademark.

19          Windermere also claims that Windermere Services Southern California, Inc.  
20          breached the parties' Area Representation Agreement by failing to make  
21          reasonable efforts to collect franchise fees, technology fees, late fees, and interest  
22          from its related entities Bennion & Deville Fine Homes, Inc. and Bennion &  
23          Deville Fine Homes SoCal, Inc.

24          Windermere also claims that the counter-defendants' breaches of the contracts  
25          caused harm to Windermere for which the counter-defendants should pay.

26          The counter-defendants deny each of Windermere's claims.

27          Also, in response to each of Windermere's claims above, the counter-defendants  
28          assert the affirmative defenses of waiver, estoppel, offset, and justification.

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1           **CACI 318 INTERPRETATION—CONSTRUCTION BY CONDUCT**

2           In deciding what the words in a contract meant to the parties, you may  
3 consider how the parties acted after the contract was created but before any  
4 disagreement between the parties arose.

5 Given as proposed           \_\_\_\_\_

6 Given as modified           \_\_\_\_\_

7 Refused                       \_\_\_\_\_

8 Withdrawn                   \_\_\_\_\_

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1                   **The B&D Parties Proposed SPECIAL INSTRUCTION NO. 1 –**  
2                   **MODIFICATION—COURSE OF PERFORMANCE**

3                   The terms set forth in the contracts between the parties in this litigation may  
4 be explained or supplemented by course of performance. Course of performance is  
5 a sequence of conduct between the parties to a particular transaction that exists if:  
6 (1) the agreement of the parties with respect to the transaction involves repeated  
7 occasions for performance by a party; and (2) the other party, with knowledge of  
8 the nature of the performance and opportunity for objection to it, accepts the  
9 performance or acquiesces in it without objection.

9 Given as proposed                   \_\_\_\_\_

10 Given as modified                   \_\_\_\_\_

11 Refused                                   \_\_\_\_\_

12 Withdrawn                               \_\_\_\_\_

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14                   **STATEMENT OF LAW**

15 California Code Of Civil Procedure § 1856(c); California Commercial Code §  
16 1303(a).

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1                   **The B&D Parties’ Proposed Instruction CACI 321 EXISTENCE OF**  
2                   **CONDITION PRECEDENT DISPUTED [MODIFIED]**

3  
4                   Windermere Services Southern California, Inc. claims that the contract with  
5                   Windermere provides that the damages limitation at Section 4 of the Area  
6                   Representation Agreement is not enforceable unless Windermere first complied  
7                   with the notice and cure obligations identified in Section 4.

8                   Windermere Services Southern California, Inc. must prove that the parties  
9                   agreed to this condition. If Windermere Services Southern California, Inc. proves  
10                  this, then Windermere must prove that it complied with the notice and cure  
11                  obligations identified in Section 4 of the Area Representation Agreement for the  
12                  damages limitation at Section 4 to apply.

13                  If Windermere Services Southern California, Inc. does not prove that  
14                  Section 4 contain these conditions precedent, then Windermere was not required to  
15                  first comply with the notice and cure obligations before enforcing the damages  
16                  limitation at Section 4 of the Area Representation Agreement.

17                  Given as proposed                   \_\_\_\_\_

18                  Given as modified                   \_\_\_\_\_

19                  Refused                                   \_\_\_\_\_

20                  Withdrawn                               \_\_\_\_\_

21   **STATEMENT OF LAW AND DIRECTIONS FOR USE**

22                  This instruction should only be given if both the existence and the  
23                  occurrence of a condition precedent are contested. If only the occurrence of a  
24                  condition precedent is contested, use CACI No. 322, Occurrence of Agreed  
25                  Condition Precedent.

26                   **Sources and Authority**

- 27                   • Conditional Obligation. California Civil Code § 1434.
- 28                   • Condition Precedent. California Civil Code § 1436.
- “Under the law of contracts, parties may expressly agree that a right or  
                    duty is conditional upon the occurrence or nonoccurrence of an act or event.” *Platt  
Pacific, Inc. v. Andelson*, 6 Cal.4th 307, 313 (1993).

