

1 I. INTRODUCTION

2 This is a dispute between, Mark Lavine ("Lavine") and James Robertson ("Robertson")
3 who became shareholders, officers and directors in two closely-held corporations (The Gutter
4 Shutter Co., Inc. ("GSI") and Gutter Shutter of California, Inc. ("GSC")). Together, these
5 corporations, along with a third company, Universal Home Improvement, Inc. ("UHI"), engaged
6 in a joint venture to sell a clog-free gutter shielding device throughout the state of California.
7 Though the business was successful, it was not without its problems. Eventually, Lavine and
8 Robertson discussed going their separate ways. However, as established by clear and convincing
9 evidence at trial, before reaching a mutual agreement with Lavine how to end the business
10 relationship, Robertson, aided by his wife Katherine Robertson, breached his fiduciary duties and
11 engaged in unfair business practices by: (1) directly competing against GSC, GSI and UHI while
12 still in a fiduciary relationship with these entities; (2) misappropriating the corporate assets,
13 offices, money, and business deals for his own (and his wife's) use; (3) inducing GSI and GSC
14 employees to resign and join his new company under false pretenses; and (4) further sabotaging
15 Plaintiffs' efforts to continue business. As a result, GSI, GSC and UHI lost millions of dollars
16 and their competition in the marketplace was harmed significantly. ^u

1005
9/5/12

17 This case is strikingly similar to the fact scenario set forth in the California Supreme
18 Court's decision in *Bancroft-Whitney Co. v. Glen* (1966) 64 Cal.2d 367. In *Bancroft-Whitney*, a
19 former officer of Bancroft Whitney was held liable along with his co-conspirator and new
20 employer Matthew Bender for breach of fiduciary duty and unfair competition resulting from the
21 theft of company property and interference with business belonging to Bancroft-Whitney. Based
22 on the directives set forth in *Bancroft-Whitney*, and on the clear and convincing evidence
23 established at trial, this Court finds that James and Katherine Robertson are liable to Plaintiffs for
24 all losses suffered as a result of the breach of fiduciary duties, interference with contract,
25 interference with prospective economic advantage, and unfair competition.

26 ¹ As will be further discussed herein, Plaintiffs were excluded from
27 the relevant marketplace for four years. However, by virtue of the
28 pretrial settlement with the Gutter Shutter Ohio Defendants, Plaintiffs
now have a renewed distributionship by which they can now re-enter the
market.

1005
9/5/12

1 **II. FACTUAL SUMMARY**

2 This matter was assigned to Department 10 for trial beginning on March 6, 2012.
3 Pursuant to a stipulation among UHI, Lavine, James Robertson and Katherine Robertson, this
4 matter was tried without a jury before the Honorable Gerald J. Buchwald. UHI and Lavine
5 appeared in court and were represented throughout trial by their counsel, J. Philip Martin, Esq.
6 and Eleanor C. Schuermann, Esq. of Kastner Kim, LLP. Defendants James Robertson and
7 Katherine Robertson (collectively, "the Robertsons") appeared in court and were represented
8 throughout trial by their counsel, Mario Fausto, Esq. of the Law Offices of Mario Fausto of
9 Sayar Fausto LLP and Matthew Coleman, Esq. of the Price Law Firm.

10 This case action was tried over approximately ten days from March 6, 2012 through
11 March 19, 2012. During the trial, ten witnesses testified and 225 exhibits were admitted
12 into evidence. The Court, having heard and observed the testimony of witnesses, considered the
13 documentary evidence presented, having reviewed the written submissions of the parties and the
14 records of this court, having considered the argument of counsel, and being fully advised, now
15 issues the following findings of fact and conclusions of law:

16 **A. UHI'S ORIGINAL EXCLUSIVE DEALERSHIP AGREEMENT**

17 The evidence at trial established that UHI is a home improvement business owned solely
18 by Lavine. On May 23, 2003, UHI entered into an exclusive dealership agreement with
19 Defendants MID-AMERICA GUTTERS, INC. dba THE GUTTER SHUTTER COMPANY
20 ("GS Ohio")^{1A} to sell a gutter sheltering device designed to prevent leaves and other debris from
21 clogging a homeowner's gutters and damaging the home. (Exhibit 5.) This agreement gave
22 UHI the exclusive right to sell the Gutter Shutter product throughout the state of California for
23 25 years. UHI began installing the devices in the San Francisco Bay Area through its own
24

25 ^{1A} All all claims involving the Ohio parties were resolved pursuant to judicially supervised settlement. GSI
26 and GSC were dismissed as individual defendants on the first day of trial.

MJM
9/5/12

MJM
9/5/12

1 installers in 2004. In 2005, UHI was doing approximately \$757,000 in annual sales. (Exhibit
2 124.)

3 Lavine brought a partner into the gutter business, Hank Wrigley ("Wrigley") who was a
4 friend he had known in high school and who also worked for UHI as a salesman. Wrigley also
5 knew Robertson and had been childhood friends with him. Two new California corporations
6 were created to further promote UHI's gutter shutter business: Gutter Shutter, Inc. ("GSI") and
7 Gutter Shutter of California ("GSC"). GSI was set up to order the materials from GS Ohio and
8 do the installations. GSC was formed to create independent gutter installer dealerships and then
9 sell GS Ohio's materials to them (and to GSI) at a markup of 30% - 60%. Wrigley and Lavine
10 were both members of the Board of Directors for GSC and GSI. Wrigley also held the position
11 of Vice President, while Lavine remained the companies' President. Beginning in 2005, UHI
12 gave GSI and GSC the rights to share in UHI's exclusive dealership agreement with GS Ohio in
13 return for: (1) cross-selling rights and referrals to UHI's home repair business; (2) the shared use
14 of facilities, equipment and personnel; and (3) joint use of a computer database where leads,
15 appointments and customer files were stored. GS Ohio approved this amendment to the original
16 dealership agreement. (Exhibit 6.)

17 B. ROBERTSON JOINS THE BUSINESS

18 In November, 2006, defendant James Robertson ("Robertson") who knew Wrigley and
19 Lavine personally became a one-third shareholder of the GSI and GSC by investing \$195,000 in
20 the business. It was established at trial by a preponderance of the evidence that, prior to paying
21 the investment money, Robertson was given copies of all corporate records, financial statements
22 and a copy of the original dealership agreement. In November 2006, Lavine, Wrigley and
23 Robertson, signed an agreement for Robertson to become a one-third owner of GSI and GSC.
24 Robertson also became a Vice President and joined the Board of Directors of both corporations.
25 This event was memorialized in several simultaneously executed corporate documents signed by
26 Robertson, including, an agreement of shareholders, minutes of meeting, and contract for the
27

msb
9/5/12

msb
9/5/12

1 purchase of shares. (Exhibits 5, 6, 39, 40.) The existence of these corporate documents is of
2 particular importance to the Court in determining the intent of the parties at the time Robertson
3 joined the business.

4 At trial, Robertson denied knowledge of the existence of the UHI dealership agreement
5 with GS Ohio. The Court does not find this denial credible. The evidence at trial clearly
6 established that Robertson not only knew of the UHI exclusive dealership agreement, but also
7 demanded that it be amended to acknowledge his interest in the venture. (Exhibit 6.) Through
8 emails with Lavine and GS Ohio, Robertson made his presence known and demanded to be
9 included in the original dealership agreement. Thus, in March 2007, the original UHI dealership
10 agreement with GS Ohio was amended to add Robertson to the agreement at his specific request.
11 (Exhibit 46.)

12 As a result, this Court finds based on substantial evidence that Lavine, Wrigley,
13 Robertson, UHI, GSI and GSC all became joint-ventures^{ra} in the Gutter Shutter business to: (1)
14 sell & install Gutter Shutter products; (2) develop leads for the GSI as well as for UHI; (3) sell
15 Gutter Shutter dealerships throughout California; and (4) sell Gutter Shutter materials to the
16 Gutter Shutter dealerships at a mark up. In addition, it was also proven by a preponderance of
17 the evidence that the parties agreed that if leads came in for general contracting services, they
18 would be referred to UHI exclusively. Also, if the Gutter Shutter clients needed additional work
19 done to their home, UHI exclusively would get that work as well. Mr. Wrigley also testified at
20 trial that there were some inter-company billings between GSI and GSC on the one hand and
21 UHI on the other which was consistent with the existence of a joint venture.

22 Shortly after Robertson came onboard, Wrigley had disagreements with Lavine and
23 eventually abandoned the business altogether in early 2007. Though frustrated with Wrigley,
24 Lavine and Robertson worked together to keep the business going and to expand its services.
25 Robertson took over the management of the Sacramento office for GSI and GSC for over two
26 years. Lavine maintained GSI and GSC's main headquarters in San Carlos, where UHI was also
27

10/5/12

1 based. It is undisputed that in 2007, Lavine and Robertson created a "Call Center" in the
2 Sacramento office designed to generate leads from interested customers. This Call Center was
3 staffed with experienced telemarketers who would make "cold calls" to homeowners pitching the
4 Gutter Shutter product. At trial, both Lavine and Robertson acknowledged the importance of the
5 Call Center to the future success of the business. In addition, GS Ohio's president, Mark
6 Steinberg, testified via deposition testimony regarding the need to have an experienced manager
7 run a successful Call Center.²

8 Robertson and Lavine continued to work together to get the Call Center up and running.
9 By January 2008, they brought in a new manager, Barry Katz, to run the center and had hired
10 several telemarketers. The volume of sales leads generated by the Call Center jumped
11 dramatically so that by February, 2008 over 464 leads had resulted in approximately 49 new jobs
12 for GSI. By March 2008, ~~the~~ GSI had generated over 880 sales leads which were in the system
13 and represented potential buyers for the gutter shutter systems. Though business was improving,
14 it was not without its problems. Neither GSI nor GSC had ^{reported} made a profit in over five years.
15 (Exhibits 102-111.)^{2a/} And GSI faced recurring problems of hiring enough installers to complete
16 jobs that were ordered. Nevertheless, from the evidence at trial it is clear that with the new Call
17 Center up and running, GSI and GSC were on their way to improving dramatically and would
18 have made a profit in 2008. There was also testimony from Barry Katz and Judy Lucero that
19 UHI received regular cross-referrals from the Call Center for its home improvement business.

20 C. ROBERTSON HIJACKS THE CALL CENTER & COMPANY PROPERTY

21 Like owners of many closely-held corporations, Lavine and Robertson had a clash of
22 management styles. Therefore, in March 2008, Robertson and Lavine began to discuss dividing
23 up their business. Robertson proposed taking over ^{the} Sacramento area and three surrounding
24

25 ² Though the Robertsons objected to Steinberg's testimony initially as undesignated expert witness opinion, they did not submit a
26 written motion as ordered by the Court. Nevertheless, the Court need not consider whether Steinberg's testimony was improper expert opinion
27 because the uncontroverted testimony from both Lavine and Robertson established the importance of the Sacramento Call Center to the success
28 of the gutter shutter business they were trying to develop.

29 ^{2a} As found later in this Decision, with certain appropriate accounting
30 adjustments, the actual net operating result shows a profit except for 2006.

12/8
9/5/12

12/8
9/5/12

12/8
9/5/12

12/8
9/5/12

mpb
9/5/12

1 counties. While Lavine was open to this proposal, the evidence at trial clearly established that
2 Robertson and Lavine never reached any agreement regarding how to divide up the jointly
3 owned assets or wind up corporate affairs. Robertson himself cautioned Lavine that until they
4 reached a written agreement to divide up the companies, they were still one company and it was
5 "business as usual." (Exhibit 80.)

