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

13 BENNION & DEVILLE FINE
14 HOMES, INC., a California
15 corporation, BENNION & DEVILLE
16 HOMES SOCAL, INC., a California
17 corporation, WINDERMERE
18 SERVICES SOUTHERN
19 CALIFORNIA, INC., a California
20 corporation,

21 Plaintiffs,

22 v.

23 WINDERMERE REAL ESTATE
24 SERVICES COMPANY, a Washington
25 corporation; and DOES 1-10.

26 Defendants.

27 **AND RELATED COUNTERCLAIMS**

Case No. 5:15-cv-01921-R-KK

Hon. Manual L. Real

**ANSWER OF COUNTER-
DEFENDANTS BENNION &
DEVILLE FINE HOMES, INC.,
BENNION & DEVILLE HOMES
SOCAL, INC., WINDERMERE
SERVICES SOUTHERN
CALIFORNIA, INC., AND
ROBERT L. BENNION TO FIRST
AMENDED COUNTERCLAIM**

1 Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc.,
2 Bennion & Deville Fine Homes SoCal, Inc., and Windermere Services Southern
3 California, Inc., and Counter-Defendant Robert L. Bennion (collectively, the
4 “B&D Parties”) hereby submits this answer to Defendant/Counter-Claimant
5 Windermere Real Estate Services Company’s (“WSC”) First Amended
6 Counterclaim (“FACC”) as follows:

7 **NATURE OF ACTION**

8 1. In answer to Paragraph 1 of the FACC, the B&D Parties are without
9 sufficient knowledge or information to admit or deny the allegations therein, but
10 state that they are informed and believe that the allegations are true.

11 2. In answer to Paragraph 2 of the FACC, the B&D Parties are without
12 sufficient knowledge or information to admit or deny the allegations therein, but
13 state that they do not have any reason to contest the truth of the allegations.

14 3. In answer to Paragraph 3 of the FACC, the B&D Parties deny the
15 allegations contained therein.

16 4. In answer to Paragraph 4 of the FACC, the B&D Parties are without
17 sufficient knowledge or information to admit or deny the allegations therein.

18 5. In answer to Paragraph 5 of the FACC, the B&D Parties deny the
19 allegations therein.

20 6. In answer to Paragraph 6 of the FACC, the B&D Parties (1) are
21 without sufficient information to admit or deny the amount expended by WSC and
22 its principals as to the “Windermere technology system,” that the Technology Fee
23 is “extremely low by industry standards,” and whether WSC sells its technology
24 package to other real estate brokerage businesses in other areas of the United
25 States, (2) deny that the “suite of tools” offered by WSC are “comparable” or
26 “superior” to the technology services offered by competitors, and that WSC’s
27 technology “is so widely respected,” and (3) admit that WSC’s Technology Fee is
28 currently \$68 per agent per month.

1 7. In answer to Paragraph 7 of the FACC, the B&D Parties admit the
2 allegations contained therein.

3 8. In answer to Paragraph 8 of the FACC, the B&D Parties admit the
4 allegations contained therein.

5 9. In answer to Paragraph 9 of the FACC, the B&D Parties deny the
6 allegations that “Bennion and Deville exercised poor business judgment in
7 growing faster than their cash flow could support,” that insinuation that they were
8 “a struggling franchise,” that the loan from WSC was a “personal loan,” that “the
9 company would soon be insolvent,” that the B&D Parties were “[unable] to repay
10 the loan on time,” that “Bennion and Deville asked for a three year extension to the
11 loan term, and that “[t]he loan remains outstanding at this time,” but admits the
12 remaining allegations in the Paragraph.

13 10. In answer to Paragraph 10 of the FACC, the B&D Parties deny that
14 the loan was an “additional personal loan” and that the loan “remains outstanding,”
15 but otherwise admits the allegations in the Paragraph.

16 11. In answer to Paragraph 11 of the FACC, the B&D Parties admit that
17 “WSC agreed to waive” certain franchise and technology fees, but deny that the
18 \$1,151,060.00 amount was ever owed to WSC the allegations contained therein.

