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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. Manual L. Real

DEFENDANT AND COUNTER-CLAIMANT WINDERMERE REAL ESTATE SERVICES COMPANY'S MEMORANDUM OF CONTENTIONS OF LAW AND FACT

Courtroom 8

Trial Date: October 18, 2016

Complaint Filed: September 17, 2015

Pursuant to Local Rule 16-4 and the Court's Orders, Defendant and Counter-Claimant Windermere Real Estate Services Company ("WSC") respectfully submits the following Memorandum of Contentions of Fact and Law, addressing the claims and defenses of the parties as regards the trial scheduled to commence October 18, 2016.

I. INTRODUCTION

Counter-defendants Robert L. Bennion, Joseph R. Deville, Bennion & Deville Fine Homes, Inc., Bennion & Deville Fine Homes SoCal, Inc., and Windermere Services Southern California, Inc. owe Windermere Real Estate Services Company's ("WSC") over $1.2 million in fees related to their operation of Windermere franchises in Southern California. As a pre-emptive measure, Bennion & Deville Fine Homes, Inc. ("BDFH"), Bennion & Deville Fine Homes SoCal, Inc. ("BDFH So Cal"), and Windermere Services Southern California, Inc. ("WSSC") (collectively, "Plaintiffs"), cobbled together the underlying Complaint and won the race to the courthouse. The parties have exchanged over 130,000 pages of documents. Plaintiffs and Counter-defendants took five fact witness depositions and plan to take at least three more. In spite of all that discovery, Counter-defendants are unable to support their claims with admissible evidence.

WSC, on the other hand, has been able to establish that Counter-defendants owe over $1.2 million in unpaid franchise fees, technology fees, late fees, and interest. Further, when WSC prevails on its claims, it will be entitled to recover all of its attorneys' fees and costs expended in this matter.

II. PLAINTIFFS' CLAIMS

In their First Amended Complaint, Plaintiffs assert seven claims. In spite of the lack of evidentiary support, it appears Plaintiffs plan to move forward with all of these baseless claims.

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A. Plaintiffs' Claims and Elements

a. Claim 1: Breach of Coachella Valley Franchise Agreement

Summary: WSC and BDFH entered into the Coachella Valley Franchise Agreement on August 1, 2001. The agreement was amended on August 10, 2007 to add WSSC as a party. The agreement was amended again on December 18, 2012 pursuant to a modification agreement between WSC and BDFH wherein WSC agreed to waive over $863,000 in fees Plaintiffs owed at that time. Plaintiffs allege WSC breached the Coachella Valley Franchise Agreement by: (1) failing to provide a "variety of services" designed to enhance BDFH's "profitability;" (2) failing to provide BDFH with a viable "Windermere system;" (3) failing to take sufficient action to protect the Windermere trademark; and (4) by failing to take commercially reasonable efforts to curtail the impacts of a negative marketing campaign undertaken by a disgruntled former Windermere customer.

Elements: Plaintiffs have the burden to prove: (1) the existence of a contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damage to plaintiff therefrom. *Wall Street Network, Ltd. v. New York Times Co.*, 164 Cal.App.4th 1171, 1178 (2008).

Key Evidence In Opposition to Plaintiffs' Claim: The following evidence will preclude Plaintiffs from prevailing on their claim for breach of the Coachella Valley Franchise Agreement: (1) WSC provided all of the services identified in the agreement; (2) as the Area Representative, Plaintiffs' affiliated company, WSSC, was responsible for providing services to BDFH in Southern California; (3) BDFH failed to perform under the agreement, namely by failing and refusing to pay franchise fees, technology fees, late fees, and interest; (4) Plaintiffs agreed that WSC took all commercially reasonable efforts to combat the impact of a negative marketing campaign undertaken by a disgruntled former Windermere customer; and (5) BDFH was not damaged because it was using Windermere's trademark and the

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Windermere system until BDFH terminated the agreement in or around September 2015.

b. Claim 2: Breach of Implied Covenant of Good Faith and Fair Dealing re Coachella Valley Franchise Agreement

Summary: WSC and BDFH entered into the Coachella Valley Franchise Agreement on August 1, 2001. The agreement was amended on August 10, 2007 to add WSSC as a party. The agreement was amended again on December 18, 2012 pursuant to a modification agreement between WSC and BDFH wherein WSC agreed to waive over $863,000 in fees Plaintiffs owed at that time. Plaintiffs allege WSC breached the implied covenant of good faith and fair dealing regarding its performance of the Coachella Valley Franchise Agreement by: (1) failing to provide adequate technology in exchange for the technology fees BDFH agreed to pay WSC; (2) failing to provide BDFH with a viable "Windermere system;" (3) improperly recruiting BDHF independent contractors and employees to join WSC; and (4) terminating WSSC as the Southern California area representative.

Elements: To establish this claim, Plaintiffs bear the burden of proving all of the following: (1) the existence of a contract; (2) Plaintiffs' performance of excuse for non-performance; (3) that WSC unfairly interfered with Plaintiffs' right to receive the benefits of the contract; and (4) that Plaintiffs were harmed by WSC's conduct. California Civil Jury Instruction (CACI) 325.

Key Evidence in Opposition to Plaintiffs' Claims: The following evidence will preclude Plaintiffs from prevailing on their claim for breach of the Coachella Valley Franchise Agreement: (1) WSC provided all of the services identified in the agreement; (2) as the Area Representative, Plaintiffs' affiliated company, WSSC, was responsible for providing services to BDFH in Southern California; (3) BDFH failed to perform under the agreement, namely by failing and refusing to pay franchise fees, technology fees, late fees, and interest; (4) Plaintiffs agreed that WSC took all commercially reasonable efforts to combat the impact of a negative

marketing campaign undertaken by a disgruntled former Windermere customer; (5) WSC did not recruit any BDFH employees or independent contractors; (6) WSSC was terminated for cause, namely its failure to collect franchise fees, technology fees, late fees, and interest from all Southern California franchisees; and (7) BDFH was not damaged because it was using Windermere's trademark and the Windermere system until BDFH terminated the agreement in or around September 2015.