1 • “A conditional obligation is one in which ‘the rights or duties of any party  
2 thereto depend upon the occurrence of an uncertain event.’ ‘[P]arties may  
3 expressly agree that a right or duty is conditional upon the occurrence or  
4 nonoccurrence of an act or event.’ A condition in a contract may be a condition  
5 precedent, concurrent, or subsequent. ‘[A] condition precedent is either an act of a  
6 party that must be performed or an uncertain event that must happen before the  
7 contractual right accrues or the contractual duty arises.’ ” *JMR Construction Corp.*  
8 *v. Environmental Assessment & Remediation Management, Inc.*, 243 Cal.App.4th  
9 571, 593 (2015).

7 • “The existence of a condition precedent normally depends upon the intent  
8 of the parties as determined from the words they have employed in the contract.”  
9 *Karpinski v. Smitty’s Bar, Inc.*, 246 Cal.App.4th 456, 464 (2016).

9 • “[W]here defendant’s duty to perform under the contract is conditioned on  
10 the happening of some event, the plaintiff must prove the event transpired.”  
11 *Consolidated World Investments, Inc. v. Lido Preferred Ltd.*, 9 122 Cal.App.4th  
12 373, 380 (1992).

### 13 **Secondary Sources**

14 1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 780–791

15 13 California Forms of Pleading and Practice, Ch. 140, Contracts, §§ 140.44,

16 140.101 (Matthew Bender)

17 5 California Points and Authorities, Ch. 50, Contracts, §§ 50.20–50.22 (Matthew  
18 Bender)

19 27 California Legal Forms, Ch. 75, Formation of Contracts and Standard  
20 Contractual Provisions, § 75.230 (Matthew Bender)

21 2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, Suing or  
22 Defending Action for Breach of Contract, 22.19, 22.66  
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1 **CACI 320 INTERPRETATION—CONSTRUCTION AGAINST DRAFTER**

2 In determining the meaning of the words of the contract, you must first  
3 consider all of the other instructions that I have given you. If, after considering  
4 these instructions, you still cannot agree on the meaning of the words, then you  
5 should interpret the contract against the party that drafted the disputed words.

6 Given as proposed \_\_\_\_\_

7 Given as modified \_\_\_\_\_

8 Refused \_\_\_\_\_

9 Withdrawn \_\_\_\_\_

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1           **WSC Proposed Instruction CACI 336. AFFIRMATIVE DEFENSE—**  
2   **WAIVER [MODIFIED]**

3  
4           Windermere Real Estate Services Company claims that it did not have to  
5 undertake any further action after June 3, 2014 to attempt to curtail the anti-  
6 marketing activities undertaken by Gary Kruger and Windermere Watch  
7 because Bennion & Deville Fine Homes, Inc. and Bennion & Deville Fine  
8 Homes SoCal, Inc. gave up their right to have Windermere Real Estate Services  
9 Company perform this obligation. This is called a “waiver.”

10           To succeed, Windermere Real Estate Services Company must prove both  
11 of the following by clear and convincing evidence:

12           1. That Bennion & Deville Fine Homes, Inc. and Bennion & Deville Fine  
13 Homes SoCal, Inc. knew Windermere Real Estate Services Company was  
14 required to use commercially reasonable efforts to attempt to curtail the anti-  
15 marketing activities undertaken by Gary Kruger and Windermere Watch; and

16           2. That Bennion & Deville Fine Homes, Inc. and Bennion & Deville Fine  
17 Homes SoCal, Inc. freely and knowingly gave up their right to have Windermere  
18 Real Estate Services Company perform this obligation.

19           A waiver may be oral or written or may arise from conduct that shows  
20 that Bennion & Deville Fine Homes, Inc. and Bennion & Deville Fine Homes  
21 SoCal, Inc. gave up that right.

22           If Windermere Real Estate Services Company proves that Bennion &  
23 Deville Fine Homes, Inc. and Bennion & Deville Fine Homes SoCal, Inc. gave  
24 up their right to Windermere Real Estate Services Company’s performance of  
25 undertaking any further action to attempt to curtail the anti-marketing activities  
26 undertaken by Gary Kruger and Windermere Watch, then Windermere Real  
27 Estate Services Company was not required to perform this obligation.

28

1 **OBJECTION**

2 The B&D Parties object to the form of the instruction to the extent that it  
3 assumes facts in the instruction, including the fact that WSC took action to  
4 combat Windermere Watch prior to June 2014. We believe this is directly  
5 contradicted by the evidence. The B&D Parties also object to the proposed  
6 instruction to the extent that it is inconsistent with the law and would undermine  
7 the parties' integration clause in the Modification Agreement entered into in  
8 December 2012.

