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

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

Plaintiffs,

v.

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

Defendant.

AND RELATED COUNTERCLAIMS

Case No. 5:15-CV-01921 R (KKx)

Hon. Manual L. Real

**[PROPOSED] AMENDED FINAL
PRETRIAL CONFERENCE ORDER**

Courtroom: 8

Complaint Filed: September 17, 2015

Pursuant to Local Rule 16-7 and this Court’s Order of May 9, 2017 [D.E. 125], Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion & Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc. (collectively, “Plaintiffs”) and Counter-Defendants Robert L. Bennion (“Bennion”) and Joseph R. Deville (“Deville”) (Plaintiffs, Bennion, and Deville are collectively referred to herein as the “B&D Parties”), on the one hand, and Defendant/Counter-

1 Claimant Windermere Real Estate Services Company's ("WSC"), on the other hand,
2 by and through their undersigned counsel, hereby lodge with the Court their
3 [Proposed] Amended Final Pretrial Conference Order.

4 Following pre-trial proceedings, pursuant to Fed. R. Civ. P. 16 and L.R. 16, IT
5 IS ORDERED:

6 **I. The Parties And Pleadings**

7 The parties to this action are as follows:

- 8 • Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc.,
9 Bennion & Deville Fine Homes SoCal, Inc., Windermere Services
10 Southern California, Inc.;
- 11 • Counter-Defendants Robert L. Bennion and Joseph R. Deville; and
- 12 • Defendant/Counter-Claimant Windermere Real Estate Services
13 Company.

14 Each of these parties has been served and has appeared. All other parties
15 named in the pleadings, including the DOES 1-10, and not identified in the
16 preceding paragraph are now dismissed.

17 The pleadings which raise the issues are:

- 18 • First Amended Complaint ("FAC") dated November 16, 2015 [D.E.
19 31];
- 20 • First Amended Counterclaim ("FACC") dated October 14, 2015 [D.E.
21 16];
- 22 • Order Granting Joint Stipulation for (i) Plaintiffs to File First
23 Amended Complaint, and (i) Counterclaimant Windermere Real
24 Estate Services Company to Voluntarily Dismiss Counts Five, Six,
25 and Seven of First Amended Counterclaim, dated November 12, 2015
26 [D.E. 30];
- 27 • Answer to Amended Counterclaim by Robert L. Bennion, Bennion
28 and Deville Fine Homes, Inc., Bennion and Deville Fine Homes

1 SoCal, Inc., and Windermere Services Southern California, Inc., dated
2 November 27, 2016 [D.E. 32];

- 3 • Answer to Amended Counterclaim by Joseph R. Deville, dated
4 December 14, 2015 [D.E. 37];
- 5 • Answer to Amended Complaint by WSC, dated December 7, 2015
6 [D.E. 34];
- 7 • Order Granting Defendant’s Motion for Partial Summary Judgment,
8 dated October 20, 2016 [D.E. 66];
- 9 • Order Granting In Part and Denying In Part Plaintiffs and Counter-
10 Defendants’ Motion for Partial Summary Judgment [D.E. 75]; and
- 11 • Final Pretrial Conference Order, date November 15, 2016. [D.E. 79.]

12 **II. Subject Matter Jurisdiction & Venue**

13 Federal jurisdiction and venue are invoked upon the following grounds:

14 **A. Jurisdiction & Venue Over the FAC**

15 Plaintiffs contend that diversity jurisdiction exists under 28 U.S.C. § 1332
16 because the amount in controversy in the FAC exceeds the jurisdictional threshold
17 of \$75,000, and because the Plaintiffs are all California corporations and WSC is a
18 Washington corporation – thus, complete diversity exists.

19 Plaintiffs also contend that venue is also proper in this District in that WSC
20 is subject to personal jurisdiction in this District, a substantial part of the events
21 occurred in this District, and all parties specifically agreed to the Central District of
22 California pursuant to a forum selection clause contained within a contract that is
23 in dispute in this action. (*See* D.E. 31, Ex. G to FAC [Modification Agreement], §
24 9.)

25 **B. Jurisdiction & Venue Over the FACC**

26 WSC contends that supplemental jurisdiction exists over Bennion and
27 Deville because the FACC is a compulsory counterclaim under Rule 13(a) of the
28 Federal Rules of Civil Procedure and that this Court may exercise

1 supplemental/ancillary jurisdiction over Bennion and Deville pursuant to 28 USC §
2 1367(a).

3 Bennion contends that because this case was brought as a diversity action,
4 and he is a resident of the State of Washington, supplemental jurisdiction over him
5 cannot exist because such claims would destroy complete diversity. *See Exxon*
6 *Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 546 (2005) (Supplemental
7 jurisdiction under § 1367 does not apply to § 1332’s complete diversity
8 requirement, “for incomplete diversity destroys original jurisdiction with respect to
9 all claims, leaving nothing to which supplemental claims can adhere.”).

10 **III. Trial Estimate**

11 The trial is estimated to take 12 to 15 trial days.

12 **IV. Jury Trial**

13 The trial is to be a jury trial. At least seven (7) days prior to the trial date the
14 parties shall file and serve by e-mail, fax, or personal delivery: (a) proposed jury
15 instructions as required by L.R. 51-1 and (b) any special questions requested to be
16 asked on voir dire.

17 **V. Admitted Facts And Stipulated Facts Subject To Objection**

18 The following facts are admitted and require no proof:

- 19 1. WSC is a Washington corporation with its principal place of business
20 in Seattle, Washington.
- 21 2. Bennion & Deville Fine Homes, Inc. is a California Corporation with
22 its principal place of business in Rancho Mirage, California.
- 23 3. Bennion & Deville Fine Homes SoCal, Inc. is a California
24 Corporation with its principal place of business in Rancho Mirage,
25 California.
- 26 4. Windermere Services Southern California, Inc. is a California
27 Corporation with its principal place of business in Rancho Mirage,
28 California.

- 1 5. Deville is a resident of the State of California.
- 2 6. WSC is the franchisor of the Windermere system of franchisees
- 3 providing real estate brokerage services to customers seeking to buy,
- 4 sell or lease real property.
- 5 7. The Plaintiffs are each owned and operated by Bennion and Deville.
- 6 8. Bennion and Deville are both experienced real estate brokers working
- 7 in the real estate industry since 1988 and 1971, respectively.
- 8 9. On August 1, 2001, Bennion, Deville, and their company Bennion &
- 9 Deville Fine Homes, Inc., on the one hand, and WSC, on the other
- 10 hand, entered into a “Windermere Real Estate License Agreement” for
- 11 the Coachella Valley (hereafter referred to as the “Coachella Valley
- 12 Franchise Agreement”).
- 13 10. On May 1, 2004, Bennion and Deville, on behalf of their entity
- 14 Windermere Services Southern California, Inc., on the one hand, and
- 15 WSC, on the other hand, entered into a “Windermere Real Estate
- 16 Services Company Area Representation Agreement for the State of
- 17 California” (the “Area Representation Agreement”).
- 18 11. On March 29, 2011, Windermere Services Southern California, Inc.,
- 19 Bennion, Deville, Bennion & Deville Fine Homes SoCal, Inc., and
- 20 WSC entered into the “Windermere Real Estate Franchise License
- 21 Agreement” (the “SoCal Franchise Agreement”).
- 22 12. On December 18, 2012, WSC and Plaintiffs amended the Coachella
- 23 Valley Franchise Agreement and the SoCal Franchise Agreement by
- 24 collectively entering into a document titled “Agreement Modifying
- 25 Windermere Real Estate Franchise License Agreement” (the
- 26 “Modification Agreement”).
- 27 13. A Windermere Real Estate Services Franchise Disclosure for
- 28 Southern California was never approved of by the California

1 Department of Business Oversight for the 2014 year.

2 14. On January 28, 2015, WSC General Counsel Paul Drayna sent a letter
3 to Deville announcing that WSC was “exercising its right to terminate
4 [the] Area Representation Agreement dated May 1, 2004, pursuant to
5 the 180-day notice provision of Paragraph 4.1,” and that Bennion and
6 Deville’s “rights and responsibilities as Area Representative will
7 terminate on Tuesday, July 28, 2015.”