c. Claim 3: Breach of Area Representation Agreement

Summary: WSC and WSSC entered into the Area Representation Agreement on May 1, 2004. Pursuant to the agreement, WSSC agreed to, among other things, provide services to Southern California franchise owners, and collect and remit all franchise fees from Southern California franchise owners. In exchange for these duties and responsibilities, WSSC was entitled to retain 50% of all franchise fees collected from Southern California franchise owners. The Area Representation Agreement was non-exclusive, meaning WSC could enter into other Area Representation Agreements throughout California. Plaintiffs allege WSC breached the Area Representation Agreement by: (1) failing to provide WSSC with the "uninterrupted right" to offer Windermere franchise businesses in Southern California; (2) failing to provide a viable "Windermere System;" (3) failing to provide servicing support in conjunction with the marketing, promotion, and administration of the Windermere Trademark and Windermere System; (4) failing to make competent key people available to WSSC; (5) failing to pay WSSC the "termination fee" following termination of the agreement; (6); failing to promptly prepare and file necessary franchise registration filings in California; (7) failing to maintain the registration of the Southern California Franchise Disclosure Document ("FDD"); (8) depriving WSSC of its "right" to offer new Windermere franchises; (9) failing to provide adequate technology systems and charging too much for those

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technology services; and (10) by terminating the agreement because WSSC failed to collect franchise fees owed by its affiliated franchises.

Elements: Plaintiffs have the burden to prove: (1) the existence of a contract, (2) Plaintiffs' performance or excuse for nonperformance, (3) WSSC's breach, and (4) damage to Plaintiffs therefrom. *Wall Street Network, Ltd. v. New York Times Co.*, 164 Cal.App.4th 1171, 1178 (2008).

Key Evidence in Opposition to Plaintiffs' Claims: The following evidence will preclude Plaintiffs from prevailing on their claim for breach of the Area Representation Agreement: (1) the Area Representation Agreement was non-exclusive, and other entities, including WSC, could offer franchise agreements throughout all of California, including Southern California; (2) Plaintiffs were never prevented from offering Windermere franchises in Southern California; (3) any delay in filing franchise registration documents in California was caused by Plaintiffs' delay in submitting required audited financial statements; (4) WSC met its obligations to provide WSSC with access to the Windermere System in Southern California; (5) WSC terminated the Area Representation Agreement for cause, so WSSC is not entitled to any "termination fee;" (6) WSSC breached the Area Representation Agreement by failing to collect and remit all franchise fees, technology fees, late fees, and interest from Windermere franchises in Southern California; (7) WSSC was not charged any franchise or technology fees; (8) WSSC was not a Windermere franchise, rather it was an area representative; and (9) BDFH and BDFH SO Cal were being charged among the lowest franchise fees and technology fees of any Windermere franchise owners.

d. Claim 4: Breach of Implied Covenant of Good Faith and Fair Dealing re Area Representation Agreement

Summary: WSC and WSSC entered into the Area Representation Agreement on May 1, 2004. Pursuant to the agreement, WSSC agreed to, among other things, provide services to Southern California franchise owners, and collect and remit all

franchise fees from Southern California franchise owners. In exchange for these duties and responsibilities, WSSC was entitled to retain 50% of all franchise fees collected from Southern California franchise owners. The Area Representation Agreement was non-exclusive, meaning WSC could enter into other Area Representation Agreements throughout California. Plaintiffs allege WSC breached the Area Representation Agreement by: (1) failing to provide a viable "Windermere System;" (2) taking actions to damage the relationship between WSSC and Windermere franchise owners in Southern California; (3) soliciting WSSC's participation in offers and sales of franchises in violation of franchise laws; (4) making efforts to acquire WSSC's services and technology; and (5) failing to act in good faith.

Elements: To establish this claim, Plaintiffs bear the burden of proving all of the following: (1) the existence of a contract; (2) Plaintiffs' performance of excuse for non-performance; (3) that WSC unfairly interfered with Plaintiffs' right to receive the benefits of the contract; and (4) that Plaintiffs were harmed by WSC's conduct. California Civil Jury Instruction (CACI) 325.

Key Evidence in Opposition to Plaintiffs' Claim: The following evidence will preclude Plaintiffs from prevailing on their claim for breach of the Area Representation Agreement: (1) the Area Representation Agreement was non-exclusive, and other entities, including WSC, could offer franchise agreements throughout all of California, including Southern California; (2) Plaintiffs were never prevented from offering Windermere franchises in Southern California; (3) any delay in filing franchise registration documents in California was caused by Plaintiffs' delay in submitting required audited financial statements; (4) WSC met its obligations to provide WSSC with access to the Windermere System in Southern California; (5) WSC terminated the Area Representation Agreement for cause, so WSSC is not entitled to any "termination fee;" (6) WSSC breached the Area Representation Agreement by failing to collect and remit all franchise fees,

technology fees, late fees, and interest from Windermere franchises in Southern California; (7) WSSC was not charged any franchise or technology fees; (8) WSSC was not a Windermere franchise, rather it was an area representative; (9) BDFH and BDFH SO Cal were being charged among the lowest franchise fees and technology fees of any Windermere franchise owners; (10) other Southern California owners approached WSC to complain about the services WSSC was providing in Southern California; (11) other Southern California owners were surprised to learn about all of the technology, marketing, and educational opportunities WSC offered Windermere owners that WSSC failed and refused to offer during their tenure as the Southern California area representative; (12) WSC did not solicit any WSSC employees or independent contractors; (13) WSC acted in good faith throughout the term of the Area Representation Agreement; and (14) WSC did not solicit WSSC's participation in offers and sales of franchises in violation of franchise law.

e. Claim 5: Breach of Southern California Franchise Agreement

Summary: WSC, WSSC, and BDFH So Cal entered into the Southern California Franchise Agreement on March 29, 2011. The agreement was amended on December 18, 2012 pursuant to a modification agreement wherein WSC agreed to waive over $863,000 in fees Plaintiffs owed at that time. Plaintiffs allege WSC breached the Southern California Franchise Agreement by: (1) failing to provide BDFH So Cal with a viable "Windermere System;" (2) failing to provide "guidance" with respect to the "Windermere System;" (3) failing to take sufficient action to protect the Windermere trademark; and (4) by failing to take commercially reasonable efforts to curtail the impacts of a negative marketing campaign undertaken by a disgruntled former Windermere customer.