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1       **CACI NO. 325 BREACH OF IMPLIED COVENANT OF GOOD FAITH**  
2       **AND FAIR DEALING—ESSENTIAL FACTUAL ELEMENTS [MODIFIED]**

3       In every contract or agreement there is an implied promise of good faith and  
4       fair dealing. This means that each party will not do anything to unfairly interfere  
5       with the right of any other party to receive the benefit of the contract; however, the  
6       implied promise of good faith and fair dealing cannot create obligations that are  
7       inconsistent with the terms of the contract.

8       Each of the plaintiffs' claims that Windermere violated the duty to act fairly  
9       and in good faith. To establish these claims, each plaintiff must prove all of the  
10       following:

- 11       1. That the plaintiff and Windermere entered into a contract;
- 12       2. That the plaintiff did all, or substantially all of the significant things that  
13       the contract required it to do or that it was excused from having to do those  
14       things;
- 15       3. That all conditions required for Windermere's performance had occurred  
16       or were excused;
- 17       4. That Windermere unfairly interfered with the plaintiff's right to receive  
18       the benefit of the contract; and
- 19       5. That the plaintiff was harmed by Windermere's conduct.

20       Given as proposed       \_\_\_\_\_

21       Given as modified       \_\_\_\_\_

22       Refused       \_\_\_\_\_

23       Withdrawn       \_\_\_\_\_

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**5.1 DAMAGES—PROOF [MODIFIED]**

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for one of the parties, you must determine that party’s damages. The party seeking damages has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate the plaintiff for any injury you find was caused by the defendant.

It is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

- Given as proposed \_\_\_\_\_
- Given as modified \_\_\_\_\_
- Refused \_\_\_\_\_
- Withdrawn \_\_\_\_\_

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1 **5.3 DAMAGES—MITIGATION**

2 The party seeking damages has a duty to use reasonable efforts to mitigate  
3 damages. To mitigate means to avoid or reduce damages.

4 The party opposing the claimed damages has the burden of proving by a  
5 preponderance of the evidence:

- 6 1. that the party seeking damages failed to use reasonable efforts to  
7 mitigate damages; and  
8  
9 2. the amount by which damages would have been mitigated.

10 Given as proposed \_\_\_\_\_

11 Given as modified \_\_\_\_\_

12 Refused \_\_\_\_\_

13 Withdrawn \_\_\_\_\_

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1 **WSC Proposed Instruction CACI 372 COMMON COUNT: OPEN BOOK**  
2 **ACCOUNT**

3 Windermere Real Estate Services Company claims that Bennion & Deville  
4 Fine Homes, Inc. and/or Bennion & Deville Fine Homes SoCal, Inc. each owe it  
5 money on a open book accounts. To establish this claim, Windermere Real Estate  
6 Services Company must prove all of the following:

7 1. That Windermere Real Estate Services Company and Bennion & Deville  
8 Fine Homes, Inc. and/or Bennion & Deville Fine Homes SoCal, Inc. had financial  
9 transactions;

10 2. That Windermere Real Estate Services Company kept an account of the  
11 debits and credits involved in the transactions;

12 3. That Bennion & Deville Fine Homes, Inc. and/or Bennion & Deville Fine  
13 Homes SoCal, Inc. owes Windermere Real Estate Services Company money on the  
14 account; and

15 4. The amount of money that Bennion & Deville Fine Homes, Inc. and/or  
16 Bennion & Deville Fine Homes SoCal, Inc. owe Windermere Real Estate Services  
17 Company.

18 Given as proposed \_\_\_\_\_

19 Given as modified \_\_\_\_\_

20 Refused \_\_\_\_\_

21 Withdrawn \_\_\_\_\_

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1                   **1.4 DUTY OF JURY (COURT READS AND PROVIDES WRITTEN**  
2                   **INSTRUCTIONS AT END OF CASE)**

3                   Members of the Jury: Now that you have heard all of the evidence and the  
4 arguments of the attorneys, it is my duty to instruct you on the law that applies to  
5 this case.

6                   [Each of you has received a copy of these instructions that you may take  
7 with you to the jury room to consult during your deliberations.]

