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

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

19 Plaintiffs,

20 v.

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

24 Defendant.

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

Hon. Douglas F. McCormick

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

Courtroom: 6B

Complaint Filed: September 17, 2015

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

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19 DATED: July 19, 2018

PEREZ VAUGHN & FEASBY INC.

20
21 By: /s/ Jeffrey A. Feasby

22 John D. Vaughn

23 Jeffrey A. Feasby

24 Attorneys for

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

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

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

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

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22 Given as proposed _____

23 Given as modified _____

24 Refused _____

25 Withdrawn _____

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Sources and Authorities for Special Jury Instruction No. 1

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

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

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

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12 Given as proposed _____
13 Given as modified _____
14 Refused _____
15 Withdrawn _____

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

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

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

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

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

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

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

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

1 Given as proposed _____

2 Given as modified _____

3 Refused _____

4 Withdrawn _____

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

- 7 • *Levi Strauss & Co. v. Shilon*, 121 F.3d 1309, 1313 (9th Cir. 1997)
- 8 • *Fuddruckers, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837, 847 (9th
- 9 Cir. 1987).
- 10 • *Kendall-Jackson Winery, Ltd. v. Superior Court*, 76 Cal.App.4th
- 11 970, 978 (1999)
- 12 • Cal. Civ. Code § 3517.

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

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

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

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

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Sources and Authorities for Special Jury Instruction No. 4

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

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

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

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

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

1 Given as proposed _____

2 Given as modified _____

3 Refused _____

4 Withdrawn _____

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Sources and Authorities for Special Jury Instruction No. 5

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- *In re ConAgra Foods, Inc.*, 908 F. Supp. 2d 1090, 1113 (C.D. Cal. 2012).

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- *Peterson v. Cellco Partnership*, 164 Cal.App.4th 1583, 1593 (2008)

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1 **Windermere Real Estate Services Company’s Special Jury Instruction No. 6 –**
2 **Conspiracy to Terminate Contract**

3 One contracting party owes no general tort duty to another not to interfere
4 with performance of the contract; its duty is simply to perform the contract
5 according to its terms. The invocation of conspiracy does not alter this fundamental
6 allocation of duty. Conspiracy is not an independent tort; it cannot create a duty or
7 abrogate an immunity. Because a party to a contract owes no tort duty to refrain
8 from interference with its performance, he or she cannot be subject to tort liability
9 by a claim of conspiracy.

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12 Given as proposed _____
13 Given as modified _____
14 Refused _____
15 Withdrawn _____

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18 **Sources and Authorities for Special Jury Instruction No. 6**

- 19 • *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 514 (1994)

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