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8  
9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**

11  
12 BENNION & DEVILLE FINE  
13 HOMES, INC., a California  
14 corporation, BENNION & DEVILLE  
15 FINE HOMES SOCAL, INC., a  
16 California corporation, WINDERMERE  
17 SERVICES SOUTHERN  
18 CALIFORNIA, INC., a California  
19 corporation,

20 Plaintiffs,

21 v.

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

25 Defendant.

26 AND RELATED COUNTERCLAIMS

Case No. 5:15-CV-01921 R (KKx)

*Hon. Manual L. Real*

**THE B&D PARTIES' NOTICE OF  
MOTION AND MOTION FOR  
CLARIFICATION, OR, IN THE  
ALTERNATIVE, MOTION FOR  
RECONSIDERATION OF THE  
COURT'S MAY 31, 2017 ORDER  
(DKT. NO. 138)**

Date: July 17, 2017

Time: 10:00 a.m.

Courtroom: 880

Action Filed: September 17, 2015

Disc. Cut-Off: August 29, 2016

Pretrial Conf.: November 15, 2016

*[Filed concurrently with Supporting  
Memorandum of Points and Authorities,  
Declaration of Kevin A. Adams, and  
[Proposed] Order]*

1 TO DEFENDANT/COUNTERCLAIMANT WINDERMERE REAL ESTATE  
2 SERVICES COMPANY (“WSC”) AND ITS ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE THAT ON July 17, 2017, at 10:00 a.m. or as soon  
4 thereafter as counsel may be heard, the Courtroom of the Honorable Manuel L. Real,  
5 located at 255 East Temple Street, Los Angeles, California 90012, Plaintiffs/Counter-  
6 Defendants Bennion & Deville Fine Homes, Inc., Bennion & Deville Fine Homes  
7 SoCal, Inc., Windermere Services Southern California, Inc., and Counter-Defendants  
8 Robert L. Bennion and Joseph R. Deville (collectively, the “B&D Parties”), will and  
9 hereby do move this Court for clarification of the Court’s Order Denying Defendant and  
10 Counterclaimant’s *Daubert* Motion *in Limine* to Exclude Plaintiffs’ Expert (Dkt. No.  
11 138.) (the “Order”), or, in the alternative, for reconsideration of the Order pursuant to  
12 Federal Rules of Civil Procedure, Rules 60(a), 60(b)(1), and 60(b)(6), and the Central  
13 District of California Local Rule 7-18.

14 The B&D Parties file the instant motion seeking clarification and correction of a  
15 serious inconsistency in the Court’s Order. On pages one through four of the Order, the  
16 Court appears to unequivocally deny WSC’s motion to exclude testimony of the B&D  
17 Parties’ damages expert, Peter Wrobel. (*See* Dkt. No. 138.) This denial is supported, in  
18 part, by the Court’s detailed analysis at page 4, lines 7-24 of the Order, finding that WSC  
19 would not be prejudiced by Mr. Wrobel’s testimony. (*See id.*, p.4:24 (WSC has “had  
20 sufficient time to analyze and rebut such a theory.”).) However, in stark contrast to the  
21 Court’s findings and analysis on the *first 4 pages* of the Order, the Court’s summary  
22 paragraph on *page 5* appears to grant, in part, WSC’s motion. (*Id.*, p. 5:9-10.) These  
23 inconsistencies cannot be reconciled, and clarification is necessary.

24 In the event that the Court’s statement on page 5 – and *not* pages 1 through 4 –  
25 reflects the final ruling of the Court, then the B&D Parties move the Court to reconsider  
26 its ruling on two separate and distinct grounds. First, the recent emergence of new  
27 material facts compels the Court to reconsider its decision to limit the testimony of Mr.  
28 Wrobel. Second, assuming that the Court did limit Mr. Wrobel’s testimony, this

1 limitation was done on the mistaken premise that the B&D Parties made an admission of  
2 fact in their opposition papers that is not present. (Dkt. No. 138, p. 4:10-12.) This  
3 phantom admission was never made by the B&D Parties and is directly contradicted by  
4 the record in this case. Accordingly, the B&D Parties respectfully request that the Court  
5 reconsider its ruling and deny, in its entirety, WSC's *motion in limine* to exclude the  
6 testimony of expert witness Peter Wrobel.

