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9 *Attorneys for Plaintiffs and Counter-Defendants*

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

12 BENNION & DEVILLE FINE ) Case No. 5:15-cv-01921-R-KK  
13 HOMES, INC., a California ) *Hon. Manual L. Real*  
14 corporation, BENNION & DEVILLE )  
15 FINE HOMES SOCAL, INC., a ) **PLAINTIFFS' AND COUNTER-**  
16 California corporation, ) **DEFENDANTS'S NOTICE OF**  
17 WINDERMERE SERVICES ) **MOTION AND MOTION TO**  
18 SOUTHERN CALIFORNIA, INC., a ) **STRIKE DEFENDANTS AND**  
19 California corporation, ) **COUNTER-PLAINTIFFS'**  
20 ) **REBUTTAL EXPERT REPORT**

Plaintiffs, )

21 v. )

22 WINDERMERE REAL ESTATE ) Date: May 1, 2017  
23 SERVICES COMPANY, a ) Time: 10:00 a.m.  
24 Washington corporation; and DOES ) Courtroom: 880  
25 1-10. ) Action Filed: September 17, 2015  
26 ) Trial: May 30, 2017

27 Defendants. )

28 AND RELATED COUNTERCLAIMS )

1 TO DEFENDANT/COUNTER-CLAIMANT WINDERMERE REAL  
2 ESTATE SERVICES COMPANY (“Windermere”) AND ITS ATTORNEYS OF  
3 RECORD:

4 PLEASE TAKE NOTICE THAT ON May 1, 2017, at 10:00 a.m. or as soon  
5 thereafter as counsel may be heard, the Courtroom of the Honorable Manuel L.  
6 Real, located at 255 East Temple Street, Los Angeles, California 90012,  
7 Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion &  
8 Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc.,  
9 and Counter-Defendants Robert L. Bennion and Joseph R. Deville (collectively,  
10 referred to herein as the “B&D Parties”), will and hereby do move this Court to  
11 grant their Motion to Strike the rebuttal expert report of Neil J. Beaton (“Beaton”)  
12 as untimely and preclude any testimony about the rebuttal report.

13 Windermere should not be allowed blindsided the B&D Parties with a rebuttal  
14 expert report that is more than *five months* and after the B&D Parties expert has  
15 already prepared for trial. The B&D Parties served their initial expert disclosure  
16 pursuant to Rule 26 of the FRCP on September 16, 2016. The B&D Parties have  
17 not made any supplemental or amended disclosures. As a result, any rebuttal report  
18 was due on or before October 17, 2016. No such report was served. Given the  
19 passage of months since the service deadline, the B&D Parties’ and their expert,  
20 Peter D. Wrobel (“Wrobel”), began preparing for trial thinking that no rebuttal  
21 report would be submitted. Incredibly, and without warning, Windermere served  
22 Beaton’s rebuttal expert report on March 3, 2017—*over five months after it was*  
23 *due*. The B&D Parties have objected to the late submission and Windermere has  
24 refused to withdraw the untimely report. The B&D Parties bring the instant motion  
25 to strike.

26 Given such an egregious violation of the expert disclosure timeline and the  
27 prejudice that would confront the B&D Parties if the untimely report is allowed,  
28 FRCP 37(c)’s self-executing remedy excluding untimely expert disclosures is

1 appropriate here. For the reasons set forth in more detail in the memorandum  
2 concurrently filed herewith, the untimely rebuttal expert report should be stricken,  
3 testimony about the report excluded from trial, and the B&D Parties should be  
4 awarded its attorneys' fees incurred having to bring this motion.

5 This motion is made under the provisions of Federal Rules of Civil  
6 Procedure 26 and 37, and is based on this Notice of Motion and Motion, the  
7 attached Memorandum of Points and Authorities, supporting declaration of Kevin  
8 A. Adams, the [Proposed] Order filed and lodged herewith, the pleadings and  
9 papers on file in this action, and upon such argument and evidence as may be  
10 presented at the hearing on this matter.

11 Dated: April 3, 2017

**MULCAHY LLP**

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14 By: /s/ Kevin A. Adams  
15 Kevin A. Adams  
16 *Attorneys for Plaintiffs/Counter-*  
17 *Defendants Bennion & Deville Fine*  
18 *Homes, Inc., Bennion & Deville Fine*  
19 *Homes SoCal, Inc., Windermere*  
20 *Services Southern California, Inc.,*  
21 *and Counter-Defendants Robert L.*  
22 *Bennion and Joseph R. Deville*  
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