

1 **MULCAHY LLP**

James M. Mulcahy (SBN 213547)

2 *jmulcahy@mulcahyllp.com*

3 Kevin A. Adams (SBN 239171)

kadams@mulcahyllp.com

4 Douglas R. Luther (SBN 280550)

5 *dluther@mulcahyllp.com*

6 Four Park Plaza, Suite 1230

Irvine, California 92614

7 Telephone: (949) 252-9377

8 Facsimile: (949) 252-0090

9 *Attorneys for Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc.,*
10 *Bennion & Deville Fine Homes SoCal, Inc., Windermere Services Southern California,*
11 *Inc., and Counter-Defendants Robert L. Bennion and Joseph R. Deville*

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

| | | | |
|----|----------------------------------|---|---|
| 14 | BENNION & DEVILLE FINE |) | Case No. 5:15-cv-01921-R-KK |
| 15 | HOMES, INC., a California |) | <i>Hon. Manual L. Real</i> |
| 16 | corporation, BENNION & DEVILLE |) | |
| 17 | FINE HOMES SOCAL, INC., a |) | SUPPLEMENTAL MEMORANDUM IN |
| 18 | California corporation, |) | SUPPORT OF PLAINTIFFS' MOTION |
| 19 | WINDERMERE SERVICES |) | TO COMPEL PRODUCTION OF |
| 20 | SOUTHERN CALIFORNIA, INC., a |) | DOCUMENTS AND RESPONSES [L.R. |
| 21 | California corporation, |) | 37-2.3] |
| 22 | |) | |
| 23 | Plaintiffs, |) | Date: June 6, 2016 |
| 24 | |) | Time: 10:00 a.m. |
| 25 | v. |) | Place: Courtroom No. 8 |
| 26 | |) | |
| 27 | WINDERMERE REAL ESTATE |) | Discovery Cutoff: August 29, 2016 |
| 28 | SERVICES COMPANY, a |) | Pretrial Conference: September 19, 2016 |
| | Washington corporation; and DOES |) | Trial: October 18, 2016 |
| | 1-10. |) | |
| | |) | Complaint filed: September 17, 2015 |
| | Defendants. |) | First Amended Complaint filed: |
| | <u>AND RELATED COUNTERCLAIMS</u> |) | October 14, 2015 |

1 Pursuant to Local Rule (“L.R.”) 37-2.3, Plaintiffs Bennion & Deville Fine Homes,
2 Inc. (“B&D Fine Homes”), Bennion & Deville Fine Homes SoCal, Inc. (“B&D SoCal”),
3 and Windermere Services Southern California, Inc. (“Services SoCal”) (collectively,
4 “Plaintiffs”), hereby submit the following Supplemental Memorandum in support of
5 Plaintiffs’ Motion to Compel Further Responses to Document Production Requests and
6 the Production of Documents from Defendant/Counterclaimant Windermere Real Estate
7 Services Company (“WSC”).

8 **I. PLAINTIFFS’ REQUESTED RELIEF SHOULD STILL BE GRANTED**

9 WSC’s discovery responses and document production should have been timely
10 produced in the case on January 20, 2016. (Adams Decl., ¶4.¹) Despite nearly four
11 months of delay, WSC continued to drag its feet and refused to provide a date in which
12 its production and supplemental responses would be complete. This left Plaintiffs with no
13 choice but to pursue the instant motion to compel.

14 Incredibly, mere days after Plaintiffs notified WSC of their intended motion, WSC
15 produced more than 41,000 pages of documents – dwarfing the 14,002 total pages it had
16 produced between January and April 2016. (Feasby Decl., ¶ 12.) Nonetheless, WSC’s
17 production and written responses were still lacking and the Joint Stipulation re: Plaintiffs’
18 Motion to Compel was filed with the Court on May 6, 2016. [D.E. 42.] After the motion
19 was filed, on May 9, 2016, Plaintiffs received WSC’s supplemental written responses and
20 several thousand additional pages of responsive documents.

21 WSC’s immediate supplementation of its written responses and substantial
22 production of documents validates Plaintiffs’ preparation and pursuit of the instant
23 motion to compel. Now, Plaintiffs are tasked with reviewing, in short order, the
24 supplemental responses and nearly 45,000 pages of documents to ensure the
25 completeness of WSC’s responses. These are not tasks that Plaintiffs have been able to
26

27
28 ¹ All truncated citations are consistent with the citations used in the parties’ Joint
Stipulation. *See* D.E. 42.

