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10 **UNITED STATES DISTRICT COURT**

11 **DISTRICT OF NEVADA**

12 TASTY ONE, LLC d/b/a EARTH SMARTE
 13 WATER OF LAS VEGAS, Foreign Limited-
 Liability Company;

Case No.: 2:20-cv-01625-APG-NJK

14 Plaintiff/Counter-Defendant,

JOINT PRETRIAL ORDER

15 vs.

16 EARTH SMARTE WATER, LLC d/b/a
 17 DENCOH20, LLC, an Arizona company; DOES
 I through X; and ROE CORPORATIONS I
 18 through X, inclusive,

19 Defendant/Counter-Claimant.

20
 21 Following pretrial proceedings in this case pursuant to LR 16-3 and LR 16-4,

22 IT IS SO ORDERED:

23 **I.**

24 **STATEMENT OF THE NATURE OF THE ACTION, RELIEF SOUGHT,**
 25 **IDENTIFICATION AND CONTENTIONS OF THE PARTIES**

26 **A. PLAINTIFF’S VIEW:**

27 This action involves the breach of a Territory License Agreement (“Agreement”) between
 28 Plaintiff and Counter-Defendant Tasty One, LLC d/b/a/ Earth Smarte Water of Las Vegas (“Plaintiff”

1 or “Tasty One”), and Defendant and Counter-Claimant Earth Smarte Water, LLC d/b/a DencoH2O
2 (“Defendant” or “ESWLLC”). Tasty One and ESWLLC entered into the Agreement on January 4,
3 2016, granting Tasty One exclusive license to sell ESWLLC’s PhSmarte 1000 water system in Clark
4 County, Nevada, for a period of seven years.

5 Pursuant to the Agreement, Tasty One began selling ESWLLC’s products in Las Vegas and
6 paid substantial sums in advertising and other set up costs to drive customers to the Earth Smarte
7 Water website and branding itself as the exclusive dealer of ESWLLC’s products in Clark County,
8 Nevada. Over the next three years, Tasty One sold and installed hundreds of ESWLLC water systems
9 in the Las Vegas area.

10 In addition to exclusive rights, the Agreement provided that ESWLLC could only increase
11 prices charged to Tasty One if the systems cost more for ESWLLC to produce, and then only the
12 direct amount of the cost increase, if any, known as a “pass through” increase. Between 2017 and
13 2020, ESWLLC raised its prices to Tasty One two times under the Agreement. ESWLLC represented
14 to Tasty One that both of these price increases were “pass through” increases as permitted by the
15 Agreement. However, Tasty One learned through its vendor, Nelson Corporation, the same vendor
16 that supplied ESWLLC with the components for its systems, that the price increases were more than
17 tariff increases as ESWLLC claimed.

18 In fact, Tasty One ordered many of the same parts from Nelson Corporation that ESWLLC
19 did, including but not limited to identical mineral tanks and mineral valves. During the same time
20 period, Tasty One had price increases on the products it purchased directly from Nelson Corporation
21 of approximately \$20. Inexplicably, the increases ESWLLC “passed on” to Tasty One were \$80 to
22 \$100, much more than the \$20 tariff increases. Tasty One later learned that these price increases also
23 included increases for modifications and upgrades made to the systems in violation of the Agreement.

24 On March 25, 2020, ESWLLC unexpectedly informed Tasty One in writing of its imminent
25 closure and dissolution due to the financial insolvency. In April, 2020, ESWLLC rescinded its earlier
26 threat of dissolution and informed Tasty One that it was continuing operation but that Tasty One no
27 longer had exclusive right to the Clark County, Nevada area because it had failed to meet a 12-unit
28 quota under the Agreement, labeling Tasty One an “unauthorized dealer” of ESWLLC products. It is

1 important to note here that the Agreement and the addendum thereto called for Tasty One to sell 8
2 units per month, not 12. Even if Tasty One did not meet its 8 unit per month quota, the sole remedy
3 for ESWLLC under the Agreement was to remove the exclusive right to sell and continue on this basis
4 for the remainder of the contract, not label Tasty One as an “unauthorized dealer” or attempt to
5 terminate the contract.

6 Based on ESWLLC’s actions, the relationship between Tasty One and ESWLLC continued to
7 deteriorate over the next weeks and months until ESWLLC informed Tasty One that it would no
8 longer have access to the ESWLLC ordering portal. Throughout the parties’ contract, ESWLLC had
9 required that any order for equipment be paid in full prior to shipment of the merchandise. When
10 ESWLLC announced that it was insolvent, would cease operations, and then rescinded this threat, this
11 requirement became untenable because Tasty One was concerned that it would be charged and not
12 receive any merchandise. In an attempt to remedy this situation, Tasty One offered to pay Nelson
13 Corporation directly for all purchases making them a de facto escrow agent that would send the
14 product to Tasty One and ESWLLC’s profits to ESWLLC; ESWLLC flatly refused.

15 Since that time, ESWLLC has nearly cut off all communications and put in place multiple
16 unnecessary barriers when Tasty One has attempted to request customer support or warranty service.
17 From January, 2017 when the contract was signed, until mid-2020 when ESWLLC cut off access to
18 the ordering portal, Tasty One continued to meet each and every one of its obligations under the
19 contract, including providing warranty service to its customers, notwithstanding the fact that
20 ESWLLC was actively and improperly trying to terminate the contract.

21 Tasty One filed its Complaint on July 17, 2020, asserting claims against ESWLLC for (1)
22 declaratory relief; (2) breach of the Agreement; (3) breach of the covenant of good faith and fair
23 dealing implied in the Agreement; and (4) injunctive relief. ESWLLC only sought to refute and
24 produce evidence against one allegation – that it did not increase contract prices for reasons other than
25 “pass through tariff increases.” To that end, ESWLLC produced correspondence from its
26 manufactures detailing when the tariff increases occurred and the corresponding price increase on
27 each unit; however, ESWLLC later admitted that it increased the prices for tariff increases and product
28 upgrades, expressly violating the Agreement.

1 On June 9, 2022, this Court filed an Order granting Tasty One’s motion for summary judgment
2 on ESWLLC’s counterclaims and request for punitive damages because there was no evidence that
3 Tasty One breached the agreement or intentionally interfered with a business relationship, or that
4 ESWLLC was damaged as a result, and the Agreement waives the parties’ right to seek punitive
5 damages against each other. *See* Order (ECF No. 84).

6 Consistent with this Court’s order granting partial summary judgment in favor of Tasty One,
7 the claims proceeding to trial are Tasty One’s claims for (1) breach of contract; (2) breach of the
8 implied covenant of good faith and fair dealing; and (3) declaratory relief. *Id.* Tasty One is seeking
9 all allowable civil damages, including restitution damages, special/consequential damages, and
10 attorneys’ fees and costs, as well as declaratory relief regarding the parties’ rights and responsibilities
11 under the Agreement. ESWLLC denies that it breached the Agreement and the covenant of good faith
12 and fair dealing implied in the Agreement, and it denies that Plaintiff is entitled to recover any
13 damages.