Elements: Plaintiffs have the burden to prove: (1) the existence of a contract, (2) Plaintiffs' performance or excuse for nonperformance, (3) WSC's breach, and (4) damage to Plaintiffs therefrom. *Wall Street Network, Ltd. v. New York Times Co.*, 164 Cal.App.4th 1171, 1178 (2008).

Key Evidence in Opposition to Plaintiffs' Claim: The following evidence will preclude Plaintiffs from prevailing on their claim for breach of the Southern California Franchise Agreement: (1) WSC provided all of the services identified in the agreement; (2) as the Area Representative, Plaintiffs' affiliated company, WSSC, was responsible for providing services to BDFH So Cal in Southern California; (3) BDFH So Cal failed to perform under the agreement, namely by failing and refusing to pay franchise fees, technology fees, late fees, and interest; (4) Plaintiffs agreed that WSC took all commercially reasonable efforts to combat the impact of a negative marketing campaign undertaken by a disgruntled former Windermere customer; and (5) BDFH So Cal was not damaged because it was using Windermere's trademark and the Windermere system until BDFH terminated the agreement in or around September 2015.

f. Claim 6: Breach of Implied Covenant of Good Faith and Fair Dealing re Southern California Franchise Agreement

Summary: WSC, WSSC, and BDFH So Cal entered into the Southern California Franchise Agreement on March 29, 2011. The agreement was amended on December 18, 2012 pursuant to a modification agreement wherein WSC agreed to waive over $863,000 in fees Plaintiffs owed at that time. Plaintiffs allege WSC breached the implied covenant of good faith and fair dealing regarding its performance of the Coachella Valley Franchise Agreement by: (1) failing to provide adequate technology in exchange for the technology fees BDFH So Cal agreed to pay WSC; (2) failing to provide BDFH with a viable "Windermere system;" (3) improperly recruiting BDHF independent contractors and employees to join WSC; and (4) terminating WSSC as the Southern California area representative.

Elements: To establish this claim, Plaintiffs bear the burden of proving all of the following: (1) the existence of a contract; (2) Plaintiffs' performance of excuse for non-performance; (3) that WSC unfairly interfered with Plaintiffs' right to

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receive the benefits of the contract; and (4) that Plaintiffs were harmed by WSC's conduct. California Civil Jury Instruction (CACI) 325.

Key Evidence in Opposition to Plaintiffs' Claims: The following evidence will preclude Plaintiffs from prevailing on their claim for breach of the Southern California Franchise Agreement: (1) WSC provided all of the services identified in the agreement; (2) as the Area Representative, Plaintiffs' affiliated company, WSSC, was responsible for providing services to BDFH So Cal in Southern California; (3) BDFH So Cal failed to perform under the agreement, namely by failing and refusing to pay franchise fees, technology fees, late fees, and interest; (4) Plaintiffs agreed that WSC took all commercially reasonable efforts to combat the impact of a negative marketing campaign undertaken by a disgruntled former Windermere customer; (5) WSC did not recruit any BDFH So Cal employees or independent contractors; (6) WSSC was terminated for cause, namely its failure to collect and remit franchise fees, technology fees, late fees, and interest from all Southern California franchisees; and (7) BDFH So Cal was not damaged because it was using Windermere's trademark and the Windermere system until BDFH terminated the agreement in or around September 2015.

g. Claim 7: Violation of California Franchise Relations Act

Summary: WSC and WSSC entered into the Area Representation Agreement on May 1, 2004. Pursuant to the agreement, WSSC agreed to, among other things, provide services to Southern California franchise owners, and collect and remit all franchise fees from Southern California franchise owners. In exchange for these duties and responsibilities, WSSC was entitled to retain 50% of all franchise fees collected from Southern California franchise owners. WSSC did not pay WSC any initial fee upon execution of the agreement, nor did it pay WSC any ongoing fee. Rather, it was allowed to retain the 50% of the franchise fees it collected from owners in Southern California. Plaintiffs allege WSC violated the California

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Franchise Relations Act by terminating the Area Representation Agreement without cause.

Elements: To establish this claim, Plaintiffs bear the burden of proving all of the following: (1) the existence of a franchisor/franchisee relationship between WSC and WSSC; and (2) WSC's termination of a franchise without good cause. Cal. Bus. & Prof. Code § 20020.

Key Evidence in Opposition to Plaintiffs' Claims: The following evidence will preclude Plaintiffs from prevailing on their claim for violation of the California Franchise Relations Act: (1) WSSC was not a franchise, it was an area representative; (2) WSSC did not pay WSC any initial franchise fee upon execution of the Area Representation Agreement, nor did it pay WSC any ongoing franchise fee; (3) WSSC breached the Area Representation Agreement by, among other things, failing and refusing to collect and remit franchise fees, technology fees, late fees, and interest from Southern California franchise owners; and (4) WSC terminated the Area Representation Agreement for good cause.

B. WSC's Counterclaims

a. Counterclaim 1: Breach of Coachella Valley Franchise Agreement

Summary: WSC and BDFH entered into the Coachella Valley Franchise Agreement on August 1, 2001. The agreement was amended on August 10, 2007 to add WSSC as a party. The agreement was amended again on December 18, 2012 pursuant to a modification agreement between WSC and BDFH wherein WSC agreed to waive over $800,000 in fees BDFH owed at that time. Pursuant to the Coachella Valley Franchise Agreement, BDFH agreed to pay to WSC monthly franchise fees and technology fees, and to the extent they failed to timely fulfill those obligations, BDFH agreed to pay late fees and interest. Counter-defendants breached the Coachella Valley Franchise Agreement by: (1) failing and refusing to

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pay franchise fees, technology fees, late fees, and interest to WSC since July 2014; and (2) intentionally misusing WSC's federally registered "Windermere" trademark.

Elements: WSC must prove: (1) the existence of a contract, (2) WSC's performance or excuse for nonperformance, (3) BDFH's breach, and (4) damage to WSC therefrom. *Wall Street Network, Ltd. v. New York Times Co.*, 164 Cal.App.4th 1171, 1178 (2008).