19 12. In answer to Paragraph 12 of the FACC, the B&D Parties deny that
20 WSC provided “extraordinary support” or that “Bennion and Deville’s earlier
21 success could not be duplicated,” and admit as to the rest of the allegations
22 contained therein.

23 13. In answer to Paragraph 13 of the FACC, the B&D Parties deny the
24 allegations contained therein.

25 14. In answer to Paragraph 14 of the FACC, the B&D Parties deny the
26 allegations contained therein.

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1 **JURISDICTION AND VENUE**

2 26. In answer to Paragraph 26 of the FACC, the B&D Parties admit that
3 the joinder of Bennion and Deville would not destroy diversity or otherwise affect
4 the Court's subject matter jurisdiction, but deny that Bennion and Deville are
5 property parties to the claims for relief alleged by WSC.

6 27. In answer to Paragraph 27 of the FACC, the B&D Parties admit the
7 allegations contained therein.

8 28. In answer to Paragraph 28 of the FACC, the B&D Parties admit that
9 WSC's Counterclaim is compulsory and that the Court may exercise
10 supplemental/ancillary jurisdiction over the Counterclaim.

11 29. In answer to Paragraph 29 of the FACC, the B&D Parties admit that
12 venue is proper in the Central District of California.

13 **RELEVANT FACTUAL BACKGROUND**

14 30. In answer to Paragraph 30 of the FACC, the B&D Parties admit that
15 Bennion and Deville each personally guaranteed certain franchise fees and costs,
16 but that the personal guarantees were later modified by the parties' execution of the
17 Modification Agreement.

18 31. In answer to Paragraph 31 of the FACC, the B&D Parties deny the
19 allegations contained therein.

20 32. In answer to Paragraph 32 of the FACC, the B&D Parties admit the
21 allegations contained therein.

22 33. In answer to Paragraph 33 of the FACC, the B&D Parties admit that
23 the fees in this Paragraph are identified in the original terms of the Coachella
24 Valley Franchise Agreement, but that those terms were later amended by the
25 parties.

26 34. In answer to Paragraph 34 of the FACC, the B&D Parties admit that
27 the late fee required by the Coachella Valley Franchise Agreement is 10% of the
28 delinquent amount, but deny the rest of the allegations contained therein.

1 35. In answer to Paragraph 35 of the FACC, the B&D Parties admit that
2 the terms referenced in the Paragraph are set forth in the Coachella Valley
3 Franchise Agreement, but deny as to WSC’s summary interpretation of those
4 terms.

5 36. In answer to Paragraph 36 of the FACC, the B&D Parties admit the
6 allegations contained therein.

7 37. In answer to Paragraph 37 of the FACC, the B&D Parties admit the
8 allegations contained therein.

9 38. In answer to Paragraph 38 of the FACC, the B&D Parties deny that
10 “WSC went out of its way to accommodate Bennion and Deville and B&D Fine
11 Homes and to assist them with financial troubles,” but admit the rest of the
12 allegations contained therein.

13 39. In answer to Paragraph 39 of the FACC, the B&D Parties deny as to
14 “extraordinary accommodations,” but admit as to the rest of the allegations
15 contained therein.

16 40. In answer to Paragraph 40 of the FACC, the B&D Parties deny that
17 B&D Fine Homes was “financially untenable,” but admit the rest of the allegations
18 contained therein.

19 41. In answer to Paragraph 41 of the FACC, the B&D Parties admit that
20 Bennion and Deville provided personal guarantees in connection with the
21 Coachella Valley Franchise Agreement, but deny that the amounts are due and
22 owing from them as the personal guarantees were later amended by the
23 Modification Agreement.

24 42. In answer to Paragraph 42 of the FACC, the B&D Parties admit that
25 Bennion and Deville and B&D Fine Homes have refused to remit Franchise Fees
26 to WSC since July 2014 despite demands for payment, but deny as to the rest of
27 the allegations contained therein.

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1 43. In answer to Paragraph 43 of the FACC, the B&D Parties deny the
2 allegations contained therein.

3 44. In answer to Paragraph 44 of the FACC, the B&D Parties admit the
4 allegations contained therein.