1 complete in advance of the May 23, 2016 Supplemental Memorandum filing deadline.
2 *See* L.R. 37-2.3. Nonetheless, Plaintiffs’ requested relief is still warranted and should be
3 ordered.

4 As explained in detail below, notwithstanding WSC’s recent, untimely production,
5 Plaintiffs’ requested relief is still necessary and appropriate. Accordingly, Plaintiffs’
6 motion to compel should be granted.

7 **A. An Order Compelling WSC To Produce The Responsive Materials Is**
8 **Still Necessary And Appropriate**

9 To date, WSC has employed a so-called “rolling production” and produced
10 documents to Plaintiffs in six separate batches. The most recent batch provided by WSC
11 was received by Plaintiffs on May 9, 2016. Although WSC’s total production consists of
12 over 58,000 pages of material – inclusive of significant duplication – this figure is far less
13 than the 150,000 pages of material that WSC’s counsel originally represented would be
14 produced by WSC in the case. (Feasby Decl., ¶ 5.) Moreover, WSC has not represented
15 that this “sixth round of production” constitutes its final production. Without such a
16 representation, the completeness and finality of WSC’s production is unknown to
17 Plaintiffs. Because the status of WSC’s production is unclear, a Court order directing
18 WSC to produce all remaining responsive materials in its possession, custody or control
19 by a specified deadline is needed.

20 Likewise, the completeness of WSC’s interrogatory responses is also in question.
21 As reflected in Plaintiffs’ portion of the Joint Stipulation, WSC responded to a large
22 volume of the interrogatories by simply stating that it will “produce documents reflecting
23 this information.” [*See* D.E. 42, Joint Stipulation, pp. 45-49.] However, consistent with
24 Fed. R. Civ. Pro. 33(d), to respond to interrogatories through reference to documents,
25 WSC must “specify where in the records the answers [can] be found.” *Rainbow Pioneer*
26 *# 44-18-04A v. Hawaii-Nevada Inv. Corp.*, 711 F.2d 902, 906 (9th Cir. 1983); *see also*
27 *Walt Disney Co. v. DeFabiis*, 168 F.R.D. 281, 284 (C.D.Cal.1996) (specification of
28 records must be in sufficient detail to allow party to locate and identify documents from

1 which the interrogatory answer may be ascertained, as readily as the party served). When
2 confronted with the above authority, WSC agreed to supplement those interrogatories at
3 issue, and has recently done so by identifying the Bates number(s) of the related
4 document(s).

5 In light of its recent supplemental responses, WSC's interrogatory responses
6 appear to be complete. However, in the event that additional documents are produced,
7 those additional documents may require WSC to amend its responses to Interrogatory
8 Request No. 3 – which cites to the Bates numbers of documents in WSC's production.
9 Thus, to the extent WSC's document production is not complete, its interrogatory
10 response may also require further supplementation. Again, a Court order directing WSC
11 to provide all supplemental interrogatory responses by a specified deadline is needed.

12 **B. WSC Should Be Ordered To Provide Declaration Testimony Describing**
13 **How The Responsive Materials Were Collected And Produced**

14 As set forth in Plaintiffs' portion of the Joint Stipulation, WSC had failed to
15 produce all responsive documents from a number of custodians. *See* Mulcahy Decl., ¶ 3.
16 “When the response is minimal and clearly omits materials from readily identifiable
17 repositories likely to include some or all of the requested materials or information, the
18 obvious conclusion is that the responding party has neither conducted a reasonable
19 inquiry nor produced all documents within its possession, custody or control.” *Meeks v.*
20 *Parsons*, 2009 U.S. Dist. LEXIS 90283 (E.D. Cal. Sept. 18, 2009). WSC's production
21 shortcomings and extended delays reveal that it has not conducted a proper and diligent
22 inquiry to locate responsive documents.