Key Evidence Supporting WSC's Claim: The following evidence supports WSC's claim that Counter-defendants breached the Coachella Valley Franchise Agreement: (1) WSC performed all of its obligations pursuant to the Coachella Valley Franchise Agreement; (2) WSSC was the area representative and services provider for BDFH, so any allegedly unsatisfactory services were being provided by WSSC rather than WSC; (3) BDFH agreed to pay WSC franchise fees, technology fees, late fees, and interest pursuant to the Coachella Valley Franchise Agreement;[1] (4) BDFH failed and refused to pay franchise fees, technology fees, late fees, and interest since July 2014; (5) BDFH terminated the Coachella Valley Franchise Agreement on September 30, 2015; (6) the Coachella Valley Franchise Agreement expressly prohibited BDFH from continuing to use the Windermere trademark following termination of the franchise agreement; and (7) following their termination of the Coachella Valley Franchise Agreement, BDFH continued to use, misuse, and misrepresent the Windermere trademark by, among other things, using the "Windermere" name in their URL and using the Windermere name and logo on their blog.

b. Counterclaim 2: Breach of Area Representation Agreement

Summary: WSC, Bennion, Deville, and WSSC entered into the Area Representation Agreement on May 1, 2004. Pursuant to the Area Representation

[1] Counter defendants Bennion and Deville guaranteed amounts owing under this agreement.

Agreement, WSSC agreed to, among other things, collect and remit all franchise fees, technology fees, administrative fees, late fees, and interest from Windermere franchisees in Southern California, provide "prompt, courteous and efficient service" to Windermere owners in Southern California, and to deal "fairly and honestly" with members of the Windermere system. Counter-defendants breached the Coachella Valley Franchise Agreement by: (1) failing and refusing to collect and remit franchise fees, technology fees, late fees, and interest to WSC since July 2014; and (2) intentionally misusing WSC's federally registered "Windermere" trademark.

Elements: WSC must prove: (1) the existence of a contract, (2) WSC's performance or excuse for nonperformance, (3) Counter-defendants' breach, and (4) damage to plaintiff therefrom. *Wall Street Network, Ltd. v. New York Times Co.*, 164 Cal.App.4th 1171, 1178 (2008).

Key Evidence Supporting WSC's Claim: The following evidence supports WSC's claim that Counter-defendants breached the Area Representation Agreement: (1) WSC performed all of its obligations pursuant to the Area Representation Agreement; (2) as the area representative, WSSC was required to collect and remit franchise fees, technology fees, late fees, and interest from Southern California franchisees; (3) WSSC did not make reasonable efforts to collect franchise fees, technology fees, late fees, and interest from its related entities, BDFH and BDFH So Cal; (4) WSSC failed to provide prompt, courteous, and efficient service to Southern California Windermere franchisees; (5) WSSC failed to educate Southern California franchisees about the technology, marketing, education, and training opportunities offered by WSC; (6) WSSC prohibited WSC employees from providing training to Southern California franchisees; (7) WSSC prohibited Southern California owners from accessing technology it was providing in its role as area representative; (8) WSSC, Bennion, and Deville, were competing against other Southern California franchisees for agents and real estate listings; (9) WSC terminated the Area Representation Agreement for cause on September 30, 2015;

(10) the Area Representation Agreement expressly prohibited Counter-defendants from continuing to use the Windermere trademark following termination of the franchise agreement; and (11) following the termination of the Area Representation Agreement, BDFH continued to use, misuse, and misrepresent the Windermere trademark by, among other things, using the "Windermere" name in their URL and using the Windermere name and logo on their blog.

c. Counterclaim 3: Breach of Southern California Franchise Agreement

Summary: On March 29, 2011, Bennion and Deville, through BDFH So Cal and WSSC, entered into the Southern California Franchise Agreement with WSC. The agreement was amended on August 10, 2007 to add WSSC as a party. The agreement was amended again on December 18, 2012 pursuant to a modification agreement between WSC and BDFH wherein WSC agreed to waive over $800,000 in fees Plaintiffs owed at that time. Pursuant to the Southern California Franchise Agreement, BDFH So Cal agreed to pay to WSC monthly franchise fees and technology fees, and to the extent they failed to timely fulfill those obligations, BDFH So Cal agreed to pay late fees and interest. Counter-defendants breached the Southern California Franchise Agreement by: (1) failing and refusing to pay franchise fees, technology fees, late fees, and interest to WSC since July 2014; and (2) intentionally misusing WSC's federally registered "Windermere" trademark.

Elements: WSC must prove: (1) the existence of a contract, (2) WSC's performance or excuse for nonperformance, (3) BDFH's breach, and (4) damage to WSC therefrom. *Wall Street Network, Ltd. v. New York Times Co.*, 164 Cal.App.4th 1171, 1178 (2008).

Key Evidence Supporting WSC's Claim: The following evidence supports WSC's claim that Counter-defendants breached the Southern California Franchise Agreement: (1) WSC performed all of its obligations pursuant to the Southern California Franchise Agreement; (2) WSSC was the area representative and services

provider for BDFH So Cal, so any allegedly unsatisfactory services were being provided by WSSC rather than WSC; (3) BDFH So Cal agreed to pay WSC franchise fees, technology fees, late fees, and interest pursuant to the Southern California Franchise Agreement;[2] (4) BDFH So Cal failed and refused to pay franchise fees, technology fees, late fees, and interest since July 2014; (5) BDFH So Cal terminated the Southern California Franchise Agreement on September 30, 2015; (6) the Southern California Franchise Agreement expressly prohibited BDFH So Cal from continuing to use the Windermere trademark following termination of the franchise agreement; and (7) following their termination of the Southern California Franchise Agreement, BDFH So Cal continued to use, misuse, and misrepresent the Windermere trademark by, among other things, using the "Windermere" name in their URL and using the Windermere name and logo on their blog.

d. Counterclaim 4: Breach of Modification Agreement

Summary: On December 18, 2012 WSC, WSSC, BDFH, BDFH So Cal, Bennion and Deville entered into a Modification Agreement that modified terms of the Coachella Valley and Southern California Franchise Agreements. Among other things, WSC agreed to waive over $800,000 in fees Counter-defendants owed at that time. In exchange for WSC agreeing to waive the unpaid fees and interest, Counter-defendants agreed to remain part of the Windermere system for five years. If Counter-defendants left before the five-year term expired, they agreed to repay a pro-rata share of the fees waived in the Modification Agreement. As of September 30, 2015, Counter-defendants owed WSC $386,056.57 in pro-rata fees waived pursuant to the Modification Agreement. Counter-defendants breached the Modification Agreement by: (1) failing and refusing to remain in the Windermere

[2] Counter defendants Bennion and Deville guaranteed amounts owing under this agreement

system through December 18, 2017; and (2) failing to repay the pro-rata share of fees waived pursuant to the Modification Agreement.

