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13
14 UNITED STATES DISTRICT COURT
15 EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

16 EDVARD ESHAGH, on behalf of himself)
17 and all others similarly situated,)
18 Plaintiffs,)
19 vs.)
20 THE TERMINIX INTERNATIONAL)
COMPANY L. P., a limited partnership;)
21 TERMINIX INTERNATIONAL, INC., a)
corporation;)
22 Defendants.)

Case No.

CLASS ACTION COMPLAINT

Date filed: February 8, 2011

DEMAND FOR JURY TRIAL

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24 **I. SUMMARY OF THE CASE**

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26 1. Terminix issues Control Service Agreements, after performing initial or periodic
27 inspections required by statute, in which Terminix promises to perform the “necessary service” to
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1 vaccinate structures against subterranean termite (herein “termite”) attack. Two of the necessary
2 services required to fulfill the promise are never performed and Terminix tries to exculpate itself
3 from the legal consequences arising from this nonperformance of its basic service commitment and
4 legal fraud through use of an unconscionable and unlawful limits of damages and remedies clause.

5 2. For over sixty years internal Terminix Standard Procedures have identified the
6 "necessary services." Terminix conceals that it does not apply an “Entire Structure Treatment”
7 called for by its Standard Procedures and promised in form contracts, annual renewal notices and
8 annual “Guarantees.” Instead, Terminix systematically and illegally applies lesser “Local
9 Treatments.” In addition, for the proposed sub-class of customers whose structures have stucco
10 siding in contact with the earth, Terminix fails to properly disclose and correct the condition.
11 Terminix’s Standard Procedures concede that if does not, or cannot, provide either of these
12 “necessary services,” the properties fail to meet minimum standards for issuing the renewable
13 Control Service Agreements and that its experience shows termites may not be prevented as its form
14 CSA’s promise.

15 3. Edvard Eshagh, the named class representative, has standing to represent the class
16 because he is an existing customer whose contract and renewal solicitations are typical of the class
17 and an investigation by the appropriate California regulatory agency conclusively establishes that
18 Terminix failed to provide an Entire Structure Treatment as promised and that it cannot do so
19 because the structure has stucco in contact with the soil.

20 4. Attorneys General in Florida and Kentucky successfully enjoined the practices
21 complained of herein and this litigation seeks to use Eshagh’s standing as a private attorney general
22 under California consumer protection statutes, and other causes of action, to obtain relief and reform
23 for Californians.

24 5. Terminix’s exculpatory clause and systemic breaches of duties and violations of law
25 should be enjoined, and the class members made whole for economic and other injuries sustained as
26 a result of Terminix’s wrongful conduct.

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1 **II. PARTIES AND JURISDICTIONAL ALLEGATIONS.**

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6. Plaintiff, Edvard Eshagh (“Plaintiff” or “Eshagh”), is an adult resident citizen of Stanislaus County, State of California, and he owns the subject structure located at 845 E. Main St., Turlock, California, 95380.

7. Plaintiff paid Terminix the initial fee and all annual premiums due to date for a renewable Control Service Agreement since 1999 and he will continue paying renewal premiums to assure Article III jurisdictional standing requirements so long as he is serving as a putative or appointed class representative under Fed. R. Civ. P. 23.

8. The Terminix International Company Limited Partnership is a Delaware Limited Partnership with its principal place of business in Tennessee, and it routinely conducts business in Stanislaus County, California.

9. Terminix International, Inc. is a Delaware corporation with its principal place of business in Tennessee, and it routinely conducts business in Stanislaus County, California, and is the general partner of the Terminix International Co., L.P.

10. These defendants (hereinafter collectively “Terminix”) operate and conduct business in this District and Division through branch offices at 2260 Cooper Ave. #E, Merced, CA 95341 and 3226 East Lance Rd., Stockton, CA 95205.

11. Jurisdiction exists under 28 U.S.C. §1331 and §1332(d)(as damages sought - in the aggregate - exceed the jurisdictional minimum).

12. The term “Plaintiff (s)” as used in this complaint means and includes all persons and entities named as Plaintiff in the caption, or any amendment thereto.

1 13. The term “Defendant” as used in this complaint means and includes Terminix as well
2 as all persons and entities listed and named as a Defendant in the caption of this complaint or any
3 amendment thereto.

4 **III. THE SPECIAL STATUTORY AND PROFESSIONAL DUTIES TERMINIX OWES**
5 **THOSE FOR WHOM IT PROVIDES INSPECTIONS AND ISSUES CONTROL**
6 **SERVICE AGREEMENTS FOR TERMITE PREVENTION**

7 14. The inspections, advice, services, advertising, chemicals and business operations
8 material to Plaintiff’s allegations are subject to numerous state and federal statutes and regulations,
9 and they involve expertise outside the common knowledge of lay persons and scientific techniques
10 and opinion that lay customers cannot fairly evaluate. These circumstances give rise to professional
11 duties and obligations akin to those of other professionals or fiduciaries. A detailed description of
12 some of the relevant information concerning these matters will establish a foundation for specific
13 accusations of wrongdoing and illegality in support of Plaintiff’s claims of unlawful conduct under
14 Cal. Bus. and Prof. Code §17200 claims of unlawfulness that arise outside the four corners of
15 written contracts or that are implied into the contract and relationship by operation of law.
16

17 15. The California Department of Consumer Affairs publishes a compilation of the
18 relevant statute and regulations relating to structural pest control (i.e., termite) laws (herein
19 “Structural Pest Control Act” or “SPCA”). The compilation in twelve point typeface and single-
20 spaced lines exceeds 150 pages. Not included in this compilation are other relevant California
21 statutes and regulations that deal with the registration and use of pesticides. Relevant federal statutes
22 and regulations relating to use, registration, storage and record keeping of pesticides used for termite
23 control add hundreds more pages of regulations. Leaving aside the science of termite control, the
24 legal framework surrounding it suggests that it is a field beyond the reasonable grasp of even the
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1 most diligent consumer. The California Legislature, which knew the history of this industry when
2 enacting the SPCA, said the primary purpose of the protections enacted are to protect consumers
3 from sharp practices, not protection of the environment.
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5 16. California's SPCA unequivocally states that "consumer protection is the primary
6 mission of" and the "highest priority for" the State's legal and regulatory scheme. Cal. Bus. & Prof.
7 Code §8520(c) and 8520.1.

8 17. The SPCA Preamble specifically admonishes "licensees" like Terminix and its
9 employees to be familiar with the Act.
10

11 18. Inspecting for, and developing prescriptions for, termite prevention is exclusively within
12 the province of professionals who are licensed as provided for in the SCPA and documented as provided
13 by law, such that consumers reasonably rely upon the advice of licensees like Terminix. §8560(a).¹

14 19. The SPCA authorizes the California Structural Pest Control Board (SPCB) to promulgate
15 regulations to carry out the mandates and purposes of the law. The Regulations are found in the
16 California Code of Regulations (CCR) and are 1900 series numbers cited herein. Statutory authorities
17 are the 8000 series numbers cited herein.
18

19 20. California precedent establishes that lay customers like Plaintiff and the class must
20 and do rely on regulated and licensed professional termite experts like Terminix.
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22 "The existence of wood-destroying pests and organisms, and the measures
23 appropriate to their control, are, usually, beyond the expertise of the individual
24 property owner; but, in the climatic and geological condition of California,
those pests and organisms represent a special and serious danger to property and
the health and safety of the occupants of property."

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26 ¹ **8560.** (a) Licenses issued to operators, field representatives, or applicators shall be limited to the
27 branch or branches of pest control for which the applicant has qualified by application and examination.
28 ...Branch 3. Termite. The practice relating to the control of wood-destroying pests or organisms by the use
of insecticides, or structural repairs and corrections...."

1 *Imperial Termite Control, Inc. v. Structural Pest Control Bd.*, 275 Cal.App.2d 685, 689, 80 Cal.Rptr.
2 156, 159 (2nd Dist. 1969).

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6 21. The need to protect Californians from sharp and unfair business practices is important,
7 in part, because the treatment of termite infestations is as great in most of California than in any area
8 of the country.

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22. This fact is recognized by both maps published for decades by the U.S. Department of
Housing and Urban Development (Exhibit A) and Terminix marketing material issued to Plaintiff and
other California consumers (e.g., Exhibit B [p.2&5] & E).²

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23. Section 8648 prohibits “[a]uthorizing, directing, conniving at or aiding in the
publication, advertisement, distribution or circulation of **any material** by false statement or
representation concerning a registered company's business....” (Emphasis added). Hence, the SPCA
specifically prohibits use of any false statement in any material concerning the business, not just
advertising. As described herein, Terminix makes false statements in its contracts and inspection
reports, in addition to advertizing materials, concerning the acts and omissions described hereinafter –
all in violation of said statute and therefore unlawful acts under Bus. & Prof. Code §17200, et. seq.

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24. Section 8653 makes it unlawful for Terminix to retain refunds due to customers because
it failed to perform the services promised (as alleged hereinafter). Terminix has not paid to Plaintiff or
any class member the money it owes them as refunds because it never performed the necessary services

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² Terminix also exaggerates the threat posed by Termites throughout its marketing material by stating that termites do more damage than injuries often covered by homeowner insurance such as “fires, storms and floods” combined.

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1 promised in its CSA's. Section 17200 also borrows this statute to render unlawful retention of the
2 money claimed herein.