5 45. In answer to Paragraph 45 of the FACC, the B&D Parties admit the
6 allegations contained therein.

7 46. In answer to Paragraph 46 of the FACC, the B&D Parties deny that
8 WSC had “the right to assign each new franchisee to an area representative that
9 made the most sense” and that “[n]ew offices would be assigned to an area in
10 WSC’s sole discretion,” but admit the rest of the allegations contained therein.

11 47. In answer to Paragraph 47 of the FACC, the B&D Parties admit that
12 the terms referenced in subsections a, b, and c of the Paragraph, but deny as to
13 WSC’s summary interpretation of the remaining obligations.

14 48. In answer to Paragraph 48 of the FACC, the B&D Parties deny the
15 first sentence of this Paragraph and admit the second sentence.

16 49. In answer to Paragraph 49 of the FACC, the B&D Parties deny that
17 the Area Representation Agreement could be lawfully terminated by WSC without
18 cause, but admit as to the rest of the allegations therein.

19 50. In answer to Paragraph 50 of the FACC, the B&D Parties admit that
20 WSC has accurately quoted from the Area Representation Agreement.

21 51. In answer to Paragraph 51 of the FACC, the B&D Parties deny the
22 allegations contained therein.

23 52. In answer to Paragraph 52 of the FACC, the B&D Parties deny the
24 allegations contained.

25 53. In answer to Paragraph 53 of the FACC, the B&D Parties deny the
26 allegations contained therein.

27 54. In answer to Paragraph 54 of the FACC, the B&D Parties deny the
28 allegations contained.

1 55. In answer to Paragraph 55 of the FACC, the B&D Parties admit to the
2 extent that WSSC was unable to collect License and Technology Fees from all of
3 the franchisees in their territory, but deny as to the rest of the allegations contained
4 therein.

5 56. In answer to Paragraph 56 of the FACC, the B&D Parties admit the
6 allegations contained.

7 57. In answer to Paragraph 57 of the FACC, the B&D Parties admit that
8 WSC provided WSSC with a second notice of termination of the Area
9 Representation Agreement on February 2, 2015, but deny as to the rest of the
10 allegations contained therein.

11 58. In answer to Paragraph 58 of the FACC, the B&D Parties deny the
12 allegations that “Bennion and Deville approached WSC explaining that they were
13 in such financial distress they were in imminent danger of insolvency, and could be
14 forced to close their business,” that the B&D Parties asked for a “personal loan,”
15 that WSC’s affiliated entity provided the B&D Parties with a “personal loan,” and
16 that the B&D Parties “were unable to timely pay the final payment,” but admit the
17 remaining allegations in the Paragraph.

18 59. In answer to Paragraph 59 of the FACC, the B&D Parties deny the
19 allegations that they “approached WSC requesting more funds,” and that the
20 affiliated entity provided the B&D Parties with “another personal loan,” but admit
21 the remaining allegations in the Paragraph.

22 60. In answer to Paragraph 60 of the FACC, the B&D Parties deny the
23 allegations that the loan was a “personal loan,” but otherwise admit the allegations
24 in the Paragraph.

25 61. In answer to Paragraph 61 of the FACC, the B&D Parties deny the
26 allegations therein.

1 62. In answer to Paragraph 62 of the FACC, the B&D Parties admit that
2 Bennion and Deville opened offices in the San Diego area in early 2011, deny as to
3 the rest of the allegations contained therein.

4 63. In answer to Paragraph 63 of the FACC, the B&D Parties admit the
5 allegations contained therein.

6 64. In answer to Paragraph 64 of the FACC, the B&D Parties admit the
7 allegations contained therein.

8 65. In answer to Paragraph 65 of the FACC, the B&D Parties admit that
9 the initial locations under the SoCal Franchise Agreement were La Mesa, Laguna
10 Niguel, Carmel Valley, and Solana Beach/Lomas Santa Fe, but deny the rest of the
11 allegations in the Paragraph.

12 66. In answer to Paragraph 66 of the FACC, the B&D Parties admit the
13 allegations contained therein.

