

FILED

2010 JUN 16 AM 11:06

CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES

BY _____

David L. Aronoff (State Bar No. 152606)
daronoff@winston.com
Gayle I. Jenkins (State Bar No. 168962)
gjenkins@winston.com
Saul S. Rostamian (State Bar No. 235292)
srostamian@winston.com
WINSTON & STRAWN LLP
333 S. Grand Avenue, 38th Floor
Los Angeles, CA 90071-1543
(213) 615-1700; Facsimile: (213) 615-1750

Attorneys for Plaintiff,
F.M. Tarbell Co. dba Tarbell, Realtors

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

F.M. TARBELL CO. DBA TARBELL,)
REALTORS, a California corporation,)
Plaintiff,)

v.

WINDERMERE REAL)
ESTATE/PREFERRED PROPERTIES,)
a.k.a. WINDERMERE PREFERRED)
PROPERTIES, an unknown business)
entity; JAMES CROTWELL, an)
individual; ANDREA MARQUEZ, an)
individual, RICHARD MICHAEL)
KING, an individual, and A & L)
PARTNERS, INC., a California)
corporation,)

Defendants.

Case No. 2:10-cv-04048-PSG -E

FIRST AMENDED COMPLAINT
FOR:

1. TRADEMARK INFRINGEMENT
AND UNFAIR COMPETITION
UNDER 15 U.S.C. § 1125(A);
2. UNFAIR COMPETITION
UNDER CAL. BUS. & PROF.
CODE § 17200, *ET SEQ.*;
3. FALSE ADVERTISING UNDER
CAL. BUS. & PROF. CODE §
17500, *ET SEQ.*;
4. COMMON LAW TRADEMARK
INFRINGEMENT

DEMAND FOR JURY TRIAL

1 **COMPLAINT**

2 Plaintiff F.M. Tarbell Co. dba Tarbell, Realtors (“Tarbell”), by its attorneys, for
3 its First Amended Complaint against Defendants Windermere Real Estate/Preferred
4 Properties, James Crotwell, Andrea Marquez, Richard Michael King, and A & L
5 Partners, Inc. (collectively “Defendants”), alleges as follows:

6
7 **NATURE OF THIS ACTION**

8 1. This is an action for trademark infringement and unfair competition
9 pursuant to 15 U.S.C. § 1125(a) of the Trademark Act of 1946 (the “Lanham Act”),
10 California Business and Professions Code §§ 17200, *et seq.* & 17500, *et seq.*, and
11 common law. Plaintiff Tarbell is the largest family-owned real estate agency in
12 Southern California, a community that it has proudly served for the last eighty years.
13 Founded in 1926 by Frank Tarbell, Tarbell, Realtors has dedicated more than 80 years
14 of service to America’s dream of home ownership. Through years of tremendous
15 growth and expansion, Tarbell, Realtors has positioned itself as a leader in real estate
16 today.

17 2. For more than a decade, Tarbell has devoted special resources and
18 attention to buyers and sellers of upper scale homes in the Southern California area
19 through its Preferred PropertiesSM division. Tarbell’s Preferred PropertiesSM services
20 focus upon assisting members of the Southern California community locate or sell
21 some of the most elite housing available in the area. Moreover, during this period,
22 Tarbell has expended significant resources to establish and promote the Preferred
23 PropertiesSM services. Through extensive marketing and sales, Tarbell has developed
24 substantial goodwill in and consumer recognition of the Preferred Properties mark
25 such that residents of the Southern California community readily recognize and
26 identify Tarbell as the source of Preferred PropertiesSM services.

1 CA. Defendant Crotwell's current licensing status with the California Department of
2 Real Estate (DRE) is "Licensed NBA", which the means that the DRE has Crotwell's
3 license as currently being in a "non-working status. The licensee may not perform
4 acts for which a real estate license is required in California. Salesperson reference for
5 NBA is equivalent to 'No Broker Affiliation' and the broker/corporation reference to
6 NBA is equivalent to 'No Business (current main office) Address'." Based on
7 Crotwell's contact information listed with the DRE, Tarbell is informed and believes
8 that Crotwell is a resident of the County of Orange, State of California.