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4 25. The preamble to the "False and Misleading Advertising" regulations of the SPCA, CCR
5 §1999.5 also expresses the remedial and consumer protection function of the regulatory mandates:

6 "It is the purpose of this regulation to protect the public from false, misleading,
7 deceptive, or unfair representations or claims concerning structural pest control
8 while enabling the public to receive truthful and legitimate information about
9 those structural pest control products and services...."

10 (Exhibit C).

11 26. The SPCA does not supplant or restrict application of other consumer protections or laws
12 as §8516(d) provides in pertinent part that nothing in the law "...shall relieve a registered company or
13 a licensee of any liability resulting from negligence, fraud, dishonest dealing, other violations pursuant
14 to this chapter, or contractual obligations between the registered company or licensee and the
15 responsible parties." Accordingly, the SPCA contemplates that §17200 will borrow violations of it to
16 establish claims under its "unlawful" prong.

17 27. The Structural Pest Control Board ("SPCB") promulgates regulations that specify acts
18 or omissions that are deemed "false, unfair or deceptive" advertising within this specialized field but
19 these regulations expressly do not create a "safe harbor" if a given activity violates other laws. Section
20 1999.5(e) states, "The remedies or penalties provided by this section are cumulative to each other and
21 to the remedies or penalties available under all other laws and regulations of this State." (Exhibit C).
22 Consequently, Plaintiff can allege violations of SPCA Regulations to state claims under the "unlawful"
23 prong of §17200.

24
25 28. California statutes impose upon licensees like Terminix the duty to inspect properties,
26 identify conditions conducive to infestation and to recommend and provide appropriate termite
27 prevention measures. See §8514.
28

1 29. It is unlawful to advertise a specific CSA as an effective termite prevention service until
2 the inspection and report thereof as required by statute is performed. See §8514.

3 30. After an initial inspection and report of the results to customers, licensees like Terminix
4 can offer and issue renewable control service agreements (herein “CSA’s”) that provide for termite
5 prevention services and periodic inspections in exchange for an annual renewal fee. §8516(g). Section
6 8516(h) lists the minimal topics that must be included in the agreement including the prevention
7 measures to be used and a statement as to whether structural modifications will be made.
8

9 31. Terminix used form CSA’s and renewal agreements pertaining thereto for Plaintiff and
10 each class member that specified that Terminix would provide “all necessary services” to prevent
11 termite attack - not just a few - and that the structures would be left unreasonably vulnerable.³
12

13 32. Throughout the life of annually renewable CSA’s like those issued to Plaintiff and the
14 class, periodic re-inspections (including very thorough inspections with detailed written reports every
15 three years) must be made and appropriate professional advice rendered regardless of the terms or
16 absence of terms in a written CSA.
17

18 33. California Business and Professions Code, Div. 3, Chapters 14 and 14.5 provide that
19 special licenses must be obtained to perform termite prevention services, including inspections,
20 soliciting, and recommending to citizens what should be done to prevent termites. "'Structural pest
21 control' and 'pest control' as used in this chapter are synonymous... [and apply to]...wood destroying
22 pests or organisms,...the engaging in, offering to engage in, advertising for, soliciting, or the
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24 _____
25 ³ Prevention service or termite prevention service is used interchangeably to identify the service
26 Terminix promised in its CSA’s. Plaintiff does not allege that Terminix represented the service would be
27 100% effective forever but that the services would be used professionally to the highest standards –
28 including the generally applicable internal Terminix Standard Procedures described hereinafter. Expert
testimony will establish that adherence to those internal Standard Procedures would result in infestation in
rare situations. A fair analogy is to a vaccination against viruses that works almost all the time but not in
100% of cases for reasons both known and unknown to the best science of the time.

1 performance of, any of the following: identification of infestations or infections; the making of an
2 inspection;...the making of inspection reports, recommendations, estimates, bids, whether oral or
3 written...; and the making of contracts [CSA's]...or the performance of any work including the making
4 of structural repairs...or the use of insecticides, pesticides ..." Cal. Bus. & Prof. Code § 8505.
5

6 34. An applicant for a pest control license must be qualified, *inter alia*, in the theory and
7 practice of pest control in the desired branch. Cal. Bus & Prof. Code § 8566 (d).

8 35. CCR section 1937 requires an applicant for a Branch 3 (termite) license to have
9 completed one hundred (100) hours of training, including at least 80 hours of actual field work.
10 Continuing education is required to remain licensed.
11

12 36. Each inspection report issued to Plaintiff and class members contained the following
13 affirmation that they should trust and rely on Terminix:

14 **A LICENSED PEST CONTROL OPERATOR IS AN EXPERT IN HIS/HER**
15 **FIELD. ANY QUESTIONS RELATIVE TO THE REPORT SHOULD BE**
16 **REFERRED TO HIM/HER.**

17 (Exhibit D, p. 1).

18 37. The SPCA also requires Terminix to provide information about conditions conducive
19 to infestation⁴ at initial and subsequent inspections "on a form approved by the board"⁵ and to show the
20 locations of such conditions on a diagram or sketch of the structure. Cal Bus & Prof Code § 8516(b)(6)
21 and (7); CCR § 1990(b). These conditions are known by the industry to hamper the protection of
22 structures and must be addressed.
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25 ⁴ "Conditions conducive to infestation" and words and phrases of similar import are used to
26 describe the concept that certain physical conditions at a structure may increase the likelihood of infestation
27 by the target pest for various reasons such as providing hidden entry, food, or that impair the ability to apply
or effectiveness of pesticides used to create an Entire Structure Treatment.

28 ⁵ Form No. 43M-41 (Rev. 10/01). CCR § 1996(a). See also CCR §§ 1990(a) and 1993 requiring
use of a State-approved form and satisfaction of all requirements of § 8516, Cal Bus & Prof Code.
Consequently, forms should exist in Terminix's records that will permit identification of the class members.

1 38. Section 1991 requires inclusion of recommendations for correcting all infestations and
2 conditions conducive to infestation.

3 39. Section 8646 subjects Terminix and its licensees to discipline if they violate the labels
4 for “pesticide use” that are required by any government entity which require applying chemicals in the
5 places and volumes and concentrations specified.

7 40. Section 8505.17 requires monthly reports of termite chemicals used to be filed with the
8 county agricultural commissioner such that regulators will have a record from which to evaluate
9 whether a licensed company like Terminix is using too little, too much, or misapplying termiticides, if
10 an investigation is launched. Hence, records should be maintained from which identification of class
11 members and liability can be established.

13 41. “Departure from, or disregard of, plans or specifications in the performance of structural
14 pest control work in any material respect, without consent of the owner...is a ground for disciplinary
15 action.” Cal. Bus. And Prof. Code §8635.

17 42. The California Legislature considers breach of any obligation it imposed under the SPCA
18 (including its regulations) so serious that a violation can be addressed by disciplinary action affecting
19 the license, civil fines, or as a criminal offense. See § 8553 and the regulations promulgated thereunder.

20 43. Recognizing the vulnerability of consumers and the importance of faithfully and
21 professionally providing the service, a California appeals court explained thirty-four years ago that
22 Terminix owes a professional duty of full disclosure to its customers and that concealing information
23 tolls the applicable statutes of limitations. *Seelenfreund v. Terminix*. 84 Cal.App.3d 133, 148 Cal.Rptr.
24 307 (Cal.App.1stDist. 1978). The *Seelenfreund* Court recognized the need to toll the statute of
25 limitations when facts “involving a fiduciary relationship such as professional malpractice” have been
26 concealed and that termite companies in California must “disclose to the client all facts that materially
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1 affect the rights and interests of the client.” *Seelenfreund*, 84 Cal.App.3d at 136, 137. Though the court
2 did not declare that Terminix’s duties arose from a traditional “fiduciary” relationship, it held that
3 Terminix’s duties are essentially the same as a fiduciary because of the “statutory mandate” imposed
4 by the SPCA and its related regulations. *Id.* at 138.

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6 44. Violations of the forgoing statutes and regulations support Plaintiff’s §17200 Unfair
7 Competition Law claims of unlawfulness.

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11 **IV. DESCRIPTION OF TERMINIX’S STANDARD PROCEDURES**

12 45. Terminix assures Plaintiff and the class it stays technically advanced as an expert and
13 “world leader in termite control... with more than 560 Terminix offices, including the largest technical
14 staff in the industry and more than 40 graduate entomologists, we can offer state of the art in termite
15 control.” (Exhibit E, p.1; Exhibit B).

16
17 46. Terminix has published many top-rated internally generated training, service and quality
18 control materials since the 1950’s that are as thorough and entomologically sound (for the most part)
19 as any in the industry.

20
21 47. Terminix published in the 1950’s a training guide and policy manual titled the “Keyman
22 Manual” that details how to inspect, record findings, complete paperwork and scale graphs, write and
23 apply treatment specifications to assure compliance with law and label’s directions, perform quality
24 control, and the like.

25
26 48. Terminix developed a uniform set of descriptive tasks it called “Unit Operations” for
27 every condition that could be encountered at the structures – complete with cartoons and, later videos,
28 to demonstrate how to perform them.

1 49. If each Unit Operation is performed to address issues associated with variations in
2 foundations or conditions that could be encountered (including alterations and modification to structures
3 and grades under and around the structures) the “necessary services” are in place to prevent termites and
4 Terminix has a reasonable basis for claiming it can prevent termite attack.⁶

5
6 50. The titles given to the service or training materials changed over the years (Keyman,
7 Service manual, Aspire Manual, etc.) but for sake of simplicity and clarity, this Complaint refers to
8 these generically as “Terminix Service Procedures.”