14 67. In answer to Paragraph 67 of the FACC, the B&D Parties admit that
15 Bennion and Deville each personally guaranteed certain franchise fees and costs,
16 but that the personal guarantees were later modified by the parties' execution of the
17 Modification Agreement.

18 68. In answer to Paragraph 68 of the FACC, the B&D Parties admit that
19 Bennion and Deville and B&D SoCal have refused to remit Franchise Fees to
20 WSC since July 2014 despite demands for payment, but deny as to the rest of the
21 allegations contained therein

22 69. In answer to Paragraph 69 of the FACC, the B&D Parties deny the
23 allegations contained therein.

24 70. In answer to Paragraph 70 of the FACC, the B&D Parties are without
25 sufficient knowledge or information to admit or deny the allegations therein, but
26 state that they are informed and believe that the allegations are true.

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1 71. In answer to Paragraph 71 of the FACC, the B&D Parties deny as to
2 WSC's summary interpretation of the parties' agreement, but admit as to the rest of
3 the allegations contained therein.

4 72. In answer to Paragraph 72 of the FACC, the B&D Parties admit the
5 allegations contained therein.

6 73. In answer to Paragraph 73 of the FACC, the B&D Parties deny as to
7 WSC's summary interpretation of the parties' agreement, but admit as to the rest of
8 the allegations contained therein.

9 74. In answer to Paragraph 74 of the FACC, the B&D Parties deny as to
10 WSC's summary interpretation of the parties' agreement, but admit as to the rest of
11 the allegations contained therein.

12 75. In answer to Paragraph 75 of the FACC, the B&D Parties admit that
13 the Modification Agreement did not amend the Area Representation Agreement,
14 but deny the rest of the allegations contained therein.

15 76. In answer to Paragraph 76 of the FACC, the B&D Parties admit the
16 allegations contained therein.

17 77. In answer to Paragraph 77 of the FACC, the B&D Parties deny that
18 the "additional expenses" were not previously discussed, but admit the rest of the
19 allegations therein.

20 78. In answer to Paragraph 78 of the FACC, the B&D Parties admit that
21 WSC has properly quoted from the June 3, 2014 letter attached as Exhibit O to the
22 FACC.

23 79. In answer to Paragraph 79 of the FACC, the B&D Parties admit as to
24 the allegations in the first sentence, but deny the allegations in the second sentence.

25 80. In answer to Paragraph 80 of the FACC, the B&D Parties admit that
26 they did not stay in the Windermere System for 5 additional years, but deny the
27 rest of the allegations contained therein.

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1 81. In answer to Paragraph 81 of the FACC, the B&D Parties deny the
2 allegations contained therein.

3 82. In answer to Paragraph 82 of the FACC, the B&D Parties are without
4 sufficient knowledge or information to admit or deny the allegations therein, but
5 state that they are informed and believe that the allegations are true.

6 83. In answer to Paragraph 83 of the FACC, the B&D Parties are without
7 sufficient knowledge or information to admit or deny the allegations therein.

8 84. In answer to Paragraph 84 of the FACC, the B&D Parties are without
9 sufficient knowledge or information to admit or deny the allegations therein, but
10 state that they are informed and believe that the allegations are true.

11 85. In answer to Paragraph 85 of the FACC, the B&D Parties admit the
12 allegations contained therein.

13 86. In answer to Paragraph 86 of the FACC, the B&D Parties admit the
14 allegations contained therein subject to a reasonable time for the B&D Parties to
15 discontinue use of the Trademark.

16 87. In answer to Paragraph 87 of the FACC, the B&D Parties admit the
17 allegations contained therein.

18 88. In answer to Paragraph 88 of the FACC, the B&D Parties admit the
19 allegations contained therein.

20 89. In answer to Paragraph 89 of the FACC, the B&D Parties admit the
21 allegations contained therein.

22 90. In answer to Paragraph 90 of the FACC, the B&D Parties admit the
23 allegations contained therein.

24 91. In answer to Paragraph 91 of the FACC, the B&D Parties admit that
25 WSC provided the B&D Parties notice of termination dated January 28, 2015 and a
26 second notice of termination dated February 26, 2015, but deny the remaining
27 allegations therein.