Elements: WSC must prove: (1) the existence of a contract, (2) WSC's performance or excuse for nonperformance, (3) BDFH's breach, and (4) damage to WSC therefrom. *Wall Street Network, Ltd. v. New York Times Co.*, 164 Cal.App.4th 1171, 1178 (2008).

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

e. Counterclaim 8: Open Book Account

Summary: Within the last four years, Counter-defendants became indebted to WSC on an open book account for money due in a sum of at least $1,208,655.43 plus interest, plus further amounts to be determined at trial. Specifically, Counter-defendants owe franchise fees, technology fees, late fees, and interest under the Coachella Valley and Southern California Franchise Agreements, and the pro-rata share of waived fees pursuant to the Modification Agreement.

Elements: WSC must prove: (1) WSC and Counter-defendants had financial transactions; (2) WSC kept an account of the credits and debits involved in the transactions; (3) that Counter-defendants owe WSC money on the account; and (4) the amount of money Counter-defendants owe WSC. CACI Instruction No. 372.

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

f. Counterclaim 9: Accounting

Summary: During the court of their existence, Counter-defendants have undertaken numerous sale transactions, and have received money from these sale transactions, a portion of which is due to WSC as provided for in the parties' various agreements. The amount of money due from Counter-defendants to WSC cannot be ascertained without an accounting of the receipts and disbursements of Counter-defendants to date. WSC repeatedly demanded that Counter-defendants account for the aforementioned transactions and pay the amount found due to WSC. To date, Counter-defendants have failed and refused to provide WSC with the requested information.

Elements: WSC must prove: (1) Counter-defendants were acting as an agent for WSC when it entered into sales transactions with franchisees and collected fees due and owing from franchisees; and (2) WSC cannot accurately ascertain the full amount due and owing from Counter-defendants without reviewing Counter-defendants' books and records. *Meixner v. Wells Fargo Bank NA*, 101 F. Supp. 3d 938, 961 (E.D. Cal. 2015).

Key Evidence Supporting WSC's Claim: The following evidence supports WSC's claim that Counter-defendants must provide WSC with an Accounting: (1)

WSSC was responsible for collecting and remitting franchise fees, technology fees, late fees, and interest from all Southern California franchisees; (2) Counter-defendants kept books and records of all their sales, all fees owed by Southern California franchisees, and all fees collected from Southern California franchisees; (3) BDFH and BDFH So Cal did not pay any franchise fees, technology fees, interest or late fees after June 2014; and (4) WSC cannot determine exactly what Counter-defendants collected or owe without reviewing their accounts and records.

C. <u>WSC's Affirmative Defenses</u>

a. Second Affirmative Defense: Uncertainty

The claims in Plaintiff's First Amended Complaint ("FAC") are so uncertain as to be unenforceable. The FAC's First Cause of Action is uncertain because the alleged breaches of the agreement at issue – as set forth in paragraph 151 – are not definite enough that a court can determine the scope of the duty owed by WSC. In addition, the limits of performance are not sufficiently defined to provide a rational basis for assessment of damages.

The FAC's Second Cause of Action is uncertain because the alleged breaches of the agreement at issue – as set forth in paragraph 158.a., a. [sic], and d. – are not definite enough that a court can determine the scope of the duty owed by WSC. In addition, the limits of performance are not sufficiently defined to provide a rational basis for assessment of damages.

The FAC's Third Cause of Action is uncertain because the alleged breaches of the agreement at issue – as set forth in paragraph 163.a., b., c., d., and i. – are not definite enough that a court can determine the scope of the duty owed by WSC. In addition, the limits of performance are not sufficiently defined to provide a rational basis for assessment of damages.

The FAC's Fourth Cause of Action is uncertain because the alleged breaches of the agreement at issue – as set forth in paragraph 170.a., and d. – are not definite enough that a court can determine the scope of the duty owed by WSC. In addition,

the limits of performance are not sufficiently defined to provide a rational basis for assessment of damages.

The FAC's Fifth Cause of Action is uncertain because the alleged breaches of the agreement at issue – as set forth in paragraph 175 – are not definite enough that a court can determine the scope of the duty owed by WSC. In addition, the limits of performance are not sufficiently defined to provide a rational basis for assessment of damages.

The FAC's Sixth Cause of Action is uncertain because the alleged breaches of the agreement at issue – as set forth in paragraph 181.a., e. [sic], and h. [sic] – are not definite enough that a court can determine the scope of the duty owed by WSC. In addition, the limits of performance are not sufficiently defined to provide a rational basis for assessment of damages.

b. Third Affirmative Defense: Statute of Limitation

As an element of their breach of contract claims, Plaintiffs claim that WSC failed to provide an adequate Windermere System and the technology provided was inadequate. To the extent Plaintiffs' claims are based on WSC's provision of the Windermere System and the quality of the technology WSC provided, those claims are barred by the applicable statute of limitations. The parties entered into the Windermere Real Estate License Agreement for Coachella Valley on August 1, 2001. To the extent any of the purported breaches occurred as set forth in paragraphs 151.a., b., and c., and 158a., and a. [sic] of the FAC, which WSC maintains it has not breached any terms of that agreement, those purported breaches would have first occurred at least four years prior to the commencement of this action.

