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Windermere Real Estate Services Company
12

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

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

19 Plaintiffs,

20 v.

21 WINDERMERE REAL ESTATE
22 SERVICES COMPANY, a Washington
corporation; and DOES 1-10
23

24 Defendant.

25 AND RELATED COUNTERCLAIMS
26
27
28

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

1 Pursuant to Local Rule 16-4 and the Court’s Orders, Defendant and Counter-
2 Claimant Windermere Real Estate Services Company (“WSC”) respectfully submits
3 the following Memorandum of Contentions of Fact and Law, addressing the claims
4 and defenses of the parties as regards the trial scheduled to commence October 18,
5 2016.

6 I. INTRODUCTION

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

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

23 II. PLAINTIFFS’ CLAIMS

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

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1 **A. Plaintiffs' Claims and Elements**

2 **a. Claim 1: Breach of Coachella Valley Franchise Agreement**

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

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

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

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1 Windermere system until BDFH terminated the agreement in or around September
2 2015.

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

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

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

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

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

8 **c. Claim 3: Breach of Area Representation Agreement**

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

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

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

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

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

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

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

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

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

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

14 **e. Claim 5: Breach of Southern California Franchise Agreement**

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

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

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

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

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

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

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

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

18 **g. Claim 7: Violation of California Franchise Relations Act**

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

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

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

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

16 **B. WSC's Counterclaims**

17 **a. Counterclaim 1: Breach of Coachella Valley Franchise**
18 **Agreement**

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

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

3 Elements: WSC must prove: (1) the existence of a contract, (2) WSC’s
4 performance or excuse for nonperformance, (3) BDFH’s breach, and (4) damage to
5 WSC therefrom. *Wall Street Network, Ltd. v. New York Times Co.*, 164 Cal.App.4th
6 1171, 1178 (2008).

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

23 **b. Counterclaim 2: Breach of Area Representation Agreement**

24 Summary: WSC, Bennion, Deville, and WSSC entered into the Area
25 Representation Agreement on May 1, 2004. Pursuant to the Area Representation
26

27 ¹ Counter defendants Bennion and Deville guaranteed amounts owing under this
28 agreement.

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

9 Elements: WSC must prove: (1) the existence of a contract, (2) WSC’s
10 performance or excuse for nonperformance, (3) Counter-defendants’ breach, and (4)
11 damage to plaintiff therefrom. *Wall Street Network, Ltd. v. New York Times Co.*,
12 164 Cal.App.4th 1171, 1178 (2008).

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

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

7 **c. Counterclaim 3: Breach of Southern California Franchise**
8 **Agreement**

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

21 Elements: WSC must prove: (1) the existence of a contract, (2) WSC’s
22 performance or excuse for nonperformance, (3) BDFH’s breach, and (4) damage to
23 WSC therefrom. *Wall Street Network, Ltd. v. New York Times Co.*, 164 Cal.App.4th
24 1171, 1178 (2008).

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

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

14 **d. Counterclaim 4: Breach of Modification Agreement**

15 Summary: On December 18, 2012 WSC, WSSC, BDFH, BDFH So Cal,
16 Bennion and Deville entered into a Modification Agreement that modified terms of
17 the Coachella Valley and Southern California Franchise Agreements. Among other
18 things, WSC agreed to waive over \$800,000 in fees Counter-defendants owed at that
19 time. In exchange for WSC agreeing to waive the unpaid fees and interest, Counter-
20 defendants agreed to remain part of the Windermere system for five years. If
21 Counter-defendants left before the five-year term expired, they agreed to repay a
22 pro-rata share of the fees waived in the Modification Agreement. As of September
23 30, 2015, Counter-defendants owed WSC \$386,056.57 in pro-rata fees waived
24 pursuant to the Modification Agreement. Counter-defendants breached the
25 Modification Agreement by: (1) failing and refusing to remain in the Windermere
26

27 ² Counter defendants Bennion and Deville guaranteed amounts owing under this
28 agreement

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

3 Elements: WSC must prove: (1) the existence of a contract, (2) WSC's
4 performance or excuse for nonperformance, (3) BDFH's breach, and (4) damage to
5 WSC therefrom. *Wall Street Network, Ltd. v. New York Times Co.*, 164 Cal.App.4th
6 1171, 1178 (2008).

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

17 **e. Counterclaim 8: Open Book Account**

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

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

28 ///

1 Key Evidence Supporting WSC's Claim: The following evidence supports
2 WSC's claim that Counter-defendants owe WSC money pursuant to an Open Book
3 Account: (1) Pursuant to the Coachella Valley and Southern California Franchise
4 Agreement, Counter-defendants agreed to pay monthly franchise fees, technology
5 fees, late fees, and interest; (2) Counter-Defendants executed the Modification
6 Agreement on December 18, 2012 pursuant to which they agreed to repay the pro-
7 rata amount of waived fees if they left the Windermere System before December 18,
8 2017; (3) Counter-defendants failed to make all necessary payments under these
9 agreements; (4) WSC accounted for all fees due and owing by Counter-Defendants;
10 (5) Counter-defendants owe WSC a sum certain that will be proven at trial.

11 **f. Counterclaim 9: Accounting**

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

21 Elements: WSC must prove: (1) Counter-defendants were acting as an agent
22 for WSC when it entered into sales transactions with franchisees and collected fees
23 due and owing from franchisees; and (2) WSC cannot accurately ascertain the full
24 amount due and owing from Counter-defendants without reviewing Counter-
25 defendants' books and records. *Meixner v. Wells Fargo Bank NA*, 101 F. Supp. 3d
26 938, 961 (E.D. Cal. 2015).