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1 92. In answer to Paragraph 92 of the FACC, the B&D Parties admit the
2 allegations contained therein.

3 93. In answer to Paragraph 93 of the FACC, the B&D Parties admit the
4 allegations contained therein.

5 94. In answer to Paragraph 94 of the FACC, the B&D Parties admit the
6 allegations contained therein.

7 95. In answer to Paragraph 95 of the FACC, the B&D Parties admit the
8 allegations contained therein subject to a reasonable time for the B&D Parties to
9 discontinue use of the Trademark.

10 96. In answer to Paragraph 96 of the FACC, the B&D Parties admit the
11 allegations contained therein.

12 97. In answer to Paragraph 97 of the FACC, the B&D Parties admit the
13 allegations contained therein.

14 98. In answer to Paragraph 98 of the FACC, the B&D Parties deny as to
15 the 314 figure, but admit the remaining allegations in the Paragraph.

16 99. In answer to Paragraph 99 of the FACC, the B&D Parties do not have
17 sufficient information needed to admit or deny the date that counsel for WSC
18 “prepared” the October 1, 2015 email communication, but admit the remaining
19 allegations contained therein.

20 100. In answer to Paragraph 100 of the FACC, the B&D Parties deny the
21 allegation that “[c]ounsel for Defendants did not respond,” but admit the remaining
22 allegations in the Paragraph.

23 101. In answer to Paragraph 101 of the FACC, the B&D Parties admit that
24 WSC has properly quoted from the SoCal Franchise Agreement, subject to the
25 inclusion of underlining that is not in the document.

26 102. In answer to Paragraph 102 of the FACC, the B&D Parties do not
27 have sufficient information to either admit or deny the allegations in this
28 Paragraph.

1 114. In answer to Paragraph 114 of the FACC, the B&D Parties deny the
2 allegations contained therein.

3 115. In answer to Paragraph 115 of the FACC, the B&D Parties admit that
4 they have not paid fees since July 2014, but deny the remaining allegations
5 contained therein.

6 116. In answer to Paragraph 116 of the FACC, the B&D Parties deny the
7 allegations contained therein.

8 117. In answer to Paragraph 117 of the FACC, the B&D Parties deny the
9 allegations contained therein.

10 118. In answer to Paragraph 118 of the FACC, the B&D Parties deny the
11 allegations contained therein.

12 119. In answer to Paragraph 119 of the FACC, the B&D Parties admit the
13 allegations contained therein, subject to reasonable time for the B&D Parties to
14 discontinue use of the Trademark.

15 120. In answer to Paragraph 120 of the FACC, the B&D Parties admit the
16 allegations contained therein.

17 121. In answer to Paragraph 121 of the FACC, the B&D Parties deny the
18 allegation that they misused WSC's intellectual property, and admit the remaining
19 allegations in the Paragraph.

20 122. In answer to Paragraph 122 of the FACC, the B&D Parties do not
21 have sufficient information to admit or deny the date the October 1, 2015 letter was
22 prepared, but admit the remaining allegations in the Paragraph.

23 123. In answer to Paragraph 123 of the FACC, the B&D Parties deny the
24 allegation that “[c]ounsel for Defendants did not respond,” but admit the remaining
25 allegations in the Paragraph.

26 124. In answer to Paragraph 124 of the FACC, the B&D Parties deny the
27 allegations contained therein.

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1 147. In answer to Paragraph 147 of the FACC, the B&D Parties deny the
2 allegations contained therein.

3 148. In answer to Paragraph 148 of the FACC, the B&D Parties deny the
4 allegations contained therein.

5 149. In answer to Paragraph 149 of the FACC, the B&D Parties admit the
6 allegations contained therein subject to a reasonable time for the B&D Parties to
7 discontinue use of the Trademark.

8 150. In answer to Paragraph 150 of the FACC, the B&D Parties admit the
9 allegations contained therein.

10 151. In answer to Paragraph 151 of the FACC, the B&D Parties deny that
11 they misused WSC's intellectual property, but admit the remaining allegations in
12 the Paragraph.