9 7. Defendant Andrea Marquez ("Marquez") holds herself out as the Chief
10 Financial Officer and Managing Partner of Defendant Windermere Real
11 Estate/Preferred Properties' location at 135 S. State College Blvd, Suite 110, Brea
12 CA. Based upon Defendant Marquez's identification of herself as working at the Brea
13 address, Tarbell is informed and believes that Marquez is a resident of the District.

14 8. Defendant Richard Michael King ("King") is a licensed real estate broker
15 with the DRE. King's DRE-assigned Broker Number of 00815016 is listed as the
16 Broker Number in documentation relating Defendant Windermere Real
17 Estate/Preferred Properties' location at 135 S. State College Blvd, Suite 110, Brea
18 CA. However, Defendant King's current status with the DRE is that he is operating
19 under the fictitious name of "Canyon Hills Mortgage Co." at 14726 Ramona Avenue,
20 Suite 410 W16 in Chino, California with no branch offices being listed for this
21 company. King has also listed with the DRE as affiliated with several corporations,
22 none of which have Windermere in their name or are located in Brea, California.
23 Based on King's contact information listed with the DRE, Tarbell is informed and
24 believes that King is a resident of the County of San Bernardino, State of California.

25 9. Defendant A & L Partners, Inc. ("A & L Partners") is a California
26 corporation that resides at 135 S. State College Blvd, Suite 110, Brea CA. Tarbell is
27 informed and believes that Andrea L. Marquez is the same Andrea Marquez who
28

1 holds herself out as the Chief Financial Officer and Managing Partner of Defendant
2 Windermere Real Estate/Preferred Properties' location at 135 S. State College Blvd,
3 Suite 110, Brea CA. Tarbell is further informed and believes that A & L Partners
4 registered and operates the domain name www.windermerepreferred.com for the
5 purpose of advertising and marketing Windermere Preferred Properties in Brea,
6 California.

7 10. Tarbell is informed and believes that each of the defendants is the agent,
8 employee, successor or assign of each other defendant and each of them, as well as the
9 agents of all Defendants, and at all times herein mentioned, were acting within the
10 course and scope of said agency, employment, succession of interest or assignment.

11 JURISDICTION AND VENUE

12 11. This action arises under the Trademark Act of July 5, 1946, as amended,
13 commonly known as the Lanham Act, 15 U.S.C. § 1051, *et seq.*; Cal. Bus. & Prof.
14 Code §§ 17200, *et seq.* & 17500, *et seq.*; and common law.

15 12. This Court has subject matter jurisdiction over the claims in this
16 Complaint pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338. This Court
17 has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

18 13. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(b). In
19 addition, the acts constituting the state law violations alleged herein occurred within
20 this judicial district.

21 14. This Court has personal jurisdiction over Defendants because, on
22 information and belief, Defendant Windermere Real Estate/Preferred Properties has
23 established its sale business address in this district and is actively recruiting agents in
24 order to offer services in this judicial district. Defendant is marketing itself under the
25 name "Windermere Real Estate/Preferred Properties" and "Windermere Preferred
26 Properties" and identifying its place of business in Brea, California, thereby engaging
27
28

1 in infringing conduct with the intent of generating business in and around the City of
 2 Brea, California. Personal jurisdiction over Defendants Crotwell, Marquez, King and
 3 A & L Partners exists because they reside in this judicial district and their conduct as
 4 outlined in this complaint occurred in this judicial district.

6 **TARBELL AND ITS PREFERRED PROPERTIESSM SERVICES**

7 15. For over eighty years, Tarbell has been engaged in the business of
 8 assisting existing and prospective homeowners in the Southern California
 9 communities in the Counties of Orange, Riverside, San Bernardino, Los Angeles and
 10 San Diego. For at least the last five years, Tarbell's specialized Preferred PropertiesSM
 11 division has been widely recognized as the premiere resource for sellers of upscale
 12 residences in the counties served by Tarbell. Only the higher echelon agents are
 13 permitted to be associated with Tarbell's Preferred PropertiesSM division. Clients
 14 serviced by the Preferred PropertiesSM division are ensured that their properties are
 15 appropriately marketed because "Special Homes Deserve Special Attention."