8 *or*

9                   [A copy of these instructions will be sent to the jury room for you to consult  
10 during your deliberations.]

11                   It is your duty to find the facts from all the evidence in the case. To those  
12 facts you will apply the law as I give it to you. You must follow the law as I give it  
13 to you whether you agree with it or not. And you must not be influenced by any  
14 personal likes or dislikes, opinions, prejudices, or sympathy. That means that you  
15 must decide the case solely on the evidence before you. You will recall that you  
16 took an oath to do so.

17                   Please do not read into these instructions or anything that I may say or do or  
18 have said or done that I have an opinion regarding the evidence or what your  
19 verdict should be.

20 Given as proposed                   \_\_\_\_\_

21 Given as modified                   \_\_\_\_\_

22 Refused                                   \_\_\_\_\_

23 Withdrawn                               \_\_\_\_\_

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1 **3.1 DUTY TO DELIBERATE**

2 Before you begin your deliberations, elect one member of the jury as your  
3 presiding juror. The presiding juror will preside over the deliberations and serve as  
4 the spokesperson for the jury in court.

5 You shall diligently strive to reach agreement with all of the other jurors if  
6 you can do so. Your verdict must be unanimous.

7 Each of you must decide the case for yourself, but you should do so only  
8 after you have considered all of the evidence, discussed it fully with the other  
9 jurors, and listened to their views.

10 It is important that you attempt to reach a unanimous verdict but, of course,  
11 only if each of you can do so after having made your own conscientious decision.  
12 Do not be unwilling to change your opinion if the discussion persuades you that  
13 you should. But do not come to a decision simply because other jurors think it is  
14 right, or change an honest belief about the weight and effect of the evidence simply  
to reach a verdict.

15 Given as proposed \_\_\_\_\_

16 Given as modified \_\_\_\_\_

17 Refused \_\_\_\_\_

18 Withdrawn \_\_\_\_\_

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### 3.2 CONSIDERATION OF EVIDENCE—CONDUCT OF THE JURY

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, via text messaging, or any Internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, or any other forms of social media. This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it[, although I have no information that there will be news reports about this case]; do not do any research, such as consulting dictionaries, searching the Internet, or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own. Do not visit or view any place discussed in this case, and do not use Internet programs or other devices to search for or view any place discussed during the trial. Also, do not do any research about this case, the law, or the people involved—including the parties, the witnesses or the lawyers—until you have been excused as jurors. If you happen to read or hear anything touching on this case in the media, turn away and report it to me as soon as possible.

These rules protect each party's right to have this case decided only on evidence that has been presented here in court. Witnesses here in court take an oath to tell the truth, and the accuracy of their testimony is tested through the trial process. If you do any research or investigation outside the courtroom, or gain any information through improper communications, then your verdict may be influenced by inaccurate, incomplete or misleading information that has not been

1 tested by the trial process. Each of the parties is entitled to a fair trial by an  
2 impartial jury, and if you decide the case based on information not presented in  
3 court, you will have denied the parties a fair trial. Remember, you have taken an  
4 oath to follow the rules, and it is very  
5 important that you follow these rules.

6 A juror who violates these restrictions jeopardizes the fairness of these  
7 proceedings, and a mistrial could result that would require the entire trial process  
8 to start over. If any juror is exposed to any outside information, please notify the  
9 court immediately.

10 Given as proposed \_\_\_\_\_  
11 Given as modified \_\_\_\_\_  
12 Refused \_\_\_\_\_  
13 Withdrawn \_\_\_\_\_

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### 3.3 COMMUNICATION WITH COURT

If it becomes necessary during your deliberations to communicate with me, you may send a note through the bailiff, signed by any one or more of you. No member of the jury should ever attempt to communicate with me except by a signed writing. I will not communicate with any member of the jury on anything concerning the case except in writing or here in open court. If you send out a question, I will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including the court—how the jury stands, whether in terms of vote count or otherwise, until after you have reached a unanimous verdict or have been discharged.