8 15. On February 26, 2015, counsel for WSC, Charles D. Sirianni, sent a
9 letter to counsel for the B&D Parties announcing that “this letter
10 constitutes notice of WSC’s intent to terminate the Agreement with
11 cause due to WS SoCal’s material breach of the Agreement.
12 Specifically, WS SoCal has breached paragraphs 3, 10, and 11 of the
13 Agreement by failing to collect and/or remit license and technology
14 fees from licensees in WS SoCal’s area representation agreement.”
15 The letter further states that “[t]he Agreement will terminate on May
16 27, 2015 for cause unless WS SoCal cures its breach.”

17 **VI. Admitted Facts Subject To Evidentiary Objection**

18 The following facts, though stipulated, shall be without prejudice to
19 evidentiary objections: None.

20 **VII. Parties’ Claims And Defenses**

21 **A. The B&D Parties’ Claims and Defenses:**

22 **1. Plaintiffs intend to pursue the following claims against**
23 **WSC:**

24 Claim 1: WSC breached the Coachella Valley Franchise
25 Agreement with Bennion & Deville Fine Homes, Inc.

26 Claim 3: WSC breached the Area Representation Agreement with
27 Windermere Services Southern California, Inc.;

28 Claim 4: WSC breached the Implied Covenant of Good Faith and

1 Fair Dealing incorporated within the Area Representation
2 Agreement with Windermere Services Southern
3 California, Inc.;

4 Claim 5: WSC breached the SoCal Franchise Agreement with
5 Bennion & Deville Fine Homes SoCal, Inc.; and

6 2. **The B&D Parties intend to pursue the following affirmative**
7 **defenses:**

8 Affirmative Defense 1: Failure to State a Cause of Action

9 Affirmative Defense 2: Waiver

10 Affirmative Defense 3: Estoppel

11 Affirmative Defense 4: Offset

12 Affirmative Defense 5: Justification

13 3. **The elements required to establish Plaintiffs' claims are:**

14 ***Claim 1: Breach of the Coachella Valley Franchise Agreement***

15 The elements for a breach of contract claim are: (1) the existence of the
16 contract; (2) performance by the plaintiff or excuse for nonperformance; (3) breach
17 by the defendant; and (4) damages. *Castro v. Wells Fargo Bank, N.A.*, 2012 WL
18 2077294, at *1 (C.D. Cal. June 6, 2012) (citing *First Commercial Mtg. Co. v.*
19 *Reece*, 89 Cal.App.4th 731, 108 Cal.Rptr.2d 23, 33 (Cal.Ct.App.2001)).

20 ***Claim 3: Breach of the Area Representation Agreement***

21 The elements for a breach of contract claim are: (1) the existence of the
22 contract; (2) performance by the plaintiff or excuse for nonperformance; (3) breach
23 by the defendant; and (4) damages. *Castro v. Wells Fargo Bank, N.A.*, 2012 WL
24 2077294, at *1 (C.D. Cal. June 6, 2012) (citing *First Commercial Mtg. Co. v.*
25 *Reece*, 89 Cal.App.4th 731, 108 Cal.Rptr.2d 23, 33 (Cal.Ct.App.2001)).

26 ***Claim 4: Breach of the Implied Covenant of Good Faith and Fair***
Dealing incorporated within the Area Representation Agreement

27 The elements for a claim for breach of the implied covenant of food faith
28 and fair dealing are: (1) a contract between plaintiff and defendant, (2) plaintiff's

1 performance, (3) defendant's performance, (4) defendant's unfair interference with
2 plaintiff's right to receive the benefits of the contract, and (5) defendant's conduct
3 harmed plaintiff. *Walis v. Fernandez*, 2016 WL 1363428, at *3 (C.D. Cal. Apr. 4,
4 2016).

5 ***Claim 5: Breach of the SoCal Franchise Agreement***

6 The elements for a breach of contract claim are: (1) the existence of the
7 contract; (2) performance by the plaintiff or excuse for nonperformance; (3) breach
8 by the defendant; and (4) damages. *Castro v. Wells Fargo Bank, N.A.*, 2012 WL
9 2077294, at *1 (C.D. Cal. June 6, 2012) (citing *First Commercial Mtg. Co. v.*
10 *Reece*, 89 Cal.App.4th 731, 108 Cal.Rptr.2d 23, 33 (Cal.Ct.App.2001)).

11 **4. The elements required to establish the B&D Parties'**
12 **affirmative defenses are:**

13 ***Affirmative Defense 1: Failure to State a Cause of Action***

14 The defense of failure to state a claim may be raised in any pleading under
15 Rule 7(a), by motion under Rule 12(c), or even at trial. Fed. R. Civ. P. 12(h)(2).
16 *Ear v. Empire Collection Authorities, Inc.*, 2012 WL 3249514, at *2 (N.D. Cal.
17 Aug. 7, 2012) (observing that failure to state a claim under Rule 12(b)(6) is the
18 “paradigmatic example of a negative defense . . . [but] is more appropriately raised
19 in motions to dismiss rather than” pleaded in the answer like an affirmative
20 defense). *See also, Ganley v. County of San Mateo*, 2007 WL 902551 at *3
21 (N.D.Cal. Mar. 22, 2007) (treating the failure to state a claim as an affirmative
22 defense).

23 ***Affirmative Defense 2: Waiver***

24 To successfully assert the affirmative defense of waiver, the B&D Parties
25 must prove must prove both of the following by clear and convincing evidence:

26 1. That WSC knew that certain members of the B&D Parties were
27 required by the Coachella Valley Franchise Agreement and SoCal Franchise
28 Agreement to pay fees by a specified date and to remain in the Windermere system

1 for a specified term; and

2 2. That WSC freely and knowingly gave up these rights to have the
3 B&D Parties perform these payment obligations in a timely manner and to remain
4 in the Windermere system for a specified term.

5 A waiver may be oral or written or may arise from conduct that shows that
6 WSC gave up that right.

7 If the B&D Parties prove that WSC gave up its right to the B&D Parties'
8 performance of the timely payment obligations under the contracts, then the B&D
9 Parties were not required to perform obligations within the timing confines of the
10 contracts.