The parties entered into the Windermere Real Estate Services Company Area Representation Agreement for The State of California on May 1, 2004. To the extent any of the purported breaches occurred as set forth in paragraphs 163.a., b., c., d., and i., and 170.a. of the First Amended Complaint, which WSC maintains it

has not breached any terms of that agreement, those purported breaches would have first occurred at least four years prior to the commencement of this action.

The parties entered into the Franchise License Agreement for Bennion & Deville Fine Homes SoCal., Inc. on March 29, 2011. To the extent any of the purported breaches occurred as set forth in paragraphs 175.a., b., and c., and 181.a. and e. [sic] of the First Amended Complaint, which WSC maintains it has not breached any terms of that agreement, those purported breaches would have first occurred at least four years prior to the commencement of this action.

Plaintiffs testified that the technology provided by WSC never met their standards, dating back to the commencement of the relationship in 2001. Consequently, any alleged breach occurred at least more than four years before the commencement of this action.

c. Fifth Affirmative Defense: Third Party Actions

Intervening actions of third parties act as the proximate cause of the alleged injury, and relieve the original actor of any liability. *Schrimscher v. Bryson*, 58 Cal. App. 3d 660, 664 (1976). As discussed above, Plaintiffs allege that WSC failed to take commercially reasonable actions to counteract the impact of a negative marketing campaign conducted by a disgruntled former customer, Mr. Kruger. In December 2012, WSC agreed to discharge the approximately $1 million debt owed by Plaintiffs and to make efforts to address Mr. Kruger's activities in exchange for Plaintiffs' express contractual commitment to remain Windermere franchisees for five (5) years. These agreements were memorialized in the parties' December 18, 2012 Agreement Modifying Windermere Real Estate Franchise License Agreements.

In or about February 2013, the parties, including at least two outside attorneys, participated in a substantive conference call in order to address what efforts should and should not be pursued to most effectively address Mr. Kruger's activities and the Windermere Watch website. During this call, all parties, including

the outside attorneys, agreed that (1) litigation would be ineffectual; and (2) no money would be paid to Mr. Kruger. Indeed, Deville was adamant that Mr. Kruger not receive a single dime from WSC. Upon group discussion and consideration, the parties agreed that the best solution was to engage in search engine optimization efforts ("SEO") to essentially "bury" or "push" the Windermere Watch website to later and less relevant search engine pages. It was then determined that for any SEO efforts to be successful, they would need to be undertaken by Plaintiffs pursuant to their own IT platforms. This was entirely appropriate given WSSC's obligations under the Area Representation Agreement.

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

The balance on a personal loan taken by Bennion and Deville was due and owing in full on March 1, 2014. At about that time, Bennion and Deville requested a 36-month extension of the loan. They also claimed they had spent significant sums on SEO efforts and demanded reimbursement from WSC. In June 2014, WSC agreed, among other things, to extend the loan for 36 months and to allow Plaintiffs to take a credit of $85,280.00 against past due franchise fees then due and owing to WSC as full reimbursement for the SEO and related Windermere Watch efforts. In exchange for these accommodations, Plaintiffs agreed, as is confirmed in June 3, 2014 correspondence, that WSC was not in breach of any obligations owed to Plaintiffs, that there was nothing more that WSC could or should be doing relative

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to Windermere Watch, and that Plaintiffs would bear the expense of any SEO efforts moving forward.

d. Sixth Affirmative Defense: Waiver

To establish its affirmative defense of waiver, WSC must prove Plaintiffs intentionally relinquished a known right with the intent to relinquish that right. *adidas-Am., Inc. v. Payless Shoesource, Inc.*, 546 F.Supp.2d 1029, 1074 (D. Or. 2008). Plaintiffs knowingly waived their claim that WSC failed to make commercially reasonable efforts to combat the effects of Windermere Watch on their business. To succeed on its Waiver affirmative defense, WSC must prove that Plaintiffs knew WSC was required to perform under the Modification Agreement, and knowingly waived any further performance. CACI Instruction No. 336.

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

In or about February 2013, the parties, including at least two outside attorneys, participated in a substantive conference call in order to address what efforts should and should not be pursued to most effectively address Mr. Kruger's activities and the Windermere Watch website. During this call, all parties, including the outside attorneys, agreed that (1) litigation would be ineffectual; and (2) no money would be paid to Mr. Kruger. Indeed, Deville was adamant that Mr. Kruger not receive a single dime from WSC. Upon group discussion and consideration, the parties agreed that the best solution was to engage in search engine optimization efforts ("SEO") to essentially "bury" or "push" the Windermere Watch website to later and less relevant search engine pages. After consultation with Bennion and Deville, WSC initially undertook the SEO efforts with the help of its affiliated

company, Windermere Solutions. However, as a practical matter, it was soon determined that for any SEO efforts to be successful, they would need to be undertaken by the B&D Parties pursuant to their own IT platforms. This was entirely appropriate given Windermere Services Southern California, Inc.'s obligations under the Area Representation Agreement.

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

The balance on Bennion and Deville's January 2009 $501,000.00 personal loan was due and owing in full on March 1, 2014. At about that time, Bennion and Deville requested a 36-month extension of the loan. They also claimed they had spent significant sums on SEO efforts and demanded reimbursement from WSC. In June 2014, WSC agreed, among other things, to extend the loan for 36 months and to allow Plaintiffs to take a credit of $85,280.00 against past due franchise fees then due and owing to WSC as full reimbursement for the SEO and related Windermere Watch efforts. In exchange for these accommodations, Plaintiffs agreed, as is confirmed in June 3, 2014 correspondence, that WSC was not in breach of any obligations owed to Plaintiffs, that there was nothing more that WSC could or should be doing relative to Windermere Watch, and that Plaintiffs would bear the expense of any SEO efforts moving forward. Consequently, Plaintiffs waived any claim that WSC had not taken commercially reasonable efforts to combat the effect of Windermere Watch on their business.