7 This motion is based on this Notice of Motion and Motion, the attached  
8 Memorandum of Points and Authorities, the Declaration of Kevin A. Adams and exhibits  
9 thereto, the [Proposed] Order, the pleadings and papers on file in this action, and upon  
10 such argument and evidence as may be presented at the hearing on this matter.

11 DATED: June 9, 2017

**MULCAHY LLP**

12  
13  
14 By: /s/ Kevin A. Adams

Kevin A. Adams

15 *Attorneys for Plaintiffs/Counter-Defendants*  
16 *Bennion & Deville Fine Homes, Inc.,*  
17 *Bennion & Deville Fine Homes SoCal, Inc.,*  
18 *Windermere Services Southern California,*  
19 *Inc., and Counter-Defendants Robert L.*  
20 *Bennion and Joseph R. Deville*

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 The B&D Parties' instant motion is necessary to correct and clarify a discrete, but  
4 important issue in the case. On May 31, 2017, the Court issued an Order that, on its face,  
5 appears to unequivocally *deny* WSC's motion to exclude the testimony of the B&D  
6 Parties' damages expert, Peter Wrobel. [Dkt. No. 138.] However, the last page of the  
7 Order contains language suggesting otherwise. These inconsistencies cannot be  
8 reconciled. As a result, the B&D Parties respectfully request that the Court issue a further  
9 ruling clarify the Order.

10 The Order's caption, introduction, analysis, and conclusion each expressly deny  
11 WSC's motion *in its entirety*. [See generally, Dkt. No. 138.] This includes the Court's  
12 rejection of WSC's attempt to preclude Mr. Wrobel from testifying as to the B&D  
13 Parties' consequential damages arising out of the Little Italy and Encinitas branch offices.  
14 [Id., p. 4:7-24.] The Court's analysis makes clear that (i) the B&D Parties' damages claim  
15 "implicitly includes a theory of consequential damages or inducement," and (ii) WSC  
16 would not be unfairly prejudiced by Mr. Wrobel's testimony on these damages. [See id.,  
17 p. 4:19-24 (The B&D Parties "disclosed the [consequential damages] theory in  
18 September 2016, nearly nine months prior to the trial date in this case. Defendants have  
19 had sufficient time to analyze and rebut such a theory.".)] Despite the Court's express  
20 rejection of WSC's argument, the final page of the Order appears to grant WSC's motion  
21 and preclude Mr. Wrobel from offering testimony on this same category of damages. [Id.  
22 at p. 5:9-10.] These inconsistencies cannot be reconciled without clarification from the  
23 Court.

24 In the event that the Court did intend to grant WSC's motion to exclude a portion  
25 of Mr. Wrobel's testimony, reconsideration and reversal of that ruling are appropriate on  
26 two separate and distinct grounds.

27 **First**, the Court should reconsider its limitation of Mr. Wrobel's testimony under  
28 L.R. 7-18(b) in light of the recent events in the case that show WSC would not be

1 unfairly prejudiced by Mr. Wrobel’s damage calculations. These facts include: (i) WSC’s  
2 submission of an untimely rebuttal expert report directly responding to each of the  
3 damages identified by Mr. Wrobel; (ii) the Court’s May 25, 2017 ruling allowing WSC to  
4 rely upon that untimely rebuttal report at trial (Dkt. No. 133); (iii) the May 17, 2017  
5 deposition of WSC’s damages expert, who addressed each of the B&D Parties’ claimed  
6 damages in the case; and (vi) WSC’s April 5, 2017 deposition of Mr. Wrobel and  
7 corresponding request for (and receipt of) Mr. Wrobel’s file. This recent, extensive  
8 discovery in the case undermines WSC’s argument that it “would be unfairly prejudiced”  
9 because it “has not had the opportunity to take any discovery from Plaintiffs on this  
10 issue.” [Dkt. No. 103-1, p. 17.] Accordingly, the Court should reconsider and reverse its  
11 limitation of Mr. Wrobel’s testimony at trial.