9
10 51. The foundation of the Service Procedures is a list of what Terminix calls “Minimum
11 Basic Requirements” (“MBR’s”) for issuing renewable service contracts of the type at issue here.
12 California statutes (§8516) refer to these agreements as “Control Service Agreements” (“CSA’s”) and
13 Terminix uses the following synonymous terms to describe them: PRO or repair contracts, Termite
14 Protection Plans; SER, retreat only, or Termite Service Plans.

15
16 52. According to Terminix internal policy, “[b]efore any property qualifies for a Terminix
17 guarantee, all twelve of the Terminix Minimum Basic Requirements for treating the structure must have
18 been carried out...” (Exhibit G, Keyman Manual, page “Terminix 1836”).

19 53. Terminix describes the MBR’s as:

20 ...the fundamental rules by which Terminix [Standard Procedures] are governed.
21 They must be completely familiar to everyone holding a responsible position in
22 the company. The rules are simple and relatively few in number. They have been
23 time-tested over a period of years and proven to be adequate without being too
restrictive...**Experience has shown that when these minimums are not**

24 ⁶ Terminix’s rationale for requiring each applicable Unit Operation also explains why failing to provide it
25 results in not providing the “necessary service” to prevent termites:

26 **The Basic Aim of Terminix International, Inc. Unit Operations** – To service
27 an area in such a manner that it will be non-infested at the time of the effective
date of the contract and so that any reinfestation can be found by competent
inspectors in the usual course of inspection before any substantial damage results.
28 (Exhibit F, 1987 Keyman Manual, page 3).

1 **maintained termites may not be controlled**...It is an important part of your job,
2 therefore, to maintain the quality of Terminix’s [termite prevention] service by
3 holding to the [Standard Procedures].

4 (Exhibit G, 1983 Keyman Manual (emphasis added), pages “Terminix 1813-1814”).

5 54. If the structure that is inspected for consideration does not meet all of the MBR’s, a
6 structure cannot qualify for, and the customer cannot be offered, a form, unmodified Control Service
7 Agreement because Terminix knows, “**Experience has shown that when these minimums are not**
8 **maintained termites may not be controlled.**” Id.

9 55. Because each class member’s structure fails to meet one or both of them, there are two
10 MBR’s critical to resolving the class claims that will be discussed in detail below. Eshagh’s structure
11 does not meet either MBR. First, the property cannot have an uncorrected Stucco Hazard. Second, the
12 structure must be capable of receiving (and must actually receive) an Entire Structure Treatment.⁷

13 56. If the inspection reveals that Terminix cannot perform all needed Unit Operations, or the
14 decision is made not to perform them, including an Entire Structure Treatment and correction of the
15 Stucco Hazard, Terminix Service Procedures provide only two options – and neither involve issuing
16 form unmodified CSA’s like those sold to Plaintiff and class members. First, the structure could receive
17 a one-time chemical treatment of some kind with no option to purchase a CSA. Second, if a CSA is
18 offered it must be modified by hand and approved by the branch manager so that the customer
19 acknowledges in writing on the face of the CSA that termite attack in some areas of the structure cannot
20 be avoided and that Terminix will accept no ongoing obligation for that area at all. Neither the Plaintiff
21 nor any class members’ contract was modified by this procedure. (A more complete description of the
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26 ⁷ Entire Structure Treatment is used to describe the concept of applying chemical to all probable
27 entry points for termite infestation at a structure because it is the natural echo of the “Local Treatment” that
28 is described in California Regulations as a lesser service. See §1991(a)(8)(C)(3). Terminix Standard
 Procedures, documents, and the structural pest control trade in general refer to the concept variously as
 treating “entry points”, establishing a barrier, or performing a complete or full treatment, and the like.

1 elaborate procedure is at Exhibit G, 1983 Keyman Manual, p. 1836-43).

2 57. “IMPORTANT: If any of the Terminix Minimum Basic Requirements described in this
3 section cannot be completed for ANY reason, then a renewable [CSA] Terminix Guarantee may not be
4 issued...” (Exhibit H, 1994 Professional Termite Control Manual, Terminix 1169).

6 **V. TERMINIX UNIFORMLY DISREGARDS STANDARD PROCEDURES REQUIRING**
7 **CORRECTION OF THE STUCCO HAZARD AND ENTIRE STRUCTURE**
8 **TREATMENT**

8 58. Terminix markets to Plaintiff and the class its termite prevention expertise. (Exhibit
9 B & D).

10 59. Terminix is one of California’s largest termite prevention service providers, serving tens
11 of thousands of customers statewide.

12 60. Terminix encourages Plaintiff and the class to rely upon Terminix’s expertise to protect
13 their largest investments from termite damage because homeowners’ insurance does not cover “the
14 almost unimaginable damage [termites] can do” and to bring them “peace of mind.” (Exhibit B, p. 2;
15 Exhibit E, p. 1).

16 61. Terminix assures Plaintiff and the class it goes “above and beyond” to protect their
17 properties and that it goes even beyond its CSA duties (“Beyond the guarantee, we renew our personal
18 commitment to you.”). (Exhibit B, p. 3, 2).

19 62. Terminix advertised to Plaintiff and the class as part of its marketing campaign (as
20 reflected by **Exhibit C** as but one example) for at least more than a decade that it uses licensed
21 professional inspectors to perform the inspections at issue here and that it will use the expertise of its
22 state-licensed inspectors in the theory and practice of termite control to recommend proper termite
23 prevention services.

24 63. Terminix’s form “Termite Guarantee” issued with the form CSA provided: “Terminix
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1 will provide the necessary service to help defend the identified property against the attack of
2 subterranean termites” (Exhibit E, p.1, ¶1).⁸

3
4 64. Terminix’s internal Standard Procedures acknowledge that omitting any applicable Unit
5 Operation means it has not provided the necessary service to prevent termites because it is not a
6 “complete control service” so that none of them should be omitted:

7 ...[The Terminix] Termite Control Specialist...learns that he can’t treat just
8 “part” of a structure; it **all** must be treated...[he must have a plan]...These
9 methods [unit operations] were put to the test of experience and time...By
10 following or carrying out each of these operations, a complete control service
11 [Entire Structure Treatment] is achieved...[These operations] are an important
12 part of what makes Terminix International a leader in our industry...

13 (Exhibit G, 1983 Keyman Manual, page “Terminix 1828” (emphasis in original).

14 ...You should not omit any of these operations in any structure where
15 there is a requirement to perform them...[They] cover the ordinary job
16 functions...or a minimum of work that must be done in order to meet the
17 Terminix basic requirements.

18 (Id. at “Terminix 1814”).

19 65. Terminix’s practice in California was never to perform Unit Operations that require
20 correcting the Stucco Hazard and even where the Stucco Hazard does not exist, its Practice is to provide
21 only a Local Treatment⁹ and not the “complete” or Entire Structure Treatment referenced.

22 66. Terminix failed to disclose to Plaintiff and class members that it was not providing the
23 “necessary services” specified by its internal Service Procedures relative to Entire Structure Treatments
24 and the Stucco Hazard (discussed in detail, below).

25 ⁸ The contract provides: “The [WDOR] Report is part of this [CSA] and is incorporated herein by
26 reference. The inspection graph included with the Report and completed during our inspection is also part
27 of this [CSA]” (Exhibit I, page 1, section A). Terminix issued a WDOR to Plaintiff (in 1999) and each
28 class member prior to entering the CSA.

⁹ “Local Treatment” is used herein because it is the phrase California Regulations give to the
concept of providing what the trade and Terminix Standard Procedures call a spot or partial treatment.

1 67. Not only did Terminix conceal its failure to perform the “necessary services” it
2 misrepresented that it had performed them both on the face of its CSA’s, inspection reports titled
3 “Wood Destroying Organism Reports” or “WDOR’s”, notices that work promised is “complete,” and
4 periodically issued “Terminix Guarantees” that it mailed customers, like Plaintiff, who paid renewal
5 fees. For example, form CSA’s falsely promise that “...all work completed by Terminix is protected
6 against live reinfestations of subterranean termites...” (Exhibit I, page 1, section B).
7

8 68. Terminix’s Standard Procedures recognize that it will be liable if it fails to provide the
9 Entire Structure Treatment and correction of the Stucco Hazard specified in its Standard Procedures:
10

11 Should there ever be a misunderstanding or disagreement about damage
12 or continuing activity under [a CSA], it is important that Terminix be able to
13 substantiate that it has not neglected any of the correct or proper termite treatment
14 [Unit Operations], that it has not skipped or substituted any treatment, and that it
15 has not been negligent in any way...Remember that the [CSA] does not allow or
16 provide for skipping any of the Terminix Minimum Basic Requirements, or for
17 using any substitute methods that are not approved in the Termite Control Service
18 Manual.[All] contracts call for adequate treatment for the control of termites
19 according to Terminix standard procedures.

20 (Exhibit G; Keyman Manual, p. “Terminix 1839”).

21 69. Terminix breached its CSA’s every year by failing to provide the two “necessary
22 services” for Plaintiff and the class members that constitutes an unfair practice under both §17200 and
23 the FTC Act’s prohibition of unfair practices. *Orkin Exterminating Co. Inc. v. Federal Trade Comm’n.*,
24 849 F.2d 1354 (11th Cir. 1988). In *Orkin Exterminating*, a case that is routinely cited as the seminal
25 authority that defines the “unfairness” prong of the Federal and state Unfair Trade Practices Acts, a
26 Federal Appeals Court affirmed the Federal Trade Commission’s (“FTC’s”) summary judgment award
27 against Orkin, and held that a “widespread, systematic” breach of termite prevention contracts meets
28 the test for “unfairness” under the FTCA.