16 16. Tarbell has devoted substantial resources to the development and
 17 maintenance of its Preferred PropertiesSM division and high quality services. Clients
 18 of this division are expecting the following service amenities from Tarbell:



21 **Preferred Properties** offers the special attention that a
 22 distinctive home requires. That attention includes the
 23 following:

24 **Individual Pictorial Brochures**, complete with color photo to
 25 present your home at its best.

26 **Property News Releases** placed in major and local
 27 newspapers.

28 **Professional Photography** that insures consistent quality.

Full Page Color Advertising that reaches a large number of prospective buyers.

World Wide Exposure - All Preferred Properties' listings can be seen on the internet, exposing them to buyers from all over the world.

Distinctive Personalized Signs, with your agents name and direct voice mail phone numbers.

A Network of Skilled Professionals - When a home is entered into the Preferred Properties Division, full color brochures are distributed to Tarbell's network of offices, putting your home at the fingertips of hundreds of real estate professionals with prospective buyers

17. In order to provide these specialized services, Tarbell has engaged specialized support services to develop and cultivate the smaller market of upscale homes in the Southern California area. Tarbell also set aside specific web-based resources, including the maintenance of <http://tarbell.com/preferred.html> and associated links to market the Preferred PropertiesSM services to prospective consumers.

18. At least as early as the beginning of 2005, Tarbell began using the Preferred Properties mark in connection with its marketing to potential sellers and purchasers of upscale residences in Southern California.

19. Tarbell is the exclusive user of the Preferred Properties mark in connection with real estate services in the Southern California communities Tarbell services. Tarbell's Preferred Properties mark is an extremely valuable asset to Tarbell.

WINDERMERE AND ITS WRONGFUL ACTS

20. On or around April 2010, Tarbell became aware that Defendants were planning to open an office in Brea, California and had applied for a city business license with the City of Brea using the name "Windermere Preferred Properties"

1 and/or “Windermere Real Estate/Preferred Properties” in connection with real estate
2 services in the County of Orange, City of Brea and surrounding communities. These
3 are same communities served by Tarbell and its Preferred PropertiesSM division,
4 operating through offices located throughout Orange County and the Inland Empire,
5 including those offices closest to Brea in Anaheim, East Anaheim, Anaheim Hills and
6 Yorba Linda. Tarbell is informed and believes that the Defendants’ office opened on
7 May 3, 2010 and is operating as “Windermere Preferred Properties” and “Windermere
8 Real Estate/Preferred Properties”.

9 21. Additionally, as of May 3, 2010, Defendants started using the Tarbell’s
10 Preferred Properties mark in listing its businesses with the Brea Chamber of
11 Commerce and real estate-related websites.

12 22. Under California Code of Regulations section 2710, notice of changes in
13 license information or status required to be submitted to the Department under
14 provisions of the Real Estate Law and regulations of the Commissioner no later than
15 five days after the effective date of the change. Furthermore, brokers and real estate
16 salespersons are required to keep their business addresses current with the DRE
17 pursuant to CCR § 2715.

18 23. Additionally, under CCR § 2731, a DRE licensee is prohibited from
19 using a fictitious name in the conduct of any activity for which a license is required
20 under the Real Estate Law unless the licensee is the holder of a license bearing the
21 fictitious name.

22 24. As of the filing of this lawsuit, however, there exists no record in the
23 California Department of Real Estate licensee lookup for a “dba” of “Windermere
24 Preferred Properties” or “Windermere Real Estate/Preferred Properties” in Brea as
25 required under the rules and regulations governing real estate licensees operating
26 under a fictitious name. Accordingly, there has been no identification to the DRE of
27 the broker’s license under which this office is operating. There is no listing with the
28

1 California Secretary of State of any corporation, limited liability company or limited
2 partnership under the name Windermere Preferred Properties or Windermere Real
3 Estate/Preferred Properties.