11 Judicial Council of California Civil Jury Instruction ("CACI") No. 336 (Dec.
12 2015).

13 ***Affirmative Defense 3: Estoppel***

14 "The elements of the doctrine" of estoppel are "that (1) the party to be
15 estopped must be apprised of the facts; (2) he must intend that his conduct shall be
16 acted upon, or must so act that the party asserting the estoppel has a right to believe
17 it was so intended; (3) the other party must be ignorant of the true state of facts;
18 and (4) he must rely upon the conduct to his injury." *County of Los Angeles v. City*
19 *of Alhambra*, 27 Cal. 3d 184, 196 (1980) (citing *City of Long Beach v. Mansell*, 3
20 Cal. 3d 462, 488-89 (1970)).

21 ***Affirmative Defense 4: Offset***

22 The burden is on the B&D Parties to show that they, or any one of them, are
23 entitled to an offset from WSC for any amounts owed to WSC. *See Jacobson v.*
24 *Persolve, LLC*, 2014 WL 4090809, at *9 (N.D. Cal. Aug. 19, 2014) (finding offset
25 to be a viable affirmative defense).

26 ***Affirmative Defense 5: Justification***

27 WSC's first, second, and third claims are barred in part because the B&D
28 Parties alleged failure to timely pay franchise and other fees was justified and were

1 fair and reasonable under all the circumstances based upon a balancing of all
2 factors related to the actions at issue.

3 WSC's fourth claim is barred in part because the B&D Parties' departure
4 from the Windermere system before the conclusion of their five-year term was
5 justified and was fair and reasonable under all the circumstances based upon a
6 balancing of all factors related to the actions at issue.

7 **5. In brief, the key evidence the B&D Parties rely on for each**
8 **claim and affirmative defense is:**

9 ***Claim 1 – Breach of the Coachella Valley Franchise Agreement***

10 WSC failed to protect its brand from the counter-marketing campaign of
11 Windermere Watch. Windermere Watch severely damaged the Windermere brand in
12 Southern California. Starting around 2005, Gary Kruger ("Kurger") – a disgruntled
13 former Seattle Windermere client – and his associates initiated an anti-marketing
14 campaign under the name "Windermere Watch," which was specifically designed to
15 direct defamatory statements, materials, and focused conduct against Windermere
16 and its franchisees and real estate agents via the website
17 www.windermerewatch.com and through various print materials. The website has
18 been (and continues to be) used by Kruger as a tool to generate and/or spread
19 negative and derogatory articles and comments concerning Windermere's purported
20 business practices, litigation, owners, executives, brokers, agents, and general
21 participation in the real estate market.

22 Windermerewatch.com is utilized and designed by Kruger to maximize its
23 search engine presence. As a result, during the relevant time period, when internet
24 users searched for Windermere on Google and other internet search engines,
25 windermerewatch.com appeared as one of the top search results – often ahead of
26 Windermere's own website. The obvious (if not express) intent of Kruger is to use
27 windermerewatch.com to turn potential clients, agents, and franchisees away from
28 Windermere in an effort to harm the business of WSC any anyone in business with

1 it.

2 Although WSC was legally obligated under the terms of the Coachella Valley
3 Franchise Agreement, the SoCal Franchise Agreement, and the Area Representative
4 Agreement to make “commercially reasonable efforts” to protect the Windermere
5 System, trademark, and brand, and to prevent unfair competition against its
6 franchisees and their businesses, WSC did virtually nothing to combat Windermere
7 Watch’s anti-Windermere marketing campaign in Southern California.

8 The Windermere Watch anti-marketing campaign has had a significant and
9 monetarily damaging effect on Plaintiffs’ businesses. Windermere’s competitors
10 incorporate information from the site in pitches to both agents and clients. WSC’s
11 failure to protect the brand in the face of the anti-marketing campaign caused the
12 loss of listings, clients, franchisees, and agents and, more specifically, caused B&D
13 Fine Homes and the other Plaintiffs to incur a non-trivial amount of money in an
14 effort to combat Windermere Watch without the assistance of WSC.

15 WSC breached Section 4 of the Coachella Valley Franchise Agreement by
16 failing to take necessary action (legal or otherwise) to prevent infringement of the
17 Windermere trademark or the related unfair competition faced by Plaintiffs in the
18 Southern California region as a result of the Windermere Watch websites and
19 mailing campaign. Similarly, WSC breached Section 3(A) of the Modification
20 Agreement failing to make commercially reasonable efforts to curtail Windermere
21 Watch and related attacks on the Windermere brand in Southern California.

22 WSC constructive termination of the Area Representation Agreement (as
23 discussed below) along with its direct breaches of the Coachella Valley Franchise
24 Agreement justified B&D Fine Homes’ discontinuation of payments to WSC under
25 the Coachella Valley Franchise Agreement and subsequent termination of that
26 agreement.

27 ***Claim 3 – Breach of the Area Representation Agreement***

28 WSC breached Section 2 of the Area Representation Agreement with Services

1 SoCal by failing to provide Services SoCal with the uninterrupted right to offer
2 Windermere franchised businesses in Southern California.

3 Under the Federal Trade Commission’s (“FTC”) Amended Franchise Rule,
4 located at title 16, part 436 of the Code of Federal Regulations, a franchisor is
5 required to disclose to prospective franchisees a franchise disclosure document
6 (“FDD”) that contains a copy of the form franchise agreement and twenty-three
7 specific “Items” about the franchised business, including specific information about
8 the franchisor’s executives and managers, its relevant litigation history, the expected
9 business of the franchisee, the costs and fees associated with the franchised business,
10 the financial wellbeing of the franchisor, and the conditions in which the franchise
11 can be terminated or renewed, among other things. 16 C.F.R. § 436.

12 The California Franchise Investment Law (“CFIL”) builds upon the FTC’s
13 Amended Franchise Rule and serves as the primary vehicle for regulating the
14 registration, offer, and sale of franchises in California. Under the CFIL, a franchisor
15 must register a franchise application – including its current FDD – with the
16 California Department of Business Oversight (“DBO”) before a franchise can be
17 offered or sold within the state.⁷ Cal. Corp. Code §§ 31110, 31119. A franchisor’s
18 California registration must be renewed every year. Cal. Corp. Code § 31120. Once
19 the franchise application is properly registered with – and approved by – the DBO,
20 the FDD, together with copies of all proposed agreements and other exhibits, must
21 be provided to any prospective franchisee at least 14 days before the earlier of the
22 day the franchisee executes the franchise agreement or pays the franchisor any
23 consideration for the franchised business. Cal. Corp. Code § 31119(a).

24 In 2014, WSC elected not to renew its Southern California offering after
25 receiving Services SoCal’s audited financials, thereby precluding Services SoCal
26 from being able to legally offer or sell any new franchises in Southern California.
27 This conduct of WSC breached Section 2 of the Area Representation Agreement.

28 WSC similarly breached Section 7 by failing to promptly and diligently

1 commence and pursue the preparation and filing of all franchise registration filings
2 required under California law and/or the United States of America and in particular
3 failing to maintain the registration of the Southern California FDD consistent with
4 the parties' course of dealing – *i.e.*, WSC was to register the FDD with the DBO
5 within a reasonable time after receipt of Services SoCal's audited financial
6 statements.

7 WSC breached Section 10 by depriving Services SoCal of its right to offer
8 new Windermere franchises rendering it unable to collect initial franchise fees and
9 continuing license fees from new franchisees.

10 WSC breached Section 4 – and in particular, Section 4.2 – of the Area
11 Representation Agreement by failing to pay Services SoCal the termination fee – *i.e.*
12 the fair market value of its interest in the Area Representation Agreement –
13 following WSC's termination of the Area Representation Agreement without cause.