70. Not only is the routine breach of its contractual promise unfair under §17200 of the

1 UCL, the breach satisfies 17200's "unlawful" prong. Misrepresenting that you have performed a
2 service, or concealing that you should have done it but did not, is the very kind of wrongdoing classified
3 as "deceptive, untrue or misleading" and, therefore, illegal under §1999.5(f)(2).
4

5 71. Plaintiff and lay persons who constitute the class are not capable of detecting that
6 Terminix failed to provide the neglected services that Terminix was paid to identify and provide.
7 Terminix's Standard Procedures recognize that it is easy to conceal omissions from customers:

8 Unlike many other types of services, termite protection is based almost
9 entirely on trust. The reason? One can't see it because much of the treatment
10 takes place out of sight under the house, inside the walls, or down in the soil.
11 Therefore, guarantees are no better than the company behind them, and the
12 property owner needs to know that the company he hires will do exactly what
13 it says it will do.

14 (Exhibit G, Keyman Manual, page "Terminix 1836").
15

16 72. Bus. & Prof. Code §8644, subjects Terminix and its licensees who conduct termite
17 WDOR inspections and make deceptive recommendations based on the introduction gained by free
18 initial inspections to discipline if they commit "fraud or misrepresentation" after the inspection
19 regardless of whether the licensee makes a written report of an inspection [like the WDOR inspection
20 Terminix performed for Plaintiff and class members] as required by Sections 8516 and 8517. Terminix
21 committed legal fraud and by failing to provide the Entire Structure Treatments and correction of the
22 Stucco Hazard described more particularly below.
23

24 73. As to the allegations made heretofore and in this Section "V" of the Complaint, all
25 involve material acts or omissions, representations or concealments, that were relied upon by Plaintiff
26 and/or relied upon by the class members or involve issues wherein the law presumes reliance.
27
28

1 74. Plaintiff did not know Terminix violated the law and provided sub-standard service until,
2 as described hereinafter, the date in 2010 that the SPCB found Terminix failed to treat all probable entry
3 points for termites at his home and that those points could not be treated safely or adequately.
4

5 **A. Terminix Failed to Accurately Disclose and/or Correct The Stucco Hazard**

6 75. Before Terminix can enter any CSA, it must first inspect a property and issue a WDOR
7 with recommendations including all conditions conducive to infestation. §8516 & 8519; §1991.

8 76. Despite promising each time Terminix collected money for the initial period and
9 renewals that it would perform the “necessary service” for termite prevention, comply with California
10 law, and go above and beyond a normal standard of care, Terminix did not reveal what it knew should
11 and must be done to address the Stucco Hazard at Plaintiff’s structure and those of the relevant sub-
12 class members.
13

14 77. Section 1990(e)’s non-exhaustive list of conditions conducive to infestation that *must*
15 be listed in any inspection as a material finding that includes a recommendation for eliminating the
16 threat includes “stucco walls.” The Structural Pest Control Act provides:
17

18 §1990. Report Requirements Under Section 8516(b) 1-9 [B&P Code], Inclusive.

19 (e) Information regarding all accessible areas of the structure including
20 but not limited to the substructure, foundation walls and footings, ...
21 stucco walls, ... or other parts of a structure normally subject to attack
22 by wood-destroying pests or organisms.

23 (Emphasis added).

24 78. A clear California directive was unnecessary to alert Terminix that it was improper and
25 unlawful to ignore or trivialize the Stucco Hazard that destroys (a) the ability to create an effective
26
27
28

1 chemical barrier¹⁰ and (b) the ability to adequately inspect for termites entering the structure within the
2 void behind the stucco. A 1974 Terminix Standard Procedure manual provides:

3 SECTION 12. SPECIAL PROBLEMS AND HAZARDS...
4 16. VENEERS-STUCCO, BRICK, STONE

5 Whenever there are veneers on the surface or face of a foundation, there
6 is also a void space in back of them. Usually the void spaces are
7 constructed as necessary air spaces for building insulation and moisture
8 control. Whenever the veneer has been constructed below grade,
9 however, it needs special attention from the standpoint of termite
10 control...In the case of stucco...it is sometimes possible and desirable
11 to chip off the stucco at the grade line, eliminating it as a termite entry
12 point...

13 (Exhibit J, 1974 Service Manual, p. 12.09-10).

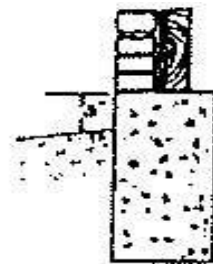
14 79. Other iterations and editions of Standard Procedures provide similar warnings and
15 describe the Unit Operations that must be performed in order for the property to meet the MBR's that
16 will permit offering an unmodified CSA.

17 80. The unit operations Terminix failed to perform for Plaintiff and the class are (all quotes
18 below are from Exhibit G, 1983 Keyman Manual, p. "Terminix 1829-30"):

19 Unit Operation # 108:

20 **108**

21 **Outside grade: Level ground so that**
22 **there is at least 3" of exposed**
23 **foundation.**



24 Terminix failed to lower the exterior grade to expose the bottom edge of the stucco and
25

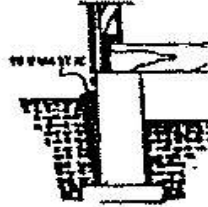
26 ¹⁰ Terminix cannot argue that it can apply chemical in the narrow void behind stucco because none
27 of its manuals since 1974 have included a Unit Operation depicting how to treat the area and, even if it did,
28 that addresses only half the hazard. As explained elsewhere, the only corrective measures it identifies are
lowering the grade and chipping or cutting away the stucco to eliminate the hidden void and to reveal an
adequate portion of the foundation to inspect for termite trails at subsequent inspections.

1 create three inches clearance of exposed foundation, and Terminix concealed that the structure
2 would not be protected from infestation to the extent that the structures failed to meet internal
3 MBR's and should not be issued a CSA.

4 Unit Operation # 163: "Seal off stucco."

5 **163**

6 **Seal off**
7 **stucco.**



8
9
10 Terminix did not seal off or recommend to Plaintiff or the sub-class members sealing off the stucco
11 and concealed that the structure would not be protected from infestation to the extent that the structures
12 failed to meet internal MBR's and should not be issued a CSA.

13 "135 Cut stucco and treat."

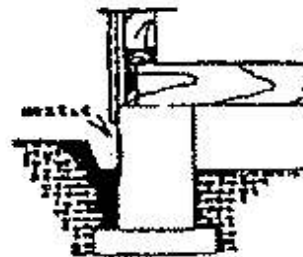
14
15
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20

21 Terminix did not cut stucco back from ground contact for proper inspection and treatment and

22

23 **135**

24 **Cut stucco**
25 **and treat.**



26 concealed that the
27 structure would not be
28 protected from
infestation to the extent
that the structures

29 failed to meet internal MBR's and should not be issued a CSA.

30

1 81. Terminix's failure to identify, report and recommend correction of the Stucco Hazard
2 at Plaintiff's and the class members' structures violates regulatory obligations of Branch 3 licensees.
3 §1990(e).
4

5 82. When the Stucco Hazard exists, the statutory expectation is that any company that
6 inspects the property will list the finding but that the recommendations as to how to cure it may vary
7 from one licensee to another. See §8516(b)(13). In other words, every company should identify the
8 Stucco Hazard as a "finding" but the recommendations about curing it could vary. In this case, the
9 requirements of Terminix's Standard Procedures that it concealed from Plaintiff and the sub-class
10 establish that it should be corrected as specified in one of the three Unit Operations listed above.
11 However, Terminix never recommended, performed, or required these corrections before issuing its
12 false assurances that it was continually performing all "necessary services" from year to year for the
13 Plaintiff or sub-class members.
14

15 83. Instead of refusing to issue a CSA, or modifying the face of the CSA as described in the
16 prior section, Terminix issued an unmodified CSA's to Plaintiff and the sub-class that included the false
17 assertion that upon completion of its work there would be no "substandard" work at the structure – an
18 unfair, false, fraudulent and illegal statement under §17200. In each subsequent year when it performed
19 an inspection or took a renewal fee and had the affirmative duty to fulfill anew its contractual and
20 statutory duties, Terminix misrepresented that it was performing or had performed the "necessary
21 service" that it knew it was not providing in violation of the law and its own Standard Procedures.
22

23 84. Beginning in 2006 for the Plaintiff, and at an unknown period for the sub-class members,
24 Terminix began listing in its WDOR's that stucco to earth contact was present but it provided an unfair,
25 false, deceptive and fraudulent explanation of the condition. Terminix consistently misrepresented it
26 could protect against problems caused by the Stucco Hazard merely by periodically inspecting.
27
28

1 However, Terminix knows the condition is incapable of an adequate inspection since termites will enter
2 behind the stucco unseen and that the void cannot be treated to prevent infestation.

3
4 85. Terminix's practice of providing false assurances to customers that structures with the
5 Stucco Hazard are adequately protected from termite attack is unfair to competitors.

6 86. Terminix is the nation's largest pest control company and its nearest competitor in size
7 is Orkin.