12 **Second**, the Court should reconsider its ruling under FRCP 60(b) as it erroneously  
13 cites to a purported admission by the B&D Parties that is not contained in the record and  
14 contradicted by the facts of the case. Specifically, the Order states that the B&D Parties  
15 “admit” that September 2016 was the “first time” the damages associated with the Little  
16 Italy and Encinitas offices were disclosed to WSC. [Dkt. No. 138, p. 4:10-11.] However,  
17 review of the B&D Parties’ opposition papers shows no such admission. [Dkt. No. 114.]  
18 This purported admission is also contradicted by the prior discovery in the case, showing  
19 that WSC was familiar with the Little Italy and Encinitas lease obligations and losses.  
20 Because the B&D Parties did not make the admission identified by the Court, and, more  
21 importantly, the record contradicts such a finding, the Court should reconsider its  
22 limitation of Mr. Wrobel’s testimony.

23 For these reasons, set forth in detail below, the B&D Parties respectfully request  
24 that the Court issues a revised ruling that denies, in its entirety, WSC’s motion to exclude  
25 the testimony of the B&D Parties’ damages expert Peter Wrobel.

1 **II. THE B&D PARTIES' REQUEST FOR CLARIFICATION IS NECESSARY**  
2 **DUE TO THE APPARENT INCONSISTENCIES IN THE ORDER**

3 On May 31, 2017, this Court issued its Order Denying Defendant and  
4 Counterclaimant's *Daubert* Motion in Limine to Exclude Plaintiff's Expert ("Order").  
5 [Order, Dkt. No. 138.] WSC's motion sought to exclude the expert opinions of the B&D  
6 Parties' damages expert Peter Wrobel ("Wrobel"). [Dkt. No. 103.] WSC moved to  
7 exclude Wrobel's expert opinions on several categories of damages, including, as  
8 relevant here, the "past and future lease obligations owed by B&D SoCal in the amount  
9 of \$1,431,482." [Order, Dkt. No. 138, at 3:4-5.] The first four pages of the Order support  
10 the Court's denial of WSC's motion in its entirety. [See *id.*, at 2:4 ("For the reasons  
11 discussed below, the Motion is denied.").]

12 Presented with the parties' respective arguments concerning B&D SoCal's  
13 damages arising out of its Encinitas and Little Italy offices, the Court made the following  
14 findings:

15 The pretrial conference order states B&D SoCal's claim that WSC breached  
16 the Modification Agreement by failing to make commercially reasonable  
17 efforts to curtail Windermere Watch. ***This general claim implicitly includes***  
18 ***a theory for consequential damages or inducement.*** Furthermore, Plaintiffs  
19 disclosed the theory in September 2016, nearly nine months prior to the trial  
20 date in this case. ***Defendants have had sufficient time to analyze and rebut***  
21 ***such a theory.***

22 [Order, Dkt. No. 138, at 4:19-24 (emphasis added).] It seems clear from this analysis  
23 that the Court found that the B&D Parties properly preserved this category of documents  
24 and that WSC would not be prejudiced by Wrobel's related testimony at trial. At the  
25 conclusion of the Order, the Court held "that WSC's *Daubert* Motion in Limine to  
26 Exclude Plaintiffs' Expert Peter Wrobel (Dkt. No. 103) is DENIED." [*Id.*, at 5.]

27 In short, the Order made clear that (i) the B&D Parties preserved their claim for  
28 consequential damages associated with the Little Italy and Encinitas branch offices, and  
(ii) WSC was not prejudiced because it had sufficient time to analyze and rebut this  
theory of damages. [*Id.*, p. 4:7-24.] Notwithstanding the Court's extensive analysis and

1 apparent denial of WSC’s motion in its entirety, the Order confusingly states, “because  
2 Plaintiffs did not disclose their theory of damages related to the Encinitas and Little Italy  
3 branches prior to the discovery cutoff and pretrial conference order, Wrobel’s proposed  
4 testimony relating to those damages is excluded.” [*Id.*, at 5:8-10.] This statement is  
5 inconsistent with the Court’s prior findings and cannot be reconciled with WSC’s  
6 inability to show any unfair prejudice.

7 Because the Court’s findings, analysis and conclusion each support the denial of  
8 WSC’s motion in its entirety, the B&D Parties respectfully request that the Court issue a  
9 clarified order that unequivocally denies WSC’s motion in its entirety so that the parties  
10 can appropriately prepare for trial in this case.