6 By mid-March 2008, the parties still had not reached an agreement on how to handle the
7 Call Center, divide up corporate property, or even identified all GSI and GSC's assets or
8 liabilities. Lavine and Robertson discussed different proposals to divide up and/or lease call
9 center leads, including Lavine setting up his own call center in the Sacramento area once the
10 business was dissolved.

11 It was established at trial that, in or around mid-March 2008, Lavine began looking to
12 lease space for a call center of his own in anticipation of the pending dissolution of his business
13 relationship with Robertson. Robertson also knew of this possible move when negotiating with
14 Lavine for a temporary cost sharing arrangement for the Call Center. Though Robertson learned
15 of these plans indirectly from Barry Katz, Robertson did not ask Lavine about them. Instead, he
16 lost patience with Lavine and, in late March, proceeded to take GSI and GSC's assets over as his
17 own. Robertson set up a competing corporation, August West Enterprises, Inc. dba Gutter
18 Shutter of Sacramento, while he was still an officer and director of the GSI and GSC. The
19 evidence is clear that, unbeknownst to Lavine, Robertson then entered into secret negotiations
20 with GS Ohio to set up his own dealership in Sacramento and surrounding counties. A
21 dealership agreement was signed between Robertson and GS Ohio and guaranteed by Katherine
22 Robertson (Exhibit 54.) Lavine did not learn of this agreement until he received this document
23 as an anonymous fax ^{on} March 20, 2008. He quickly contacted GS Ohio and asked them not to
24 enter into such agreement because the parties still had not yet resolved how to divide up their
25 business. Robertson continued to remind Lavine that the ^{wind-up of these} businesses would not be final until they
26 reached a final agreement and all documents were signed. (Exhibit 132.) At the same time that
27

mpb
9/5/12

msj
9/5/12

1 Robertson was negotiat^{ing} with Lavine individually and later, through his lawyers, he engaged in a
2 secret campaign to take over the business assets as his own and to sabotage GSC, GSI and UHI's
3 business interests over the next four months.

4 On April 10, 2008, Robertson held a meeting with all employees in the Sacramento office
5 for the purpose of inducing them to jump ship and join his competing company. Robertson told
6 the employees that he and Lavine were going their separate ways and they could work for him in
7 his new venture in the existing Sacramento office, or try to obtain a job with Lavine. At trial,
8 two former employees, Barry Katz and Pablo Paloma, testified that Robertson offered them and
9 all other Sacramento employees a raise if they would join with him. It is undisputed that Lavine
10 was never given a chance to tell his side of the story, to speak with employees himself regarding
11 the planned break up of GSI and GSC, or to offer them a chance to join his own business once the
12 companies were wound down. It was also undisputed that all the Sacramento employees
13 resigned en mass on April 10, 2008, and all were immediately hired by Robertson for his new
14 business venture which began just a few days later. Robertson also candidly admitted that he
15 took Company equipment and deposited checks from GSI's customers into his own bank
16 account.

msj
9/5/12

17 Therefore, the Court finds based on clear and convincing evidence that in April 2008,
18 while Robertson was still an officer and director of the GSI and GSC, and knowing that UHI was
19 a joint venturer, Robertson misappropriated the assets of the GSI, GSC and UHI and took
20 company business for himself by:

- 21 (1) misappropriating the Call Center office, records, equipment and materials³;
- 22 (2) inducing Call Center employees to resign their position and join his new company
- 23 through promises of increased compensation, lying about the status of GSI and GSC, and lying
- 24 about his relationship with GS Ohio;

msj
9/5/12

25
26 ³ The Court does not find ^{credible} Mr. Robertson's testimony that the inventory that he took for the new business was of
27 minimal value. The year end financial statement for 2007 for GSI and GSC showed inventory still being held at
28 year end of \$31,327. So there was value there which Robertson misappropriated for his own use.

MB
9/5/12

- 1 (3) misleading GS Ohio into believing that he and Lavine and completely dissolved
- 2 their existing business in order to obtain ^{his own} separate dealership agreement with GS Ohio;
- 3 (4) taking GSI's 880 existing sales leads for himself;
- 4 (5) receiving money from GSI customers for jobs for his own use;
- 5 (6) instructing employees to delete existing sales appointments for GSI, GSC and
- 6 UHI from the shared ACT computer database.

7 The Court further finds based on clear and convincing evidence that Katherine Robertson
8 participated in Robertson's actions and aided him by:

- 9 (1) changing the locks on the doors of the Sacramento office;
- 10 (2) appropriating GSI and GSC's corporate records and sales leads belonging to GSI,
- 11 GSC and UHI;
- 12 (3) enabling Robertson to develop the competing business by co-founding and jointly
- 13 controlling August West; funding the new operation, hiring and firing employees, managing
- 14 financial records and accounting; and
- 15 (4) serving as a guarantor for the new dealership agreement with GS Ohio.

16 D. THE DEMISE OF GSI AND GSC

17 By clear and convincing evidence, it was established that the Robertsons' actions above
18 proximately caused damage to GSC, GSI and UHI in the form of lost property, lost income, lost
19 business, and lost future sales. GSI not only lost existing leads and pending sales, but the
20 unanimous resignation of its entire Call Center staff prevented GSI and GSC from developing
21 new business. The evidence also established that, as a captive vendor, GSC was unable to sell
22 parts and materials to GSI or to other vendors ^{due to} ~~based on~~ the Robertsons' wrongful actions. GSI's
23 staff and installers resigned a few weeks after ~~wards~~ ^{and} the Robertsons' wrongful actions ^{and} due to lack
24 of business, ^{resulting from those wrongful acts.} At trial, there was substantial evidence that Lavine attempted to mitigate the GSI's
25 damage through at least two attempts to create a new Call Center, but was unsuccessful.

MB
9/5/12

1 Unbeknownst to Lavine, at the same time he was trying to rebuild GSI and GSC's
2 business, Robertson was working behind the scenes to sabotage his relationship with GS Ohio
3 and terminate UHI's distributorship agreement altogether. There was clear and convincing
4 evidence that between March 2008 and the fall of 2008 Robertson spread false rumors to GS
5 Ohio regarding Lavine and UHI to induce GS Ohio to cancel UHI's exclusive statewide
6 dealership agreement and give it to Robertson instead. **(Exhibits 60 – 67.)** Robertson also
7 falsely told GS Ohio that he and Lavine had dissolved their business when he clearly knew that
8 was untrue. This caused GS Ohio to send a letter to UHI and Lavine notifying them that the
9 dealership agreement was being terminated. **(Exhibit 219.)** Lavine immediately told GS Ohio
10 that the business had not dissolved and that there were no grounds to terminate the dealership
11 agreement. **(Exhibit 213.)** Recognizing that it had been misled, GS Ohio quickly rescinded the
12 termination and restored UHI's agreement.

13 Between April 2008 and June 2008, Lavine continued to try to negotiate with Robertson
14 individually, and later through his attorney, regarding the dissolution of their business by letters
15 and emails between March 2008 and June 2008. **(Exhibits 73-74.)** Negotiations fell apart not
16 long thereafter and the parties ceased communicating with each other altogether in late June
17 2008. GSC and GSI could not sustain the losses they incurred and shut their doors in 2009.
18 Robertson's new business failed as well in 2009 after he and his wife fired the Call Center
19 employees in late 2008.

20 The Court further finds that UHI also suffered losses due to Robertsons' wrongful
21 actions. There was also sufficient evidence presented at trial to show that UHI lost cross-referral
22 business as a result of Robertson Defendants taking over the Call Center, destruction of
23 corporate records and tampering with the ACT database. The Court finds that UHI suffered
24 decline in sales due to the complete shut down of cross-referrals from the Call Center.

25 E. WRIGLEY'S SALE OF STOCK TO ROBERTSON
26
27

1 On or about May 23, 2011, Hank Wrigley sold his interest in the business to Robertson.
2 It appears from the evidence that Wrigley had second thoughts about abandoning the business
3 and his friend Robertson. The Court finds these second thoughts were credible based on
4 Wrigley's relationship with Robertson as a long-time friend and big-brother figure. However,
5 neither Wrigley nor Robertson followed the procedure set forth in the Exhibit 39 for the sale of
6 the shares. The record is also clear that no notice was given to Lavine, GSI or GSC regarding
7 the proposed sale. Wrigley and Robertson executed a written agreement memorializing the
8 transaction on May 23, 2011. (Exhibit 131.) At trial it was established that the transfer was part
9 gift by Wrigley to Robertson and part consideration paid in the form of waiving a \$1,600 debt
10 Wrigley owed to Robertson relating to a real estate deal.

300B
9/5/12

11 Though Wrigley and Robertson did not follow the procedures set forth in Exhibit 39, it
12 appears based on the evidence that there was an adequate transfer of Wrigley's shares to
13 Robertson. Nevertheless, the Court finds that the GSI and GSC retain the right to buy back those
14 shares as shall be discussed infra.

15 **III. PROCEDURAL BACKGROUND**

16 **A. CLAIMS AND PARTIES**

17 The original complaint was filed on June 8, 2010 by Plaintiffs UHI, GSI, GSC and
18 Lavine against Defendants MARK STEINBERG; GS Ohio, THE GUTTERSHTTER
19 MANUFACTURING CO., (collectively, "Ohio parties"), the Robertsons and AUGUST WEST
20 ENTERPRISES, INC. (August West) for breach of contract, breach of fiduciary duty,
21 interference with contract, interference with prospective business advantage, assorted business
22 torts and injunctive relief. GS Ohio and Steinberg filed a cross-complaint against UHI, Lavine,
23 GSC, GSI, The Robertsons and August West for breach of contract, fraud, various business torts
24 and indemnity claims. The Robertsons, in turn, filed a cross-complaint against GS Ohio, UHI,
25 Mark Lavine and former employee Judy Lucero ^{asserting} ~~for~~ a collection of tort claims, contract claims
26 and equitable claims.

300B
9/5/12

27 3A Exhibit #39 is a Shareholders Agreement whereby GSI and GSC had
28 the right to repurchase shares of a withdrawing shareholder
based on an appraised price. 11

1 During a settlement conference held on February 17, 2012, all claims involving the Ohio
2 parties were resolved pursuant to judicially supervised settlement. GSI and GSC initially were
3 represented first by separate counsel, Jeffrey E. Ryan, and later Michael Karcis, who
4 subsequently withdrew for personal reasons. Due to the shareholder dispute between Lavine and
5 Robertson, GSI and GSC were unable to obtain new counsel or participate in this litigation.
6 They remained unrepresented as of the time of trial and had defaults entered against them on the
7 GS Ohio cross-complaint. Pursuant to a stipulation negotiated among all parties before Judge
8 Grans^daert on March 5, 2012, and as part of the settlement with GS Ohio, it was agreed that GSI
9 and GSC's individual claims be dismissed from the case so that only Lavine's derivative claims
10 on behalf of GSI and GSC would go forward.