14 Further, WSC breached Section 3 of Exhibit A by terminating the Area
15 Representation Agreement under the pretense that Services SoCal was the
16 “guarantor” of the franchise fees owed by the franchisees in the Southern California
17 region. Section 3 of Exhibit A specifically states that Services SoCal is not a
18 guarantor of the franchisees in its region.

19 ***Claim 4 – Breach of the Implied Covenant of Good Faith and Fair***
20 ***Dealing***

21 WSC breached the implied covenant of good faith and fair dealing in its Area
22 Representation Agreement with Services SoCal by:

- 23 • Taking action to interfere with and damage many of the relationships
24 between Services SoCal and franchisees in the Southern California
25 region; and
- 26 • Failing to act in good faith and conduct its business such that Plaintiffs
27 received the benefits of being an Area Representative in the franchise
28 system.

1 Moreover, WSC's material breaches of the express and implied terms of the
2 Area Representation Agreement constructively terminated the Area Representation
3 Agreement during the time period August/September 2014.

4 ***Claim 5 – Breach of SoCal Franchise Agreement***

5 Consistent with those statements set forth in connection with Claim 1, above,
6 WSC likewise breached Section 6 of the SoCal Franchise Agreement by failing to
7 take necessary action (legal or otherwise) to prevent infringement of the Windermere
8 trademark or the related unfair competition faced by Plaintiffs in the Southern
9 California region as a result of the Windermere Watch websites, mailings, and other
10 conduct of Gary Kruger. WSC also breached Section 3(A) of the Modification
11 Agreement by failing to make commercially reasonable efforts to curtail
12 Windermere Watch and related attacks on the Windermere brand in Southern
13 California.

14 WSC constructive termination of the Area Representation Agreement (as
15 discussed above) along with its direct breaches of the SoCal Franchise Agreement
16 justified B&D SoCal's discontinuation of payments to WSC under the SoCal
17 Franchise Agreement and subsequent termination of that agreement.

18 ***Affirmative Defense 1 – Failure to State a Claim***

19 The B&D Parties have asserted failure to state a claim as an affirmative
20 defense in order to preserve the defense for trial. The B&D Parties contend that the
21 FACC fails to state a claim on the following grounds:

- 22 • WSC's claim for breach of the Area Representation Agreement fails
23 to state a claim for Services SoCal's alleged failure to support the
24 franchisees in its territory as WSC failed to provide (and plead) the
25 contractual prerequisite notice and opportunity to cure WSC was
26 required to provide to Services SoCal prior to asserting the claim;
- 27 • WSC's claim for breach of the Modification Agreement fails to state a
28 claim as this is not a separate contract but instead an addendum to the

1 existing franchise agreements. Any alleged breach of the Modification
2 Agreement should be subsumed within the franchise agreement claims
3 and not constitute a separate claim; and

4 ***Affirmative Defense 2, 3, and 5 – Waiver, Estoppel, and***
5 ***Justification***

6 The B&D Parties' affirmative defenses of waiver, estoppel and justification
7 are predicated on the same core set of facts. Several of WSC's claims allege that
8 the B&D Parties failed to timely collect, pay or remit fees to WSC as required by
9 the corresponding contract. Over the course of the parties' fifteen-year
10 relationship, the payments submitted by the B&D Parties to WSC convinced with
11 the seasonal highs and lows of the business (the summer months being a slow time
12 for the B&D Parties' operations in the desert) and not consistent with the payment
13 terms in the contracts. Because WSC accepted (and even encouraged) this conduct
14 by the B&D Parties over such a protracted period of time, WSC is now precluded
15 from contradicting this established course of conduct through its assertion of
16 breach of contract claims to the contrary.

17 Finally, WSC's fourth claim for breach of the Modification Agreement is
18 barred because the B&D Parties' departure from the Windermere system prior to
19 the conclusion of the five-year term stated in the document was justified and was
20 fair and reasonable in light of the symbiotic relationship between the B&D Parties'
21 franchise agreement and the Area Representation Agreement and WSC's
22 termination (constructive or otherwise) of the Area Representation Agreement, and
23 WSC's corresponding breaches of the franchise agreements.

24 B. **WSC's Claims and Defenses:**

25 1. **WSC intends to pursue the following counterclaims against**
26 **the B&D Parties:**

27 Counterclaim 1: Bennion & Deville Fine Homes breached the
28 Coachella Valley Franchise Agreement with WSC

1 contract; (2) performance by WSC or excuse for nonperformance; (3) breach by
2 Windermere Services Southern California; and (4) damages. *Wall Street Network,*
3 *Ltd. v. New York Times Co.*, 164 Cal.App.4th 1171, 1178 (2008).

4 ***Claim 3: Breach of the Southern California Franchise Agreement***

5 The elements for a breach of contract claim are: (1) the existence of the
6 contract; (2) performance by WSC or excuse for nonperformance; (3) breach by
7 Bennion & Deville Fine Homes Southern California; and (4) damages. *Wall Street*
8 *Network, Ltd. v. New York Times Co.*, 164 Cal.App.4th 1171, 1178 (2008).

9 ***Claim 4: Breach of the Modification Agreement***

10 The elements for a breach of contract claim are: (1) the existence of the
11 contract; (2) performance by WSC or excuse for nonperformance; (3) breach by
12 the B&D Parties; and (4) damages. *Wall Street Network, Ltd. v. New York Times*
13 *Co.*, 164 Cal.App.4th 1171, 1178 (2008).

14 ***Claim 8: Open Book Account***

15 The elements for an open book account common claim are: (1) WSC and the
16 B&D Parties had financial transactions; (2) WSC kept an account of the credits and
17 debits involved in the transactions; (3) that the B&D Parties owe WSC money on
18 the account; and (4) the amount of money the B&D Parties owe WSC. CACI
19 Instruction No. 372.

20 **4. The elements required to establish the WSC's affirmative**
21 **defenses are:**

22 ***Affirmative Defense 5: Third Party Actions***

23 To establish its affirmative defense of third party actions, WSC must prove
24 that third party actions, namely those of Mr. Kruger and Windermere Watch, were
25 the proximate cause of the injury the B&D Parties alleged incurred. *Schrimsher*
26 *v. Bryson*, 58 Cal. App. 3d 660, 664 (1976).

27 ***Affirmative Defense 6: Waiver***

28 To successfully assert the affirmative defense of waiver, WSC must prove
must prove both of the following by clear and convincing evidence:

1 1. That WSC agreed to undertake commercially reasonable efforts to
2 combat the effect of Windermere Watch on the B&D Parties' Business;

3 2. That the B&D Parties freely and knowingly agreed that WSC had
4 taken commercially reasonable efforts to combat the effects of Windermere Watch
5 on their business; and

6 3. That WSC detrimentally relied on the B&D Parties' agreement that all
7 commercially reasonable efforts had been taken WSC agreed to waive fees the
8 B&D Parties owed and extend the terms of a promissory note.

9 A waiver may be oral or written or may arise from conduct that shows that
10 the B&D Parties gave up that right.

11 If WSC proves that the B&D Parties gave up their right to any further
12 performance under the contracts, then WSC was not required to further perform
13 obligations.

14 Judicial Council of California Civil Jury Instruction ("CACI") No. 336 (Dec.
15 2015); *adidas-Am., Inc. v. Payless Shoesource, Inc.*, 546 F.Supp.2d 1029, 1074 (D.
16 Or. 2008).