13 152. In answer to Paragraph 152 of the FACC, the B&D Parties do not
14 have sufficient information to admit or deny the date the October 1, 2015 letter was
15 prepared, but admit the remaining allegations in the Paragraph.

16 153. In answer to Paragraph 153 of the FACC, the B&D Parties deny the
17 allegation that “[c]ounsel for Defendants did not respond,” but admit the remaining
18 allegations in the Paragraph.

19 154. In answer to Paragraph 154 of the FACC, the B&D Parties deny the
20 allegations contained therein.

21 155. In answer to Paragraph 155 of the FACC, the B&D Parties deny the
22 allegations contained therein.

23 156. In answer to Paragraph 156 of the FACC, the B&D Parties deny the
24 allegations contained therein.

25 157. In answer to Paragraph 157 of the FACC, the B&D Parties lack
26 sufficient information to admit or deny the allegations in the first sentence of the
27 Paragraph, but deny the allegations in the second Paragraph.

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1 **FOURTH CAUSE OF ACTION**

2 158. In answer to Paragraph 158 of the FACC, the B&D Parties state that
3 this Paragraph does not make an allegation of fact or law, and thus cannot be
4 admitted or denied.

5 159. In answer to Paragraph 159 of the FACC, the B&D Parties admit the
6 allegations contained therein.

7 160. In answer to Paragraph 160 of the FACC, the B&D Parties deny the
8 allegations contained therein.

9 161. In answer to Paragraph 161 of the FACC, the B&D Parties deny the
10 allegations contained therein.

11 162. In answer to Paragraph 162 of the FACC, the B&D Parties deny the
12 allegations contained therein.

13 163. In answer to Paragraph 163 of the FACC, the B&D Parties deny the
14 allegations contained therein.

15 164. In answer to Paragraph 164 of the FACC, the B&D Parties lack
16 sufficient information to admit or deny the allegations in the first sentence of the
17 Paragraph, but deny the allegations in the second Paragraph.

18 **FIFTH CAUSE OF ACTION**

19 165. The B&D Parties do not need to answer Paragraphs 165-175 of the
20 FACC as a result of the Court's Order on the parties' Joint Stipulation dismissing
21 Count Five of the FACC. [D.E. 30.]

22 **SIXTH CAUSE OF ACTION**

23 166. The B&D Parties do not need to answer Paragraphs 176-186 of the
24 FACC as a result of the Court's Order on the parties' Joint Stipulation dismissing
25 Count Six of the FACC. [D.E. 30.]

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

3 **SIXTH AFFIRMATIVE DEFENSE**

4 **(Contractual Bar -- Integration Clauses / Parol Evidence Rule)**

5 6. WSC's FACC and the causes of action stated therein are barred in
6 whole or in part by the Parol Evidence Rule and the integration provisions of
7 Section 16 of the Modification Agreement.

8 **SEVENTH AFFIRMATIVE DEFENSE**

9 **(Performance)**

10 7. WSC's FACC and the causes of action stated therein are barred in
11 whole or in part because the B&D Parties performed all obligations they had a
12 duty to perform in light of WSC's failure to perform all obligations owed by it
13 under the agreements.

14 **EIGHTH AFFIRMATIVE DEFENSE**

15 **(Damages Caused by Others)**

16 8. The B&D Parties deny that WSC has been damaged as alleged in the
17 FACC. However, to the extent WSC has been damaged, if at all, those damages
18 were proximately caused by and contributed to in whole or in part by either WSC's
19 own actions or omissions or the actions or omissions of third parties not under the
20 control of the B&D Parties at the time such actions or omissions occurred.

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WHEREFORE, the B&D Parties pray that WSC take nothing by its FACC; and the FACC be dismissed with prejudice; that FACC be denied recovery of any portion of its costs and expenses incurred in bringing this action; that the B&D Parties recover reasonable attorneys' fees and costs from WSC as may be available under law and/or contract; and such other and further relief as the Court may deem proper and just.

DATED: November 27, 2015

MULCAHY LLP

By: /s/ James M. Mulcahy
James M. Mulcahy
Kevin A. Adams
Attorneys for Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion & Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc., and Counter-Defendant Robert L. Bennion