1608
9/15/12

11 B. REMAINING CAUSES OF ACTION AND DEFENSES

12 At the time of trial, UHI and Lavine asserted the following claims against the Robertsons:
13 (1) Breach of Fiduciary Duty (2d Cause of Action); (2) Misappropriation of Trade Secret (4th
14 Cause of Action); (3) Intentional Interference with Prospective Economic Advantage (5th Cause
15 of Action) ; (4) Intentional Interference with Contract (6th Cause of Action) (5) Violation of
16 Business & Professions Code § 7028.41 (7th Cause of Action) (Lavine only); and (6) Unfair
17 Competition against James and Kathy Robertson and August West.⁴ (8th Cause of Action.) In his
18 Third Amended Complaint (TAC), Lavine brought derivative claims for breach of fiduciary
19 duty, interference with contract, interference with prospective economic advantage and unfair
20 competition on behalf of GSC and GSI against the Robertsons due to the stalemate between
21 Lavine and Robertson as shareholders of GSI and GSC. Lavine's 7th Cause of Action was
22 asserted solely on his own behalf against the Robertsons for violation of Business & Professions
23 Code section 7028.4, alleging that Robertson unlawfully used Lavine's contractor's license.

24 _____
25 ⁴ August West is currently not represented by counsel and has defaulted by failing to file an answer to the Third
26 Amended Complaint.
27

1 The Robertsons' Amended Answers plead numerous affirmative defenses, including, (1)
2 failure to state a claim; (2) statute of limitations; (3) actions of third parties; (4) offset; (5) failure
3 to mitigate damages; (6) laches; (7) waiver (8) estoppel; (9) unclean hands; (10) good faith, (11)
4 unauthorized acts; (12) superseding acts; (13) lack of standing; (14) lack of capacity to sue; (15)
5 ratification; (16) assignment; (17) repudiation; (18) novation; (19) Plaintiffs' misconduct; (20)
6 third party acts; (21) contribution; (22) equitable indemnity; (23) apportionment of fault; (24)
7 consent; (25) rescission and release; and (26) justification.

8 In addition, the Robertsons asserted the following causes of action against UHI and
9 Lavine⁵ for: (1) Fraud; (2) Constructive Fraud; (3) Conspiracy to Defraud; (4) Breach of
10 Fiduciary duty; (5) Conspiracy to breach fiduciary duties (against Lavine only); (6) accounting
11 (against Lavine only); (7) Unjust enrichment; (8) Negligent Misrepresentation; (9) Breach of
12 Contract; (10) Declaratory relief; (11) Equitable Estoppel; (12) Aiding and Abetting Fraud; (13)
13 Recession of Sale of Securities (against Lavine only); (14) Breach of implied covenant of good
14 faith and fair dealing (against Lavine only); (15) Conversion; (16) Alter Ego (Lavine Only); (17)
15 Breach of Contract Duty to Indemnify (against Lavine only) (18) Contribution; (19) Equitable
16 Indemnity (against Lavine only) and (20) Comparative indemnity (against Lavine only).

17 UHI and Lavine asserted the following affirmative defenses to the Robertsons Cross-
18 Complaint: (1) failure to state a claim; (2) actions of third parties; (3) failure to mitigate
19 damages; (4) wrong party sued; (5) waiver; (6) estoppel; (7) statute of frauds; (8) lack of
20 standing; (9) failure to join necessary party; (10) unclean hands; (11) statute of limitations; (12)
21 laches; (13) Excuse of performance; (14) repudiation; (15) failure of consideration; (16)
22 fraudulent representation; (17) set off and off-set; (18) parole evidence rule; (19) interference
23 with performance; (20) business judgment; (21) good faith reason; (22) consent and ratification;
24 (23) failure of condition precedent; (24) Right to rescission & release; (25) nonperformance of

25 _____
26 ⁵ The Robertsons claims against Judy Lucero were dismissed with prejudice on the first day of trial pursuant to an
27 agreement reached between Lucero and the Robertsons.

1 Cross-Cross-Complainants; (26) justification and legal privilege; (27) apportionment of fault;
2 (28) misrepresentation and concealment by Cross-Cross-Complainants; (29) Lack of malice for
3 punitive damages; and (30) doctrine of impossibility and impracticability.

4 **IV. LEGAL ANALYSIS**

5 **A. PLAINTIFFS' CLAIMS AGAINST DEFENDANTS**

6 **1. Preliminary Matters**

7 **a. Establishment of Joint Venture**

8 A joint venture is an agreement between two or more persons to jointly carry out a single
9 business enterprise for profit. *Boyd v. Bevilacqua* (1966) 247 Cal.App.2d 272, 285. Little
10 formality is required for formation of a joint venture, and the agreement is not invalid because it
11 may be indefinite with respect to its details. *Id.* A joint venture agreement need not be an
12 express written contract; it can be implied from the conduct of the parties, despite their
13 declarations to the contrary. *Id.* The Court finds based on substantial evidence that a joint
14 venture existed among UHI, Robertson, Lavine, Wrigley, GSC and GSI by virtue of the
15 permission UHI gave to GSC and GSC to use its exclusive rights to sell the Gutter Shutter
16 product in California. GS Ohio consented to this amendment granting permission. The
17 consideration for use of UHI's rights was the cross-referrals of home improvement business
18 (roofing, general contracting) to UHI and joint access to work crews and supplies. There was
19 also some evidence from Wrigley's testimony that there were inter-company billings between
20 UHI and GSI and GSC, which supports the existence of the joint venture.

21 The case *Boyd v. Bevilacqua* supports a finding of joint venture in this case. In *Boyd*, the
22 court held that a joint enterprise requires little formality to support its creation. *Boyd*, 247
23 Cal.App.2d 285. The joint venture in *Boyd* was founded on a claim that a group of real estate
24 developers were about to develop real estate created a joint enterprise in their purchase of real
25 property. Though it was a somewhat incomplete arrangement and one party denied being part of
26 the joint venture, the *Boyd* court held there was an enforceable joint enterprise despite minimal
27

399b
9/5/12

1 documentation. This holding is pertinent to the claims of UHI and by derivative action, GSI and
2 GSC. Though Robertson denied existence of joint venture, the Court finds substantial evidence
3 supports the conclusion that he was aware of its existence and consented by his actions as
4 described above.

5 There also is clear and convincing evidence that at least of as of May 2008, UHI had a
6 dealership agreement and that Robertson was aware of it. Robertson was given a copy of the
7 UHI dealership agreement in November 2006, along with all financial and corporate records for
8 GSC and GSI, prior to investing in the business. Further, Robertson demanded that the
9 dealership agreement be amended to add his name to the UHI deal as set forth in **Exhibit 6**. GS
10 Ohio consented to this amendment as set forth in **Exhibit 6**. The Court finds that Robertson's
11 testimony that he did not realize that there was a joint venture is simply not credible for someone
12 of his business background and experience.⁶ Further, Robertson demanded and received an
13 amendment to the dealership agreement in early 2007 that specifically referenced the UHI
14 exclusive distributorship agreement. It is simply not credible that Robertson did not understand
15 the document he specifically requested be created and amended.

16 b. Lavine's Standing to Sue Derivatively for GSI and GSC

17 Lavine brings derivative action on behalf of GSI and GSC against the Robertsons for
18 breach of fiduciary duty, interference with contract, interference with prospective economic
19 advantage, unfair business practices, and misappropriation of trade secret. The purpose of a
20 shareholder derivative action is to allow shareholders to pursue litigation when a company is
21 unable or unwilling to act on its own behalf to protect its rights. Prior to filing a lawsuit, Section
22 800 requires that a shareholder make a demand upon the Board of Directors unless the
23 shareholder can show it would be futile to do so.

24 _____
25 ⁶ The court had an opportunity to observe Robertson when he testified. Robertson is very intelligent and
26 knew exactly what he was doing. *He had prior business experience as well, that
27 rendered him a sophisticated player.*

10/15/12
9/5/12

10/15/12
9/5/12

1 The Robertsons argue that Lavine lacks standing to bring a derivative action because he
2 did not make a demand on the board of directors prior to asserting his derivative claims. Lavine
3 maintains that any demand would have been futile due to the stalemate between shareholders of
4 GSI and GSC. The evidence supports Lavine's argument that it would have been futile to make
5 a demand to the corporations to act under the totality of the circumstances. First, GSC and GSI
6 were initial parties to this lawsuit, and thus clearly approved pursuing these claims against the
7 Defendants, having acted specifically to pursue them. Second, Robertson and Wrigley, as
8 Members of the Board of Directors of GSC and GSI, were both aware of the claims brought by
9 Lavine. Third, prior to approximately June 2011, neither Lavine nor Robertson were majority
10 shareholders, and thus, could not solely direct the action of GSI and GSC. Fourth, after
11 Robertson's purchase of Wrigley's shares in about June 2011, Robertson became a majority
12 shareholder of GSI and GSC, and would have rejected Lavine's attempts to pursue litigation
13 against him individually. Based on all these factors, the Court finds based on clear and
14 convincing evidence that a demand to the corporation under section 800 prior to instituting
15 derivative action would have been superfluous and futile. Mark Lavine has met the requirements
16 of Corporations Code section 800 and had standing to pursue the Second, Fourth, Fifth, Sixth,
17 and Eighth Causes of action derivatively on behalf of GSI and GSC.

18 2. Breach of Fiduciary Duty Claim (4th Cause of Action) (UHI & Lavine
19 (Derivatively))

20 To prove breach of fiduciary duty, a plaintiff must show the existence of a fiduciary
21 relationship, its breach, and damage proximately caused by that breach. *LaMonte v. Sanwa Bank*
22 *California* (1996) 45 Cal.App.4th 509, 517. Officers and directors of ^a company are fiduciaries to
23 the entity and to its shareholders. *Stephenson v. Drever* (1997) 16 Cal.4th 1167. In addition,
24 members of a joint venture owe a fiduciary relationship to each other. *Pellegrini v. Weiss* (2008)
25 165 Cal.App.4th 515, 524-525.

26 a. Liability of James Robertson

1 As an officer and director of GSI and GSC, Robertson owed these entities a fiduciary
2 duty. Robertson also owed UHI a fiduciary duty as a coventurer in the dealership agreement with
3 UHI. Based on clear and convincing evidence, Robertson remained at all times in a fiduciary
4 capacity to GSI and GSC by virtue of his positions within GSI and GSC. Indeed, it is undisputed
5 that he holds these same offices of trust today. Robertson was also in a fiduciary relationship
6 with UHI by virtue of his knowledge of and participation in the joint venture between UHI, GSI
7 and GSC to sell Gutter Shutter products. At the time Robertson called the meeting with GSI and
8 GSC employees on April 10, 2008, he did not give notice to the corporations or other
9 shareholders as required by the agreement among shareholders. **(Exhibit 39.)**

10 There is also clear and convincing evidence that Robertson knew his duties as
11 shareholder, officer and director of GSI and GSC. The Court notes that if he did not understand
12 these obligations, he was free to consult with Wrigley with whom he had sought advice in the
13 past. In April 2008, while Robertson was still an officer and Director of GSC and GSI, at the
14 time he lost patience with Lavine, and knowing of the joint venture agreement with UHI,
15 Robertson nevertheless misappropriated the assets of GSI and GSC ~~and~~. The Court finds based
16 on clear and convincing evidence that Robertson breached his fiduciary duty to GSI, GSC and
17 UHI by:

- 18
- misappropriating the Call Center office, records, equipment and materials;
 - inducing Call Center employees to resign their position and join his new company
19 through promises of increased compensation and lying about the status of GSI and
20 GSC;
 - misleading GS Ohio into believing that he and Lavine ^{had} and completely dissolved their
21 existing business in order to obtain ^{for himself a} separate dealership agreement with GS Ohio;
 - taking GSI and GSC's 880 existing sales leads for himself;
 - receiving money from GSI customers for jobs for his own use;
- 22
23
24
25
26
27

1007B
9/5/12

1007B
9/5/12

- 1 • instructing employees to delete existing sales appointments for GSI, GSC and UHI
- 2 from the shared ACT computer database.
- 3 • sabotaging UHI, GSI, and GSC's efforts to rebuild business

4 The Court further finds by preponderance of the evidence that Robertson misled GS Ohio
5 that there had been dissolution of GSI and GSC or that it was out of business. It was wrongful
6 for Robertson to encourage GS Ohio to terminate UHI's agreement with GS Ohio which formed
7 the basis for GSI and GSC's business. The speed with which GS Ohio later withdrew this
8 termination is evidence of just how wrongful it was. (Exhibits 219, 213.)