17 ***Affirmative Defense 8: Set-Off***

18 To establish its Set-Off affirmative defense, WSC will need to prove the
19 amounts the B&D Parties owe under the Coachella Valley Franchise Agreement,
20 the Southern California Franchise Agreement, and the Modification Agreement,
21 and offset those amounts against any alleged damages the B&D Parties incurred. 2
22 Cal. Affirmative Def. § 44:1 (2d ed.); *Harrison v. Adams*, 20 Cal.2d 646, 648
23 (1942); *see also Jacobson v. Persolve, LLC*, 2014 WL 4090809, at *9 (N.D. Cal.
24 Aug. 19, 2014).

25 ***Affirmative Defense 10: Unclean Hands***

26 To prevail on its affirmative defense of unclean hands, WSC must show that
27 the B&D Parties did not "act fairly in the matter for which [they] seek a remedy."
28 *Kendall-Jackson Winery, Ltd. v. Superior Court*, 76 Cal.App.4th 970, 978 (1999);

1 see also Civ. Code § 3517 (“no one can take advantage of his own wrong”). If
2 the B&D Parties did not act fairly in their performance under the agreements, they
3 will be denied relief, regardless of the merits of their claim. *Id.*

4 ***Affirmative Defense 11: Estoppel***

5 “The elements of the doctrine” of estoppel are “that (1) the party to be
6 estopped must be apprised of the facts; (2) he must intend that his conduct shall be
7 acted upon, or must so act that the party asserting the estoppel has a right to believe
8 it was so intended; (3) the other party must be ignorant of the true state of facts;
9 and (4) he must rely upon the conduct to his injury.” *County of Los Angeles v. City*
10 *of Alhambra*, 27 Cal. 3d 184, 196 (1980) (citing *City of Long Beach v. Mansell*, 3
11 Cal. 3d 462, 488-89 (1970)).

12 ***Affirmative Defense 12: Compliance with Applicable Laws***

13 To prevail on this affirmative defense, WSC must prove that it substantially
14 complied with all applicable laws, including Cal. Bus & Prof. Code section 20020
15 *et seq.*

16 ***Affirmative Defense 13: Valid Business Purpose***

17 To prevail on its affirmative defense of valid business purpose, WSC must
18 establish that the actions taken during and throughout its 15-year relationship with
19 the B&D Parties occurred pursuant to and were protected by a valid business
20 purpose.

21 ***Affirmative Defense 17: Consent***

22 To prevail on its consent affirmative defense, WSC must establish that the
23 B&D Parties consented to the actions of which they now complain. *Am. Nat. Bank*
24 *v. Stanfill*, 205 Cal. App. 3d 1089, 1093 (1988).

25 ***Affirmative Defense 22: Unjust Enrichment***

26 To prove its affirmative defense of unjust enrichment, WSC will establish
27 that: (1) Plaintiffs received a benefit; and (2) unjust retained that benefit at the
28 expense of WSC. *In re ConAgra Foods Inc.*, 908 F. Supp. 2d 1090, 1113 (C.D.

1 Cal. 2012).

2 **4. In brief, the key evidence WSC relies on for each claim and**
3 **affirmative defense is:**

4 ***Counterclaim 1 – Breach of the Coachella Valley Franchise***
5 ***Agreement***

6 The following evidence supports WSC’s claim that Counter-defendants
7 breached the Coachella Valley Franchise Agreement: (1) WSC performed all of its
8 obligations pursuant to the Coachella Valley Franchise Agreement; (2) Windermere
9 Services Southern California, Inc. (“WSSC”) was the area representative and
10 services provider for Bennion & Deville Fine Homes, Inc. (“BDFH”), so any
11 allegedly unsatisfactory services were being provided by WSSC rather than WSC;
12 (3) BDFH agreed to pay WSC franchise fees, technology fees, late fees, and interest
13 pursuant to the Coachella Valley Franchise Agreement; (4) BDFH failed and
14 refused to pay franchise fees, technology fees, late fees, and interest since July 2014;
15 (5) BDFH terminated the Coachella Valley Franchise Agreement on September 30,
16 2015; (6) the Coachella Valley Franchise Agreement expressly prohibited BDFH
17 from continuing to use the Windermere trademark following termination of the
18 franchise agreement; (7) following their termination of the Coachella Valley
19 Franchise Agreement, BDFH continued to use, misuse, and misrepresent the
20 Windermere trademark by, among other things, using the “Windermere” name in
21 their URL, using the Windermere name and logo on their blog, and failing to
22 cooperate fully and in good faith with WSC to transfer URLs containing WSC’s
23 trademarks following termination of the Coachella Valley Franchise Agreement ;
24 and (8) Bennion and Deville personally guaranteed amounts owed under the
25 Coachella Valley Franchise Agreement.

26 ***Counterclaim 2 – Breach of the Area Representation Agreement***

27 The following evidence supports WSC’s claim that Counter-defendants
28 breached the Area Representation Agreement: (1) WSC performed all of its

1 obligations pursuant to the Area Representation Agreement; (2) as the area
2 representative, WSSC was required to collect and remit franchise fees, technology
3 fees, late fees, and interest from Southern California franchisees; (3) WSSC did not
4 make reasonable efforts to collect franchise fees, technology fees, late fees, and
5 interest from its related entities, BDFH and Bennion & Deville Fine Homes SoCal,
6 Inc. (“BDFH So Cal”); (4) WSC terminated the Area Representation Agreement for
7 cause on September 30, 2015; (5) the Area Representation Agreement expressly
8 prohibited Counter-defendants from continuing to use the Windermere trademark
9 following termination of the franchise agreement; and (6) following the termination
10 of the Area Representation Agreement, BDFH continued to use, misuse, and
11 misrepresent the Windermere trademark.

12 ***Counterclaim 3: Breach of Southern California Franchise Agreement***

13 The following evidence supports WSC’s claim that Counter-defendants
14 breached the Southern California Franchise Agreement: (1) WSC performed all of
15 its obligations pursuant to the Southern California Franchise Agreement; (2) WSSC
16 was the area representative and services provider for BDFH So Cal, so any allegedly
17 unsatisfactory services were being provided by WSSC rather than WSC; (3) BDFH
18 So Cal agreed to pay WSC franchise fees, technology fees, late fees, and interest
19 pursuant to the Southern California Franchise Agreement; (4) BDFH So Cal failed
20 and refused to pay franchise fees, technology fees, late fees, and interest since July
21 2014; (5) BDFH So Cal terminated the Southern California Franchise Agreement on
22 September 30, 2015; (6) the Southern California Franchise Agreement expressly
23 prohibited BDFH So Cal from continuing to use the Windermere trademark
24 following termination of the franchise agreement; (7) following their termination of
25 the Southern California Franchise Agreement, BDFH So Cal continued to use,
26 misuse, and misrepresent the Windermere trademark by, among other things, using
27 the “Windermere” name in their URL and using the Windermere name and logo on
28 their blog; and (8) Bennion and Deville personally guaranteed amounts owed under

1 the Southern California Franchise Agreement.