14 **B. DEFENDANT’S VIEW:**

15 Consistent with this Court’s June 9, 2022 Order granting partial summary judgment, Tasty
16 One’s claims, as addressed in the Complaint, in the Motion for Summary Judgment, and reiterated
17 above, are now limited in scope. This Court has already held, as a matter of law that a majority of
18 Tasty One’s claims fail as a matter of law. Because the Court, in its purview, has already established
19 that these claims fail as a matter of law, those claims cannot not proceed to a trier of fact. Based upon
20 the ruling in the June 9, 2022 Order, and a recital of the vertically identical facts that this Court
21 reviewed in reaching its decision, Tasty One’s claims which should proceed to trial under questions
22 of material fact over whether some of ESWLLC’s actions breached the agreement and whether Tasty
23 One was damaged as a result, are limited to the following claims:

24 1) Price Increases

25 Whether price increases resulting from technology improvements are direct increases or
26 are otherwise allowed as a pass through under the Agreement. Tasty One needs to establish
27 evidence justifying its argument that the Agreement defines a “direct increase” as one that
28 is only outside of ESWLLC’s control.

1 The Court, in its June 9, 2022 Order indicates that Tasty One has the burden of proof in
2 establishing the definition of what is a “direct increase”. Tasty One has not, to date,
3 produced any evidence or expert testimony on this issue and as such, will not likely met
4 the burden of proof needed.

5 2) Premature Termination

6 Whether ESWLLC’s attempt to terminate the Agreement by insolvency violates the
7 Agreement, whether the Agreement was terminated, and whether Tasty One was damaged
8 as a result.

9 The Agreement was not terminated, and therefore no breach occurred. Additionally,
10 because Earth Smarte provided reasonable assurances that it was an ongoing concern with
11 the ability to meet Tasty One’s future Orders, tasty One has no damages. Tasty One has
12 presented no evidence, other than its tax returns, from which damages could be calculated.
13 Earth Smarte will object to the introduction of any reference to tax returns as the June 9,
14 2022 Order held that as a matter of law, that tasty One has not established that the alleged
15 losses established in the tax returns are causally connected to any of ESWLLC’s alleged
16 breaches.

17 Pursuant to Federal Rules of Evidence 403, “The court may exclude relevant evidence if
18 its probative value is substantially outweighed by a danger of one or more of the following:
19 unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or
20 needlessly presenting cumulative evidence.”

21 Even if Tasty One is able to establish that the Agreement was terminated, and that there
22 was a breach, it cannot present any evidence of damages necessary to sustain the cause of
23 action as Arizona law requires that the elements of (1) the existence of a contract, (2)
24 breach, and **(3) resulting damages**. See *First Am. Title Ins. Co. v. Johnson Bank*, 372 P.3d
25 292, 297 (Ariz. 2016) be present for a breach of contract claim.

26 3) Good Faith and Fair Dealing

27 Whether the claimed misrepresentation(s) regarding Earth Smarte’s insolvency violates the
28 covenant of good faith and fair dealing.

1 The Court, in its June 9, 2022 Order has already concluded, as a matter of law, that Tasty
 2 One's remaining claims fail. As the Court noted in the June 9, 2022, Order, Arizona law governs the
 3 parties' disputes arising under the Agreement. Under Arizona law, the elements of a breach of contract
 4 claim are: (1) the existence of a contract, (2) breach, and (3) resulting damages. *See First Am. Title*
 5 *Ins. Co. v. Johnson Bank*, 372 P.3d 292, 297 (Ariz. 2016). Contract interpretation is a question of law
 6 for the court. *Hadley v. Sw. Props., Inc.*, 570 P.2d 190, 193 (Ariz. 1977) (en banc). "Where the
 7 language of the contract is clear and unambiguous, it must be given effect as it is written." *Id.* But if
 8 the language is ambiguous and it is necessary to consider the circumstances in determining its
 9 meaning, then determining those circumstances is a question for the trier of fact. *Ash v. Egar*, 541
 10 P.2d 398, 401 (Ariz. Ct. App. 1975). (ECR #83, pg. 7, lns. 5-13). Because the Court determined as a
 11 matter of contract interpretation that at least one of the three necessary elements are missing, the
 12 following issues fail as matter of law and do not need to be tried:

13 1) Price Increases

14 The Court held that no evidence was presented which would indicate that Tasty One sold an
 15 ESWLLC product at the increased price within 60 days of the newsletter, so it **does not demonstrate**
 16 **that ESWLLC breached the Agreement or damaged Tasty One** in this way.

17 The Court, within its purview, has already determined that under Arizona law, the elements of
 18 (2) breach, and (3) resulting damages, are missing. *See First Am. Title Ins. Co. v. Johnson Bank*, 372
 19 P.3d 292, 297 (Ariz. 2016). Therefore, this claim does not need to proceed to a trier of fact as the
 20 claim does not exist as a matter of law.

21 2) "Unauthorized Dealer" Label

22 The Court has held that Tasty One **did not demonstrate** that ESWLLC's "unauthorized
 23 dealer" **label breached the Agreement**. Tasty One also has **not demonstrated that it was damaged**
 24 **by ESWLLC's label**. It does not demonstrate what, if any, consequences flowed from ESWLLC's
 25 email or that it lost credibility or goodwill from customers.

26 The Court, within its purview, has already determined that under Arizona law, the elements of
 27 (2) breach, and (3) resulting damages, are missing. *See First Am. Title Ins. Co. v. Johnson Bank*, 372
 28

1 P.3d 292, 297 (Ariz. 2016). Therefore, this claim does not need to proceed to a trier of fact as the
2 claim does not exist as a matter of law.

3 3) Online Product Portal

4 Tasty One **does not identify the Agreement provision** requiring ESWLLC to maintain an
5 online sales portal, and it **does not demonstrate that it lost customers' sales** as a result of losing
6 access to the portal. Though Kaplan testified that he was reluctant to email sales directly to ESWLLC
7 after it closed its portal, Tasty One presented **no evidence that closing the portal actually caused**
8 **lost sales**. And though Tasty One presents its tax returns showing a decrease in gross sales and a net
9 loss for the first time in 2020, Tasty One **has not causally connected** those to any of ESWLLC's
10 alleged breaches.

11 The Court, within its purview, has already determined that under Arizona law, the elements of
12 (1) agreement, and (3) resulting damages, are missing. *See First Am. Title Ins. Co. v. Johnson Bank*,
13 372 P.3d 292, 297 (Ariz. 2016). Therefore, this claim does not need to proceed to a trier of fact as the
14 claim does not exist as a matter of law.

15 4) Warranty Services

16 Tasty One **has not demonstrated ESWLLC breached the Agreement** by failing to provide
17 warranty services **or** that Tasty One was **damaged as a result**. Tasty One's claims that it was damaged
18 as a result of by failing to provide warranty services the **no evidence substantiating its claim** that it
19 suffered \$12,500 in unreimbursed warranty expenses.

20 The Court, within its purview, has already determined that under Arizona law, the elements of
21 (2) breach, and (3) resulting damages, are missing. *See First Am. Title Ins. Co. v. Johnson Bank*, 372
22 P.3d 292, 297 (Ariz. 2016). Therefore, this claim does not need to proceed to a trier of fact as the
23 claim does not exist as a matter of law.

24 5) Breach of Implied Covenant of Good Faith and Fair Dealing

25 The Court has held that Tasty One's argument that because ESWLLC breached the
26 Agreement, it also breached the implied covenant of good faith and fair dealing. As a matter of law,
27 the Court has held that Tasty One's conclusion does not follow from Arizona law. *See Wells Fargo*
28

1 *Bank*, 38 P.3d at 30 (“A party may breach an express covenant of the contract without breaching the
2 implied covenant of good faith and fair dealing.”)