8 87. In 1999 and 2004, at the time Terminix was issuing unmodified CSA's to Plaintiff and
9 sub-class members, Orkin was issuing inspection reports and letters to customers that "stucco in contact
10 with ground" will "contribute" to infestation and "compromise the effectiveness of Orkin's treatment"
11 and that notice "in writing when you have corrected" the problem is required. Orkin also warns that it
12 is "important" to correct the Stucco Hazard and that the consequence of not doing so is that it "is
13 probable that your home will experience future termite activity and damage, and retreatment by Orkin
14 may not solve the problem." (Exhibit K, 1999 and 2003 Vicksburg, Ms. inspection reports and letter
15 from Orkin).
16
17

18 88. California recognizes that unfair competition not only victimizes consumers but law
19 abiding competitors as well.

20 89. The State of California, Orkin and Terminix all agree that Terminix has failed to provide
21 the "necessary service" to prevent termite attack for Plaintiff and members of the sub-class.
22

23 **B. Terminix Failed to Provide the Entire Structure Treatment**
24 **Required By Law And Internal Terminix Service Procedures**

25 90. Terminix knew that its promise to provide the "necessary service" to prevent termites
26 that its Standard Procedures provide is a complete chemical barrier at all potential entry points also
27 requires placing chemical in the correct volume and concentration as specified on labels for the termite
28 chemicals used because it is only application to that degree of thoroughness that has passed testing for

1 efficacy by State and Federal regulatory authorities.

2 91. In its two-page “Pesticide Info” guidance to licensees titled “What You Should Know
3 About Pesticides” and subtitled “Read the Label First” the California Department of Pesticide
4 Regulations (“CalDPR”) explains that applying the right chemical for a target pest exactly as specified
5 on labels is important because you need to “... *use* a product so it works like it should...” so you “...get
6 [the] maximum benefit[] from the pesticide....” (Exhibit L, p. 1). See also U.S. E.P.A. PR-Notice 96-7.
7

8 92. Terminix represented in its CSA’s and “guarantees” that if the customer paid the fee it
9 was requesting that the company would provide an Entire Structure Treatment, regular inspections, and
10 “necessary service(s) to...protect the structure(s)”, provided that Plaintiff and the class continued to pay
11 the annual renewal fee.
12

13 93. Terminix routinely issued the CSA and guarantees and renewed them annually without
14 ever performing an Entire Structure Treatment of all probable entry points of termites for Plaintiff and
15 this sub-class.
16

17 94. The Local Treatments Terminix routinely applied, and that the SPCB found is all that
18 was performed at Plaintiff’s structure from 1999 to present is sub-standard according to the SPCA,
19 labels for the termite chemicals Terminix used for Local Treatments in California since 1992, and
20 Terminix’s internal Standard Procedure (including the MBR’s).
21

22 95. As explained in the introductory section, Terminix’s own experience is that termites
23 might not be controlled if a Local Treatment is applied.

24 96. Terminix’s Standard Procedures since at least 1974 and throughout the class period
25 confirm that part of the “necessary service” is an Entire Structure Treatment, rather than the Local
26 Treatment provided to Plaintiff and the class.
27

28 97. An Entire Structure Treatment (not a Local Treatment) is the “necessary service”

1 described in promotional literature, CSA's, renewal solicitations and periodically issued Terminix
2 Guarantees.

3
4 98. According to Terminix's 1994 "Terminix Professional Termite Control Services"
5 manual, for example, application of "barrier treatment" (that Terminix uses as a synonym for Entire
6 Structure Treatment) has been the 'gold standard' and appropriate termite prevention service since at
7 least the 1950's. As the manual says, a "Chemical Barrier protects structures from subterranean
8 termites." (Exhibit H, p. "Terminix 1101").

9
10 99. Terminix's Standard Procedure also says, "The goal in treating for subterranean termites
11 is to treat the soil at all points where termites could enter the structure." (Id. at 1138).

12 100. Plaintiff and sub-class members were assured in narrative descriptions of the CSA's
13 promise to provide the "necessary service" that it includes, at a minimum, the duty to "[c]hemically treat
14 the soil at all probable termite entry points in the entire structure." (Exhibit D, p. 3-4, items 3(A) and
15 10(B)).

16
17 101. Plaintiff and each sub-class member uniformly received written assurance from Terminix
18 that if they purchased the termite prevention services recommended as a result of its inspections and
19 those recommendations were completed (including an Entire Structure Treatment that Terminix refers
20 to by the synonymous phrase "treatment of all potential entry points" for termites), that none of its
21 service could be considered "substandard" under §1992 of the SPCA. (Exhibit M).

22
23 102. CalDPR also explains that the "directions for use" section of the label "...tells you how
24 much to use, and where, how and when you should apply the product. Always read and follow label
25 directions." (Exhibit L, p.2).

26
27 103. Sec. 1991(a)(8)(C)(3) provides:

28 "If any recommendation is made for Local Treatment [as opposed to an
Entire Structure Treatment], the report [the WDOR required before contracting]

1 must contain the following statement:

2 'Local Treatment is not intended to be an entire structure
3 treatment method. If infestations of wood-destroying pests extend or
4 exist beyond the area(s) of Local Treatment, they may not be
exterminated.'"

5 Each prong of §17200 and §17500 is violated when Terminix claims to provide the "necessary
6 service," that Defendant equates to "[c]hemically treat[ing] the soil at all probable termite entry points
7 in the entire structure" when Terminix only performs a Local Treatment as it did at Plaintiff's and the
8 class' structures. See also §1999.5(f)(2)(*et seq.*)(false advertising - misrepresentations)(Exhibit C).
9 Likewise, Terminix never disclosed to Plaintiff or the sub-class the material fact that a "Local
10 Treatment" was provided and the failure to make the required statement as mandated by
11 §1991(a)(8)(C)(3) is an unlawful business practice under UCL §17200.

12 104. Terminix's Standard Procedures affirm the duty to apply chemicals at the rates,
13 concentrations and places described by labels, but also require satisfying Terminix's additional
14 standards if they are higher.

15 105. Because Terminix had sole access to material facts and knowledge about how it provided
16 service that are outside the understanding or ability of laypersons to evaluate, Terminix owed the
17 Plaintiff and the sub-class a duty to voluntarily tell the whole truth, even if that required disclosing that
18 Terminix previously provided sub-standard service.

19 106. Attorney General investigations in Florida and Kentucky revealed that Terminix failed
20 to provide Entire Structure Treatments and concealed these facts from customers as a systematic
21 practice. In these two states, Terminix's CSA's contained the identical promise to provide the
22 "necessary service" to prevent termites but investigations showed Terminix did only Local Treatments.
23 In each case Consent Judgments were entered under which Terminix was ordered to provide Entire
24 Structure Treatments and other benefits to the citizens of those states. (See Exhibits N (Florida) and
25 O (Kentucky)).
26
27
28

1 **VI. CLASS ALLEGATIONS AND DEFINITION.**

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107. This action is brought by the named Plaintiff as a class action on behalf of all others similarly situated (“the Class”), under the provisions of Fed. R. Civ. P. Rule 23 except for the additional and individual damages sought by the named Plaintiff for property damages, etc.

108. The main class (hereinafter “the Illegal Exculpatory Clause Class”) is comprised of all individuals, proprietorships, partnerships, corporations, and other entities that are residents of or citizens of the State of California or domiciled in the State of California (hereinafter ‘persons and entities’) that own any structure, and/or improvements to real property (hereinafter referred to as “structure”) located in the State of California and who have purchased CSA’s that (1) provide for providing the necessary service to prevent termites through use of chemicals rather than “baiting” systems, and (2) contain clauses that purport to exclude or limit Defendants’ liability and duties even if the necessary service is not provided.

109. The first sub-class (hereinafter “the Stucco Hazard Sub-Class”) is comprised of members of the Illegal Exculpatory Clause Class with structures whose Terminix file reflects a Stucco Hazard and their Terminix CSA does not contain on its face a hand-written modification of terms and warning that termite prevention services have no reasonable chance of working due to the condition unless corrected per Terminix Standard Procedures.

110. The second sub-class (hereinafter “the Local Treatment Sub-Class”) is comprised of members of the Illegal Exculpatory Clause Class whose file reflects an initial Local Treatment rather than an Entire Structure Treatment and their Terminix CSA (including the graph and WDOR) does not state on its face that a Local Treatment pursuant to CCR §1991(a)(8)(c)(3) will be provided.

111. Excluded from the Main Class and the Sub-Classes are all claims by any persons or entities that have already commenced an individual civil action or arbitration against Defendants related

1 to the subject matter of this litigation. Also excluded from the Class are the following: Defendants; any
2 parent, subsidiary, affiliate, or controlled person of Defendants; the officers, directors, agents, servants
3 or employees of any of the same; persons whose participation as a class representative or member would
4 require recusal of the hearing officer; members of the judiciary assigned to this case and their relatives
5 within the second degree of consanguinity.
6

7 112. Joinder of the thousands of class members is impractical. There are numerous common
8 questions of law and fact with respect to Defendants and their CSA's involving the Class and Sub-Class
9 members as outlined in detail in this complaint.
10

11 113. Certification of a class provides a fair and effectual method for the adjudication of the
12 controversy including an effective method whereby the enforcement of the rights of Plaintiff and
13 members of the Class and Sub-Classes can be fairly managed without unnecessary expense or
14 duplication.
15

16 114. Individual litigation would be unduly burdensome to the courts and inefficient for the
17 victims who were subjected to common action and inaction of the Defendants that was part of a
18 comprehensive scheme.

19 The claims have a "negative value" in that the cost of litigating individual claims is more than
20 the claims are worth, cases particularly amenable to class treatment. A class action in this situation
21 affords the parties and court the benefit of unitary adjudication, economies of scale, and comprehensive
22 supervision by a single court.