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

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

8 **C. WSC's Affirmative Defenses**

9 **a. Second Affirmative Defense: Uncertainty**

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

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

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

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

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

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

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

13 **b. Third Affirmative Defense: Statute of Limitation**

14 As an element of their breach of contract claims, Plaintiffs claim that WSC
15 failed to provide an adequate Windermere System and the technology provided was
16 inadequate. To the extent Plaintiffs' claims are based on WSC's provision of the
17 Windermere System and the quality of the technology WSC provided, those claims
18 are barred by the applicable statute of limitations. The parties entered into the
19 Windermere Real Estate License Agreement for Coachella Valley on August 1,
20 2001. To the extent any of the purported breaches occurred as set forth in
21 paragraphs 151.a., b., and c., and 158a., and a. [sic] of the FAC, which WSC
22 maintains it has not breached any terms of that agreement, those purported breaches
23 would have first occurred at least four years prior to the commencement of this
24 action.

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

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

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

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

13 **c. Fifth Affirmative Defense: Third Party Actions**

14 Intervening actions of third parties act as the proximate cause of the alleged
15 injury, and relieve the original actor of any liability. *Schrimsher v. Bryson*, 58 Cal.
16 App. 3d 660, 664 (1976). As discussed above, Plaintiffs allege that WSC failed to
17 take commercially reasonable actions to counteract the impact of a negative
18 marketing campaign conducted by a disgruntled former customer, Mr. Kruger. In
19 December 2012, WSC agreed to discharge the approximately \$1 million debt owed
20 by Plaintiffs and to make efforts to address Mr. Kruger's activities in exchange for
21 Plaintiffs' express contractual commitment to remain Windermere franchisees for
22 five (5) years. These agreements were memorialized in the parties' December 18,
23 2012 Agreement Modifying Windermere Real Estate Franchise License
24 Agreements.

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

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

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

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

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

3 **d. Sixth Affirmative Defense: Waiver**

4 To establish its affirmative defense of waiver, WSC must prove Plaintiffs
5 intentionally relinquished a known right with the intent to relinquish that right.
6 *adidas-Am., Inc. v. Payless Shoesource, Inc.*, 546 F.Supp.2d 1029, 1074 (D. Or.
7 2008). Plaintiffs knowingly waived their claim that WSC failed to make
8 commercially reasonable efforts to combat the effects of Windermere Watch on
9 their business. To succeed on its Waiver affirmative defense, WSC must prove that
10 Plaintiffs knew WSC was required to perform under the Modification Agreement,
11 and knowingly waived any further performance. CACI Instruction No. 336.

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

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

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

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

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

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1 **e. Eighth Affirmative Defense: Set-Off**

2 As discussed above, Counter-defendants owe WSC over \$1.2 million dollars
3 in unpaid fees pursuant to the agreements. To the extent Plaintiffs are able to prove
4 their claims and are awarded damages, which is unlikely, WSC will be able to “set-
5 off” the amounts Counter-defendants owe against any alleged damages Plaintiff
6 experiences. 2 Cal. Affirmative Def. § 44:1 (2d ed.); *Harrison v. Adams*, 20 Ca1.2d
7 646, 648 (1942).

8 **f. Ninth Affirmative Defense: Detrimental Reliance**

9 WSC relied on Plaintiffs’ promises that after WSC agreed to waive
10 \$85,280.00 in past due fees and extend the terms of a \$501,000 personal loan to
11 Plaintiffs, WSC had fulfilled its obligations regarding Mr. Kruger’s negative
12 marketing campaign. Based on this reliance, Plaintiffs are estopped from now
13 claiming WSC failed to meet its obligations under the 2012 Modification
14 Agreement.

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

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

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

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

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

1 **g. Tenth Affirmative Defense: Unclean Hands**

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

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

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

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

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

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

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

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

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

12 **h. Eleventh Affirmative Defense: Estoppel**

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

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

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

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

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

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

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

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

14 **i. Twelfth Affirmative Defense: Compliance With Applicable**
15 **Laws**

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

20 **j. Thirteenth Affirmative Defense: Valid Business Purpose**

21 WSC believes that much of its conduct occurring during and throughout its
22 15-year relationship with Plaintiffs including, but not limited to, the marketing and
23 sale of franchises in the Southern California Region, its interactions with third
24 parties such as third-party franchisees in the Southern California Region as well as
25 individuals like Gary Kruger, its administrative and regulatory functioning, and its
26 direct interactions and various agreements with Plaintiffs, occurred pursuant to and
27 protected by a valid business purpose.

28 ///

1 **k. Seventeenth Affirmative Defense: Consent**

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

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

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

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

21 **I. Twenty-Second Affirmative Defense: Unjust Enrichment**

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

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

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

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

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

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

18 **D. Identification of Issues of Law**

19 As discussed above, to the extent Plaintiffs' claims for breach of contract are
20 based on WSC's alleged failure to provide a viable "Windermere System" or
21 adequate technology resources, those claims are barred by the applicable statute of
22 limitations. Plaintiffs testified that the Windermere System generally, and the
23 technology provided by WSC specifically, never met their standards throughout the
24 15-year relationship between the parties. Consequently, any claim based on WSC's
25 alleged failure to provide a viable "Windermere System," or failure to provide
26 adequate technology, accrued more than 4 years ago and is barred by the applicable
27 statute of limitations.

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

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

6 **E. Anticipated Evidentiary Issues**

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

9 **F. Bifurcation**

10 No issues need to be bifurcated for trial.

11 **G. Issues Triable to the Jury**

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

15 **H. Attorneys' Fees**

16 WSC seeks to recover its attorneys' fees pursuant to the parties' franchise
17 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