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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF MENDOCINO**

10 MARK GOLOB,

11 Plaintiff,

12 v.

13 SEAN KELLY,

14 Defendant.

) **CASE NO. SUUK CV PO-1463543**

) **DECLARATION OF DEFENDANT**
) **SEAN KELLY IN SUPPORT OF**
) **SPECIAL MOTION TO STRIKE OF**
) **DEFENDANT SEAN KELLY**

) **Date: April 11, 2014**

) **Time: 9:30 am.**

) **Dept.: E (Hon. Richard Henderson)**

) **Complaint Filed: Feb. 5, 2014**

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17 I, Sean Kelly, declare as follows:

- 18 1. I am the defendant in this action and I have personal knowledge of the facts and
19 information set forth herein. If called as a witness I would testify as to the same.
- 20 2. I am the publisher of an interactive website containing news, information and
21 discussions about franchising called Unhappy Franchisee (UnhappyFranchisee.Com). The
22 objectives of the publication include providing information and opinions to prospective and
23 existing franchisees and the public about franchise systems and businesses.
- 24 3. I publish this information and blog due to my background of over twenty five years in
25 the franchise industry. I have worked with hundreds of franchise companies including as the Vice
26 president of an international franchise consulting firm, and as the founder and president of a
27 franchise marketing firm. I earned a Master's Degree in English, have been a contributing writer
28 to the industry's largest trade magazine, and have been a guest speaker at International Franchise
Association (IFA) and other industry conferences. I have served as Director of Marketing of

1 Auntie Anne's Soft Pretzels here in Pennsylvania as well as in various other capacities in
2 marketing for franchisors and franchisees.

3 4. Franchising composes a significant portion of all retail sales and the economy in the
4 United States, and involves significant financial impact on the individuals who purchase
5 franchises.

6 5. The sale of franchises is regulated by the Federal Trade Commission and many states,
7 including requiring the disclosure of specified information during the offer and sale of franchises.
8 Among the required disclosure information is the litigation history of the franchisor and its
9 officers and directors, the cost of opening a unit, and any financial performance information
10 disclosed.

11 6. Both existing and potential franchisees seek information about franchise businesses,
12 including both performance and problems with franchisors. The Federal Trade Commission's
13 "Buying a Franchise: A Consumer's Guide" and virtually every franchise buying guide instruct
14 prospective franchise owners to seek out the opinions and experiences of current and former
15 franchisees as part of the due diligence process. However, contacting franchisees one-by-one can
16 be difficult, time consuming and expensive.

17 7. From November 2006 to October 2009 I wrote and managed a franchise blog named
18 Franchise Pick (FranchisePick.Com) for the Canada-based media network b5Media.

19 8. I started both FranchisePick.Com and UnhappyFranchisee.Com, in part, to help
20 prospective franchise investors learn from the experiences of current and former franchise
21 owners.

22 9. On May 10th, 2007, I posted the question "IS BUTTERFLY LIFE A GREAT FITNESS
23 FRANCHISE?" on my FranchisePick.Com blog. I posted two positive comments I had received
24 about this women's fitness franchise, and invited franchisees to share their opinions. Plaintiff
25 Mark Golob was CEO and President of the Butterfly Fitness, Inc. franchisor company also known
26 as Butterfly Life. The question prompted a flood of over 400 comments from franchisees mostly
27 negative and several characterizing Mr. Mark Golob as a "con man" and a "used car salesman"
28 who had misrepresented the Butterfly Life franchise opportunity and did not provide franchisees
with promised services. A true and complete screen shot of the original blog post of "Is Butterfly
Life a Great Fitness Franchise?" published on May 10, 2007 on Franchise Pick.Com and a true

1 and correct copy of the text version of the same with all 415 comments is attached hereto as
2 Exhibit A and incorporated by reference as though fully set forth herein.

3 10. Franchisee comments left on this and other FranchisePick.com posts in 2007 and 2008
4 described numerous prior controversies involving Mr. Mark Golob, including a lawsuit involving
5 the actress Linda Evans, a public controversy regarding Mr. Mark Golob's initial refusal to refund
6 members when he closed the Linda Evans health club chain, an intellectual property dispute
7 between Butterfly Life and a well-known health and fitness expert, and a developing group action
8 lawsuit being planned against Butterfly Fitness, Inc., Mr. Golob and his associates.