23 Concentrating this litigation in one forum will aid judicial economy and efficiency, promote
24 parity among the claims of the individual Class and Sub-Class members, result in judicial consistency,
25 and prevent the Defendants from being subjected to the possibility of inconsistent judgments.

26 115. Notice of the pendency and any resolution of this action can be provided to the Class and
27 Sub-Class members by publication and direct mailing upon discovery of Defendants' files, as
28

1 Defendants have names and home addresses for customers, and cancelled customers who have moved
2 can be skip traced.

3
4 116. The claims of Plaintiff, as the Class Representative, are typical of the claims of the
5 members of the Class and Sub-Classes.

6 117. Common issues predominate over non-common issues.

7 118. Defendant acted, as alleged elsewhere herein, on grounds generally applicable to the
8 class.

9
10 119. Plaintiff will fairly and adequately protect the interests of the Class and Sub-Classes
11 he represents. The Class Representative's interests are consistent with and not antagonistic to members
12 of the Class and Sub-Classes. Plaintiff is represented by experienced and able counsel with directly
13 relevant experience.

14 120. Certification is proper under Fed. R. Civ. P. 23(a) and 23(b)(2)(opt-out injunctive
15 relief) and 23(b)(3)(legal relief).

16
17 121. To the extent that an arbitration clause exists, it is procedurally and substantively
18 unconscionable as applied to negative value claims made herein and the inclusion of the clause is
19 unconscionable as it has the legal effect of an exculpatory clause since no prudent individual consumer
20 would bring the claim in arbitration.

21
22 **VII. TERMINIX'S USE OF AN UNCONSCIONABLE AND UNLAWFUL EXCULPATORY**
CLAUSE TO ESCAPE LIABILITY.

23 122. Terminix uses exculpatory clauses (herein "Exculpatory Clauses") that are materially
24 the same as the following excerpts from Plaintiff's form CSA in order to escape the consequences of
25 the underlying wrongdoing. Said exculpatory clauses are unconscionable, unfair, fraudulent, and
26 deceptive.
27

28 123. The Exculpatory Clauses are presented in adhesive contracts on a take-it or leave-it

1 basis by a party of unequal bargaining power.

2 124. The Exculpatory Clauses are non-conspicuous fine print on the back of Plaintiff's and
3 the class' form CSA's and drafted by Terminix in such a manner that they will not be read or
4 understood. Plaintiff's clause, excerpted as it appears on the reverse side of Exhibit A in six-point,
5 opaque-gray print in all capital letter is as follows:
6

7
8 "FUTURE DAMAGE, LIMITATION OF LIABILITY...IN CONSIDERATION OF THE SUMS CHARGED BY TERMINIX HEREUNDER AND AS A LIQUIDATED DAMAGE AND NOT AS A PENALTY, TERMINIX'S
9 SOLE LIABILITY TO PURCHASER, OR ANYONE CLAIMING THROUGH PURCHASER, UNDER A RE-TREATMENT SERVICE PLAN (SER) IS LIMITED TO RE-TREATMENT ONLY AND PURCHASER EXPRESSLY
10 RELEASES TERMINIX FROM, AND AGREES TO INDEMNIFY TERMINIX WITH RESPECT TO, ANY OBLIGATION WHATSOEVER TO REPAIR AND/OR PAY FOR ANY DAMAGE. NOTWITHSTANDING ANY CONTRACT,
11 TORT OR OTHER CLAIM THAT TERMINIX SHALL NOT HAVE PROPERLY PERFORMED ITS DUTIES TO PURCHASER, TERMINIX'S SOLE RESPONSIBILITY IN THE EVENT OF A CLAIM SHALL BE TO RE-TREAT THE
PROPERTY IF NECESSARY AND, WITH RESPECT TO A RE-TREATMENT PROTECTION AND DAMAGE REPAIR PLAN (SER) ONLY, TO ARRANGE FOR THE NECESSARY REPAIRS OR REPLACEMENT BY A
CONTRACTOR OF ITS CHOICE AND PAY THE ENTIRE COST OF LABOR AND MATERIALS...DISCLAIMERS AND EXCLUSIONS. A TERMINIX DISCLAIMS ANY LIABILITY FOR SPECIAL INCIDENTAL OR
CONSEQUENTIAL DAMAGES. THE WARRANTY IN THIS AGREEMENT IS GIVEN IN LIEU OF ANY OTHER WARRANTY OR OTHER RESPONSIBILITY EXPRESSED OR IMPLIED...IN NO EVENT SHALL EITHER PARTY

12 (Exhibit I, p. 2).

13
14 125. The Exculpatory Clause unlawfully seeks to exculpate Terminix from any duty other
15 than to provide the initial prevention service (and repairs it chooses to make in its sole discretion for
16 customers with the "PRO" contract) for basic non-performance and all torts including promissory fraud
17 and fraud-in-the-inducement:
18

19 "Notwithstanding [viz., 'despite' or 'in spite of'] any contract, tort or other claim
20 that Terminix shall not have properly performed its duties to purchaser,
21 Terminix's sole responsibility in the event of a claim shall be to re-treat the
22 property if necessary..."

23 Read literally, the clause strips Terminix of all the duties imposed upon it and designed for the
24 protection of consumers, under the SPCA and other consumer protection laws. Although Terminix
25 agrees to "re-treat" if it sees fit, it does not require that it provide any other service the SPCA provisions
26 or its Standard Procedures say are necessary and, therefore, already paid for by Plaintiff or class
27 members.

28 126. In keeping with the Exculpatory Clause, even after Terminix conceded during and after
the SPCB investigation of Plaintiff's administrative complaint that it did not provide an Entire Structure

1 Treatment and failed to identify a number of violations of its MBR's (including the Stucco Hazard), all
2 Terminix offered to do was a Local Treatment (that Plaintiff refused).

3
4 127. Limitations of remedies or warranty are unenforceable as Terminix failed to provide the
5 warranted termite prevention service that renders the CSA voidable or void under common law;
6 violative of the SPCA, UCL §17200's fraud, unlawfulness, and unfairness prongs; and §17500's false
7 advertising protections since Defendant exculpate itself from coverage of consumer protection statutes
8 or any other cause of action when performing a professional service.

9
10 128. Nothing in Terminix's CSA's nor in the judicially created "economic loss" rule works
11 to provide a defense for the injuries inflicted by violating the SPCA and Regulations because doing so
12 would allow Terminix to escape an obligation assigned by the Code as described elsewhere herein. See,
13 *Seelenfreund v. Terminix*, 84 Cal.App.3d 133, 148 Cal.Rptr. 307 (Cal.App.1stDist. 1978).

14
15 **VIII. THE CLASS REPRESENTATIVE'S SUITABILITY TO REPRESENT A CLASS**
16 **AND ADDITIONAL FACTS AND CLAIMS RELATING TO ESHAGH**

17 129. Plaintiff Eshagh's claims are typical of the class as described above.

18 130. Plaintiff's claims are not antagonistic of the class.

19
20 131. Plaintiff has paid to date, and agrees to pay as long as class action allegations are
21 pending, annual renewal fees for a service Terminix refuses to provide in order to remove any doubt
22 as to whether he has Article III standing to represent a class of current CSA customers.

23 132. In addition to being affected by each of the three class claims described above, Plaintiff's
24 experience with Terminix demonstrates in additional ways that Terminix never intends to comply with
25 its professional, statutory, or contractual duties because it failed to disclose the wrongdoing identified
26 above even after making numerous complaints to Terminix and filing a formal administrative complaint
27 with the SPCB. In particular, managers of the branch office personally inspected Plaintiff's structure
28

1 on numerous occasions as reflected by the dates on WDOR's attached as exhibits and additional ones
2 on file at Terminix. Managers identities are accurately reflected on the WDOR's Terminix provided and
3 filed with the SPCB.
4

5 133. Terminix also failed to disclose or reveal accurately the consequences of other conducive
6 conditions to infestation at Plaintiff's structure besides its Local Treatment and the Stucco Hazard,
7 including faulty grade level (§1990(b)(1)), inadequate clearance in crawl space (§1990(b)(2)), an
8 inaccessible substructure and wood to earth contact (§1990(e)). (Exhibit D). In recent months,
9 Terminix conceded that some of these conditions cannot be corrected without extraordinary expense.
10

11 134. On February 17, 2010, Terminix (Charles Reynaldo) issued a WDOR to Plaintiff in
12 which Terminix stated that if Plaintiff wanted "a full and complete treatment of the entire structure"
13 Plaintiff would need to enter a new contract and pay an additional fee. (Exhibit P). However, in late
14 2010 or early 2011, Tom Graston indicated that Terminix could not provide an Entire Structure
15 Treatment because the excavation necessary to accomplish the treatment Eshagh paid for annually since
16 1999 would likely cause the structure to collapse.
17

18 135. Even after an infestation was discovered on or after February 8, 2008 by Plaintiff when
19 a section of flooring in a small area gave way, Terminix lulled Plaintiff to believe it was simply an
20 example of a vaccine not working 100% of the time and that a Local retreatment was all that was
21 necessary to provide the "necessary service" to prevent future infestation. During this interchange,
22 Terminix concealed all of the forgoing information and failed to disclose its violation of §1991(a)(5)
23 that was apparent to an expert (but not a layperson) at the time.¹¹
24

25 136. In 2009, another area of the floor in a different room gave way and Plaintiff suspected
26

27
28 ¹¹ Each interaction with Terminix and Plaintiff is documented with a letter or WDOR to or from
Terminix and those records reflect the names and dates of the relevant interactions.