9 The Court further finds that Robertson created a competitor company; first as August
10 West and, later, as GS Sacramento. Even though Robertson's business did not exist for long, the
11 Court finds by a preponderance of the evidence that there was some use of UHI's exclusive
12 distributorship license and GSI and GSC were deprived of business because of it. There is also
13 evidence that Robertson converted other jobs that belonged to GSI's, and sabotaged entries in the
14 ACT computer customer tracking system which crippled GSI's and UHI's business. GSC, as a
15 captive vendor to GSI, was completely dependent on GSI for its future sales of dealerships and
16 materials at a markup. Robertson's tortious acts described above deprived GSC of all business.

17 Therefore, the Court finds based on clear and convincing evidence that Robertson
18 breached his fiduciary duties to GSI, GSC and UHI by the conduct described herein.
19 Robertson's bad conduct proximately caused harm to these entities in the form of appropriated
20 funds that belong^{ed} to GSI, misappropriated equipment, lost business opportunities, potential sales,
21 and ultimately destruction GSI and GSC's business altogether.

22 b. Liability of Katherine Robertson

23 The Court also finds authority to hold Katherine Robertson liable as an aider and abettor
24 in Robertson's breach of fiduciary duty under the case *Bancroft Whitney v. Glen*, 64 Cal. App. 2d
25 327. Though Mrs. Robertson owed no direct fiduciary duty to Plaintiffs, she is nonetheless liable
26 for Robertson's breach of fiduciary duty because she promoted his tortious acts and received the

1 benefit of them. *Bancroft-Whitney* is a significant case because it was a unanimous decision by
2 the California Supreme Court. At page 353, the *Bancroft* court notes that Bender was aware of
3 Glen's breach of fiduciary duty, cooperated in it, received the benefits from it, such that ^{it} cannot
4 be said ~~that here~~ ^{... that Bender Co.} ~~he~~ "did not reap where it had not sown." Under all the circumstances, Bender and
5 Bender Co. must be held liable for their part in Glen's breach of his fiduciary duties. ... They
6 encouraged the sowing and reaped the benefit. They cannot now disclaim the burden." *Id.* at
7 353-354.

8 Mrs. Robertson's status as a guarantor of Defendants' competitive business out of the
9 Sacramento office was also a material factor in Mr. Robinson's and August West's ability to be
10 in the marketplace and to bid for and perform any Guttershutter business separate and apart from
11 GSI and GSC. In *Bancroft Whitney*, the new employer, Matthew Bender and its President, JT
12 Bender, were held jointly liable for breach of fiduciary duty ^{by} Glen because of Glen's efforts to get
13 18 *Bancroft* employees to join the new company. The Court finds this case of particular note
14 because of the similar facts and size of businesses. Glen, like Robertson, was still an officer of
15 Bancroft Whitney. Bender knew about his role as officer of Bancroft Whitney, yet cooperated in
16 Glen's effort to breach fiduciary duty and supported it. And for these reasons the *Bancroft-*
17 *Whitney* court found JT Bender equally liable as his company in the breach of fiduciary duty by
18 Glen.

19 Here, the Court finds there was substantial evidence that Katherine Robertson supported
20 James Robertson's competitive business by signing a guarantee for the new business and
21 knowingly provided capital for the new business. Mrs. Robertson was very much aware of her
22 husband's fiduciary responsibilities to GSI and GSC as an officer and director of both
23 companies. The evidence clearly established that Mrs. Robertson provided the initial \$195,000
24 for Robertson's buy-into the joint venture and was familiar with GSI and GSC's operations
25 based on Robertson's discussions with her and her own review of the GSI and GSC documents
26 which were held exclusively at the Sacramento office. Pablo Paloma testified that Mrs.
27

1 Robertson went through all GSI and GSC records at the Sacramento office, reviewed files and
2 sales documents and customer binders which were held exclusively at the Sacramento office.
3 Therefore, she had intimate knowledge of the workings of the business and aided her husband in
4 his breach of fiduciary duties to GSI, GSC and UHI. Like Bender, Mrs. Robertson obtained the
5 benefits which Robertson reaped through her encouragement, facilitation and intentional acts.

6 The Court finds based on substantial evidence that Mrs. Robertson was on site in
7 Sacramento as early as mid-April 2008, and was making management decisions in the business
8 operations in Robertson's competitive business. She worked jointly with Robertson to destroy
9 GSI and GSC, and to harm UHI. Though Defendants and Plaintiffs differed in their view of
10 what Mrs. Robertson's precise role was in the GS Sacramento Company, the Court finds by
11 substantial evidence that she was involved personally in Defendants' business, and was fully
12 informed on the day to day business of GS Sacramento. Therefore, it is appropriate for
13 Katherine Robertson to be held liable as a joint tortfeasor with James Robertson in the breach of
14 his fiduciary duties to GSI, GSC and UHI. Katherine Robertson is a joint tortfeasor with James
15 Robertson in all tortious acts that constituted the breach of his fiduciary duties from April 2008
16 through the present. *And, each was the agent of the other in committing these*
tortious acts.

17 Based on clear and convincing evidence, the Court finds Katherine Robertson is liable to
18 Plaintiffs on the Breach of Fiduciary duty cause of action by:

- 19 • changing the locks on the doors of the Sacramento office;
- 20 • misappropriating corporate records and sales leads belonging to GSI, GSC and UHI;
- 21 • enabling Robertson to develop and operate the competing business by co-owning and
22 operating August West;
- 23 • funding the new operation, hiring and firing employees, managing financial records and
24 accounting; and
- 25 • serving as a guarantor for the new dealership agreement with GS Ohio.

26 3. Misappropriation of Trade Secret (UHI & Lavine (Derivatively))
27

1 The elements of misappropriation of trade secret are: “A trade secret is misappropriated
2 if a person (1) acquires a trade secret knowing or having reason to know that the trade secret has
3 been acquired by ‘improper means,’ (2) discloses or uses a trade secret the person has acquired
4 by ‘improper means’ or in violation of a nondisclosure obligation, (3) discloses or uses a trade
5 secret the person knew or should have known was derived from another who had acquired it by
6 improper means or who had a nondisclosure obligation or (4) discloses or uses a trade secret
7 after learning that it is a trade secret but before a material change of position.” *Ajaxo Inc. v.*
8 *E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 66. Civil Code section 3426.1 identifies a trade
9 secret as: information, including a formula, pattern, compilation, program, device, method,
10 technique, or process, that: (1) derives independent economic value, actual or potential,
11 from not being generally known to the public or to other persons who can obtain economic value
12 from its disclosure or use; and (2) is the subject of efforts that are reasonable under the
13 circumstances to maintain its secrecy.

14 After the presentation of Plaintiff’s evidence, the Court was persuaded by Defendants’
15 motion for judgment against UHI as to the Fourth Cause of action for misappropriation of trade
16 secrets. Though confirmed appointments and customer data for UHI in the ACT database were
17 password protected and had some economic value to UHI, there was insufficient evidence to
18 support that the information was kept secret to the level required by Civil Code section 3426.1.
19 GSI and GSC’s trade secret claims were different. On the one hand, the 880 existing sales leads
20 and the ACT customer database clearly had great economic value to GSI and GSC and
21 represented imminent sales potential. The ACT database was password-protected and only
22 management and call-center employees could access the database. On the other hand, none of
23 the GSI or GSC employees signed a confidentiality agreement and the evidence of efforts to
24 maintain secrecy of the material was mixed. This was a close call, but the Court finds there is
25 insufficient evidence to establish that Plaintiffs met their burden of proof on this claim.
26 Accordingly, Plaintiffs’ Fourth Cause of Action is hereby dismissed, without prejudice.
27

MSB
9/5/12

4. Interference With Contract and Interference with Prospective Economic Advantage (5th and 6th Causes of Action) (UHI and Lavine (Derivatively))

The elements of ^{the} intentional interference with contract cause of action, for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.

Interference with prospective economic advantage is established by showing: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." *Youst v. Longo* (1987) 43 Cal.3d 64, 71

The Court finds by clear and convincing evidence that all elements of Plaintiffs' claims for both interference with contract and interference with prospective economic advantage have been met here. First, it was conclusively established at trial that a valid contract existed between UHI, GSI and GSC on the one hand and GS Ohio on the other to sell the Gutter Shutter Products throughout the state of California. In addition, there was evidence that at least one contract with a GSI customer signed before April 10, 2008 was taken over directly by Robertson and for which Robertson directly received payment. In addition, there is clear and convincing evidence that GSI and UHI had non-contractual relationships with third parties that held the reasonable expectation of future economic benefit. These prospective economic advantages took the form of GSI's 880 existing sales leads with customers that were directly misappropriated by the Robertsons, and the confirmed appointments with GSI and UHI customers who were prepared to sign contracts that were stored in the ACT database.

1 Second, the Court finds that Mr. Robertson clearly knew about these contracts, as well as
2 the non-contractual economic relationships with customers, the latter of which all held the
3 probability of future economic benefit for Plaintiffs. Robertson's claim that he did not know
4 what he was doing has no credibility. The prospective economic advantage here is clear from
5 the history of operations of GSI and GSC up through the end of the first quarter of 2008. There
6 definitely was a prospective economic advantage for UHI, GSC and GSI to be derived from ~~that~~ ^{those}
relationships, Robertson diverted potential business away from GSI, GSC and UHI for his own
8 use. Robertson continued to interfere with the GS Ohio's contractual relationship with UHI, GSI
9 and GSC by selling in UHI's exclusive territory, and attempting through false pretenses to
10 induce GS Ohio to terminate UHI, GSI and GSC's dealership agreement altogether.

11 It was also established by a preponderance of the evidence at trial that Mrs. Robertson
12 also should be held liable on these causes of action. As discussed above, not only was Mrs.
13 Robertson ~~was~~ familiar with GSI and GSC corporate and accounting records (**Exhibit 88**), but
14 she also reviewed all GSI and GSC customer records at the Sacramento office. These included
15 sales records, customer binders and hard copies of customer sales leads. Consequently, Mrs.
16 Robertson was aware not only of the Master Dealership agreement with GS Ohio, but also of all
17 880 sales leads, potential contracts with customers, pending sales and other prospective deals
18 that GSI, GSC and UHI were working on prior to the time that Defendants' misappropriated the
19 Call Center and took over the business. Mrs. Robertson interfered with UHI's and GSI and
20 GSC's contract with GS Ohio by: (1) providing start up capital to her husband (\$50,000) for his
21 new venture; (2) serving as a guarantor for the new business agreement with GS Ohio, (3)
22 serving ^{as} officer and manager of August West Enterprises; (4) misappropriating Plaintiffs'
23 property (sales records, accounting documents, lead sheets, etc.) and (4) actively running the new
24 competitive business. Therefore, ^{GA} ^{this} Court finds by a preponderance of the evidence that the
25 Robertsons proximately caused harm to GSI, GSC and UHI through their tortious interference
26 with contract and prospective economic advantage.