3 6) Declaratory Relief

4 The Court has previously ruled that Tasty One’s request for declaratory relief is duplicative of its
5 contractual claims. *Cf. Swartz v. KPMG LLP*, 476 F.3d 756, 766 (9th Cir. 2007) (request for a declaration
6 of defendants’ liability for damages that were sought for plaintiff’s other causes of action was properly
7 dismissed).

8 Additionally, Tasty One materially breached the contract first which relieved Earth Smarte from
9 any further duties under the contract.

10 **II.**

11 **STATEMENT OF JURISDICTION**

12 Jurisdiction in this case is based on diversity of citizenship under Title 28 U.S.C. § 1332.
13 Plaintiff is a New Mexico limited liability company doing business in Clark County, Nevada.
14 Defendant is an Arizona limited liability company doing business in Maricopa County, Arizona. The
15 amount in controversy exceeds the sum or value of \$75,000.00.

16 **Earth Smarte’s Position:** Based upon the June 9, 2022, ruling the amount in controversy
17 does not exceed \$75,000.00.

18 Venue is proper in this District pursuant to Title 28 U.S.C. § 1391(b)(2), as a substantial part
19 of the events giving rise to the claims in this action occurred in this District. *See also* Order Denying
20 Motion to Transfer Venue (ECF No. 15).

21 **III.**

22 **THE FOLLOWING FACTS ARE ADMITTED BY THE PARTIES AND REQUIRE NO**
23 **PROOF:**

24 1. On January 4, 2017, Tasty One and ESWLLC entered into a Territory Licensing
25 Agreement granting Tasty One exclusive license to sell ESWLLC’s PhSmarte 1000 water system in
26 Clark County, Nevada, for a period of seven (7) years.

27 2. **Excerpted Key Terms of the Agreement:**

28 3. Term and Renewal

.... This Agreement shall expire seven (7) years following the Effective

1 Date....

2 4.2 Currently Supplied Product Pricing

3 Prices are subject to change from time to time with advance notification
4 to Licensee of a minimum of 60 days. Such price increases shall only be a
"pass through" of the direct increase in costs of material or components.

5 5. Authorized Products and Other Services

6 Licensors does not restrict other business activity or other equipment lines
7 offered within Licensee's Protected Territory. In no case may
"competitive" products and/or services sold within the Licensee's
8 Protected Territory be contracted on forms associated with EarthSmarte
Water, LLC....

9 10.2 Post Sale Services

10 Licensee will be responsible for providing labor cost associated with
11 preventative, remedial and/or Warranty services of PhSmarte 1000 units.
Equipment replacement costs under the terms of the manufacturer's
12 warranty (Earth Smarte Water, LLC) is paid for by Licensor.

13 17.1 Restriction on Use of Confidential Information

14 You will never copy, reproduce, divulge or use any Confidential
15 Information for the benefit of any- other person. Business Entity, or other
16 entity, nor will you directly or indirectly permit the disclosure of imitate
17 or aid any such third party to imitate any of the Confidential Information.
"Confidential Information" is defined as information, knowledge, trade
18 secrets or know-how relating to the Licensor and the business of marketing
19 the PhSmarte 1000 or concerning the Licensor's Systems of operation,
20 program, services, products, customers' materials, books...We
acknowledge that, except to the extent required to comply with our
21 obligations under Licensor warranties or to effect product recalls, we have
22 no right to require you to share or otherwise disclose to us the identity of
23 your customers.

24 Minimum Sales Performance Guarantee

25 Within the terms and conditions of this Agreement under the Evaluation
26 of Sales Performance section it is agreed that my Protective Territory will
27 be expected to meet a minimum of Eight (8) sales per month. ...Failure to
28 meet the minimum within the terms and conditions of this Agreement will
forfeit exclusivity to the protected territory under the terms and conditions
within this Agreement.

3. On September 1, 2018, ESWLLC issued a newsletter entitled "Waterflow" to its
dealers notifying them of price increases. The newsletter notified dealers that price increases from
our suppliers on imported descaler parts. The increase was effective October 2018 and was alleged
to cover price increases on tariffs. Said increases were \$20 on all units.

1 **IV.**
2 **THE FOLLOWING FACTS ARE ALLEGED BY THE PARTIES, WILL BE CONTESTED**
3 **AT TRIAL, AND WILL REQUIRE EVIDENCE OF PROOF AT TRIAL:**

4 **A. PLAINTIFF'S FACTS:**

5 4. In or around October 2017, Tasty One, in compliance with Section 4.3 of the
6 Agreement, sought prior approval for its advertisements. These requests were approved by Terry
7 Denton, CEO of ESWLLC in October 2017 and July 2018.

8 5. On August 28, 2019, ESWLLC sent correspondence to Tasty One revoking its status
9 as an authorized dealer for failure to meet its monthly sales quota of 12 units per month. This email
10 was factually inaccurate because the Minimum Sales Performance Guarantee provision in the
11 Agreement set the minimum monthly sales quota at 8 units.

12 6. Pursuant to that provision, the sole remedy if Tasty One did not meet its sales quota
13 was forfeit its status as exclusive dealer in the Clark County area.

14 7. On August 30, 2019, Tasty One responded to ESWLLC's Unauthorized Dealer Email
15 and listed several grievances. Tasty One argued that ESWLLC (1) had no right to label it as an
16 unauthorized dealer pursuant to Section 11.2 of the Agreement; (2) ESWLLC had been overcharging
17 beyond the pass through increases contemplated by the Section 4.2 of the Agreement; and (3)
18 ESWLLC had failed to respond to customer warranty issues. This correspondence also requested a
19 refund of all overcharges.

20 8. On September 14, 2019, Tasty One sent an email to ESWLLC requesting it honor
21 warranty claims of three customers.

22 9. On February 20, 2020, Tasty One sent a second formal request for refund. Specifically,
23 Tasty One noted that ESWLLC had increased the price beyond pass through increases which was in
24 no way sufficient to justify its increase of \$105.00 per unit for model #948 and \$50.00 per unit for
25 model #1252. This email initiated a dialogue between the parties regarding tariff increases,
26 verification requests directly from ESWLLC's manufacturers, and the desire to return to civility as
27 the business relationship had soured.

28 10. ESWLLC admitted that price increases resulted from not only tariff increase but that
ESWLLC decided to add additional technology to the units.

1 11. By Tasty One’s calculation, it was overcharged \$24,215.00 as of February 2020.

2 12. Shortly thereafter, on March 25, 2020, ESWLLC – through its counsel Martin W.
3 Saltzman, P.C. – informed Tasty One that, effective immediately, ESWLLC would be closing for
4 business, and dissolving as it had no assets. The letter also informed Tasty One that its online dealer
5 ordering portal would now be closed. This notice of dissolution was patently false as ESWLLC
6 remains operational.

7 13. In response, on April 10, 2020, counsel for Tasty One sent a written request that
8 ESWLLC immediately remedy the situation as the Agreement had no provision which allowed for
9 ESWLLC to terminate its contractual obligations based on its own dissolution.

10 14. A series of correspondence ensued between counsel, each outlining its clients’ rights
11 and remedies under the terms of the Agreement as well as proposed solutions.

12 15. During this time, an email was sent from Terry L. Denton, ESWLLC’s CEO, admitting
13 to Tasty One that ESWLLC had not yet dissolved as a corporation.

14 16. In its first year of operations, 2017, Tasty One’s gross revenue for the sale of ESWLLC
15 product was \$736,482 and a net profit or loss of \$48,851. In 2018, Tasty One’s revenue increased to
16 \$902,337, nearly a 20% increase with a net profit or loss of \$4,792. Revenue increased again in 2019
17 to \$1,110,897 and a net profit or loss of \$338,377, which was again a nearly 20% increase in revenue
18 and a significant increase in profit.