1 Terminix was not honest providing professional advice, including more assurances from Terminix
2 Manager Tom Graston that Terminix had properly serviced the structure.

3
4 137. The State of California investigated Terminix's work at Plaintiff's structure in 2010 and
5 concluded as follows:

6 "[Terminix is guilty of the]failure to complete [Terminix's] contract in that
7 [Terminix's paperwork, see Exhibit D, p.3-4] indicated chemical treatment for
8 subterranean termites had taken place on the property at all probable termite entry
9 points in the entire structure. There were inaccessible substructures, and
[Terminix's] chemical records indicate an application amount that is far less than
what would be required for a structure of that size. Violation: 8638 Business and
Professions Code...."

10 (Exhibit Q, p. 1, item 1). Since Plaintiff made no changes to the substructure since Terminix began
11 servicing the property in 1999 except those requested by Terminix, the findings logically require the
12 conclusion that Terminix failed to perform its contract and identify conditions conducive to infestation
13 for eleven years.

14 138. Terminix did not contest or appeal these findings within the time permitted by law and
15 extensions granted by the SPCB. (Exhibit Q, pages 3-4).

16
17 139. The service history at Plaintiff's structure exemplifies Terminix's pattern and practice
18 of failing to provide the necessary services and concealment of its wrongdoing.

19 140. In 1999, prior to offering its form CSA without any modifications, Terminix inspected
20 Plaintiff's building. Terminix pledged to apply an Entire Structure Treatment, but failed to identify or
21 correct the Stucco Hazard, or that the inaccessible substructure in the crawl (and other conditions
22 conducive to infestation) prohibited an Entire Structure Treatment or adequate periodic inspections.

23
24 141. The State has found Terminix never treated the entire structure as promised in the CSA.
25 (Exhibit Q (State report)).

26 142. In 2002, Terminix inspected Eshagh's structure and made no findings or
27 recommendations at all.
28

1 143. In 2003 and 2005, Terminix inspected Eshagh's structure and failed to make the
2 disclosure referenced above, and did not provide the necessary remedial services to satisfy Standard
3 Procedures for termite prevention.
4

5 144. In 2006, Terminix inspected Eshagh's structure and failed to make the disclosure
6 referenced above. Terminix listed in a "finding" that stucco was below grade and that the void between
7 the stucco veneer and foundation could provide an entry point for termites, but trivialized the hazard
8 this created.
9

10 145. In keeping with its practice, Terminix concealed the fact that correction of the Stucco
11 Hazard was a necessary service. Instead, Terminix deceptively stated that "periodic inspection is
12 advised." (Exhibit R, p.2.) However, a "periodic inspection" is nothing more than the minimum service
13 required by the SPCA for any structure covered by a CSA. Accordingly, the "finding" accompanied by
14 the statement that "no recommendations [for correction of the Stucco Hazard] are made" (Exhibit R,
15 p. 3) misrepresents the professional opinion contained in Terminix's Standard Procedures that
16 correction of the Stucco Hazard is necessary.
17

18 146. In 2007, Terminix inspected Eshagh's structure and issued a WDOR report that is
19 materially identical to the 2006 report.
20

21 147. In 2008, subterranean termite damage was identified by Terminix. However, Terminix
22 told Plaintiff the damage contained no live termites and that it was not covered under his CSA and
23 guarantee at any rate.

24 148. Terminix again failed to disclose the inaccessible substructure in the crawl and did not
25 even mention the Stucco Hazard.
26

27 149. Instead of disclosing only a local initial treatment, Terminix again affirmatively
28 misrepresented, "This company has previously treated this structure for the control and/or eradication

1 of the WDO [subterranean termites]. No additional treatment is recommended at this time.” (Exhibit
2 S, p. 2).

3
4 150. Terminix also recommended in 2008 fixing a wooden floor joist that contacted the
5 ground in the crawl space that Plaintiff promptly fixed.

6 151. In 2009, subterranean termite damage was identified by Terminix in a new location.
7 However, Terminix told Plaintiff the damage contained no live termites and that it was not covered
8 under his CSA and guarantee at any rate. Terminix again failed to disclose the inaccessible substructure
9 in the crawl and did not even mention the Stucco Hazard.
10

11 152. Instead of disclosing only a local initial treatment, Terminix again affirmatively
12 misrepresented “This company has previously treated this structure for the control and/or eradication
13 of the WDO [subterranean termites]. No additional treatment is recommended at this time.” (Exhibit
14 T, p. 2).

15
16 153. Plaintiff either performed, or had someone perform, or had Terminix perform all
17 recommendations requiring action on Plaintiff’s part that Terminix ever made to him since 1999 until
18 those made within the past three years.

19 154. For conditions such as the Stucco Hazard that Terminix recommended only required
20 continued inspection by Terminix, Plaintiff paid Terminix to continue its termite prevention services.
21

22 155. Terminix actively concealed its practices, schemes and wrongdoing, took steps to make
23 it appear as if there was no wrongdoing, including negligent failure to disclose information it was duty
24 bound to disclose regarding the impropriety of the termite prevention services measures allegedly in
25 place (state-required Local Treatment warning versus the promised Entire Structure Treatment),
26 provided a service wherein the wrongdoing conceals itself, and engaged in other activities by reason
27 of which the tolling of all applicable statutes of limitation is appropriate and required.
28

1 156. Plaintiff and the class, as laymen, reasonably relied upon Terminix's professional advice
2 when Terminix continually reported Plaintiff's and class members' structures were protected by
3 professional termite prevention services in compliance with law, Terminix's Standard Procedures and
4 the CSA.
5

6 157. Plaintiff and the class had no knowledge of Terminix's wrongdoing alleged herein and
7 could not have discovered the true nature of Terminix's acts and omissions at any time prior to the filing
8 of this complaint by exercise of due diligence because of the concealment of the wrongdoing by
9 Terminix. Accordingly, Plaintiff's and class members' claims alleged herein are not barred by any
10 applicable statute of limitations.
11

12 158. Plaintiff will additionally and individually, and not on behalf of any class, seek recovery
13 of his prior 2008 and 2009 termite damage repair costs as well as costs to repair all newly discovered
14 and hidden damages as well as to remediate conditions conducive to infestation and/or diminished value
15 of his property.
16

17 159. Plaintiff's additional proof will be short and simple and will not delay the case. The
18 State of California has already essentially found Terminix liable breach of duty, Terminix did not
19 appeal, and Terminix is therefore estopped from denying liability.
20

21 160. Moreover, Plaintiff's individual facts bolster the inference that Terminix never intends
22 to provide all "necessary services" as promised in its form CSA because three additional conditions
23 conducive to infestation exist at Eshagh's structure that were not disclosed, remediated, or excepted
24 through modification of the CSA. Consequently, other than evidence relating to the reasonableness and
25 necessity of remediation and repair costs, all evidence regarding Plaintiff's class and individual claims
26 would be material at a trial on the merits.
27

28 **IX. CAUSES OF ACTION**

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FIRST CAUSE OF ACTION

Violation of §17200 Unlawful, Fraudulent, and Unfair Business Acts and Practices

161. Defendant's unlawful, fraudulent, and unfair business acts and practices include, but are not limited to, wrongfully claiming it would perform “all necessary services” to reasonably prevent damage by subterranean termites in the two particulars described herein (i.e., the use of a Local Treatment and failure to correct the Stucco Hazard) and use of an illegal exculpatory clause to escape what experts would know are the probable consequences of these failures.

162. In addition to the above, the conduct as alleged throughout the complaint constitutes breaches of duty imposed by law that may be borrowed for a finding of liability under §17200, *et seq.*

163. Plaintiff and the class have been damaged by said practices, relied or are presumed to have relied on material misrepresentations or concealments, and suffered injury-in-fact.

164. Defendant's conduct violates all three prongs (unfair, unlawful and fraudulent) of §17200, *et seq.*, and other similar state unfair competition and unlawful practices statutes.

165. Pursuant to Business and Professions Code §§ 17200 and 17203, Plaintiff and the class, seek relief as prayed for below.

166. Defendant used a service that was never intended to reasonably prevent termites and therefore never intended to fulfill its promise and duty to recommend and then provide termite prevention services using sound methods. At the time that promise was made and renewed and relied upon by Plaintiff and the class, Defendant never intended to fulfill its promise which constitutes promissory fraud and fraud under the Business and Professions Code, Section 17200 which allows Plaintiff and the class to avoid the CSA or renders the CSA void as a matter of law.

SECOND CAUSE OF ACTION

Violations of - False Advertising

1
2 167. Plaintiff alleges and incorporates by reference the preceding and succeeding allegations
3 as if fully set forth herein.

4
5 168. The standardized practice of offering termite prevention services and advertisements
6 regarding the practice were uniformly applied to Plaintiff and the class. Examples of the false and
7 misrepresented advertisements are set forth above. Additionally, the CSA's and WDOR's were
8 presented as advertisements of the problem to be addressed and services to be performed.

9
10 169. Terminix's marketing literature (Exhibits B & E) assures existing and prospective
11 customers that its ability to provide expert advice and recommendations result from extensive training
12 and includes knowledge of laws and regulations for the industry and thus its work is done in accordance
13 with California law (Exhibit D, p. 1); (Exhibit M (work done in accordance with California laws)).

14
15 170. Plaintiff and the class relied on the advertisements and were damaged as a result by
16 paying Defendant for service it could not and did not provide.