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e. Eighth Affirmative Defense: Set-Off

As discussed above, Counter-defendants owe WSC over $1.2 million dollars in unpaid fees pursuant to the agreements. To the extent Plaintiffs are able to prove their claims and are awarded damages, which is unlikely, WSC will be able to "set-off" the amounts Counter-defendants owe against any alleged damages Plaintiff experiences. 2 Cal. Affirmative Def. § 44:1 (2d ed.); *Harrison v. Adams*, 20 Ca1.2d 646, 648 (1942).

f. Ninth Affirmative Defense: Detrimental Reliance

WSC relied on Plaintiffs' promises that after WSC agreed to waive $85,280.00 in past due fees and extend the terms of a $501,000 personal loan to Plaintiffs, WSC had fulfilled its obligations regarding Mr. Kruger's negative marketing campaign. Based on this reliance, Plaintiffs are estopped from now claiming WSC failed to meet its obligations under the 2012 Modification Agreement.

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

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

efforts ("SEO") to essentially "bury" or "push" the Windermere Watch website to later and less relevant search engine pages. After consultation with Bennion and Deville, WSC initially undertook the SEO efforts with the help of its affiliated company, Windermere Solutions. However, as a practical matter, it was soon determined that for any SEO efforts to be successful, they would need to be undertaken by the B&D Parties pursuant to their own IT platforms. This was entirely appropriate given Windermere Services Southern California, Inc.'s obligations under the Area Representation Agreement.

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

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

g. Tenth Affirmative Defense: Unclean Hands

With regard to Windermere Watch, the filing of franchise disclosure documents, and the use of WSC's trademarks following the termination of the franchise agreements, principles of fairness dictate that Plaintiffs shall not recover anything from these alleged wrongs. To prevail on a claim, "a plaintiff [must] act fairly in the matter for which he seeks a remedy. He must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim." *Kendall-Jackson Winery, Ltd. v. Superior Court*, 76 Cal.App.4th 970, 978 (1999); see also Civ. Code § 3517 ("no one can take advantage of his own wrong").

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

In or about February 2013, the parties, including at least two outside attorneys, participated in a substantive conference call in order to address what efforts should and should not be pursued to most effectively address Mr. Kruger's activities and the Windermere Watch website. During this call, all parties, including the outside attorneys, agreed that (1) litigation would be ineffectual; and (2) no money would be paid to Mr. Kruger. Indeed, Deville was adamant that Mr. Kruger not receive a single dime from WSC. Upon group discussion and consideration, the parties agreed that the best solution was to engage in search engine optimization efforts ("SEO") to essentially "bury" or "push" the Windermere Watch website to later and less relevant search engine pages. After consultation with Bennion and Deville, WSC initially undertook the SEO efforts with the help of its affiliated company, Windermere Solutions. However, as a practical matter, it was soon

determined that for any SEO efforts to be successful, they would need to be undertaken by the B&D Parties pursuant to their own IT platforms. This was entirely appropriate given Windermere Services Southern California, Inc.'s obligations under the Area Representation Agreement.

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

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

With regard to the registration of the 2013 and 2014 FDDs for Southern California, the California Department of Business Oversight would not approve the renewal of WSC's Southern California registration without audited financial statements from WSC's Area Representative, Windermere Services Southern

California, Inc. In 2013 and 2014, Windermere Services Southern California, Inc. did not provide its audited financial statements on a timely basis despite repeated requests from WSC. Accordingly, delays in submitting the renewal franchise applications for Southern California in 2013 and 2014 were due, at least in part, to Windermere Services Southern California, Inc.'s failure to timely provide its audited financial statements.

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

h. Eleventh Affirmative Defense: Estoppel

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

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

In or about February 2013, the parties, including at least two outside attorneys, participated in a substantive conference call in order to address what efforts should and should not be pursued to most effectively address Mr. Kruger's activities and the Windermere Watch website. During this call, all parties, including the outside attorneys, agreed that (1) litigation would be ineffectual; and (2) no

money would be paid to Mr. Kruger. Indeed, Deville was adamant that Mr. Kruger not receive a single dime from WSC. Upon group discussion and consideration, the parties agreed that the best solution was to engage in search engine optimization efforts ("SEO") to essentially "bury" or "push" the Windermere Watch website to later and less relevant search engine pages. After consultation with Bennion and Deville, WSC initially undertook the SEO efforts with the help of its affiliated company, Windermere Solutions. However, as a practical matter, it was soon determined that for any SEO efforts to be successful, they would need to be undertaken by the B&D Parties pursuant to their own IT platforms. This was entirely appropriate given Windermere Services Southern California, Inc.'s obligations under the Area Representation Agreement.

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

The balance on Bennion and Deville's January 2009 $501,000.00 personal loan was due and owing in full on March 1, 2014. At about that time, Bennion and Deville requested a 36-month extension of the loan. They also claimed they had spent significant sums on SEO efforts and demanded reimbursement from WSC. In June 2014, WSC agreed, among other things, to extend the loan for 36 months and to allow Plaintiffs to take a credit of $85,280.00 against past due franchise fees then due and owing to WSC as full reimbursement for the SEO and related Windermere Watch efforts. In exchange for these accommodations, Plaintiffs agreed, as is confirmed in June 3, 2014 correspondence, that WSC was not in breach of any

obligations owed to Plaintiffs, that there was nothing more that WSC could or should be doing relative to Windermere Watch, and that Plaintiffs would bear the expense of any SEO efforts moving forward.

With regard to the registration of the 2013 and 2014 FDDs for Southern California, the California Department of Business Oversight would not approve the renewal of WSC's Southern California registration without audited financial statements from WSC's Area Representative, Windermere Services Southern California, Inc. In 2013 and 2014, Windermere Services Southern California, Inc. did not provide its audited financial statements on a timely basis despite repeated requests from WSC. Accordingly, any delay in submitting the renewal franchise applications for Southern California in 2013 and 2014 was due to Windermere Services Southern California, Inc.'s failure to timely provide its audited financial statements.

i. Twelfth Affirmative Defense: Compliance With Applicable Laws

WSC substantially complied with all applicable laws with respect to the various franchise disclosure filings alleged in Plaintiffs' FAC, including without limitation Cal. Bus. & Prof. Code § 20020 et seq. Consequently, any claim arising out of WSC's alleged violation of California franchise law fails as a matter of law.

j. Thirteenth Affirmative Defense: Valid Business Purpose

WSC believes that much of its conduct occurring during and throughout its 15-year relationship with Plaintiffs including, but not limited to, the marketing and sale of franchises in the Southern California Region, its interactions with third parties such as third-party franchisees in the Southern California Region as well as individuals like Gary Kruger, its administrative and regulatory functioning, and its direct interactions and various agreements with Plaintiffs, occurred pursuant to and protected by a valid business purpose.