19 17. In late 2019 and early 2020, ESWLLC attempted to declare itself insolvent, notified
20 Tasty One that it did not meet an arbitrary and inflated quota, and cut off Tasty One’s access to the
21 online ordering portal. Plaintiff’s revenue in 2020 subsequently fell to \$535,237 and its net profit or
22 loss was \$12,878.

23 18. There are no components or configuration of water filtration systems that are
24 proprietary to any one company because all components are designed by or in some cases patented by
25 third party manufacturers who sell these products to companies like ESWLLC and Tasty One on the
26 wholesale market.

27 19. To date, ESWLLC has not refunded Tasty One for the overcharges related to price
28 increases beyond “pass through” increases contemplated under the Agreement.

1 **B. DEFENDANT’S FACTS:**

2 20. The September 2018 “Waterflow” newsletter also advised the dealers of the
3 opportunity to improve the PhSmarte 1000 with a new innovative water distributor system (The
4 Vortech). The newsletter advised that this distribution system would improve the effectiveness of the
5 cleaning cycle and make the system last much longer and treat water much better. The newsletter
6 stated that the Vortech option also included stainless steel hoses for installation. Finally, the newsletter
7 indicated that Earth Smarte would let its dealers vote on the Vortech Distributor improvement option,
8 advised how to vote, and that results will be posted in the October WaterFlow Newsletter.

9 21. In the October 2018, “Waterflow” newsletter, Earth Smarte notified it’s of the price
10 increase for the tariffs from the stainless steel jackets, descaler parts & Vortech upgrades. The
11 increase was effective November 2018 and was to cover price increases on tariffs. Said increases
12 were \$88.00 on Model 948 and \$108.00 for Model 1252.

13 22. In an April 2020 correspondence, Tasty One was provided “reasonable assurances”
14 that Earth Smarte Water could and would continue operations and meet Tasty One’s need.

15 23. Based on Tasty One’s order history beginning in late 2019 and early 2020, Tasty One
16 was not buying any product.

17 24. In August 2019, Tasty One had not ordered any of Earth Smarte Water’s product.

18 25. In November 2019, Tasty One did not order any of Earth Smarte Water’s product.

19 26. In June, October, and December 2019, Tasty One only order five (5) units, below the
20 quota amounts.

21 27. Tasty One had not ordered any of Earth Smarte Water’s product in January or February
22 2020, months before the “insolvency” letter was sent.

23 28. Tasty One still ordered one unit in March 2020 and one in April 2020, despite Earth
24 Smarte Water’s alleged “insolvency.”

25 29. Tasty One materially breached the contract first, thereby relieving Earth Smarte from
26 any further performance.

27 ///

28 ///

V.

**THE FOLLOWING FACTS, THOUGH NOT ADMITTED, WILL NOT BE CONTESTED
AT TRIAL BY EVIDENCE TO THE CONTRARY:**

1. None at this time.

VI.

**THE FOLLOWING ARE THE ISSUES OF FACT TO BE TRIED AND DETERMINED
UPON TRIAL:**

A. PLAINTIFF'S PROPOSED ISSUES OF FACTS:

1. Whether ESWLLC increased the prices of its products fewer than 60 days after ESWLLC issued a newsletter to its dealers notifying them of price increases.

Earth Smarte Water's Response: The Court has already reviewed this fact and made the determination, as a matter of law by virtue of its June 9, 2022 Order, that no claim exists. This should not be a fact presented at trial.

2. Whether Tasty One sold an ESWLLC product at the increased price within 60 days of ESWLLC sending the newsletter notice.

Earth Smarte Water's Response: The Court has already reviewed this fact and made the determination, as a matter of law by virtue of its June 9, 2022 Order, that no claim exists. This should not be a fact presented at trial.

3. Whether Tasty One and ESWLLC intended for improvements to technology to constitute "direct increases in costs of material or components" or otherwise "pass through" increases at the time of entering the Agreement, when the parties did not include "improvements to technology" in the provision on allowable pass through increases.

4. Whether ESWLLC breached the Agreement when it changed the technology of the unit and increased its price to dealers as a "pass through" increase because of the technology change.

5. Whether ESWLLC breached the Agreement when it labeled Tasty One as an "unauthorized dealer," when the addendum states that if Tasty One fails to meet the minimum sales requirement, it will "forfeit exclusivity" to Clark County.

Earth Smarte Water's Response: The Court has already reviewed this fact and made

1 the determination, as a matter of law by virtue of its June 9, 2022 Order, that no claim exists.

2 This should not be a fact presented at trial.

3 6. Whether ESWLLC breached the Agreement when it revoked Tasty One’s access to
4 ESWLLC’s online sales portal, when the addendum states that if Tasty One fails to meet the minimum
5 sales requirement, it will “forfeit exclusivity” to Clark County.

6 **Earth Smarte Water’s Response:** The Court has already reviewed this fact and made
7 the determination, as a matter of law by virtue of its June 9, 2022 Order, that no claim exists.

8 This should not be a fact presented at trial.

9 7. Whether Tasty One suffered damages through lost sales as a result of ESWLLC
10 denying it access to the online sales portal in 2020, when Tasty One’s revenue subsequently fell
11 \$535,237, resulting in a suffered loss of \$12,878, despite its consistent near 20% revenue increases
12 and profit increases from 2017 through 2019.

13 **Earth Smarte Water’s Response:** The Court has already reviewed this fact and made
14 the determination, as a matter of law by virtue of its June 9, 2022 Order, that no claim exists.

15 This should not be a fact presented at trial.

16 8. Whether ESWLLC breached the Agreement when it failed to maintain its online sales
17 portal, when Tasty One’s ability to sell ESWLLC products depends on its ability to access the online
18 sales portal.

19 **Earth Smarte Water’s Response:** The Court has already reviewed this fact and made
20 the determination, as a matter of law by virtue of its June 9, 2022 Order, that no claim exists.

21 This should not be a fact presented at trial.

22 9. Whether the parties intended for ESWLLC to be responsible for providing warranty
23 services to Tasty One’s customers when the Agreement states that although Tasty One was
24 “responsible for providing labor cost[s] associated with . . . [w]arranty services of ESWLLC’s units,”
25 ESWLLC was to pay for “[e]quipment replacement costs under the terms of the manufacturer’s
26 warranty,” and ESWLLC is the party that was required to fulfill Tasty One’s warranty requests.

27 **Earth Smarte Water’s Response:** The Court has already reviewed this fact and made
28 the determination, as a matter of law by virtue of its June 9, 2022 Order, that no claim exists.

1 This should not be a fact presented at trial.

2 10. Whether Tasty One suffered damages as a result of ESWLLC’s barriers to servicing
3 the warranty, when Tasty One subsequently suffered \$12,500 in unreimbursed warranty expenses.

4 **Earth Smarte Water’s Response:** The Court has already reviewed this fact and made
5 the determination, as a matter of law by virtue of its June 9, 2022 Order, that no claim exists.
6 This should not be a fact presented at trial.

7 11. Whether ESWLLC intentionally and fraudulently misrepresented to Tasty One that it
8 was insolvent.

9 12. Whether ESWLLC attempted to prematurely terminate the Agreement when it
10 misrepresented to Tasty One that it was insolvent.