17 171. Pursuant to Business and Professions Code § 17500, Plaintiff and the class seek relief
18 as prayed for below.

19 **THIRD CAUSE OF ACTION**
20 **Breach of Professional Duty**

21 172. Plaintiff realleges and incorporates by reference the preceding and succeeding
22 allegations as if fully set forth herein.

23 173. By virtue of Defendants' superior and expert knowledge as a licensed termite
24 prevention services provider under California statutes and regulations, the duty imposed on
25 professionals such as Defendant to exercise and possess due care, skill and knowledge in the
26 practice of its profession, and the inferior knowledge of Plaintiff and the class who are not licensed
27 experts in termite prevention services, Defendant had a duty to exercise reasonable prudence
28

1 commensurate to its profession in advising Plaintiff and the class regarding appropriate measures
2 needed to prevent termite attack, in carrying out performance of such measures, and in the event
3 appropriate measures were not undertaken by Defendant, to warn Plaintiff and the class about the
4 hazards of leaving a home unprotected by proper termite prevention measures, and the limited
5 nature of the alleged prevention services provided by Defendant that could not reasonably be
6 anticipated to prevent termite infestation and damage to structures as promised and advertised.
7 These duties were continuous and recurring and independent of any CSA between Defendant and
8 Plaintiff and the class as more fully described herein.
9
10

11 174. Instead of providing appropriate advice, termite prevention services measures,
12 disclosures or warnings Defendant was obligated to make to Plaintiff and the class, Defendant
13 continuously made and renewed false, misleading and deceptive promises of termite protection in
14 order to obtain money from Plaintiff and the class when it knew it was not providing termite
15 protection services that had any reasonable chance of preventing termite infestation and damage.
16

17 175. Defendant breached its duty to exercise reasonable prudence in providing termite
18 prevention services to Plaintiff and the class, including advising as to what measures were needed,
19 undertaking performance of such measures, and in making proper disclosures related to such
20 services as described herein, commensurate with an appropriate level of knowledge, skill, and
21 training a professional termite prevention service provider ought to possess.
22

23 176. Plaintiff additionally and individually claims property damages, remediation costs,
24 and diminished value as a result of the failure to use a termite prevention service that a professional
25 exercising reasonable prudence commensurate with appropriate knowledge, skills and training of
26 such professionals would have provided. Property damage was reported to Defendant by Plaintiff,
27 and representatives of the Defendant inspected the damage but refused to pay for repairs.
28

1 177. Defendant's failure to exercise due care has proximately caused Plaintiff and the
2 class to incur and suffer damage.

3 **FOURTH CAUSE OF ACTION**
4 **Breach of Contract / Breach of Duty of Good Faith and Fair Dealing**

5 178. Plaintiff realleges and incorporates by reference the preceding and succeeding allegations
6 as if fully set forth herein.

7 179. Plaintiff and the class entered into contractual relationships with Defendant through entry
8 into CSA's that for purposes of the claims of the Plaintiff and Class Members contain materially
9 identical terms.

10 180. Under these CSA's, which were drafted by and are binding on Defendant, Defendant
11 agreed to provide an Entire Structure Treatment and to perform all necessary services for termite
12 prevention that also includes all Terminix Standard Procedures for correction of the Stucco Hazard and
13 other conditions conducive to infestation described in Terminix's Standard Procedures.

14 181. Under these CSA's, Defendant was required to administer these CSA obligations and
15 promises in accordance with principles of good faith and fair dealing, which at a minimum requires
16 performing all services identified above.

17 182. Defendant breached its contractual obligation to Plaintiff and the class by failing to
18 properly perform termite prevention services as alleged herein.

19 183. Defendant did not provide an Entire Structure Treatment or correct the Stucco Hazard
20 (and the Plaintiff's individual conditions) and avoids the damages proximately resulting therefrom
21 through use of an illegal and unenforceable Exculpatory Clause, thereby violating and breaching its
22 CSA.

23 184. Defendants' Exculpatory Clause is unconscionable and illegal and is due to be excised
24 from the CSA as void.

1 185. As a result of Defendant's breach of its contractual obligations, Plaintiff and the class
2 have been damaged in the manner set forth herein.

3
4 186. Defendant is liable for those damages in an amount to be determined at trial, and should
5 be enjoined from continuing to engage in these unlawful, deceptive, unreasonable and unlawful
6 practices as alleged herein and continued breach of contract.

7 **FIFTH CAUSE OF ACTION**
8 **Assumpsit/Money Had and Received**

9 187. Plaintiff realleges and incorporates by reference the preceding and succeeding allegations
10 as if fully set forth herein.

11 188. Defendant "is indebted to the plaintiff in a certain sum 'for money had and received by
12 the defendant for the use of the plaintiff.' " (*Schultz v. Harney* (1994) 27 Cal. App. 4th 1611, 1623.)
13 *Farmers Ins. Exchange v. Zerin*, 53 Cal. App. 4th 445, 460 (Cal. App. 3d Dist. 1997). Specifically,
14 Defendant took money from the Plaintiff and the class for the purpose of providing termite prevention
15 services in a professional manner as would be dictated by a professional with the specialized training
16 and skill of a company like Defendant, but Defendant did not provide this service; and because the
17 nature of the service involved application of professional skills and the use of materials and methods
18 unknown to the Plaintiff and the class, it was not possible for the Plaintiff and the class to know the
19 service was not provided.
20
21

22 189. Defendant volunteered to inspect the properties of the Plaintiff and the class for the
23 purpose of recommending termite prevention services that would be specifically designed to reasonably
24 prevent termite infestation and it elected to systematically breach this obligation.
25

26 190. Defendant published to Plaintiff and the class pre-printed form documents that promised
27 that the services recommended after inspections would be to prevent and protect against damage by
28

1 subterranean termites so the Plaintiff and the class are presumed to and did believe, according to the
2 campaign undertaken by Defendant to cause consumers to believe, Defendant was recommending a
3 service that was what it was intended to be when in fact it was not. Defendant annually (or at least
4 periodically) issued solicitations for renewals and a “Termite Guarantee” that reiterated it was
5 performing services that it knew were reasonably necessary but that it intended never to provide and
6 that it has not provided to the Plaintiff or Class members.
7

8 191. In each instance the Plaintiff and the class were advised to buy (and then annually
9 encouraged to renew) the CSA’s as described elsewhere herein.
10

11 192. In each instance, Defendant knew the service was not complete as promised but a
12 substandard service that consisted of applying a Local Treatment instead of an Entire Structure
13 Treatment. Chemicals were not used as specified by either approved labels or methods were used that
14 were not licensed and approved by state and federal authorities or even Defendants’ own Standard
15 Procedures.
16

17 193. Plaintiff’s and the class’ payment of fees to Defendants for services never rendered as
18 described herein, Defendants’ indebtedness for a sum certain (i.e., all fees paid plus interest), and
19 Defendants’ failure to pay back the money had and received, entitles Plaintiff and the class to return of
20 said funds, plus interest.
21

22 194. Under the circumstances of the case, Defendants should return, with interest, all monies
23 collected from Plaintiff and the class for the services as Defendants did not provide or intend to provide
24 the kind of services they said they would recommend based upon their expertise when it performed
25 WDOR inspections.
26

27 195. The nature of the relationship between Defendant and Plaintiff and the class is that
28 Plaintiff and the class were reasonably expected to rely upon Defendant to identify and provide the

1 necessary services to prevent termites from damaging the property of Plaintiff and the class.

2 196. Defendants completely failed to provide reasonable termite prevention services by only
3 providing a Local Treatment and failing to warn about and correct conditions conducive to infestation.
4

5 197. Defendant continually failed to provide termite prevention services annually from the
6 beginning of the relationship.

7 198. Defendant's failure to reasonably provide the termite prevention services and
8 concealment of the failure as alleged herein constitutes a breach of the basic purpose for paying
9 Defendant.
10

11 199. Plaintiff and the class paid Defendant to perform all services necessary to prevent termites
12 from attacking and damaging their property, and never received the protection promised.

13 200. Fees paid to Defendant for services never rendered are recoverable at law based on the
14 equitable principle that it is unfair for Defendant to collect and keep payments for termite prevention
15 services that were never provided pursuant to obligations of Defendant that arose under the
16 circumstances.
17

18 201. Plaintiff and the class were damaged by paying fees for services never rendered and are
19 entitled to return of said payments plus interest.
20

21 **X. REQUEST FOR JURY TRIAL**

22 Plaintiff requests a jury trial on all claims so triable.
23

24 **XI. PRAAYER FOR RELIEF**

25
26 WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

- 27 1. For an order certifying the action as a class action and appointing Plaintiff and his counsel
28 to represent the Class and Sub-Classes;

- 1 2. For an order entering judgment in favor of Plaintiff against Defendant;
- 2 3. For an order enjoining Defendant from continuing to engage in these unlawful and
- 3 deceptive practices under §17200, *et seq.*
- 4
- 5 4. For compensatory, actual and consequential damages against Defendant in favor of
- 6 Plaintiff in an amount to be determined at trial (and additionally, for Plaintiff individually, for
- 7 property damages for repairs and remediation and for diminution in value);
- 8 5. For an order awarding Plaintiff pre-judgment and post-judgment interest, as well as
- 9 reasonable attorneys' and expert-witness fees under §1021.5 and other statutes as may be applicable;
- 10 and
- 11
- 12 6. For such additional or further relief as the Court finds just and appropriate.

13

14 DATED: February 8, 2011

15

16 Respectfully submitted,

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19

20 By: 

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