2 ***Counterclaim 4: Breach of Modification Agreement***

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

13 ***Counterclaim 8: Open Book Account***

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

24 ***Affirmative Defense 5: Third Party Actions***

25 Plaintiffs allege that WSC failed to take commercially reasonable actions to
26 counteract the impact of a negative marketing campaign conducted by a
27 disgruntled former customer, Mr. Kruger. In December 2012, WSC agreed to
28 discharge the approximately \$1 million debt owed by Plaintiffs and to make efforts

1 to address Mr. Kruger's activities in exchange for Plaintiffs' express contractual
2 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,
9 including the outside attorneys, agreed that (1) litigation would be ineffectual; and
10 (2) no money would be paid to Mr. Kruger. Indeed, Deville was adamant that Mr.
11 Kruger not receive a single dime from WSC. Upon group discussion and
12 consideration, the parties agreed that the best solution was to engage in search
13 engine optimization efforts ("SEO") to improve their own online presence and thus
14 effectively "bury" or "push" the Windermere Watch website to later and less
15 relevant search engine pages. Because the Windermere Watch website was
16 targeting Plaintiffs, it was then determined that for any SEO efforts to be
17 successful, they would need to be undertaken by Plaintiffs pursuant to their own IT
18 platforms.

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

27 The balance on a \$501,000 personal loan taken by Bennion and Deville was
28 due and owing in full on March 1, 2014. At about that time, Bennion and Deville

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

12 ***Affirmative Defense 6: Waiver***

13 Plaintiffs knowingly waived their claim that WSC failed to make
14 commercially reasonable efforts to combat the effects of Windermere Watch on
15 their business. To succeed on its Waiver affirmative defense, WSC must prove
16 that Plaintiffs knew WSC was required to perform under the Modification
17 Agreement, and knowingly waived any further performance. CACI Instruction
18 No. 336.

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

1 including the outside attorneys, agreed that (1) litigation would be ineffectual; and
2 (2) no money would be paid to Mr. Kruger. Indeed, Deville was adamant that Mr.
3 Kruger not receive a single dime from WSC. Upon group discussion and
4 consideration, the parties agreed that the best solution was to engage in SEO to
5 improve their own online presence and thus effectively “bury” or “push” the
6 Windermere Watch website to later and less relevant search engine pages. After
7 consultation with Bennion and Deville, WSC initially undertook the SEO efforts
8 with the help of its affiliated company, Windermere Solutions. However, as a
9 practical matter, it was soon determined that for any SEO efforts to be successful,
10 they would need to be undertaken by the B&D Parties pursuant to their own IT
11 platforms. This was entirely appropriate given Windermere Services Southern
12 California, Inc.’s obligations under the Area Representation Agreement.

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

21 The balance on Bennion and Deville’s January 2009 \$501,000.00 personal
22 loan was due and owing in full on March 1, 2014. At about that time, Bennion and
23 Deville requested a 36-month extension of the loan. They also claimed they had
24 spent significant sums on SEO efforts implementing the parties’ agreed upon plan
25 to combat Windermere Watch and demanded reimbursement from WSC. In June
26 2014, WSC agreed, among other things, to extend the loan for 36 months and to
27 allow Plaintiffs to take a credit of \$85,280.00 against past due franchise fees then
28 due and owing to WSC as full reimbursement for the SEO and related Windermere

1 Watch efforts. In exchange for these accommodations, Plaintiffs agreed, as is
2 confirmed in June 3, 2014 correspondence, that WSC was not in breach of any
3 obligations owed to Plaintiffs, that there was nothing more that WSC could or
4 should be doing relative to Windermere Watch, and that Plaintiffs would bear the
5 expense of any SEO efforts moving forward. Consequently, Plaintiffs waived any
6 claim that WSC had not taken commercially reasonable efforts to combat the effect
7 of Windermere Watch on their business.

8 ***Affirmative Defense 8: Set-Off***

9 The B&D Parties owe WSC over \$1.2 million dollars in unpaid fees
10 pursuant to the agreements. Those amounts must be offset against any alleged
11 damages the B&D Parties suffered.

12 ***Affirmative Defense 10: Unclean Hands***

13 With regard to Windermere Watch, the filing of franchise disclosure
14 documents, and the use of WSC's trademarks following the termination of the
15 franchise agreements, principles of fairness dictate that Plaintiffs shall not recover
16 anything from these alleged wrongs.

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

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

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

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

19 The balance on Bennion and Deville’s January 2009 \$501,000.00 personal
20 loan was due and owing in full on March 1, 2014. At about that time, Bennion and
21 Deville requested a 36-month extension of the loan. They also claimed they had
22 spent significant sums on SEO efforts implementing the parties’ agreed upon plan
23 to combat Windermere Watch and demanded reimbursement from WSC. In June
24 2014, WSC agreed, among other things, to extend the loan for 36 months and to
25 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 Finally, Plaintiffs continued to use, misuse, and misappropriate WSC's
5 trademarks after they terminated the franchise agreements. WSC made multiple
6 demands that Plaintiffs cease and desist their misuse of WSC trademarks, but
7 Plaintiffs continued to misuse the marks in direct contravention of the express
8 requirements of the franchise agreements.

9 ***Affirmative Defense 11: Estoppel***

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

15 In December 2012 WSC agreed to discharge the approximately \$1 million
16 debt owed by Plaintiffs and to make commercially reasonable efforts to address
17 Mr. Kruger's activities in exchange for Plaintiffs' express contractual commitment
18 to remain Windermere franchisees for five (5) years. These agreements were
19 memorialized in the parties' December 18, 2012 Agreement Modifying
20 Windermere Real Estate Franchise 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,
25 including the outside attorneys, agreed that (1) litigation would be ineffectual; and
26 (2) no money would be paid to Mr. Kruger. Indeed, Deville was adamant that Mr.
27 Kruger not receive a single dime from WSC. Upon group discussion and
28 consideration, the parties agreed that the best solution was to engage in SEO to

1 improve their own online presence and thus effectively “bury” or “push” the
2 Windermere Watch website to later and less relevant search engine pages. After
3 consultation with Bennion and Deville, WSC initially undertook the SEO efforts
4 with the help of its affiliated company, Windermere Solutions. However, as a
5 practical matter, it was soon determined that for any SEO efforts to be successful,
6 they would need to be undertaken by the B&D Parties pursuant to their own IT
7 platforms.

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

16 The balance on Bennion and Deville’s January 2009 \$501,000.00 personal
17 loan was due and owing in full on March 1, 2014. At about that time, Bennion and
18 Deville requested a 36-month extension of the loan. They also claimed they had
19 spent significant sums on SEO efforts implementing the parties’ agreed upon plan
20 to combat Windermere Watch and demanded reimbursement from WSC. In June
21 2014, WSC agreed, among other things, to extend the loan for 36 months and to
22 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 ***Affirmative Defense 12: Compliance with Applicable Laws***

2 WSC substantially complied with all applicable laws with respect to the
3 various franchise disclosure filings alleged in Plaintiffs' FAC, including without
4 limitation Cal. Bus. & Prof. Code § 20020 et seq.

5 ***Affirmative Defense 13: Valid Business Purpose***

6 WSC believes that much of its conduct occurring during and throughout its
7 15-year relationship with Plaintiffs including, but not limited to, the marketing and
8 sale of franchises in the Southern California Region, its interactions with third
9 parties such as third-party franchisees in the Southern California Region as well as
10 individuals like Gary Kruger, its administrative and regulatory functioning, and its
11 direct interactions and various agreements with Plaintiffs, occurred pursuant to and
12 protected by a valid business purpose.