11 13. Whether Tasty One was damaged as a result of ESWLLC’s attempt to prematurely
12 terminate the Agreement by intentionally and fraudulently misrepresenting its insolvency and closing
13 access to the online dealer portal, when Tasty One was forced to expend time and resources to
14 correspond with ESWLLC’s counsel and CEO to find out that ESWLLC had not actually dissolved,
15 and when Tasty One could no longer make further orders for equipment or parts through the online
16 dealer portal.

17 **Earth Smarte Water’s Response:** The Court has already partially reviewed this fact
18 and made the determination, as a matter of law by virtue of its June 9, 2022 Order, that no
19 claim exists. The only genuine fact that should be presented is “Whether Tasty One was
20 damaged as a result of ESWLLC’s attempt to prematurely terminate the Agreement by stating
21 it was insolvent.”

22 **B. DEFENDANT’S PROPOSED ISSUES OF FACT:**

23 1. Whether the price increases resulting from technology improvements are direct
24 increases or are otherwise allowed as a pass through under the Agreement.

25 2. Whether technology improvements are costs of material or components.

26 3. Whether Tasty One can establish its definition that “direct increase” is one that is
27 outside of ESWLLC’s control.

28 4. Whether Earth Smarte Water represented insolvency in order to preliminarily and

1 argument that the Agreement defines “direct increase” as one that is outside of ESWLLC’s
2 control. (ECF #83, pg. 8, lns 8-12).

3 4. Whether price increases that result from improvements to technology constitute “direct
4 increase in costs of material or components” and/or “pass through” increases under the Agreement.

5 **Earth Smarte Water’s Response:** The Court has already held that as a matter of law:
6 The Agreement does not unambiguously prohibit price increases that resulted from
7 improvements to technology. At a minimum, there is a **question of fact** about whether price
8 increases resulting from technology improvements are direct increases or are otherwise
9 allowed as a pass through under the Agreement. Tasty One presents no evidence justifying its
10 argument that the Agreement defines “direct increase” as one that is outside of ESWLLC’s
11 control. (ECF #83, pg. 8, lns 8-12).

12 5. Whether the Addendum to the Agreement re: Minimum Sales Quota provides that the
13 sole remedy to ESWLLC in the event Tasty One fails to meet the minimum sales requirement is that
14 Tasty One would “forfeit exclusivity” to Clark County.

15 **Earth Smarte Water’s Response:** The Court has already held that as a matter of law:
16 The Agreement states that if Tasty One fails to meet the minimum sales requirements it will
17 “forfeit exclusivity to” Clark County. *Id.* at 30. The Agreement does not unambiguously state
18 that this is the sole remedy for this particular breach. (ECF #83, pg. 9, lns 6-8).

19 6. Does ESWLLC labelling Tasty One as an “unauthorized dealer” constitute a breach of
20 the Agreement if the addendum only provides that in the event Tasty One fails to meet the minimum
21 sales requirement, it will “forfeit exclusivity” to Clark County?

22 **Earth Smarte Water’s Response:** The Court has already held that as a matter of law:
23 Tasty One therefore has not demonstrated that ESWLLC’s “unauthorized dealer” label
24 breached the Agreement. Tasty One also has not demonstrated that it was damaged by
25 ESWLLC’s label. It does not demonstrate what, if any, consequences flowed from ESWLLC’s
26 email or that it lost credibility or goodwill from customers. (ECF #83, pg. 9, lns 8-12).

27 7. Does ESWLLC’s refusal to maintain the online sales portal constitute a breach of the
28 Agreement when the addendum states that if Tasty One fails to meet the minimum sales requirement,

1 it will only “forfeit exclusivity” to Clark County?

2 **Earth Smarte Water’s Response:** The Court has already held that as a matter of law:
3 Tasty One does not identify the Agreement provision requiring ESWLLC to maintain an
4 online sales portal, and it does not demonstrate that it lost customers’ sales as a result of losing
5 access to the portal. Though Kaplan testified that he was reluctant to email sales directly to
6 ESWLLC after it closed its portal, Tasty One presented no evidence that closing the portal
7 actually caused lost sales. And though Tasty One presents its tax returns allegedly showing a
8 decrease in gross sales and a net loss for the first time in 2020, Tasty One has not causally
9 connected those to any of ESWLLC’s alleged breaches. (ECF #83, pg. 9, lns 13-19).

10 8. Whether the Agreement requires ESWLLC to provide warranty services to Tasty
11 One’s customers when the Agreement states that although Tasty One was “responsible for providing
12 labor cost[s] associated with . . . [w]arranty services of ESWLLC’s units,” ESWLLC was to pay for
13 “[e]quipment replacement costs under the terms of the manufacturer’s warranty.”

14 **Earth Smarte Water’s Response:** The Court has already held that as a matter of law:
15 The Agreement provides that Tasty One was “responsible for providing labor cost[s]
16 associated with . . . [w]arranty services of” ESWLLC’s units, while ESWLLC was to pay for
17 “[e]quipment replacement costs under the terms of the manufacturer’s warranty (Earth Smarte
18 Water, LLC).” *Id.* at 8. The Agreement unambiguously states that ESWLLC must pay for
19 equipment replacement costs under the manufacturer’s warranty. But the Agreement is
20 ambiguous as to which party is responsible for facilitating customers’ warranty claims.
21 Therefore, Tasty One has not demonstrated that ESWLLC’s actions breached the Agreement.
22 And though Tasty One argues that ESWLLC’s barriers to servicing the warranty damaged
23 Tasty One, Tasty One presents no evidence substantiating its claim that it suffered \$12,500 in
24 unreimbursed warranty expenses. (ECF #83, pg. 10, lns 6-15)

25 9. Whether ESWLLC’s attempt to prematurely terminate the Agreement by intentionally
26 and fraudulently misrepresenting its insolvency prior to the 7-year expiration date of the Agreement
27 constitutes a breach of the Agreement, when the Agreement provides that ESWLLC can terminate the
28 Agreement upon Tasty One’s dissolution but does not provide for ESWLLC’s ability to terminate the

1 Agreement based on its own dissolution.

2 **Earth Smarte Water’s Response:** The Court has already held that as a matter of law:
3 Tasty One has not met its burden to identify where the Agreement provides that an attempt to
4 terminate the Agreement through insolvency breaches the Agreement. Questions of fact
5 remain, including whether ESWLLC’s attempt to terminate the Agreement in this way violates
6 the Agreement, whether the Agreement was terminated, and whether Tasty One was damaged
7 as a result. (ECF #83, pg. 11, lns 2-8)

8 10. Whether ESWLLC’s attempt to terminate the Agreement by intentionally and
9 fraudulently misrepresenting its insolvency well before the expiration date of the Agreement
10 constitutes a termination of the Agreement.

11 **Earth Smarte Water’s Response:** The Court has already held that as a matter of law:
12 Tasty One has not met its burden to identify where the Agreement provides that an attempt to
13 terminate the Agreement through insolvency breaches the Agreement. Questions of fact
14 remain, including whether ESWLLC’s attempt to terminate the Agreement in this way violates
15 the Agreement, whether the Agreement was terminated, and whether Tasty One was damaged
16 as a result. (ECF #83, pg. 11, lns 2-8).

17 **C. DEFENDANT’S PROPOSED ISSUES OF LAW:**

18 1. Defendant addresses issues of law on pages 4-8 above, including price increases,
19 premature termination, good faith and fair dealing regarding alleged insolvency, “unauthorized
20 dealer” label, online product portal, warranty services, breach of implied covenant of good faith and
21 fair dealing, and declaratory relief.