Given as proposed	_____
Given as modified	_____
Refused	_____
Withdrawn	_____



1 **3.3 READBACK OR PLAYBACK [IF NECESSARY]**

2 Comment

3 If during jury deliberations a request is made by the jury or by one or more  
4 jurors for a readback of a portion or all of a witness’s testimony, and the court in  
5 exercising its discretion determines after consultation with the lawyers that a  
6 readback should be allowed, the Committee recommends the following admonition  
7 be given in open court with both sides present:

8 Because a request has been made for a [readback] [playback] of the  
9 testimony of [*witness’s name*] it is being provided to you, but you are  
10 cautioned that all [readbacks] [playbacks] run the risk of distorting the  
11 trial because of overemphasis of one portion of the testimony.  
12 [Therefore, you will be required to hear all the witness’s testimony on  
13 direct and cross-examination, to avoid the risk that you might miss a  
14 portion bearing on your judgment of what testimony to accept as  
15 credible.] [Because of the length of the testimony of this witness,  
16 excerpts will be [read] [played].] The [readback] [playback] could  
17 contain errors. The [readback] [playback] cannot reflect matters of  
18 demeanor [, tone of voice,] and other aspects of the live testimony.  
19 Your recollection and understanding of the testimony controls.  
20 Finally, in your exercise of judgment, the testimony [read] [played]  
21 cannot be considered in isolation, but must be considered in the  
22 context of all the evidence presented.

23 Although a court has broad discretion to read back excerpts or the entire testimony  
24 of a witness when requested by a deliberating jury, precautionary steps should be  
25 taken. Absent the parties’ stipulation to a different procedure, the jury should be  
26 required to hear the readback in open court, with counsel for both sides present,  
27 and after giving the admonition set out above. *See United States v. Newhoff*, 627  
28 F.3d 1163, 1167 (9th Cir. 2010); *see also* JURY INSTRUCTIONS COMMITTEE  
OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES §  
5.1.C (2013).

Given as proposed \_\_\_\_\_  
Given as modified \_\_\_\_\_  
Refused \_\_\_\_\_  
Withdrawn \_\_\_\_\_

1 **3.5 RETURN OF VERDICT**

2 A verdict form has been prepared for you. After you have reached  
3 unanimous agreement on a verdict, your foreperson should complete the verdict  
4 form according to your deliberations, sign and date it, and advise the bailiff that  
5 you are ready to return to the courtroom.

6 Given as proposed \_\_\_\_\_

7 Given as modified \_\_\_\_\_

8 Refused \_\_\_\_\_

9 Withdrawn \_\_\_\_\_

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1                   **3.6 ADDITIONAL INSTRUCTIONS OF LAW [IF NECESSARY]**

2                   At this point I will give you an additional instruction. By giving an  
3 additional instruction at this time, I do not mean to emphasize this instruction over  
4 any other instruction.

5                   You are not to attach undue importance to the fact that this instruction was  
6 read separately to you. You must consider this instruction together with all of the  
7 other instructions that were given to you.

8                   *[Insert text of new instruction.]*

9                   You will now retire to the jury room and continue your deliberations.

10 Given as proposed                   \_\_\_\_\_

11 Given as modified                   \_\_\_\_\_

12 Refused                               \_\_\_\_\_

13 Withdrawn                           \_\_\_\_\_

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1 **3.7 DEADLOCK JURY [IF NECESSARY]**

2 Members of the jury, you have advised that you have been unable to agree  
3 upon a verdict in this case. I have decided to suggest a few thoughts to you.

4 As jurors, you have a duty to discuss the case with one another and to  
5 deliberate in an effort to reach a unanimous verdict if each of you can do so  
6 without violating your individual judgment and conscience. Each of you must  
7 decide the case for yourself, but only after you consider the evidence impartially  
8 with the other jurors. During your deliberations, you should not be unwilling to  
9 reexamine your own views and change your opinion if you become persuaded that  
10 it is wrong. However, you should not change an honest belief as to the weight or  
11 effect of the evidence solely because of the opinions of the other jurors or for the  
12 mere purpose of returning a verdict.

13 All of you are equally honest and conscientious jurors who have heard the  
14 same evidence. All of you share an equal desire to arrive at a verdict. Each of you  
15 should ask yourself whether you should question the correctness of your present  
16 position.

17 I remind you that in your deliberations you are to consider the instructions I  
18 have given you as a whole. You should not single out any part of any instruction,  
19 including this one, and ignore others. They are all equally important.

20 You may now return to the jury room and continue your deliberations.

21 Given as proposed \_\_\_\_\_  
22 Given as modified \_\_\_\_\_  
23 Refused \_\_\_\_\_  
24 Withdrawn \_\_\_\_\_  
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