4 25. Accordingly, it appears that each of the Defendants is operating in direct
5 contravention to the rules and regulations of the California Department of Real Estate
6 while deliberately infringing Tarbell's Preferred Properties mark.

7 26. Defendants' prominent use of Tarbell's Preferred Properties mark in its
8 name, and in combination with the services in residential real estate, is likely to
9 mislead or deceive real estate professionals and the consuming public into believing
10 that Defendants or their services are sponsored by or associated with Tarbell.
11 Defendants' use of Tarbell's Preferred Properties mark is without authorization from
12 Tarbell. In addition, Defendants' use of Tarbell's Preferred Properties mark will
13 result in lost sales opportunities for Tarbell.

14 27. Defendants' conduct is continuing and will continue unless restrained by
15 the Court. Defendants' conduct Defendants use of Tarbell's Preferred Properties mark
16 in the marketing of their job opportunities and services to the same communities
17 served by Tarbell actively promotes confusion among real estate professionals and
18 consumers such that Tarbell had no choice but to file the instant complaint to stop the
19 continuing irreparable injury to Tarbell and the Tarbell's Preferred PropertiesSM
20 division. Unless Defendants' are enjoined from engaging in the wrongful conduct
21 described above, Tarbell will suffer irreparable injury and further harm.

22 23 **FIRST CLAIM FOR RELIEF**

24 **Trademark Infringement, Unfair Competition** 25 **and False Designation of Origin 15 U.S.C. § 1125(a)**

26 28. Tarbell repeats and realleges the allegations set forth in paragraphs 1
27 through 27 above, as though fully set forth herein.

1 29. Tarbell has built up valuable goodwill in its Preferred Properties mark
2 within Southern California. Defendants' wrongful acts have permitted or will permit
3 Defendants to make substantial sales and profits on the strength of Tarbell's
4 substantial advertising, sales, consumer recognition, and goodwill.

5 30. With knowledge of the value of breadth and depth of recognition of
6 Tarbell's Preferred Properties mark within the Southern California real estate industry
7 and local communities, and without Tarbell's authorization and consent, Defendants
8 have traded and continue to trade on the goodwill associated with Tarbell's Preferred
9 Properties mark and mislead the public into assuming a connection between
10 Defendants' services and those of Tarbell.

11 31. As a direct and proximate result of Defendants' wrongful conduct,
12 Tarbell has been and will be deprived of the value of the Preferred Properties mark as
13 a commercial asset. Defendants' prominent use of Tarbell's Preferred Properties mark
14 in connection with recruiting real estate sales persons and the offering of services in
15 relation to the purchase and sale of upscale homes, and advertising of its related
16 services without consent of Tarbell, is likely to cause and is causing confusion and
17 deception among real estate professionals and the general consuming public as to the
18 origin of Defendants' services. Defendants' actions are likely to deceive the public
19 into believing that the employment opportunities and services being offered by
20 Defendants originated from, are sponsored by, or are associated with, or otherwise
21 authorized by Tarbell.

22 32. Defendants' activities have caused, and will continue to cause Tarbell to
23 suffer substantial injury. Tarbell has no adequate remedy at law and, if Defendants'
24 activities in the use of "Preferred Properties" are not enjoined, Tarbell will continue to
25 suffer irreparable harm and injury to its goodwill and reputation.

26
27
28

SECOND CLAIM FOR RELIEF**Unfair Competition Under Cal. Bus. & Prof. Code § 17200, *et seq.***

33. Tarbell repeats and realleges the allegations contained in the foregoing paragraphs 1 through 32, as if fully set forth herein.

34. The above-described acts and practices by Defendants are likely to mislead the general public and therefore constitute unfair and fraudulent business practices and unfair, deceptive, untrue, and misleading advertising in violation of California Business and Professions Code § 17200, *et seq.*

35. Tarbell has built valuable goodwill in its Preferred Properties mark. Defendants' use of Tarbell's Preferred Properties mark in advertising and marketing is likely to confuse and deceive real estate professionals and the public such that they will believe there is a connection or affiliation between Tarbell and Defendants. This conduct results in damage to Tarbell's goodwill and reputation and unjust enrichment of Defendants.