22 2. As addressed throughout this Joint Proposed Pretrial, the issues of law directly on point
23 in this matter have already been decided by virtue of the June 9, 2022 Order, ECF #83. Trial should
24 proceed on those issues of fact, this Court could not rule on directly from a review of the Agreement
25 and evidence presented. The remaining issues are those of fact for the trier of fact.

26 3. Is Tasty One’s material breach such that Earth Smarte would be excused from any
27 further performance under the contract?

28 The parties may be filing various motions in limine. As the motions in limine are filed, this

1 section of the Joint Pretrial Order will be amended accordingly.

2 **VIII.**

3 **EXHIBITS**

4 **A. The following exhibits are stipulated into evidence in this case and may be so**
 5 **marked by the clerk:**

6 The parties have conferred on multiple occasions regarding stipulations, and they anticipate
 7 that the Territory License Agreement and many other exhibits will be admitted into evidence by
 8 stipulation. The parties will continued to work together in good faith to eliminate exhibits that will
 9 be unnecessary in light of evidentiary stipulations.

10 **B. As to the following additional exhibits, the parties have reached the stipulations**
 11 **stated:**

12 **1. Set forth stipulations as to Plaintiff's exhibits.**

13 Exhibit Number	Bates No.	Exhibit Description	Date Offered	Objection	Date Admitted
14	PLTF000001	Correspondence dated March 25, 2020 to all Dealers from Law Office of Martin W. Saltzman P.C. in regards to DENCOH20, Inc. & Earth Smarte Water, LLC closing for business		Stipulate	
15	PLTF000150	EarthSmarte Water Advertisement ("Deliver After March 12th")		Stipulate	
16	PLTF000152	Certificate of Liability Insurance, dated April 28, 2020		Stipulate	
17	PLTF000410 – PLTF000438	EarthSmarte Water Territory License Agreement		Stipulate	
18	PLTF001215 – PLTF001382	Various EarthSmarte Water of Las Vegas, and Pure Water Technology Ads		Stipulate	
19	PLTF002141 – PLTF002182	Various EarthSmarte Water of Las Vegas Advertising Agreements with The Home Mag		Stipulate	
20	PLTF002189 – PLTF002190	Certificate of Liability Insurance dated September 9, 2019		Stipulate	

1		PLTF002191	Certificate of Liability Insurance dated September 1, 2016		Stipulate	
2		PLTF002192	Certificate of Liability Insurance dated September 1, 2017		Stipulate	
3		PLTF002193	Certificate of Liability Insurance dated September 1, 2018		Stipulate	
4		PLTF002194	Certificate of Liability Insurance dated December 5, 2019		Stipulate	
5		PLTF002195	Certificate of Liability Insurance dated December 11, 2019		Stipulate	
6		PLTF002196	Certificate of Liability Insurance dated May 24, 2021		Stipulate	
7		PLTF002197	Ad Approval Emails and Attached Ads		Stipulate	
8		– PLTF002203				
9		PLTF002204	Refund Correspondence		Stipulate	
10		– PLTF002213				
11		PLTF002214	Tasty One Email to Terry Denton, dated September 24, 2019		Stipulate	
12		– PLTF002215				
13		PLTF002216	Email exchange Terry Denton and Adam Kaplan September 11, 2019		Stipulate – see comment	
14		– PLTF002219				
15		PLTF002232	Email from Tasty One to Terry Denton re: “Leaking Valve Issue,” dated November 6, 2017		Stipulate	
16		– PLTF002233				
17		PLTF002234	Email from Tasty One to Terry Denton re: “Descalers and Valve need warranty repair work” dated September 14, 2019		Stipulate	
18		– PLTF002236				
19		PLTF002237	Email Correspondence Between Terry Denton and Earth Smarte Water of Las Vegas, dated December 8, 2017		Stipulate per comments	
20		– PLTF002250				
21		PLTF002255	Email Correspondence re: “Dealer agreement,” dated January 16, 2018		Stipulate	
22		– PLTF002256				
23		PLTF002260	Email Correspondence re: “RED light,” dated May 22, 2018		Stipulate	
24		– PLTF002263				
25		PLTF002264	Email Correspondence re: Warranty Repair Work, dated September 14, 2019		Stipulate	
26		– PLTF002271				
27		PLTF002272	Email Correspondence re: “Revised ad approval,” dated July 18, 2019		Stipulate	
28		– PLTF002274				

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PLTF002275 – PLTF002276	Email Correspondence re: “Revised ads for review,” dated October 27, 2017		Stipulate	
PLTF002277 – PLTF002278	Email Correspondence re: “Teresa Togo Descaler Pic and Serial Number,” dated December 8, 2017		Stipulate	
PLTF002279 – PLTF002284	Email Correspondence re: “UPS Delivery Notification,” dated December 29, 2017		Stipulate	
PLTF002285 – PLTF002286	Email Correspondence re: “Warranty Card,” dated December 27, 2017		Stipulate	
PLTF002287 – PLTF002288	Email Correspondence re: “Zepeda Descaler Pix and serial number,” dated December 8, 2017		Stipulate	
PLTF002296 – PLTF002301	Various Ad Approval Emails with Ad Attachments		Stipulate	
PLTF002291 – PLTF002295	Email Correspondence Between Terry Denton and Earth Smarte Water of Las Vegas, dated December 11, 2017		Stipulate	
ESW0053 – ESW0055	Waterflow Newsletter, dated September 1, 2018		Stipulate	
ESW0085 – ESW0086	Unauthorized Dealer Email, dated August 28, 2019		Stipulate	
ESW0087 – ESW0098	Email Correspondence re: Warranty Repair Work, dated September 14, 2019		Stipulate	
N/A	Defendant’s Responses to Plaintiff’s First Set of Requests for Admission to Defendant Earth Smarte Water, LLC D/B/A DencoH2O, LLC		Stipulate	
N/A	Defendant’s Amended Responses to Plaintiff’s First Set of Requests for Production of Documents to Defendant Earth Smarte Water, LLC D/B/A DencoH2O, LLC		Stipulate	
N/A	Defendant’s Responses to Plaintiff’s First Set of Interrogatories to Defendant Earth Smarte Water, LLC D/B/A DencoH2O, LLC		Stipulate	
PLTF 2254	Email dated January 16, 2018 between Denton and A. Kaplan		Stipulate	

2. Set forth stipulations as to Defendant's exhibits.

Exhibit Number	Bates No.	Exhibit Description	Date Offered	Objection	Date Admitted
	ESW0031	Letter dated September 18, 2018, regarding the impending price increase from Krystal Clear Water to Terry Denton at Earth Smarte Water		Stipulate	
	ESW0032	Undated letter from Krystal Clear Water explaining the \$20.00 price increase on the Descaler product due to the tariffs placed on imported products from China		Stipulate	
	ESW0053-0054	DenCoH2O Waterflow Newsletter for September 2018		Stipulate	
	ESW0056-0058	DenCoH2O Waterflow Newsletter for October 10, 2018		Stipulate	
	ESW0060	March 13, 2020, letter from Nelson Corporation regarding price increases due to tariffs and Vortech technology		Stipulate	
	ESW0061	Email dated March 9, 2020, from Royal Metal regarding price increases due to tariffs		Stipulate	
	ESW0062-0063	March 30, 2020 letter from Terry Denton to Mike Kaplan		Stipulate	
	ESW0069-0071	Letter dated May 2, 2020, from Earth Smarte's former attorney Saltzman to Tasty One's attorney regarding the low order numbers		Stipulate	
	N/A	Defendant's Amended Answers to Tasty One, LLC dba Earth Smart Water of Las Vegas' Second Set of Requests for Production of Documents (8/16/2021)		Stipulate	
	N/A	Defendant's Answers to Plaintiff's First Set of Interrogatories (3/8/2021)		Stipulate	