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k. Seventeenth Affirmative Defense: Consent

When a Plaintiff consents to the action of which they now complain, they will be estopped from claiming that action breached any duty owed by the defendant. *Am. Nat. Bank v. Stanfill,* 205 Cal. App. 3d 1089, 1093 (Ct. App. 1988). Plaintiffs consented to the actions taken in response to Mr. Kruger's negative marketing campaign, and consequently are now estopped from arguing they were somehow damaged by the very conduct they previously consented to. In December 2012 WSC agreed to discharge the approximately $1 million debt owed by Plaintiffs and to make efforts to address Mr. Kruger's activities in exchange for Plaintiffs' express contractual commitment to remain Windermere franchisees for five (5) years. These agreements were memorialized in the parties' December 18, 2012 Agreement Modifying Windermere Real Estate Franchise License Agreements.

In or about February 2013, the parties, including at least two outside attorneys, participated in a substantive conference call in order to address what efforts should and should not be pursued to most effectively address Mr. Kruger's activities and the Windermere Watch website. During this call, all parties, including the outside attorneys, agreed that (1) litigation would be ineffectual; and (2) no money would be paid to Mr. Kruger. Indeed, Deville was adamant that Mr. Kruger not receive a single dime from WSC. Upon group discussion and consideration, the parties agreed that the best solution was to engage in search engine optimization efforts ("SEO") to essentially "bury" or "push" the Windermere Watch website to later and less relevant search engine pages. After consultation with Bennion and Deville, WSC initially undertook the SEO efforts with the help of its affiliated company, Windermere Solutions. However, as a practical matter, it was soon determined that for any SEO efforts to be successful, they would need to be undertaken by the B&D Parties pursuant to their own IT platforms. This was entirely appropriate given Windermere Services Southern California, Inc.'s obligations under the Area Representation Agreement.

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

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

l. Twenty-Second Affirmative Defense: Unjust Enrichment

To prove its affirmative defense of unjust enrichment, WSC will establish that: (1) Plaintiffs received a benefit; and (2) unjust retained that benefit at the expense of WSC. *In re ConAgra Foods Inc.,* 908 F. Supp. 2d 1090, 1113 (C.D. Cal. 2012). Plaintiffs consented to the actions taken in response to Mr. Kruger's negative marketing campaign, and consequently are now estopped from arguing they were somehow damaged by the very conduct they previously consented to. In December 2012 WSC agreed to discharge the approximately $1 million debt owed by Plaintiffs and

to make efforts to address Mr. Kruger's activities in exchange for Plaintiffs' express contractual commitment to remain Windermere franchisees for five (5) years. These agreements were memorialized in the parties' December 18, 2012 Agreement Modifying Windermere Real Estate Franchise License Agreements.

In or about February 2013, the parties, including at least two outside attorneys, participated in a substantive conference call in order to address what efforts should and should not be pursued to most effectively address Mr. Kruger's activities and the Windermere Watch website. During this call, all parties, including the outside attorneys, agreed that (1) litigation would be ineffectual; and (2) no money would be paid to Mr. Kruger. Indeed, Deville was adamant that Mr. Kruger not receive a single dime from WSC. Upon group discussion and consideration, the parties agreed that the best solution was to engage in search engine optimization efforts ("SEO") to essentially "bury" or "push" the Windermere Watch website to later and less relevant search engine pages. After consultation with Bennion and Deville, WSC initially undertook the SEO efforts with the help of its affiliated company, Windermere Solutions. However, as a practical matter, it was soon determined that for any SEO efforts to be successful, they would need to be undertaken by the B&D Parties pursuant to their own IT platforms. This was entirely appropriate given Windermere Services Southern California, Inc.'s obligations under the Area Representation Agreement.

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

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

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

D. <u>Identification of Issues of Law</u>

As discussed above, to the extent Plaintiffs' claims for breach of contract are based on WSC's alleged failure to provide a viable "Windermere System" or adequate technology resources, those claims are barred by the applicable statute of limitations. Plaintiffs testified that the Windermere System generally, and the technology provided by WSC specifically, never met their standards throughout the 15-year relationship between the parties. Consequently, any claim based on WSC's alleged failure to provide a viable "Windermere System," or failure to provide adequate technology, accrued more than 4 years ago and is barred by the applicable statute of limitations.

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Further, there is no disputed issue of material fact regarding Plaintiffs' claims that WSC violated California franchise law with regard to the Area Representation Agreement, which is not a franchise agreement under California law.

WSC anticipates bringing a motion for partial summary judgment regarding at least these claims prior to trial in this matter.

E. Anticipated Evidentiary Issues

WSC anticipates bringing various motions in limine to exclude irrelevant evidence that it anticipates Plaintiffs will seek to admit at trial.

F. Bifurcation

No issues need to be bifurcated for trial.

G. Issues Triable to the Jury

A timely demand for jury trial was made, and all issues are triable to a jury. The parties have asserted various equitable affirmative defenses that will be tried to the Court.

H. Attorneys' Fees

WSC seeks to recover its attorneys' fees pursuant to the parties' franchise agreements, the Area Representation Agreement, and the Modification Agreement.

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I. Abandonment of Issues

WSC elected to dismiss the following causes of action in its First Amended Counterclaim: Fifth Cause of Action for violations of the Anticybersquatting & Consumer Protection Act; Sixth Cause of Action for Federal Trademark Infringement; and the Seventh Cause of Action for Unfair Business Practices based on trademark infringement.

DATED: August 29, 2016 PEREZ WILSON VAUGHN & FEASBY

By: /s/ Jeffrey A. Feasby
John D. Vaughn
Jeffrey A. Feasby
Attorneys for Defendant and Counterclaimant
Windermere Real Estate Services Company