27 GA. Katherine Robertson deliberately took those actions, with the intent
28 of interfering with the existing and prospective customer relationships
of the Plaintiff(s).

1 5. Business & Professions Code §7028.4 (7th Cause of Action) (Lavine Only)

2 Lavine asserted a separate individual claim for violation of Business & Professions Code
3 section 7028.4 based on Mr. Robertson's use of Lavine's contractor's license. The Court is
4 persuaded by a preponderance of the evidence that there was some initial wrongful use of Mr.
5 Lavine's general contractor's license. It did not go on for a long period of time, but there was
6 evidence that it did occur in 2008 and 2009. The suspension of Mr. Lavine's contractor's license
7 does not preclude a finding in his favor on this claim, since the suspension occurred long after
8 Robertson used Lavine's license. Further, under B&P Code section 7028.4, a plaintiff is not
9 required to prove irreparable harm in order to prevail on this claim.

10 Nevertheless, the Court finds that there is no need for an injunction to issue on this
11 particular claim at this time. The injunctive relief to be issued by the Court in redressing the
12 unfair competition claim provides sufficient protection for Lavine, UHI, GSI and GSC. (See
13 discussion, *infra*.) Accordingly, Plaintiffs' Seventh Cause of Action is hereby dismissed,
14 without prejudice.

15 6. Unfair Business Practices/Unfair Competition (8th Cause of Action) (UHI
16 & Lavine (derivatively)

17 Unfair competition is defined as any unlawful, unfair or fraudulent business act or
18 practice and unfair, deceptive, untrue or misleading advertising. Business & Professions Code
19 section 17200, et seq. As discussed above, Lavine had standing bring this cause of action
20 derivatively on behalf of GSI and GSC. The Court finds based on clear and convincing evidence
21 that the Robertsons engaged in unfair business practices and unfair competition against GSI and
22 GSC such that they were eliminated from the covered gutter product marketplace after a
23 relatively successful startup period. When the Robertsons hijacked the call center and took steps
24 to destroy Plaintiffs' business, they did more than just harm GSI, GSC and UHI directly.
25 Defendants created a chilling effect on the marketplace such that other competitors were
26 discouraged from competing with the Robertsons. This injured ~~the~~ free and fair competition in
27 the marketplace. Under section 17200 any kind of wrongful conduct is sufficient to trigger a

1300b
9/5/12

1 violation. *Visto Corporation*, ^{V.} ~~Plaintiff~~ *Sprogit Technologies, Inc.*, 360 F. Supp.2d 1064 (N.D.
2 Cal. 2005). To prove unfair business practice, a plaintiff need only establish that the conduct was
3 wrongful by some measure. In *Visto*, the wrongful conduct consisted of a competitor making
4 false allegations of patent infringement in order to gain a commercial advantage. Under *Spiegler*
5 *v. Home Depot* (2008) 552 F. Supp.2d 1036, an unfair business practice occurs "when it offends
6 an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous
7 or substantially injurious to consumers." *Id.* at 1045, (quoting *People v. Casa Blanca*
8 *Convalescent Homes Inc* (1984) 159 Cal.App.3d 509).

9 To prove a ^{Restitution in any} loss sustained under ^{she} Unfair Business Practices, ^{But} a plaintiff must show that it
10 suffered both "injury in fact" and "a loss of money or property caused by unfair competition."

11 *Peterson v. Cellco P'ship* (2008) 164 Cal.App.4th 1583, 1590. A loss of money is ordinarily
12 demonstrated through proof that plaintiff "parted, deliberately or otherwise, with some
13 identifiable sum formerly belonging to him or subject to his control." *Silvaco Data Sys.*, ^{v. Intel Corp. (2010)} 184
14 Cal.App.4th 210, 244. A plaintiff suffers a loss of property when it "has parted with some
15 particular item of property" that it "formerly owned or possessed." *Id.* Section 17200 does not
16 require that a plaintiff prove that he or she was directly injured by the unfair practice or that the
17 predicate law provides for a private right of action. *Gregory v. Albertson's, Inc.*, (2002) 104

18 Cal.App.4th 845, 851. ^{This is because Section 17200 is in the nature of}
19 ^{a State anti-trust law that protects competition itself, not individual} Based on the clear and convincing evidence at trial, the Court finds that the conduct of ^{competitors.}

20 the Robertsons was wrongful and immoral in view of Mr. Robertson's fiduciary relationship to
21 Plaintiffs. The actions of James and Kathy Robertson as described above clearly caused the harm
22 suffered to the UHI, GSI and GSC. In 2008, when all financial data indicated that GSI and GSC
23 should have been able to turn a profit, the joint venture business ^{of UHI, GSI and GSC} was sabotaged by Mr. and Mrs.
24 Robertson. Though the pace of installation had hampered success in the past, the Court is
25 persuaded by a preponderance of the evidence that this obstacle would have been removed.

26 Lavine testified that he was going to take measures to schedule installations closer together
27

1 geographically and/or hire subcontractors to do installations. Instead, the business was disrupted
2 by the Robertsons whose ^{unlawful and wrongful} competitive conduct occurred in April 2008 and continued throughout
3 2009.

4 Despite Lavine's efforts to revive the business, GSI failed. And, as a result, so did GSC,
5 because it was a captive vendor to GSI. Consequently, Plaintiffs have been eliminated from the
6 marketplace for four years. Though there was some discussion between Lavine and Robertson
7 that Robertson could compete in three counties, the Court rejects Defendants' argument that
8 there was a binding oral agreement (or indemnity agreement) to allow Robertson to compete in
9 those counties. The actual evidence is that the Defendants created a competing business while
10 corporate Plaintiffs were not yet dissolved and the affairs of the corporations had not yet wound
11 down. Though Lavine indicated that he was receptive to that option (Robertson competing in
12 Sacramento), this receptiveness never rose to an actual agreement, nor was the corporation given
13 an opportunity to orderly wind up its affairs before Robertson began secretly competing with it.
14 Indeed, Robertson cut short that discussion. The Court further finds that emails between the
15 parties on this subject do not rise to the level of waiver or estoppel. There was no consent or
16 permission given to ^{the Robertsons to} compete in Sacramento. (Further, Robertson's clandestine attempt to obtain
17 the distributorship agreement in lieu of UHI was wrongful and deceptive. It was designed to
18 hamper competition by eliminating UHI and GSI from market to clear the way for Robertson's
19 own business to succeed.)

20 As for GSC, while the Robertsons' own business did not sell Gutter Shutter parts or
21 dealerships, Robertson's unfair and anti-competitive practices were equally designed to and did
22 harm GSC directly. Robertson was fully aware that GSC was a captive vendor to GSI by virtue
23 of his position as an officer and director of GSI and GSC, and manager of the Sacramento office.
24 Robertson also received regular financial statements from GSI and GSC's accountants regarding
25 the business of GSC and GSI. The Court finds by a preponderance of the evidence that
26 Robertson intended to shut down GSC as well as GSI in order to remove any obstacles for his
27

1 own business to succeed. Robertson's attempts to get GS Ohio to cancel the UHI master
2 dealership agreement (of which GSI and GSC were part) is proof that he intended to harm GSC's
3 business as well as GSI and UHI. In doing so, he engaged in unfair anticompetitive business
4 practices that proximately caused GSC to fail.

5 Thus, Court finds by a preponderance of the evidence Plaintiffs' business was wrongfully
6 disrupted caused by the wrongful competition and Defendants' other wrongful conduct
7 described above. So despite Lavine's efforts to try to revive the business, GSI and GSC failed a
8 short time after April 2008. And, as a result the Plaintiffs have now been eliminated from the
9 relevant marketplace for nearly four years. Therefore, Plaintiffs are entitled to ^{responsible} damages, as shall

10 be discussed below, ^{OB} under Section 17200. *As noted above, the exclusion of Plaintiffs' companies from the market harmed competition generally.*

*mpb
9/5/12*

7. Robertson's Defenses

a. Statute of Limitations

12 Defendants argued *in limine*, and in a motion for judgment halfway through trial, and
13 again at closing argument that the claims for Interference with Contract and Interference with
14 Prospective Economic Advantage were time-barred. The crux of this argument is that Lavine
15 had notice of Robertson's attempt to interfere with GSI, GSC and UHI's dealership agreement ^{with GS Ohio}
16 early as March 2008 when he learned that Robertson was negotiating a dealership agreement
17 with GS Ohio. *(Exhibit 10.)* Relying on ^{what part,} Defendants claim that Lavine missed the statute of
18 limitations by not filing this action until June 10, 2008, two month after the statute of limitations
19 arguably expired.

*mpb
9/5/12*

21 The Court is not persuaded by Defendants' arguments. The statute of limitations is not
22 triggered until a Plaintiff has actual knowledge of facts that support a claim or is put on inquiry
23 notice. *Nogart v. Upjohn* (1997) 21 Cal.4th 383, 397. By March 2008, all Lavine knew was that
24 an anonymous fax had come through showing Robertson and GS Ohio were negotiating to
25 establish a separate dealership agreement for Robertson. The evidence at trial established Lavine
26 was not aware of Robertson's attempts to take over the entire dealership agreement until months

27 *OB. There was no evidence that the Robertsons made a profit in their
28 competing enterprise that needs to be disgorged. Normally recoverable
front damages, coupled with injunctive relief, should suffice to remedy*

*mpb
9/5/12*

*A just resolution
this closing.*

1 after the split and within the two year limit to bring the claim. To the extent Lavine was
2 suspicious of potential wrong-doing, Robertson's concealment of facts and false representations
3 to Lavine that they would continue to work out their differences tolled the statute of limitations.
4 There was substantial evidence at trial that between March 2008 and June 2008, the parties had
5 multiple discussions regarding dissolution of their business together. Robertson discussed
6 several options with Lavine and led him to believe certain terms were agreeable. Defendant's
7 selling outside the discussed area is further evidence of bad faith. Based on this evidence, the
8 Robertsons are equitably estopped from relying on the statute of limitations defense.

100B
9/5/12

9 While Lavine may have had some suspicion of Robertson's intent to sell in part of UHI's
10 territory, he had no idea that Robertson was actively lobbying GS Ohio to cancel UHI's original
11 dealership altogether. Under the fraudulent concealment doctrine, a defendant's fraud in
12 concealing a cause of action against a plaintiff operates to toll the statute of limitations. *Regents*
13 *of University of California v. Superior Court* (1999) 20 Cal.4th 509, 533. Further, this Court
14 finds that, as a director and officer in GSI and GSC and co-venturer with UHI, Robertson owed
15 the Plaintiffs a fiduciary duty to deal honestly and make full disclosure. Instead, he concealed
16 matters and led Lavine to believe the parties were resolving matters while using the time to gain
17 an unfair advantage.