1	N/A	Defendant's Answers to Plaintiff's First Set of Requests for Admission (2/11/2021)		Stipulate	
2					
3	N/A	Defendant's Answers to Tasty One, LLC dba Earth Smart Water of Las Vegas' Second Set of Requests for Production of Documents (7/16/2021)		Stipulate	
4					
5	N/A	Defendant's Answers to Plaintiff's First Set of Requests for Production of Documents (3/8/2021)		Stipulate	
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10 **C. The parties intend to offer the following exhibits into evidence in this case, subject**
 11 **to the objections of the parties (as stated below):**

13	Exhibit Number	Bates No.	Exhibit Description	Date Offered	Objection	Date Admitted
14		PLTF000002 – PLTF000004	Correspondence dated April 10, 2020 to the Law Office of Martin W. Saltzman P.C. and DENCOH20, Inc. & Earth Smarte Water, LLC from Maier Gutierrez & Associates in regards to dissolution of contractual relationship		Object: Relevance Hearsay Settlement discussion	
15						
16		PLTF000036 – PLTF000038	Correspondence dated April 21, 2020 to Maier Gutierrez & Associates from the Law Office of Martin W. Saltzman P.C. in regards to agreement		Object: Relevance Hearsay Settlement discussion	
17						
18		PLTF000039 – PLTF000044	Correspondence dated April 23, 2020 to the Law Office of Martin W. Saltzman P.C. and DENCOH20, Inc. & Earth Smarte Water, LLC from Maier Gutierrez & Associates in regards to email to Mike Kaplan on April 17, 2020		Object: Relevance Hearsay Settlement discussion Incomplete document	
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1	PLTF000076– PLTF000078	Correspondence dated May 1, 2020 to the Law Office of Martin W. Saltzman P.C. and DENCOH20, Inc. & Earth Smarte Water, LLC from Maier Gutierrez & Associates in regards to resolution proposal		Object: Relevance Hearsay Settlement discussion Incomplete document	
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5	PLTF002183 – PLTF002188	Various EarthSmarte Water of Las Vegas Advertising Agreements with HomeConcepts		Relevance Hearsay Authenticati on/ foundation	
6					
7					
8	PLTF002252 – PLTF002253	Email Correspondence re: upset customer, dated April 19, 2018		Relevance	
9					
10	PLTF002304 – PLTF002307	Tasty One Schedule C tax forms 2017 – 2020		Hearsay Foundation Relevance Federal Rules of Evidence 403 – Unfair Prejudice	
11					
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13					
14		E. Allan Horner CWS-VI, CI Expert Report		Relevance Hearsay Competence Foundation	
15					

1. Defendant's Exhibits with Plaintiff's Objections:

Exhibit Number	Bates No.	Exhibit Description	Date Offered	Objection	Date Admitted
	ESW0001-0030	Territory Licensing Agreement dated January 4, 2017		Objection: incomplete document	
	ESW0033-0050	Invoices from Krystal Klear Water Enterprises from March 26, 2018; August 29, 2018; October 9, 2018; November 19, 2018; January 15, 2019; and January 30, 2019 showing the \$20.00 manufacturing increase beginning in November 2018		Objection: Relevance 401 (a)(b), authenticity, foundation.	
	ESW0051-0052	DenCoH20 Waterflow Newsletter for August 2018		Objection - Relevance 401 (a)(b),	

1	ESW0068	Email dated April 27, 2020, from Tracy Lavenant regarding Las Vegas' low order numbers for 2019		Objection - Relevance 401 (a)(b), authenticity, foundation.	
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4	ESW0083-0086	Email correspondence between Terry Denton to Adam Kaplan		Objection: not properly disclosed under FRCP 26(a); Relevance 401 (a)(b).	
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8	ESW0087-0095	September 14, 2019 email correspondence between Terry Denton to Adam Kaplan with photos		Objection: not properly disclosed under FRCP 26(a)	
9					
10	ESW0096-0101	Email correspondence between Terry Denton to Adam Kaplan with photos		Objection: not properly disclosed under FRCP 26(a)	
11					
12					
13	ESW0102-0103	March 14, 2020 email correspondence between Terry Denton to Adam Kaplan		Objection: not properly disclosed under FRCP 26(a); Relevance 401 (a)(b).	
14					
15					
16	ESW0104-0106	Documents regarding Tasty One's unauthorized use of Earth Smarte's order forms		Objection: not properly disclosed under FRCP 26(a); Relevance 401 (a)(b)	
17					
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19					
20	ESW0111-0112	Email correspondence between Terry Denton to Judy Stallings		Objection: not properly disclosed under FRCP 26(a)	
21					
22	ESW0107-0110	February 11, 2021 letter from Nelson Corporation regarding Tasty One's orders for 2020		Objection: not properly disclosed under FRCP 26(a)	
23					
24					
25	ESW0113-0166	Tasty One's unapproved advertising		Objection: not properly disclosed under FRCP 26(a); Relevance 401 (a)(b).	
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ESW0167-0168	Certificate of Insurance		Objection: not properly disclosed under FRCP 26(a)
ESW0169-0259	Documents regarding leads sent to Tasty One from Earth Smarte's national website		Objection: not properly disclosed under FRCP 26(a); Relevance 401 (a)(b)
ESW0260-0281	Documents regarding advertising or promotion of "Counter-claimants national website"		Objection: not properly disclosed under FRCP 26(a);
ESW0282-0283	Chart of Dealer issues		Objection: not properly disclosed under FRCP 26(a);
ESW0284-0285	August 6, 2021 letter from Krystal Klear Water to Terry Denton		Objection: not properly disclosed under FRCP 26(a)
ESW0286	Undated letter from Krystal Klear Water to Terry Denton		Objection: not properly disclosed under FRCP 26(a); Relevance 401 (a)(b), authenticity, foundation.
ESW0287	September 5, 2018 letter from Krystal Klear Water to Earth Smarte Water		Objection: not properly disclosed under FRCP 26(a); Relevance 401 (a)(b), authenticity, foundation.
ESW0288-0289	September 18, 2018 letter Krystal Klear Water to Terry Denton		Objection: not properly disclosed under FRCP 26(a); Relevance 401 (a)(b), authenticit, foundation.

1	ESW0290-1053	Documents regarding the purchases of components, equipment, and/or materials used in the manufacture of DenCo water filtration systems		Objection: not properly disclosed under FRCP 26(a); Relevance 401 (a)(b), authenticity, foundation.	
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6	ESW1054-1553	Documents related to all dealers or licensees of the Earth Smarte Water		Objection: not properly disclosed under FRCP 26(a); Relevance 401 (a)(b), authenticity, foundation.	
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10	PLTF 2222-2227	Email from Mike Kaplan		Objection: 2222 Attorney client privilege	
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13 Tasty One has the burden of proof to establish that:

- 14 1) The Agreement defines a “direct increase” as one that is only outside of ESWLLC’s
15 control; and
- 16 2) Tasty One sustained damages that can be calculated by other documents than its taxes
17 returns as this Court has already held that the tax returns did not establish damages causally related to
18 any alleged breach.