9 11. In 2008 I researched the franchisees' allegations of legal disputes and litigation in Mr.
10 Mark Golob's past and found they were based in fact. I found that Mr. Mark Golob had been
11 named in a job discrimination lawsuit in 1991 while he was an executive with Women's Workout
12 World (Wulf v. Women's Workout World). A true and complete copy of the PACER case
13 summary I found of the Wulf v. Women's Workout World lawsuit listing Mr. Mark Golob as
14 defendant is attached hereto as Exhibit B and incorporated by reference as though fully set forth
15 herein.

16 12. In 2008 I also learned that during 1998 and 1999, Mr. Mark Golob and his partner were
17 sued by the actress Linda Evans in a licensing dispute, and that they filed a \$5 million dollar
18 counterclaim against the actress. A true and complete copy of an article on the Linda Evans
19 lawsuit is attached hereto as Exhibit C-1 and incorporated by reference as though fully set forth
20 herein, and a true and complete copy of a PACER court case summary I obtained for Linda Evans
21 Fitness Center, Inc. lawsuit listing cross-claimant therein Mark Golob is attached hereto as
22 Exhibit C-2.

23 13. In 2008 I also learned that in 2004 there was a public uproar when Mr. Mark Golob
24 closed several Linda Evans women's health clubs and refused to return member's membership
25 fees, and that an outspoken former member and the Orange County District Attorney prevailed in
26 getting Mr. Mark Golob to issue refunds to members. True and complete copies of news articles I
27 obtained on the internet, including from the Los Angeles Times, about gym members of Linda
28 Evans clubs seeking refunds after the club closures including comments from Mark Golob, and
these documents are attached as Exhibit D incorporated by reference as though fully set forth
herein.

1 14. In 2008 I also learned that Mr. Mark Golob's Butterfly Life was involved with
2 franchisee lawsuits in 2005 (Butterfly Life, Inc. v Susan Kruse & Linda Coogan, Beth J. Shaw v
3 Butterfly Fitness, Inc.) and that ten franchisees had filed a counterclaim on or about January 10,
4 2008 alleging that Mr. Mark Golob and Butterfly Life had provided illegal earnings claims and
5 allegedly committed "fraud in the inducement" during the sale of his health club franchises. A
6 true and complete copy of relevant pages of the 2006 Butterfly Fitness, Inc., Franchise Offering
7 Circular listing some earlier litigation is attached hereto as Exhibit E and incorporated by
8 reference as though fully set forth herein.

9 15. In April, 2008, I created Unhappy Franchisee and have operated the website since that
10 time from my offices in Lancaster, Pennsylvania. One of the purposes of Unhappy Franchisee
11 was to provide franchisee interviews and discussions on more controversial and troubled
12 franchises, such as Butterfly Life. Since that time Unhappy Franchisee has posted information
13 about hundreds of franchise systems, including Butterfly Life.

14 16. In August of 2008, I posted interviews I conducted with seven failed Butterfly Life
15 franchise owners. One of the Butterfly Life fitness franchisees who I interviewed was Mr. Jeff
16 Marks who told me that he had purchased several Butterfly Life franchises and lost over
17 \$350,000. With his permission, on August 4, 2008, I posted the interview with my overview
18 mentioning a "history of litigation in the health club industry" and my opinion about "checkered
19 pasts." A true and complete copy of the a screenshot of above August 4, 2008 publication and a
20 text version of the same including blog comments which followed during 2008 and 2009 is
21 attached hereto as Exhibit F and incorporated by reference as though fully set forth herein. The
22 sentence included my opinion that: "Golob & Gergley both have checkered pasts and a history of
23 litigation in the health club industry." This alleged defamatory sentence has remained posted on
24 my website since August of 2008.

25 17. In the above article, entitled "Butterfly Life: Jeff Marks, Ex-Franchisee" and attached as
26 Exhibit F, I included a link to a post discussing pending franchisee litigation involving Mr. Mark
27 Golob that I had found.

28 18. In the above article, entitled "Butterfly Life: Jeff Marks, Ex-Franchisee" and attached as
Exhibit F, I let the reader know twice that this was an article reporting information from Jeff
Marks, Ex-Franchisee, including my opinion that Mark Golob and Tom Gergley "both have

1 checkered pasts.”

2 19. Numerous blog posts followed about Butterfly Life and some about Mark Golob and his
3 business practices. Several blog commenters later referenced another company, TopDocAmerica,
4 and stated that Mark Golob was involved.