100B
9/5/12

18 Because Robertson's actions concealed the facts which would have lead Lavine to
19 conclude Robertson was inducing breach of contract by GS Ohio, the Court finds that the statute
20 of limitations for interference with contract and interference with prospective economic
21 advantage did not begin to run, at the very earliest, until June 30, 2008. The acts constituting
22 these torts were not completed before that date. Further, Robertson's subsequent attempts to
23 cancel GSI, GSC and UHI's dealership agreement altogether in November 2008 are separate
24 successive torts, which provide their own separate basis for interference with contract and
25 interference with prospective economic advantage. *Wyatt v. Union Mortgage Co.*, 24 Cal.3d 773
26 (1979). Therefore, the Court finds by a preponderance of the evidence that the causes of action for

100B
9/5/12

100B
9/5/12

1 interference with contract and interference with prospective economic advantage are not time-
2 barred.

3 b. Laches

4 The doctrine of laches will bar even timely filed actions if delays are deemed
5 unreasonable and such delays unfairly prejudice the defendant. *Rouse v. Underwood*,⁽¹⁹⁶⁶⁾ 242
6 Cal.App.2d 316 (~~1966~~). Defendants argued that all Plaintiffs claims should be barred by the
7 doctrine of laches because Plaintiffs waited more than two years to instigate this action, and
8 failed to seek corporate dissolution in that time. The Court finds that Defendants have not met
9 their burden of proof with regard to laches. Plaintiffs' delay in filing this action was not
10 unreasonable given the parties' negotiations to resolve their disputes through June 2008. Further
11 Defendants' tortious conduct continued through October 2008 and created a separate tortious act
12 upon which Plaintiffs could sue. Lavine was not required to seek dissolution of the corporations
13 which until 2011 were capable of initiating this action on their own behalf. Further, Defendants
14 presented no evidence of any prejudice they sustained by virtue of the filing of this case in June
15 2010. Accordingly, the Court rejects this defense.

16 c. Unclean Hands/Estoppel/Consent/Waiver/Concealment

17 Defendants argued that there was an oral agreement between Robertson and Lavine such
18 that Robertson was permitted ~~Robertson~~ to compete in the three-county area in and around ^{the}
19 Sacramento area. The Court finds that the Defendants have not met their burden to prove that
20 any such agreement existed or that Plaintiffs acquiesced in Defendants wrongful conduct or were
21 otherwise estopped. Lavine's willingness to agree to divide the territory was just that: a
22 receptiveness to doing so as part and parcel of an orderly windup and dissolution of GSI and
23 GSC. It was an indication of openness to the proposal that never rose to the level of any final
24 agreement because the rest of process for an orderly windup never happened and hasn't happened
25 to this day. To the contrary, Robertson abruptly cut short those windup discussions by
26 wrongfully going his own way. So, the Court finds that the emails that reflected tentative
27

1 agreement to give Robertson his own three-county territory, do not rise to the level of any waiver
2 or estoppel or acquiescence. The Court further finds that there was no consent or permission for
3 Robertson to compete in that fashion even in those three counties. The actual evidence is that
4 even the Defendants' conducting a competing business in that the three-county area was
5 wrongful here. Robertson's acquisition of a distributorship agreement from GS Ohio while he
6 knew that UHI had those rights was wrongful. The evidence also established that Robertson
7 himself failed to abide by the proposed agreement by doing business in Marin County, which
8 was well outside the counties supposedly assigned to him.

9 With regard to the unclean hands defense raised by Defendants, the Court agrees that the
10 *Rosenfeld case*, *Rosenfeld, Meyer & Susman v. Cohen* (1987) 191 Cal.App.3d ^{1035, at 1063,} referenced by the
11 Defendants, holds that unclean hands may bar derivative action. However, based on the evidence
12 presented, the Court finds that there was no evidence ^{here} to support that the conclusion that Lavine
13 acted with unclean hands. Lavine's efforts to locate the other call center in March 2008 were not
14 inconsistent with the parties' negotiations to divide up GSI and GSC at that time. The more
15 reasonable inference is that each party planned to operate a separate call center once GSC and
16 GSI were dissolved. Further, the Court finds that it was Robertson, not Lavine, who acted with
17 unclean hands by cutting short discussions regarding ^{mutually} winding down corporate affairs through his
18 bad faith actions described above.

19 Finally, the Court finds there is no evidence that Lavine concealed any facts from
20 Robertson regarding the existence of the UHI dealership agreement or amendments to the
21 agreement. As discussed above, there is clear and convincing evidence that Robertson was well
22 aware of the UHI dealership agreement having received a copy of it along with all financial
23 records prior to investing. Robertson also demanded and received an amendment to the
24 agreement in his favor recognizing his ownership interest in the joint venture. Robertson's
25 testimony that he did know of the existence of this agreement is simply not credible.

26 d. Superseding Causes and Other Affirmative Defenses

1 As to the remaining affirmative defenses, the Court finds that Defendants have not met
2 their burden of proof to establish any of these defenses. Defendants argued that the recession in
3 2008 and the suspension of UHI and Lavine's contractor's license should be the superseding
4 cause for the lost profits and ultimate destruction of GSI and GSC's business. Defendants argue
5 that it is common knowledge that this recession was the worst since the Great Depression and
6 was especially devastating to the housing industry. While the Court takes judicial notice of the
7 recession, there is insufficient evidence that the severity of the 2008 recession was a superseding
8 cause of the lost profits and damaged business opportunities suffered by UHI, GSI and GSC.
9 Aside from Robertson's reference to the recession in general terms, Defendants produced no
10 direct evidence to show that the recession would have diminished Plaintiffs' potential for profits
11 so greatly that it displaces Defendants' bad acts as a proximate cause for lost profits. Neither
12 does this Court find that the suspension of UHI's and Lavine's contractor's licenses for a few
13 months in 2011 and 2012 affected a superseding cause of the damages suffered by Plaintiffs.
14 The suspensions occurred three years *after* Defendants' tortious conduct in 2008 and two years
15 *after* GSC and GSI closed their doors. The Court also finds credible the testimony from Lavine
16 that the suspensions resulted from minor customer disputes which have since been resolved.

17 The Court is persuaded based on substantial evidence in the form of projected sales from
18 the first quarter in 2008 that GSI and GSC would have made a profit in 2008 in spite the
19 recession. In addition, while the recession may have impacted future sales and future lost profits,
20 Plaintiffs properly discounted those damages in the opinion presented by their expert witness,
21 Stan Smith. (**Exhibit 128.**) Defendants produced no contrary evidence and elected not to
22 designate an expert witness to opine as to the impact of the recession or license suspension on
23 GSI and GSC or UHI's business. Therefore, the Court finds there were no superseding causes of
24 Plaintiffs damages.

25 Finally, the Defendants presented no evidence on their affirmative defenses of good faith,
26 unauthorized acts; assignment; repudiation; novation; third party acts; contribution; equitable
27

1 indemnity; apportionment of fault; or rescission. Accordingly, the Court finds that Defendants
2 failed to meet their required burden of proof for these affirmative defenses.

3 B. ROBERTSON'S CLAIMS AGAINST LAVINE AND UHI

4 1. Breach of Fiduciary Duty

5 Like Robertson, Lavine was an officer and director of GSI and GSC. He was also a
6 shareholder in a closely held corporation. As an officer and Director, Lavine owed Robertson a
7 fiduciary duty. Defendants argued that Lavine breached his fiduciary duty to Robertson by
8 allegedly: (1) concealing the fact that neither GSC nor GSI held an exclusive dealership
9 agreement to sell Gutter Shutter productions; (2) concealing the fact that his own corporation,
10 UHI, held those exclusive rights; (3) failing to obtain independent board or shareholder approval
11 of any joint ventures or other economic relationships between GSI, GSC and UHI; and (4)
12 engaging in self-dealing by applying resources owned by GSI and GSC to UHI.

13 The Court finds that Defendants have failed to establish that Lavine breached his
14 fiduciary duty to Robertson. Lavine acted appropriately when he caused UHI to enter into the
15 exclusive agreement with GS Ohio. The evidence clearly established that UHI's agreement with
16 GS Ohio predated the existence of GSI and GSC which were not formed until after the
17 dealership agreement was signed. (GSI was formed in 2003; GSC was created in 2005.) Further,
18 Wrigley testified that things were happening so quickly with GS Ohio in 2003, that it was
19 necessary to have a dealership agreement signed within a few months of their initial meeting
20 with GS Ohio. Further, Lavine testified that GS Ohio's president, Lee Brown, wanted to have a
21 corporation rather than individuals sign the agreement. It made sense that UHI would be the
22 signator on the dealership agreement. There was evidence that in 2003, UHI had ready-made
23 crews and materials available to conduct the Gutter Shutter business, which was operated out of
24 UHI's office in San Carlos.

25 The Court finds there is no evidence that Lavine engaged in any self-dealing or that UHI
26 was unjustly enriched. Any resources received by UHI were consistent with the joint venture
27

Boys
9/5/12

1 agreement. And, there is substantial evidence that UHI paid its fair share of rent, advertising
2 costs and staff expense in return for cross-selling rights in the ACT database and giving GSI and
3 GSC its exclusive right to purchase and market ^{paid value by} ~~to~~ ^{the Subsequent Ohio} gutter products. UHI also advanced monies to
4 GSI and GSC after the joint venture was created in order to get the business off the ground.

5 **(Exhibits 123-126.)**

6 There was absolutely no evidence offered that Lavine engaged in any self-dealing. The
7 Court further finds that there is no evidence that Lavine or UHI concealed anything from
8 Robertson. To the contrary, the Court finds based on substantial evidence that Robertson was
9 provided with all corporate documents, agreements, financial statements and records before he
10 invested in the business and signed the agreement among shareholders. The Court further finds
11 that Robertson received regular corporate and financial updates from the San Carlos office, had
12 access to GSI and GSC's QuickBooks, and was provided with financial statements from GSI and
13 GSC's accountants.

14 2. Rescission

15 Based on the facts above, the Court finds that Defendants have not met their burden of
16 proof to show that the agreement for Robertson to purchase ownership interest in the business
17 should be rescinded. There was no evidence of fraud, mistake or concealment by any of the
18 parties in the formation of the agreement. To the contrary, all the evidence supports the
19 conclusion that Robertson knowingly entered into the agreement, was fully aware of all terms,
20 and requested and received the amendment to the agreement. He was provided with copies of all
21 corporate documents at least twice: once prior to joining the business in 2006, and again in late
22 2007.

23 3. Defendants Remaining Causes of Action

24 The Court finds that Defendants have not met their burden of proof as to the remaining
25 cause of action in the Cross-Cross-Complaint. Defendants produced no evidence to support their
26 claims for fraud, constructive fraud, conspiracy to defraud, conspiracy to breach fiduciary duties
27

1 (against Lavine only); Negligent Misrepresentation, Breach of Contract; Equitable Estoppel;
2 Breach of implied covenant of good faith and fair dealing (against Lavine only); Conversion;
3 Alter Ego (Lavine Only); Breach of Contract Duty to Indemnify (against Lavine only);
4 Contribution; Equitable Indemnity (against Lavine only) or Comparative indemnity (against
5 Lavine only). Accordingly, the Court dismisses all of Defendants' claims against Lavine, UHI,
6 GSC and GSI claims with prejudice.

7 C. DAMAGES AND INJUNCTIVE RELIEF

8 Based on clear on clear and convincing evidence, the Court finds that Defendants'
9 wrongful conduct proximately caused the harm to Plaintiffs, and that Plaintiffs are the prevailing
10 parties in this litigation. The Court further finds that UHI, GSI and GSC are entitled to monetary
11 damages and injunctive relief due to lost business caused by Defendants' breach of fiduciary
12 duty, interference with contract, interference with prospective economic advantage, and unfair
13 competition.