11 **III. IN THE EVENT THAT THE COURT INTENTIONALLY LIMITED THE**  
12 **TESTIMONY OF WROBEL, THE B&D PARTIES RESPECTFULLY**  
13 **REQUEST THAT THE COURT RECONSIDER**

14 As set forth above, the Court’s analysis and findings support its ultimate  
15 conclusion to deny WSC’s motion in its entirety. In the unlikely event that the Court  
16 changes its analysis and findings, the B&D Parties respectfully request that the Court  
17 reconsider its ruling and issues a revised ruling that denies WSC’s motion *in limine* to  
18 exclude the expert testimony of Wrobel, in its entirety.

19 Motions for reconsideration are justified where there is the availability of new  
20 evidence or the need to correct a clear error or prevent manifest injustice. *See Page v.*  
21 *Something Weird Video*, 960 F.Supp. 1438, 1440 (C.D. Cal. 1996). Central District L.R.  
22 7-18 provides the basis for bringing a motion for reconsideration in this judicial district.  
23 The Local Rule provides, in relevant part: “[a] motion for reconsideration of the decision  
24 on any motion may be made only on the grounds of [...] (b) the emergence of new  
25 material facts or a change of law occurring after the time of such decision, or (c) a  
26 manifest showing of a failure to consider material facts presented to the Court before  
27 such decision.” L.R. 7-18 (December 1, 2016).

1           However, L.R. 7-18 does not serve as the exclusive grounds for reconsideration in  
2 the Central District. *See United States v. Lavender*, 2015 U.S. Dist. LEXIS 51805, at \*2  
3 (C.D. Cal. 2015) (court considers motion for reconsideration under both L.R. 7-18 and  
4 FRCP 60(b)); *American Bullion, Inc. v. Regal Assets, LLC*, 2014 U.S. Dist. LEXIS  
5 178714, \*3-4 (C.D. Cal. Dec. 30, 2014) (same); *see also, NRDC v. Cnty. of L.A.*, 2015  
6 U.S. Dist. LEXIS 40761, at \*11 (C.D. Cal. 2015) (citing *Atchison, Topeka & Santa Fe*  
7 *R.R. v. Hercules Inc.*, 146 F.3d 1071, 1074 (9th Cir. 1998)) (“A court’s local rules have  
8 the force and effect of law, so long as they are not inconsistent with statute or the  
9 Federal Rules.”). FRCP 60(b) allows the Court to “relieve a party or its legal  
10 representative from a final judgment, order, or proceeding for the following reasons:

- 11           (1) mistake, inadvertence, surprise, or excusable neglect;  
12                     [...] or  
13           (6) any other reason that justifies relief.”

14 *See also Dufour v. Allen*, 2015 U.S. Dist. LEXIS 168364, at \*2 (C.D. Cal. 2015).

15 Additionally, under FRCP 60(a), “the court may correct a clerical mistake arising from  
16 oversight or omission whenever one is found in a judgment, order, or other part of the  
17 record.”

18           Here, the Court should reconsider its Order limiting Wrobel’s testimony because  
19 (i) new facts have emerged that show WSC would not suffer any unfair prejudice from a  
20 denial of its motion in its entirety, and (ii) the Court erroneously cites to a purported  
21 admission by the B&D Parties that is not contained in the record and contracted by the  
22 facts of the case. As explained in detail below, any limitation on Wrobel’s testimony  
23 should be reconsidered and reversed on each of these separate and distinct grounds.

24           A.     **THE EMERGENCE OF NEW MATERIAL FACTS SHOW THAT**  
25                   **DISCOVERY HAS CONTINUED AND WSC WOULD NOT BE**  
26                   **UNFAIRLY PREJUDICED BY WROBEL’S TESTIMONY**

27           Page five of the Order purports to limit Wrobel’s testimony because the B&D  
28 Parties did not disclose their damages relating to the Encinitas and Little Italy offices  
prior to the close of discovery in the case. [Dkt. No. 138, p. 5:8-10.] The Court



1 previously rejected this contention at page four of the Order, finding that WSC has had  
2 more than nine months with this information, providing it “sufficient time to analyze and  
3 rebut such a theory.” [*Id.*, p. 4:22-24.] However, assuming the Court did not make such a  
4 finding, the continued, extensive discovery of the parties through May 2017 raises new  
5 material facts that require the Court to reconsider its limitation of Wrobel’s testimony.