5 20. On August 28, 2008, on a page titled “Butterfly Life Franchise Discussion,” I
6 republished the same introductory information about Butterfly Life with links to the above
7 interview of Mr. Jeff Marks as well as interviews of six other franchisees or ex-franchisees of
8 Butterfly Life which I had conducted. I quoted the following comments from the franchisee
9 interviews: “complaints include: “Marketing was horrible” “...they couldn’t deliver what they
10 promised. Nothing was ready on time.” “The name had no meaning to anyone” “...without brand
11 building, it was very hard to get traffic in the clubs.” “There was no support” “They told me they
12 were not in the business of running clubs, just selling them” A true and complete copy of the
13 above August 28, 2008 publication of “Butterfly Life Franchise Discussion” including later blog
14 comments which followed during 2008 and 2009 is attached hereto as Exhibit G and incorporated
15 by reference as though fully set forth herein.

16 21. Later in or about March 14, 2009, one of the commenters on the blog was a lawyer by
17 the name of Scott Hammel. Mr. Hammel had read the blog and added a comment. Mr. Hammel
18 wrote that he was the lawyer for Butterfly Life. He posted that: “Update on the franchisee class
19 action arbitration. The franchisees’ claims are being terminated and dismissed because they failed
20 to pay their allocated share of the arbitration fees. Several motions were pending against the
21 franchisees when the arbitration proceedings were terminated.” Exhibit G page 7, entry dated
22 March 14, 2009.

23 22. Absent in attorney Hammel’s 2009 comment about the blog information about Butterfly
24 Life and Mr. Mark Golob was a statement that the history of litigation reference and the
25 “checkered past” opinion were false and defamatory and needed to be removed on behalf of his
26 client Mark Golob.

27 23. Although the above postings had remained unchanged, over two years later in February,
28 2011, I received a cease and desist letter from the Mr. Hammel specifying a different comment
posting in the blog regarding another company apparently involving Mr. Mark Golob
(TopDocAmerica). A true and complete copy of the Hammel cease and desist letter to me, dated

1 February 10, 2011 is attached hereto as Exhibit H and incorporated by reference as though fully
2 set forth herein. The letter references Mark Golob as not being an officer and director of Top Doc
3 America, and contains a demand to delete all reference to Mark Golob being part of Top Doc
4 America within forty eight hours or face a legal action for defamation.

5 24. While the attorney Hammel's 2011 cease and desist letter, Exhibit H, references the
6 blog that contains the statements regarding "checkered pasts" and a "history of litigation," absent
7 in the letter was a statement that the history of litigation reference and the "checkered past"
8 opinion were false and defamatory and needed to be removed on behalf of his client Mr. Mark
9 Golob.

10 25. Since the original posting, I received a copy of a desist and refrain order dated March
11 24, 2009, issued against Butterfly Fitness, Inc. and Mr. Mark Golob by the California
12 Department of Corporations in connection with his sale of franchises in California. A true and
13 correct copy of the above desist and refrain order is attached hereto as Exhibit I and incorporated
14 by reference as though fully set forth herein.

15 26. I have also received copies of lawsuit complaints by several Butterfly Life franchisees
16 including allegations of fraud against Mark Golob. True and complete copies of two lawsuit
17 complaints I later obtained from franchisees are attached hereto as Exhibits J-1 (a copy of
18 PACER document verified complaint in *Rosner v. Gergley*, Case No. 1:09-cv-03730-NLH-AMD)
19 and J-2 (a copy of filed Third Amended Complaint in *Barnhart v. Gergley*, Case No. C 09-00120,
20 Superior Court of the State of California in and for the County of Contra Costa) and incorporated
21 by reference as though fully set forth herein.

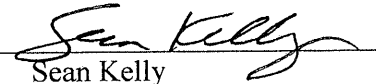
22 27. I have also received a copy of the bankruptcy petition for Butterfly Fitness, Inc. filed on
23 September 30, 2011. A true and complete copy of this bankruptcy petition of Butterfly Fitness,
24 Inc. is attached hereto as Exhibit K and incorporated by reference as though fully set forth herein.

25 28. A true and complete copy of a Club Industry trade magazine article I obtained on the
26 Internet entitled "Financial Trouble Plaques Some Health Club Franchises" and mentioning
27 Butterfly Fitness, Inc. and quoting Mark Golob is attached hereto as Exhibit L and incorporated
28 by reference as though fully set forth herein.

29. A true and complete copy of an additional Butterfly Fitness Inc. Uniform Franchise
Offering Circular item on Litigation which I obtained is attached hereto as Exhibit M and

1 incorporated by reference as though fully set forth herein.

2 I declare under penalty of perjury under the laws of the State of California that the
3 forgoing is true and correct, executed at Lancaster, Pennsylvania, on March 13, 2014.

4 By: 
5 Sean Kelly

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