14 1. Nature of Remedies Available

15 All of the damages sustained by Plaintiffs sound in tort and they are entitled to all
16 damages under Civil Code section 3333: "For the breach of an obligation not arising from
17 contract, the measure of damages, except where otherwise expressly provided by this Code, is
18 the amount which will compensate for all the detriment proximately caused thereby, *whether it*
19 *could have been anticipated or not.*" (emphasis added) Plaintiffs' claims for breach of fiduciary
20 duty, interference with contract, and interference with prospective economic advantage provide
21 for recovery of lost profits. The Court finds that GSI and GSC are entitled to lost profits due to
22 the conversion of the business, materials, equipment funds and misappropriation of the Call
23 Center by the Robertsons. UHI is also entitled to lost profits due to Defendants tortious acts.
24 For the unfair competition claim, Plaintiffs are entitled to either recovery of profits from ^a ₂
25 competing business or injunctive relief. For the reasons discussed below, the Court finds that
26 injunctive relief is appropriate to redress the harm caused by the Robertsons' tortious acts.
27
28

MBB
9/5/12

1 At trial Defendants argued that Plaintiffs could not recover lost profits because ~~the~~ ^{and the fact} ~~of~~ ^{and the fact}
2 uncertainty, ^{and the fact} ~~and the fact~~ that the businesses never generated a profit. The Court is not persuaded
3 by this argument. Uncertainty is not fatal to a calculation of lost profits. The Court finds based
4 on clear and convincing evidence that GSI and GSC had a history of established sales and that
5 this history is set forth in their tax returns. Neither was a start up company without a record of
6 sales. The Court finds persuasive the authority cited in *Grupe v. Glick* (1945) 26 Cal.2d 680
7 which held that a startup company can establish lost profits by projected sales. The Court finds
8 that if a company without sales history can use such data, then established companies such as
9 GSC and GSI with 5 years of operations should be able to prove lost profits based on projected
10 sales data. *Grupe* also held that lost future profits for an existing business can be demonstrated
11 by actual profits or "other provable data" that is available. Further, any uncertainty as to the
12 amount of damages was caused by Defendants who wrongfully took over the business just as it
13 was beginning to take off. A party which causes uncertainty in recovery of damages is not
14 entitled to prevent a plaintiff from recovering damages because of such uncertainty. *Bigelow v.*
15 *RKO Radio Pictures* (1946) 327 US 351, 265. The Court finds that Plaintiffs were precluded
16 from the marketplace for a four year period due to Defendants' unfair competition and unfair
17 business practices. Here the question is what would be a reasonable time in any marketplace to
18 obtain the same level of sales as in 2008. Lavine has lots of self confidence. And, while this
19 does not necessarily create certainty, confidence does aid one in overcoming obstacles. This is
20 an important factor to the success of any business. On an objective basis, the Court finds that it
21 would take approximately three years to build the business up back to the level that it was at in
22 2008 with approximately \$2.1 million in sales. This three year ramp up period is not
23 unreasonable, though it actually took GSI and GSC more than three years to reach the level of
24 readiness that they had in April 2008. Three years is a conservative estimate and represents lost
25 opportunity to Plaintiffs caused by Defendants' tortious acts. That opportunity ^{clear from} ~~is~~ ^{clear from} their actual
26 operating experience as established companies poised to make sales based on prior experience.

MBB
9/5/12

1 The Court finds that Plaintiffs are entitled to a seven year period for lost profits based on three
2 year ramping up to get back in business and four years²⁰ projected sales thereafter. This seven year
3 window is a reasonable window for lost opportunity caused by the Robertsons' tortious
4 disruption of the business and anti-competitive behavior.

msb
9/5/12

5 Plaintiffs are entitled to compensation for lost business opportunity within the seven year
6 window. As to the matter of damages, the Court finds the case *Grupe v. Glick* (1945) 26 Cal.2d
7 680 very instructive. That case involved lost profits as a result of breach of an equipment
8 manufacturing lease. The *Grupe* court held that lost profits on a prospective sale may be had if
9 the evidence makes it reasonably certain. *Grupe*, 26 Cal.2d at 692-693. The *Grupe* court noted:
10 "Where the operation of an established business is prevented or interrupted, as by a tort or breach
11 of contract or warranty, damages for the loss of prospective profits that otherwise might have
12 been made from its operation are generally recoverable for the reason that their occurrence and
13 extent may be ascertained with reasonable certainty from the past volume of business and other
14 provable data relevant to the probable future sales." In addition, the Court notes that, as set forth
15 on page 693 of *Grupe*, anticipated profits dependent upon future events are allowed where their
16 nature and^{anticipated} occurrence can be shown by evidence of reasonable reliability. In other words,
17 damages for the loss of prospective profits are recoverable where the evidence makes reasonably
18 certain their occurrence and extent.

msb
9/5/12

19 The Court finds this same rationale applies to the current case in that profits were
20 reasonably certain as to their occurrence and extent based on⁽¹⁾ the 880 sales leads at the time of
21 the breach of fiduciary duty and⁽²⁾ GSI and GSC's history of sales and profits as measured by their
22 respective tax returns and corresponding financial statements. Further, Defendants offered no
23 independent evidence regarding proper measure of lost profits. Instead, they referred only to the
24 financial records and testimony from Mr. Robertson regarding financial difficulties faced by GSI
25 and GSC, which the Court has already taken into account in making its own analysis.

msb
9/5/12

26 2. Calculation of Damages

msb
9/5/12

1 As to the damages, the Court finds that Plaintiffs shall be awarded damages as a result of
2 Defendants' wrongful acts ^{described} above. To assess damages for breach of fiduciary duty, interference
3 with contract, and interference with prospective economic advantage, the Court reviewed the
4 financial statements and tax returns submitted by Plaintiffs in Exhibits 102-127. To calculate
5 damages, it is necessary to look at the actual operating results for GSI, GSC and UHI over a five
6 year period prior to 2008. The Court notes that this five year review period is a common method
7 used by banking and financial institutions to evaluate the small closely held businesses, and it
8 takes judicial notice of this practice.

9 The financial statements and tax returns for GSI, GSC and UHI all show that, after the
10 costs of goods sold are taken out, the gross income for these businesses was rising. This also is
11 consistent with the testimony of Plaintiffs' expert witness, Stan Smith, who said that the
12 companies' condition was improving overall.⁷ This point regarding the financial history is
13 relevant to whether lost profits based on projected sales are sufficiently clear enough to warrant
14 an award here, or are too speculative. Here, the financial statements and tax returns show the
15 steady increase in GSI and GSC's business from its startup position to just before April of 2008.
16 Backing out the officer's compensation, depreciation, repayment of share holder loans, and auto
17 ^{expense} reimbursement reveals the true operating result. For example, in 2007, after deducting the cost
18 of goods sold, officer compensation, insurance, interest, ^{and} auto expenses, the total pre-tax income
19 for GSI for 2007 was \$174,031. The attached Figure 1 shows the results of application of this
20 method to GSI, GSC and UHI for 2007.

21 _____
22 ⁷ Defendants objected to the admission of Smith's amended report (Exhibit 11), claiming it had not been
23 disclosed earlier. The amended report addressed the difference in financial losses taking into account the new
24 dealership agreement which Plaintiffs negotiated with GS Ohio as part of the judicially supervised settlement. The
25 Court overruled Defendants' objections based on the fact that Mr. Smith's deposition occurred after the settlement
26 conference and Defendant had an opportunity to question Smith on this very issue during his deposition. Further,
27 after the in limine motions were heard, the Court offered the Defendants the opportunity to conduct further
28 deposition of Plaintiff's expert witness, Stan Smith, who was available. Defendants declined to do so, and chose
instead, to move forward with their case.

1 In 2006, GSI sustained a net operating loss of \$113,614. However in all other years, GSI
2 made a profit after you deduct the cost of goods sold, the salaries paid to officers, shareholder
3 loans, auto expenses, etc. And if you make that analysis, other than 2006 when there was an
4 operating loss of \$113,614, the GSI continued to show an operating profit and made money. For
5 example, in 2003, that same analysis shows the actual operating result was a profit of \$11,566.
6 In 2004, it was an actual operating profit of \$70, 974. In 2005, it was a profit of \$83,737. And
7 in 2007 it was \$174,031.

8 The attached Figure 2 shows a more detailed breakdown of GSI, GSC's and UHI's operating
9 results for this same period. In summary, GSC had an actual operating result for 2005-2008 as
10 follows:

11	2005:	\$38,972
12	2006	(\$46,822)
13	2007	\$53,759
14	2008	(\$1,368)

15
16 And for UHI, the results are:

17	2003	\$211,431
18	2004	\$236,635
19	2005	\$144,221
20	2006	(\$27,993)
21	2007	(\$1,045)
22	2008	\$43,091

23
24 Therefore, the Court finds that had GSI's , GSC and UHI's businesses not been disrupted,
25 by the Defendants, they would have expected a net result of \$175,000 per year or \$1,225,000
26 over a seven year period. And, because these are tort claims, under Civil Code § 3333, Plaintiffs
27

1 are also entitled to recover general damages. Using formulas that adjusters have used in tort
2 cases for years, this would mean a reasonable recovery here could be as much as \$2,450,000 if
3 special damages were doubled or as much as \$3,675,000 if tripled. And so, based on the
4 evidence, the Court find^s that a reasonable range of monetary recovery here is anywhere between
5 \$1,225,000 and \$3,675,000.

MSJB
9/5/12

6 Looking at Mr. Smith's analysis^{of Gutter Shutter Co., INC.} at Exhibit 128, at page UHI003387, and taking the first
7 seven years projected profit under his scenario 1 (which includes 2008-2014), the total of his
8 estimated 20 percent profit there is \$2,888,923. And then if you take his comparable analysis at
9 page UHI003391 for Gutter Shutter California also under his scenario 1, the total of his
10 estimated profit is \$758,342. And on that basis, if you add both companies together for the
11 seven years^{it} is a \$3,647,265^{Projected Profit} figure. Thus, Mr. Smith's analysis (which the Court accepts^{by}
12 preponderance of the evidence) winds up more or less in the same bracket of recovery that the
13 Court's independent analysis^{applies at §1} applied here.

MSJB
9/5/12

MSJB
9/5/12

14 Therefore, the Court finds the appropriate amount of monetary damages to be awarded to
15 Plaintiffs against Defendants for loss of business for seven years to be \$3.5 million. This amount
16 shall not be adjusted for inflation or discounted to present value, as these metrics generally
17 cancel each other out.

18 3. Injunctive Relief

19 Plaintiffs are also entitled to injunctive relief on their claim for unfair competition.
20 Section 17200 gives the Court broad authority to fashion^{an} equitable remedy to redress the harm
21 caused by Plaintiffs anti-competitive practices. Here, the Court finds that competition in the
22 marketplace was harmed by Defendants conduct, and damage was done to the public's interest in
23 free and fair competition. The Court further finds that there should be some injunctive relief to
24 keep Defendants out of the marketplace and allow Plaintiffs to rebuild their business without
25 interference from Defendants. The Court finds that if Robertson were allowed to continue in
26 ownership of GSI and GSC, he would be in a position to continue his breach of fiduciary duties

MSJB
9/5/12

27 8 Note that Mr. Smith's scenarios leave projected revenue flat for three
28 years due to the Great-Depression-like economy

MSJB
9/5/12

1 to them and to further harm Plaintiffs. In addition, the Robertsons should not be allowed to gain
2 from the monies awarded to the ^{Plaintiff} corporations for the tortious damages they caused. Therefore,
3 Robertson is directed to surrender his shares to GSI and GSC and shall be compensated for these
4 shares according to the formula set forth in **Exhibit 39** without taking into account monies to be
5 recovered by GSI and GSC by virtue of this lawsuit. Robertson is further directed to resign from
6 his position as director & officer of GSI and GSC, and to return all equipment, materials, office
7 furniture, computers, and stationary to GSI and GSC.