6 WSC has designated damages expert, Neal Beaton (“Beaton”), to analyze and  
7 rebut each of the damage calculations advanced by the B&D Parties. (Declaration of  
8 Kevin Adams (“Adams Decl.”), ¶ 6, Ex. G.) On May 17, 2017, Beaton was deposed.<sup>1</sup>  
9 This deposition occurred long after WSC (i) learned of the B&D Parties’ damages in  
10 connection with the Little Italy and Encinitas offices, (ii) received Wrobel’s expert  
11 report on damages, and (iii) obtained Wrobel’s entire file and substantiation for his Little  
12 Italy and Encinitas damage calculations. (Adams Decl., ¶ 8.) Importantly, Beaton’s  
13 deposition also occurred after he personally attended and participated in Wrobel’s  
14 deposition of April 5, 2017, during which time WSC’s counsel extensively questioned  
15 Wrobel regarding the Little Italy and Encinitas office damages. (Adams Decl., ¶ 7, Ex.  
16 H, at 3, 147, 154:16 – 165:25; Ex. I, at 167:11-17.) For instance, WSC’s counsel  
17 questioned Wrobel on his inclusion of these two offices and not others owned by the  
18 B&D Parties, WSC’s inducement of B&D SoCal to open these offices, mitigation of  
19 damages, Wrobel’s calculation methodology, and Wrobel’s expert opinion on these  
20 items, among other things. (*Id.*) Beaton was present for Wrobel’s entire deposition.  
21 (Adams Decl., ¶ 7.)

22 Nearly a month and a half later, Beaton was deposed. (Adams Decl., ¶ 8, Ex. I.)  
23 He testified at length regarding Wrobel’s opinions and the B&D Parties’ pursuit of  
24 damages in connection with the Little Italy and Encinitas offices. (*Id.*, ¶ 8, Ex. I, 167:11-  
25 172:8.) With respect to this particular category of damages, Beaton testified that he  
26 would correct portions of Wrobel’s expert report, and also offered a mitigation and  
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28 <sup>1</sup> The deposition took place after the parties had fully briefed the Court on WSC’s  
motion to exclude the testimony of Wrobel. (*See* Dkt. Nos. 103, 114, 119.)

1 offsetting valuation analysis. (*Id.*, Ex. I, pp. 167:11-172:8.)

2 Because extensive discovery has continued through May 2017, the Court’s  
3 limitation of Wrobel’s testimony on the flawed premises that discovery concluded in  
4 August 2016 should be reconsidered. WSC has not been “sandbagged” – as it claims –  
5 as its own expert has fully examined and rebutted all of the damages identified by the  
6 B&D Parties in this case.

7 Moreover, on May 25, 2017, the Court issued a ruling that allows WSC to rely  
8 upon Beaton’s untimely rebuttal opinions at trial. [Dkt. No. 133.] As the Court is aware,  
9 the B&D Parties timely presented WSC with Wrobel’s expert report on September 16,  
10 2016. (Adams Decl., ¶ 5.) Rule 26 of the Federal Rules of Civil Procedure (“FRCP”)  
11 required WSC to submit any rebuttal reports by October 2016. For reasons not  
12 identified, WSC waited until March 3, 2017 to serve Beaton’s rebuttal report.<sup>2</sup> (Adams  
13 Decl., ¶ 6.) The B&D Parties moved to strike the report as untimely. [Dkt. No. 84.] Last  
14 month, the Court denied the motion finding that the B&D Parties were not sufficiently  
15 harmed by the late submission. [Dkt. No. 133, p. 2.] This recent ruling by the Court,  
16 alone, provides a sufficient basis for the Court to reconsider its limitation of Wrobel’s  
17 testimony.