36. Defendants have also unfairly competed with Tarbell by violating California Code of Regulations regarding the identification of the provider of services, opening for business while failing to register this operation with the Department of Real Estate, and failing to identify new real estate affiliations with the DRE and thus shielding itself from accountability with the Department of Real Estate.

37. The unfair and fraudulent business practices and deceptive and untrue advertising of Defendants described above presents a continuing threat to members of the public in that Defendants intend to promote and advertise their services by wrongfully trading on the name and goodwill of Tarbell and the Tarbell Preferred Properties mark.

38. Defendants' conduct has injured Tarbell and, unless enjoined, will continue to cause great, immediate, and irreparable injury to Tarbell. Tarbell is

1 entitled to injunctive relief and an order for restitutionary disgorgement of all of
2 Defendants' ill-gotten gains.

3
4 **THIRD CLAIM FOR RELIEF**

5 **Deceptive, False and Misleading Advertising**

6 **under Under Cal. Bus. & Prof. Code § 17500, *et seq.***

7 39. Tarbell repeats and realleges the allegations set forth in paragraphs 1
8 through 38 above, as though fully set forth herein.

9 40. The above-described acts of Defendants constitute untrue and misleading
10 advertising as defined by California Business & Professions Code § 17500, *et seq.*

11 41. The acts of untrue and misleading advertising by Defendants described
12 above present a continuing threat to members of the public in that Defendants' will
13 misrepresent the source of their services.

14 42. Defendants' false and misleading advertising will permit them to make
15 substantial sales and profits on the strength of Tarbell's success, goodwill, and
16 consumer recognition.

17 43. As a direct and proximate result of Defendants' wrongful conduct,
18 Tarbell will be injured by Defendants' wrongful acts, and such harm will continue
19 unless the Court enjoins Defendants' acts. Tarbell has no adequate remedy at law for
20 Defendants' continuing violations of Tarbell's rights.

21
22 **FOURTH CLAIM FOR RELIEF**

23 **Trademark Infringement**

24 **under Common Law**

25 44. Tarbell repeats and realleges the allegations set forth in paragraphs 1
26 through 43 above, as though fully set forth herein.

1 45. Tarbell has valid and existing common law rights with respect to the
2 Preferred Properties mark.

3 46. The above acts by Defendants constitute trademark infringement of the
4 Preferred Properties mark, in violation of Tarbell's common law rights.

5 47. Defendants' wrongful acts will permit them to make substantial sales and
6 profits on the strength of Tarbell's success, goodwill, and consumer recognition.

7 48. As a direct and proximate result of Defendants' wrongful conduct,
8 Tarbell, among other things, will be deprived of the value of its Preferred Properties
9 mark as a commercial asset.

10 49. As a direct and proximate result of Defendants' wrongful conduct,
11 Tarbell will be injured by Defendants' wrongful acts, and such harm will continue
12 unless the Court enjoins Defendants' acts. Tarbell has no adequate remedy at law for
13 Defendants' continuing violations of Tarbell's rights.

14
15 **PRAYER FOR RELIEF**

16 WHEREFORE, Plaintiff Tarbell demands judgment as follows:

17 A. Preliminarily and permanently restraining and enjoining Defendants,
18 their officers, agents, servants and employees, and all persons in acting in concert and
19 participation with them, from their unauthorized use of Preferred Properties
20 trademark, including, without limitation, any confusingly similar variation, or
21 colorable imitation thereof, in connection with the providing of real estate services in
22 the Southern California communities in the Counties of Orange, Los Angeles,
23 Riverside and San Bernardino by Defendants.

24 B. Permanently restraining and enjoining Defendants, their officers, agents,
25 servants and employees, and all persons in active concert and participation with them,
26 from any further conduct suggesting or tending to suggest that any services
27
28

1 Defendants offer are directly or indirectly sponsored by, approved by, or affiliated
2 with Tarbell.

3 C. Awarding Tarbell damages, costs, attorneys' fees, and investigator's fees,
4 and an accounting of Defendants' profits attributable to Defendants' unauthorized use
5 of Tarbell's trademarks.