8 Both the plaintiffs' Third Amended Complaint and Defendants' [^]Cross-Cross-Complaint
9 contained prayers which requested that the Court award such other further relief as it deems just
10 and proper. In addition, Defendants ask the Court to issue declaratory relief finding that
11 Robertsons hold a security interest in GSC and GSI. The Court finds that the Defendants should
12 not benefit from their own wrongdoing, particularly where such wrongful acts have been proven
13 by clear and convincing evidence. The transfer of shares from Wrigley to the Robertsons, while
14 technically valid, placed ^{MR.} the Robertson in a position of majority shareholder and gives him [^]the
15 ability to control the fate of GSC and GSI. This creates an inherent inequity for Plaintiffs and
16 indeed would allow Defendants to subvert the very purpose of a shareholder derivative lawsuit,
17 which is to restore to the corporation money and property which was wrongfully taken

18 The Court is persuaded by out of state authority *Samia v. Central Oil Company* (1959),
19 339 Mass. 101, 158 N.E.2d 469 (~~1959~~) cited by Mr. Martin regarding the public policy interest
20 in preventing a tortfeasor shareholder who wrongs a corporation to participate in the benefits of
21 recovery obtained by ^{the} corporation, or by a shareholder derivative action. To the extent that a
22 controlling shareholder interest would interfere with the orderly operation of GSI and GSC, the
23 Court declares that Robertson shall have no interest in any the new distributorship agreement to
24 be negotiated between Plaintiffs and GS Ohio as a result of their separate settlement. The Court
25 orders Robertson to surrender his 2/3 ownership interest under the terms of the shareholder's
26 agreement in November 2006 giving ^{that was signed} the corporations ^{the} an option to repurchase those shares.

1 Robertson shall surrender the shares to GSI and GSC and be paid the value of the shares as of
2 April 10, 2008. That value to be set without respect to the recovery to be provided to plaintiffs.
3 Robertson must also resign from his position as an officer of GSI and GSC and member of the
4 board of directors of each company.

5 The Court further finds that injunctive relief is necessary to protect Plaintiffs from further
6 harm by defendants. Therefore, the Court ^{shall} issue an injunction that, for the 5 year period to be
7 set out in the new agreement Plaintiff shall have with GS Ohio, Defendants shall be restrained
8 from conducting any business in the gutter installation market or selling gutter related products.

9 4. Prejudgment Interest

10 Plaintiffs also are entitled to prejudgment interest on the \$3.5 million under Civil Code
11 section 3287. Pursuant to ^{that section,} prejudgment interest is calculated at a rate of 10 % per annum from
12 the date of damage accrues. Damage accrues from the date Plaintiff suffers loss, not the date the
13 statute of limitations begins to run. *Michelson v. Hamada*, (1995) 29 Cal. App.4th 1566, 1589.
14 Accordingly, the Court finds that prejudgment interest should be calculated from April 10, 2008,
15 which is the date Defendants misappropriated the Call Center. Therefore, Plaintiffs are entitled to
16 prejudgment interest ^{at} ten (10%) ^{per annum} from the April 10, 2008 until judgment is issued. Prejudgment
17 interest shall continue to accrue at a rate of \$958 ⁹⁰ per day until judgment is issued.

18 5. Costs, Attorney's Fees and Punitive Damages

19 Plaintiffs are the prevailing parties and are entitled to all statutory costs incurred in this
20 matter. The matter of punitive damages is reserved for separate hearing should plaintiffs wish to
21 pursue such a claim. The matter of attorney's fees is also reserved pending application by
22 plaintiffs' counsel.

23 *For the reasons above-stated,*

24 IT IS HEREBY ORDERED [REDACTED] by the Court as follows:

25 1. Plaintiffs UHI, MSI and GSC shall have recovery in
26 their favor, jointly and severally, as against Defendants James
27 Robertson and Katherine Robertson, jointly and severally, on Plaintiff's
28 Second Cause of Action (Breach of Fiduciary Duty), Fifth and Sixth
Causes of Action (Interference with Contract and Interference

With Prospective Economic Advantage), and
Eighth Cause of Action (Business + Prof. Code § 17200). 91

1. Judgment shall be entered in favor of the Plaintiffs GSI, GSC and UHI, jointly and severally, and against Defendants James Robertson and Katherine

Robertson, jointly and severally, in the amount of \$3.5 million dollars, on the Second and Fifth + Sixth Causes of Action.

2. Plaintiffs' Fourth Cause of Action for Misappropriation of Trade Secret against Defendants James and Katherine Robertson is hereby dismissed

without prejudice. Plaintiffs' Seventh Cause of Action (Business + Prof. Code § 7028.41) is hereby dismissed without prejudice. 101

3. Defendants' cross-cross-complaint against Mark Lavine, UHI, GSI and GSC

is hereby dismissed with prejudice, except as to their 10th Cause of Action on Deceitful Relief.

4. As prevailing parties, Plaintiffs shall be awarded prejudgment interest at a rate of 10 percent per year, \$958 per day from April 10, 2008 until such time as the Judgment is issued;

5. On the Plaintiffs' Eighth Cause of Action (§ 17200 Claim), An injunction shall issue against Defendants Robertson and Kathy Robertson, pursuant to Business + Prof. Code § 17203, and in favor of Plaintiffs as follows:

a. Defendant James Robertson is ordered to resign his position as Vice President and Member of the Board of Directors of GSC and GSI;

b. Defendants James Robertson is ordered to surrender his shares in GSC and GSI to the corporations for purchase by these corporations in an amount consistent with the terms of the Agreement Among Shareholders set forth in Exhibit 39. The value shall be calculated without taking into account the \$3.5 million to be restored to GSI and GSC.

c. Defendant James Robertson shall return all corporate property, stationary, equipment, materials and supplies to Plaintiffs.

d. Defendants James Robertson and Katherine Robertson are enjoined from conducting any business in the covered gutter market anywhere

9. First and Third Causes of Action asserted by Plaintiffs are now moot by virtue of the separate pretrial Settlement with the Ohio Defendants.
10. On the Dismissal of those two claims, each side to bear their own attorneys fees and costs on dismissal.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

377B
9/5/12

in the State of California for a period of five years from the date of Judgment.

- 5a.* ~~5~~ *ON Defendant's 1st Tenth Cause of Action (Declaratory Relief),*
 The Court finds and declares that Defendant James Robertson is not entitled to any ownership interest in the new dealership agreement to sell Gutter Shutter Products which is currently being negotiated between Mark Lavine, UHI and GS Ohio *as per the pretrial Settlement reached between them.*
6. Determination of punitive damages is reserved for further proceedings by Plaintiffs, *if they elect to pursue that issue.*
7. The issue of attorney's fees is reserved pending application by either side.

IT IS SO ORDERED. [REDACTED]

Date: *Sest.* ~~April~~ 5, 2012

Gerald J. Buchwald
 Hon. Gerald J. Buchwald,
 JUDGE OF SUPERIOR COURT

Figure 1

Deductions From Actual Operating Results - Fiscal Year 2007

GSI 2007 Exhibit 103			
Officers' Compensation	\$ 181,232.00		
Depreciation	\$ 31,137.00		
Interest on Shareholders' Loans	\$ 4,369.00		
Auto Reimbursements	\$ 56,515.00		
Total	\$ 273,253.00		
GSC 2007 Exhibit 109			
Officers' Compensation*	\$ -		
Depreciation*	\$ -		
Interest on Shareholders' Loans	\$ 4,823.00		
Auto Reimbursements*	\$ -		
Total	\$ 4,823.00		
UHI 2007 Exhibit 122			
Officers' Compensation*	\$ -		
Depreciation*	\$ -		
Interest on Shareholders' Loans*	\$ -		
Auto Reimbursements*	\$ -		
Total	\$ -		
*These amounts are zero.			

Figure 2

DAMAGE CALCULATIONS

GSI							
	GSI 2003	GSI 2004	GSI 2005	GSI 2006	GSI 2007*	GSI 2008	
Total Deductions	\$ 232,698.00	\$ 424,713.00	\$ 277,109.00		\$ 1,029,209.00	\$ 255,792.00	
Less Backed-out Expenses	\$ (54,110.00)	\$ (59,167.00)	\$ (52,372.00)		\$ (273,253.00)	\$ (41,896.00)	
Net Deductions	\$ 178,588.00	\$ 365,546.00	\$ 224,737.00		\$ 755,956.00	\$ 213,896.00	
Gross After Cost of Goods Sold	\$ 190,152.00	\$ 436,520.00	\$ 308,204.00		\$ 929,987.00	\$ 169,953.00	
Less Net Deductions	\$ (178,588.00)	\$ (365,546.00)	\$ (224,737.00)		\$ (755,956.00)	\$ (213,896.00)	
Profit	\$ 11,564.00	\$ 70,974.00	\$ 83,467.00		\$ 174,031.00	\$ (43,943.00)	
GSC							
			GSC 2005	GSC 2006	GSC 2007*	GSC 2008	
Total Deductions			\$ 29,223.00	\$ 33,367.00	\$ 7,819.00	\$ 2,417.00	
Less Backed-out Expenses			\$ (5,385.00)	\$ (11,666.00)	\$ (2,996.00)	\$ -	
Net Deductions			\$ 23,838.00	\$ 21,701.00	\$ 4,823.00	\$ 2,417.00	
Gross After Cost of Goods Sold			\$ 62,810.00	\$ (25,121.00)	\$ 58,582.00	\$ 1,049.00	
Less Net Deductions			\$ (23,838.00)	\$ (21,701.00)	\$ (4,823.00)	\$ (2,417.00)	
Profit			\$ 38,972.00	\$ (46,822.00)	\$ 53,759.00	\$ (1,368.00)	
UHI							
	UHI 2003	UHI 2004	UHI 2005	UHI 2006	UHI 2007*	UHI 2008	
Total Deductions	\$ 782,943.00	\$ 906,913.00	\$ 774,709.00	\$ 44,461.00	\$ 7,576.00	\$ 254,495.00	
Less Backed-out Expenses	\$ (104,685.00)	\$ (165,895.00)	\$ (165,875.00)	\$ (7,959.00)	\$ -	\$ (21,560.00)	
Net Deductions	\$ 678,258.00	\$ 741,018.00	\$ 608,834.00	\$ 36,502.00	\$ 7,576.00	\$ 232,935.00	
Gross After Cost of Goods Sold	\$ 889,689.00	\$ 977,653.00	\$ 753,055.00	\$ 8,509.00	\$ 6,531.00	\$ 276,026.00	
Less Net Deductions	\$ (678,258.00)	\$ (741,018.00)	\$ (608,834.00)	\$ (36,502.00)	\$ (7,576.00)	\$ (232,935.00)	
Profit	\$ 211,431.00	\$ 236,635.00	\$ 144,221.00	\$ (27,993.00)	\$ (1,045.00)	\$ 43,091.00	

*The "backed-out" expenses are itemized on Figure 1.