18 In the rebuttal report, Beaton analyzes and purports to refute each of the damage  
19 calculations identified in Wrobel’s report. (Adams Decl., Ex. G, at 4-5.) As Beaton  
20 states in his report, “[o]f the four categories of damage set forth in the Wrobel Report,  
21 only two *require an in-depth expert discussion and analysis*, namely the calculation of  
22 WSSC’s net value and *the past and future losses and lease obligations* [at the Encinitas  
23 and Little Italy locations].” (*Id.*, Ex. G, ¶ 12.) Beaton goes on to conduct an in-depth  
24 analysis of these damages, and discusses them at length throughout his report. (*Id.*, Ex.  
25 F, ¶¶ 10, 12, 27, 28, 31.) This rebuttal report shows that WSC has had sufficient time  
26 and information to address – and, has addressed – the B&D Parties’ damages in  
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28 <sup>2</sup> Notably, the Court correctly found that “[WSC] ha[s] had sufficient time to analyze  
and rebut such a theory.” (Order, Dkt. No. 138, at 4:24.)

1 connection with the Little Italy and Encinitas offices. WSC’s claim of prejudice is  
2 without merit and the Court should reconsider its limitation of Wrobel’s testimony in  
3 light of its ruling on Beaton’s corresponding rebuttal report.

4 In short, the recent, material events in the case undermine WSC’s argument that it  
5 “would be unfairly prejudiced” because it “has not had the opportunity to take any  
6 discovery from Plaintiffs on this issue.” [Dkt. No. 103-1, p. 17.] In truth, WSC did  
7 conduct extensive discovery on all of Wrobel’s opinions. Accordingly, the Court should  
8 reconsider and reverse its limitation of Mr. Wrobel’s testimony at trial.

9 **B. The Court Erroneously Found That The B&D Parties Had Admitted A**  
10 **Fact That Is Not Contained In The Record And Is Contradicted By the**  
11 **Evidence**

12 In the Order, the Court erroneously found that the B&D Parties “admit that the  
13 first time they disclosed [the Little Italy and Encinitas] damages was in Wrobel’s expert  
14 report.” (Order, Dkt. No. 138, at 4:10-12.) However, review of the B&D Parties’ papers  
15 reveals no such admission. More importantly, the prior discovery in the case shows that  
16 WSC was on notice of the B&D Parties’ losses in connection with the Little Italy and  
17 Encinitas offices long before September 2016. As a result of this error, the Court should  
18 reconsider its Order.

19 Wrobel’s damage calculations for the Little Italy and Encinitas office consist of  
20 lost income and the present value of the lease obligations. (Adams Decl., Ex. F.) During  
21 discovery, both sides produced evidence of these losses and lease obligations. (Adams  
22 Decl., ¶¶ 3, 4, Exs. A-E.) For instance, on April 8, 2016, the B&D Parties produced  
23 profit and loss statement detailing the losses at the Encinitas and Little Italy locations  
24 through the conclusion of the parties’ relationship in 2015. (*Id.*, Exs. A, B.) On May 6,  
25 2016, WSC produced copies of the lease agreements for the Encinitas and Little Italy  
26 locations.<sup>3</sup> (*Id.*, Exs. C, D, E.) These leases clearly identify the B&D Parties’ monthly  
27

28 <sup>3</sup> WSC’s pre-litigation possession and subsequent production of the relevant lease  
agreements shows that it was well aware of the B&D Parties’ lease obligations prior to

1 financial obligations along with the remaining term of the lease. (*Id.*) WSC's knowledge  
2 of the B&D Parties' losses and continuing financial obligations contradicts the Court's  
3 finding that such information was not known to WSC until September 2016. To the  
4 extent the Court limited Wrobel's testimony on this purported admission of the B&D  
5 Parties, reconsideration is appropriate under L.R. 7-18 and FRCP 60.

6 **IV. CONCLUSION**

7 For the reasons stated above, the B&D Parties respectfully request that the Court  
8 clarify that it denied in total WSC's motion to exclude Wrobel's expert testimony. In the  
9 event that the Court did intend to limit Wrobel's testimony, the B&D Parties respectfully  
10 request that the Court reconsider its ruling and deny WSC's motion to exclude the  
11 testimony of Wrobel in its entirety.

12  
13 Dated: June 9, 2017

**MULCAHY LLP**

14  
15 By: /s/ Kevin A. Adams

16 Kevin A. Adams

17 *Attorneys for Plaintiffs and Counter-Defendants*  
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September 2016. WSC's argument to the contrary should be rejected.