6 D. Awarding Tarbell treble damages, pursuant to 15 U.S.C. § 1117(b), as a
7 result of Defendants' wanton, deliberate, malicious, and willful conduct.

8 E. Entering an order, pursuant to 15 U.S.C. § 1118 and other applicable law,
9 directing Defendants to deliver for impoundment and destruction all manuals,
10 packaging, images, and promotional materials bearing any unauthorized use of
11 Tarbell's Preferred Properties trademark or any simulation, reproduction, counterfeit,
12 copy, confusingly similar variation, or colorable imitation thereof.

13 F. Entering an order, directing Defendants to delete the
14 Windermerepreferred.com domain name.

15 G. Directing that Defendants pay to Tarbell the costs of this action,
16 including their reasonable attorneys' fees incurred herein.

17 H. Awarding Tarbell punitive damages in an amount sufficient to punish
18 Defendants.

19 I. Awarding Tarbell pre-judgment and post-judgment interest on any
20 monetary awards.

21 J. Ordering Defendants to disgorge all of their ill-gotten gains pursuant to
22 California Business & Professions Code § 17203.

23 K. Granting Tarbell any other and further relief as the Court may deem just
24 and proper.

Winston & Strawn LLP
333 S. Grand Avenue
Los Angeles, CA 90071-1543

Jury Demand

Plaintiff Tarbell demands a trial by jury on all issues so triable.

Respectfully submitted,

Dated: June 15, 2010

By /s/ Gayle I. Jenkins
David L. Aronoff (State Bar No. 152606)
daronoff@winston.com
Gayle I. Jenkins (State Bar No. 168962)
gjenkins@winston.com
Saul S. Rostamian (State Bar No. 235292)
srostamian@winston.com
WINSTON & STRAWN LLP
333 S. Grand Avenue, 38th Floor
Los Angeles, CA 90071-1543
(213) 615-1700; Facsimile: (213) 615-1750

Attorneys for Plaintiff F.M. Tarbell Co. dba
Tarbell, Realtors

LA:272856.3

David L. Aronoff 152606
 Gayle I. Jenkins 168962
 Winston & Strawn LLP
 333 S. Grand Ave., Ste 3800, Los Angeles, CA 90071
 213.615.1700
 FAX: 213.615.1750

Plaintiff, F.M. Tarbell Co. dba Tarbell, Realtors

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

F.M. TARBELL CO. DBA TARBELL, REALTORS, a
 California corporation,
 PLAINTIFF(S)

v.

WINDERMERE REAL ESTATE/PREFERRED
 PROPERTIES, a.k.a. WINDERMERE PREFERRED
 PROPERTIES, an unknown business entity; JAMES
 CROTWELL, an individual; ANDREA MARQUEZ,
 an individual, RICHARD MICHAEL KING, an
 individual, and A & L PARTNERS, INC., a California
 corporation,

DEFENDANT(S).

CASE NUMBER

2:10-cv-04048-PSG -E

SUMMONS

TO:DEFENDANT(S):

WINDERMERE REAL ESTATE/PREFERRED PROPERTIES, a.k.a. WINDERMERE PREFERRED PROPERTIES, an unknown business entity; JAMES CROTWELL, an individual; ANDREA MARQUEZ, an individual, RICHARD MICHAEL KING, an individual, and A & L PARTNERS, INC., a California corporation,

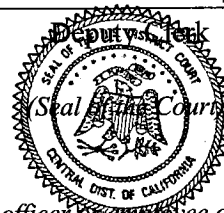
A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached ☐ complaint ☒ First amended complaint ☐ counterclaim ☐ cross-claim or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, WINSTON & STRAWN LLP, whose address is 333 S. Grand Ave., Suite 3800, Los Angeles, CA 90071. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Clerk, U.S. District Court

Dated: JUN 16 2010

By: NATALIE LONGORIA



[Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States. Allowed 60 days by Rule 12(a)(3)].

1198