13 ***Affirmative Defense 17: Consent***

14 When a Plaintiff consents to the action of which they now complain, they
15 will be estopped from claiming that action breached any duty owed by the
16 defendant. *Am. Nat. Bank v. Stanfill*, 205 Cal. App. 3d 1089, 1093 (Ct. App.
17 1988). Plaintiffs consented to the actions taken in response to Mr. Kruger's
18 negative marketing campaign, and consequently are now estopped from arguing
19 they were somehow damaged by the very conduct they previously consented to.

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

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

1 activities and the Windermere Watch website. During this call, all parties,
2 including the outside attorneys, agreed that (1) litigation would be ineffectual; and
3 (2) no money would be paid to Mr. Kruger. Indeed, Deville was adamant that Mr.
4 Kruger not receive a single dime from WSC. Upon group discussion and
5 consideration, the parties agreed that the best solution was to engage in SEO to
6 improve their own online presence and thus effectively “bury” or “push” the
7 Windermere Watch website to later and less relevant search engine pages. After
8 consultation with Bennion and Deville, WSC initially undertook the SEO efforts
9 with the help of its affiliated company, Windermere Solutions. However, as a
10 practical matter, it was soon determined that for any SEO efforts to be successful,
11 they would need to be undertaken by the B&D Parties pursuant to their own IT
12 platforms.

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

21 The balance on Bennion and Deville’s January 2009 \$501,000.00 personal
22 loan was due and owing in full on March 1, 2014. At about that time, Bennion and
23 Deville requested a 36-month extension of the loan. They also claimed they had
24 spent significant sums on SEO efforts implementing the parties’ agreed upon plan
25 to combat Windermere Watch and demanded reimbursement from WSC. In June
26 2014, WSC agreed, among other things, to extend the loan for 36 months and to
27 allow Plaintiffs to take a credit of \$85,280.00 against past due franchise fees then
28 due and owing to WSC as full reimbursement for the SEO and related Windermere

1 Watch efforts. In exchange for these accommodations, Plaintiffs agreed, as is
2 confirmed in June 3, 2014 correspondence, that WSC was not in breach of any
3 obligations owed to Plaintiffs, that there was nothing more that WSC could or
4 should be doing relative to Windermere Watch, and that Plaintiffs would bear the
5 expense of any SEO efforts moving forward.

6 ***Affirmative Defense 22: Unjust Enrichment***

7 Plaintiffs consented to the actions taken in response to Mr. Kruger's
8 negative marketing campaign, and consequently are now estopped from arguing
9 they were somehow damaged by the very conduct they previously consented to. In
10 December 2012 WSC agreed to discharge the approximately \$1 million debt owed
11 by Plaintiffs and to make efforts to address Mr. Kruger's activities in exchange for
12 Plaintiffs' express contractual commitment to remain Windermere franchisees for
13 five (5) years. These agreements were memorialized in the parties' December 18,
14 2012 Agreement Modifying Windermere Real Estate Franchise License
15 Agreements.

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

1 they would need to be undertaken by the B&D Parties pursuant to their own IT
2 platforms.

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

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

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

1 **VIII. Evidence of Issues Remaining To Be Tried**

2 **The B&D Parties' Statement**

3 The B&D Parties reserve all rights to amend the following pending the
4 outcome of pending motions and/or the resolution of any motions in limine:

5 1. Whether B&D Fine Homes can prove by a preponderance of the
6 evidence that it performed its obligations under the Coachella Valley Franchise
7 Agreement, or was excused from performance;

8 2. Whether B&D SoCal can prove by a preponderance of the evidence that
9 it performed its obligations under the SoCal Franchise Agreement, or was excused
10 from performance;

11 3. Whether Services SoCal can prove by a preponderance of the evidence
12 that it performed its obligations under the Area Representation Agreement, or was
13 excused from performance;

14 4. Whether the B&D Parties can prove by a preponderance of the evidence
15 that WSC failed to take necessary action to prevent infringement of the Windermere
16 trademark by Windermere Watch;

17 5. Whether the B&D Parties can prove by a preponderance of the evidence
18 that WSC failed to make "commercially reasonable" efforts to curtail Windermere
19 Watch's negative marketing campaign;

20 6. Whether WSC has waived or is otherwise precluded from pursuing the
21 liquidated damages provided for in Section 3(F) of the Modification Agreement in
22 light of its breaches of the franchise agreements and Area Representation
23 Agreement;

24 7. Whether the B&D Parties can prove by a preponderance of the evidence
25 that WSC improperly terminated the Area Representation Agreement without proper
26 notice;

27 8. Whether WSC provided a comparable area representative for the
28 Southern California region after terminating Services SoCal's status as the area

1 representative;

2 9. Whether the B&D Parties can prove by a preponderance of the evidence
3 that WSC failed to provide Services SoCal with the uninterrupted right to offer
4 Windermere franchises in Southern California;

5 10. Whether the B&D Parties can prove by a preponderance of the evidence
6 that WSC failed to timely register the Southern California Franchise Disclosure
7 Document following receipt of Services SoCal's audited financials in July 2014;

8 11. Whether the B&D Parties can prove by a preponderance of the evidence
9 that WSC terminated the Area Representation Agreement without cause, and in
10 doing so, was obligated to pay Services SoCal the fair market value of that business;

11 12. The value (fair market or otherwise) of the Area Representation
12 Agreement;

13 13. Whether the B&D Parties can prove by a preponderance of the evidence
14 that WSC failed to promptly and diligently commence and pursue the preparation
15 and filing of all franchise registration filings required under California and/or federal
16 law;

17 14. Whether WSC's termination of the Area Representations Agreement
18 was done under the pretense that Services SoCal was the guarantor of the franchise
19 fees owed by the franchisees in Southern California region;

20 15. Whether WSC interfered with the relationships between Services SoCal
21 and Windermere franchisees within the Southern California region;

22 16. Whether the B&D Parties can prove by a preponderance of the evidence
23 that WSC was surreptitiously engaged in efforts to acquire the B&D Parties'
24 superior services and technology;

25 17. Whether the B&D Parties can prove by a preponderance of the evidence
26 that WSC failed to act in good faith and to conduct its business such that Services
27 SoCal received the benefit of being an area representative of WCS;

28 18. Whether the B&D Parties can prove by a preponderance of the evidence

1 that B&D Fine Homes and B&D SoCal were justified in terminating the franchise
2 agreements in light of WSC's termination of the Area Representation Agreement
3 thereby negating B&D Fine Homes and B&D SoCal's 50% reduction in franchise
4 fees that was central to the continued franchise relationships;

5 19. Whether the B&D Parties were commercially justified in their efforts to
6 discontinue use of the Windermere mark after September 30, 2015;

7 20. Whether the B&D Parties were justified in discontinuing payment
8 under the franchise agreements in light of WSC's prior breaches of the franchise
9 agreements; and

10 21. Damages to B&D Fine Homes for WSC's breaches of the Coachella
11 Valley Franchise Agreement;

12 22. Damages to B&D SoCAL for WSC's breaches of the SoCal Franchise
13 Agreement;

14 23. Damages to Services SoCal for WSC's breaches of the Area
15 Representation Agreement;

16 24. Whether the B&D Parties are entitled to attorneys' fees and costs as
17 provided for in the contracts.