19 To date, no evidence has been presented that establishes Tasty One will be able to meet its
20 burden of proof on these two issues. Earth Smarte anticipates motion practice on these two issues,
21 including Motion in Limines will be necessary.

22 **D. ELECTRONIC EVIDENCE:**

23 1. Plaintiff does not anticipate presenting evidence in electronic form at this time.
24 Plaintiff’s counsel will utilize trial presentation software and/or the courtroom evidence display
25 equipment system (overhead projector) to display paper exhibits to the jury during trial. Plaintiff’s
26 counsel’s office will contact the Courtroom Administrator prior to Calendar Call consistent with Judge
27 Andrew P. Gordon’s Order Regarding Trial (standing order).

28 2. Defendant does not anticipate presenting evidence in electronic form at this

1 time. Defendant's counsel will utilize trial presentation software and/or the courtroom evidence
2 display equipment system (overhead projector) to display paper exhibits to the jury during trial.
3 Defendant's counsel's office will contact the Courtroom Administrator prior to Calendar Call
4 consistent with Judge Andrew P. Gordon's Order Regarding Trial (standing order).

5 **E. DEPOSITIONS:**

6 The parties anticipate using live witness testimony in lieu of deposition testimony unless a
7 witness is, or becomes, unavailable.

8 **F. OBJECTIONS TO DEPOSITIONS:**

9 The parties reserve all objections to the use of depositions testimony at trial at this time.

10 **IX.**

11 **THE FOLLOWING WITNESSES MAY BE CALLED BY THE PARTIES UPON TRIAL:**

12 **A Plaintiffs' Witnesses:**

- 13 1. NRCP 30(b)(6) witness and/or designee
14 Tasty One, LLC d/b/a Earth Smarte Water of Las Vegas
15 c/o Jean-Paul Hendricks, Esq.
16 Joseph A. Gutierrez, Esq.
17 MAIER GUTIERREZ & ASSOCIATES
18 8816 Spanish Ridge Avenue
19 Las Vegas, Nevada 89148
20 (702) 629-7900
- 21 2. Adam Kaplan
22 c/o Jean-Paul Hendricks, Esq.
23 Joseph A. Gutierrez, Esq.
24 MAIER GUTIERREZ & ASSOCIATES
25 8816 Spanish Ridge Avenue
26 Las Vegas, Nevada 89148
27 (702) 629-7900
- 28 3. Mike Kaplan
c/o Jean-Paul Hendricks, Esq.
Joseph A. Gutierrez, Esq.
MAIER GUTIERREZ & ASSOCIATES
8816 Spanish Ridge Avenue
Las Vegas, Nevada 89148
(702) 629-7900

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1 4. NRCP 30(b)(6) witness and/or designee
2 Earth Smarte Water, LLC d/b/a DENCOH20
3 c/o John P. Aldrich, Esq.
4 ALDRICH LAW FIRM, LTD.
5 7866 W. Sahara Avenue
6 Las Vegas, Nevada 89117
7 (702) 853-5490

8 5. Walt Kemmer
9 c/o Jean-Paul Hendricks, Esq.
10 Joseph A. Gutierrez, Esq.
11 MAIER GUTIERREZ & ASSOCIATES
12 8816 Spanish Ridge Avenue
13 Las Vegas, Nevada 89148
14 (702) 629-7900

15 6. Mackenzie Davis
16 c/o Jean-Paul Hendricks, Esq.
17 Joseph A. Gutierrez, Esq.
18 MAIER GUTIERREZ & ASSOCIATES
19 8816 Spanish Ridge Avenue
20 Las Vegas, Nevada 89148
21 (702) 629-7900

22 7. E. Allen Horner
23 c/o Jean-Paul Hendricks, Esq.
24 Joseph A. Gutierrez, Esq.
25 MAIER GUTIERREZ & ASSOCIATES
26 8816 Spanish Ridge Avenue
27 Las Vegas, Nevada 89148
28 (702) 629-7900

B. The following witnesses will be called at trial by Defendant in its case in chief:

1. Terry Denton
c/o Aldrich Law Firm, Ltd.
7866 West Sahara Avenue
Las Vegas, Nevada 89117

2. Adam Kaplan
c/o Maier Gutierrez & Associates
8816 Spanish Ridge Avenue
Las Vegas, Nevada 89148

4. Mike Kaplan
c/o Maier Gutierrez & Associates
8816 Spanish Ridge Avenue
Las Vegas, Nevada 89148

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1 4. Person(s) Most Knowledgeable for Royal Metal Building Components
2 2031 Amistad Drive
3 San Benito, TX 78586
4 (956) 399-2271

5 5. Tracy Lavenant
6 Nelson Corporation
7 3250 Barber Road
8 Norton, OH 442030
9 800-362-9686

10 6. Person(s) Most Knowledgeable for Krystal Klear Water Enterprises
11 8829 Main Street
12 Williamsville NY 14221
13 716-332-4400

14 **X.**

15 **PROPOSED TRIAL SETTINGS**

16 Given multiple scheduling conflicts between the parties due to travel, trials, prescheduled
17 vacations for parties and/or witnesses, and in order to allow adequate time for the parties to participate
18 in a settlement conference, and receive rulings on pretrial motions, the parties propose the following
19 trial dates:

- 20 1. Monday June 26, 2023
- 21 2. Monday July 17, 2023
- 22 3. Monday August 21, 2023

23 It is expressly understood by the undersigned that the Court will set the trial of this matter on
24 one (1) of the agreed-upon dates if possible; if not, the trial will be set at the convenience of the Court's
25 calendar.

26 The parties anticipate that based on the anticipated motion practice on the issues and the Motion
27 in Limines, that it will not be ready for Trial until June 2023.

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XI.

PROPOSED TRIAL LENGTH

It is estimated that the trial herein will take a total of 5 days.

APPROVED AS TO FORM AND CONTENT:

DATED this 4th day of November, 2022.

DATED this 4th day of November, 2022.

MAIER GUTIERREZ & ASSOCIATES

ALDRICH LAW FIRM, LTD.

/s/ Jean Paul Hendricks

/s/ John P. Aldrich

JOSEPH A. GUTIERREZ, ESQ.
Nevada Bar No. 9046
JEAN-PAUL HENDRICKS, ESQ.
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XI.

ACTION BY THE COURT

This case is set for Bench Trial on the June 26, 2023 trial stack at 9:00 a.m. in Courtroom 6C.

Calendar call shall be held on June 23, 2023 at 9:00 a.m. in Courtroom 6C.

~~(b) An original and two (2) copies of each trial brief shall be submitted to the Clerk on or before _____.~~

~~(c) Jury trials:~~

~~(1) An original and two (2) copies of all instructions requested by either party shall be submitted to the Clerk for filing on or before _____.~~

~~(2) An original and two (2) copies of all suggested questions of the parties to be asked of the jury panel by the Court on *voir dire* shall be submitted to the Clerk for filing on or before _____.~~

~~(d) Court trials:~~

~~Proposed findings of fact and conclusions of law shall be filed on or before _____.~~

~~The foregoing pretrial order has been approved by the parties to this action as evidenced by the signatures of their counsel hereon, and the order is hereby entered and will govern the trial of this case. This order shall not be amended except by order of the Court pursuant to agreement of the parties or to prevent manifest injustice.~~

DATED this 7th day of November, 2022.



U.S. DISTRICT JUDGE