18 **WSC's Statement**

19 WSC reserves the right to amend and supplement the following pending
20 outcome of any pending motions and/or motions in limine:

21 1. Whether WSC can prove by a preponderance of the evidence that it
22 performed its obligations under the Coachella Valley Franchise
23 Agreement, or was excused by performance;

24 2. Whether WSC can prove by a preponderance of the evidence that the
25 B&D Parties breached their obligation to, among other things, pay
26 franchise fees pursuant to the Coachella Valley Franchise Agreement;

27 3. The amount of damage WSC incurred pursuant to the B&D Parties
28 breach of the Coachella Valley Franchise Agreement;

- 1 4. Whether WSC can prove by a preponderance of the evidence that it
2 performed its obligations under the Area Representation Agreement, or
3 was excused by performance;
- 4 5. Whether WSC can prove by a preponderance of the evidence that the
5 B&D Parties breached their obligations pursuant to the Area
6 Representation Agreement;
- 7 6. The amount of damage WSC incurred pursuant to the B&D Parties
8 breach of the Area Representation Agreement;
- 9 7. Whether WSC can prove by a preponderance of the evidence that it
10 performed its obligations under the Southern California Franchise
11 Agreement, or was excused by performance;
- 12 8. Whether WSC can prove by a preponderance of the evidence that the
13 B&D Parties breached their obligation to, among other things, pay
14 franchise fees pursuant to the Southern California Franchise
15 Agreement;
- 16 9. The amount of damage WSC incurred pursuant to the B&D Parties
17 breach of the Southern California Franchise Agreement;
- 18 10. Whether WSC can prove by a preponderance of the evidence that it
19 performed its obligations under the Modification Agreement, or was
20 excused by performance;
- 21 11. Whether WSC can prove by a preponderance of the evidence that the
22 BDFH and BDFH SoCal breached their obligations pursuant to the
23 Modification Agreement;
- 24 12. The amount of damage WSC incurred pursuant to BDFH and BDFH
25 SoCal's breach of the Modification Agreement;
- 26 13. Whether WSC can prove by a preponderance of the evidence that the
27 B&D Parties waived any claim that WSC failed to take commercially
28 reasonable efforts to curtail the negative marketing campaign of

1 Windermere Watch;

2 14. Whether WSC was entitled to terminate the Area Representation
3 Agreement for cause based on the B&D Parties' failure to collect and
4 remit all franchise fees owed by franchisees in their area;

5 15. Whether WSC was entitled to terminate the Area Representation
6 Agreement for cause based on the B&D Parties' failure to provide
7 adequate services to franchisees in their area;

8 16. Whether WSC is entitled to attorneys' fees and costs as provided in the
9 agreements.

10 **IX. Statements Regarding Discovery**

11 Discovery is complete.

12 **X. Disclosures and Exhibits**

13 The parties have disclosed their respective witnesses and agreed to make
14 available at trial all of their respective employees that have been identified in the
15 witness lists filed with the Court.

16 The parties' will file a combined joint exhibit list on Friday, May 26, 2017.
17 Unless all parties agree that an exhibit shall be withdrawn, all exhibits will be
18 admitted without objection at trial except those objections identified by the parties
19 in their joint exhibit list.

20 **XI. Witnesses**

21 The parties originally filed their respective witness lists with the Court on
22 August 29, 2016. [D.E. 50, 53.]The B&D Parties have since submitted an
23 Amended Witness List. [D.E. 128.] WSC objects to the B&D Parties' Amended
24 Witness List. No witnesses other than those identified in the parties' respective
25 witness lists will be permitted to testify (other than solely for impeachment).

26 Each party intending to preserve evidence by way of deposition testimony
27 has marked such depositions in accordance with L.R. 16-2.7. For this purpose, the
28 following depositions shall be lodged with the Clerk as required by L.R. 32-1:

1 None.

2 **XII. Law And Motion Matters**

3 The following law and motion matters and motions *in limine*, and no others,
4 are pending or contemplated:

5 **The B&D Parties' Law and Motion Matters**

6 1. Pending Motions

- 7 a. Motion *in Limine* to preclude WSC from introducing evidence
8 of breach of the Area Representation Agreement by Services
9 SoCal not identified in the February 2015 notice of termination;
- 10 b. Motion *in Limine* to exclude exhibits and other evidence
11 concerning loans to the B&D Parties from third-party lenders;
- 12 c. Motion *in Limine* to preclude WSC from introducing evidence
13 of the personal wealth of Counter-Defendants Bennion and
14 Deville;
- 15 d. Motion *in Limine* to preclude WSC from introducing evidence
16 and argument that B&D Fine Homes was obligated to transfer
17 the Windermere domain names and evidence of expenses for
18 obtaining domain names;
- 19 e. Motion *in Limine* to preclude WSC from introducing evidence
20 of work performed on the Sundberg Report prior to October
21 2013;
- 22 f. Motion *in Limine* to preclude WSC from introducing evidence
23 withheld on grounds of privilege;
- 24 g. Motion *in Limine* to preclude WSC from referring to the two
25 franchise agreements and Area Representation Agreement as
26 being the collectively responsibilities of the B&D Parties; and
- 27 h. Motion to Strike WSC's Rebuttal Expert Report.

28 2. Contemplated Motions

- 1 a. The B&D Parties’ motion for judgment as a matter of law on
2 their claims, WSC’s counterclaims, and the B&D Parties
3 affirmative defenses.

4 **WSC’s Law and Motion Matters**

5 1. **Pending Motions**

- 6 a. WSC’s Motion *in Limine* to Exclude Plaintiffs’ Expert Peter
7 Wrobel;
8 b. WSC’s Motion *in Limine* to Exclude Portions of Plaintiffs and
9 Counter-Defendants’ Rebuttal Report;
10 c. WSC’s Motion *in Limine* to Exclude Evidence Related to
11 Dismissed Claims; and
12 d. WSC’s Motion *in Limine* to Exclude Evidence Related to Its
13 Offer to Purchase Plaintiffs and Counter-Defendants.

14 2. **Contemplated Motions**

- 15 a. WSC’s motion to judgment as a matter of law on its
16 counterclaims, the B&D Parties’ claims, and the B&D Parties’
17 affirmative defenses.

18 **XIII. Bifurcation**

19 Bifurcation of the following issues for trial is ordered: None.

20 **XIV. Final Pretrial Conference Order Statement**

21 The foregoing admissions having been made by the parties, and the parties
22 having specified the foregoing issues remaining to be litigated, this Final Pretrial
23 Conference Order shall supersede the pleadings and govern the course of trial of
24 this case, unless modified to prevent manifest injustice.

25
26 Dated:

27
28 _____
Hon. Manual L. Real

1
2
3 Approved as to form and content:

4 **MULCAHY LLP**

5
6 By: /s/ Kevin A. Adams

7 Kevin A. Adams

8 *Attorneys for Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc.,*
9 *Bennion & Deville Fine Homes SoCal, Inc., Windermere Services Southern*
10 *California, Inc., and Counter-Defendants Robert L. Bennion and Joseph R. Deville*

11 **PEREZ WILSON VAUGHN &**
12 **FEASBY**

13
14 By: /s/ Jeffrey A. Feasby

15 Jeffrey A. Feasby

16 *Attorneys for Windermere Real Estate*
17 *Services Company*