23 In order for Plaintiffs to quickly get to the bottom of WSC's production
24 deficiencies, Plaintiffs ask the Court to order WSC to provide declarations or affidavits
25 detailing the nature of its “reasonable inquiry” to locate responsive documents on a
26 request-by-request basis. *See A. Farber & Ptners., Inc. v. Garber*, 234 F.R.D. 186, 190
27 (C.D. Cal. 2006); *Rogers v. Giurbino*, 288 F.R.D. 469, 485 (S.D. Cal. 2012) (“A party
28 must make a reasonable inquiry to determine whether responsive documents exist, and if

1 they do not, the party should so state with sufficient specificity to allow the Court to
2 determine whether the party made a reasonable inquiry and exercised due diligence.”)

3 At this point, WSC has produced a declaration from Paul Drayna, its General
4 Counsel, acknowledging receipt of Plaintiffs’ discovery requests in December 2015, and
5 engaging a meeting with litigation counsel in January 2016. (Drayna Decl., ¶¶ 3-4.)
6 However, following the January meeting with counsel, Mr. Drayna fails to identify any
7 additional dates in which he or WSC engaged in any efforts to locate and produce the
8 responsive materials. This naturally calls into question the nature of WSC’s “reasonable
9 inquiry” to locate the responsive materials.

10 Because of this, WSC should be ordered to provide a verified declaration or
11 affidavit that: (1) details the extent of its efforts to comply with Plaintiffs’ discovery
12 requests, (2) acknowledges WSC’s full compliance with its discovery obligations, and (3)
13 represents that production is complete.

14 Further, WSC’s counsel represented in his filing with the Court that “a matrix of
15 the document requests at issue” has been created to verify that WSC has complied with
16 many of the discovery obligations in the case. (Feasby Decl., ¶¶ 10-11.) Plaintiffs request
17 that WSC be ordered to produce this matrix to help expedite the extensive discovery
18 delay already caused by WSC and allow Plaintiffs the ability to confirm WSC’s
19 representations regarding its production.

20 **C. WSC Should Be Ordered To Pay Plaintiffs’ Reasonable Attorneys’ Fees**
21 **And Costs In Bringing The Motion To Compel**

22 As explained in the Declaration of Kevin Adams filed in support of Plaintiffs’
23 motion to compel, this is not the first time that Plaintiffs have been forced to expend
24 significant attorneys’ fees in preparing a motion to compel discovery in order to gain
25 Defendants’ cooperation. (D.E. 42-2, Adams Decl., ¶ 16.) In late February 2016, after
26 meeting and conferring with WSC regarding the inadequacies in its written discovery
27 responses, Plaintiffs prepared a motion to compel and began the joint stipulation and
28 filing process set forth in L.R. 37-2. After drafting its portion of the joint stipulation and

1 supporting documents, WSC capitulated to Plaintiffs' requests and agreed to supplement
2 its responses. Because WSC ultimately supplemented its responses, Plaintiffs did not
3 pursue their first motion to compel and did not seek (or obtain) the recovery of attorneys'
4 fees from WSC in connection with the preparation of the moving papers.

5 Plaintiffs again find themselves having to incur substantial attorneys' fees in
6 forcing WSC to comply with its discovery obligations. An award of reasonable attorneys'
7 fees and costs should be awarded under these circumstances. *See Nat'l Ass'n of Radiation*
8 *Survivors v. Turnage*, 115 F.R.D 543, 558 (N.D. Cal. 1987) (the responding party's
9 "failure to produce clearly responsive documents and information" among other items,
10 made fees and costs recoverable); *see also Advanced Visual Image Design*, 2015 U.S.
11 Dist. LEXIS at *23 (awarding fees due, in part, to the responding party's "unjustified
12 delay in producing documents").
13

14 Accordingly, Plaintiffs respectfully request that they be awarded fees and costs in
15 bringing the instant motion to compel.²

16 Dated: March 4, 2016

MULCAHY LLP

17 By: /s/ Kevin A. Adams

18 James M. Mulcahy

19 Kevin A. Adams

20 *Attorneys for Plaintiffs/Counter-Defendants*

21 *Bennion & Deville Fine Homes, Inc.,*

22 *Bennion & Deville Fine Homes SoCal, Inc.,*

23 *Windermere Services Southern California, Inc.,*

24 *and Counter-Defendants Robert L. Bennion and*

25 *Joseph R. Deville*

26 _____
27 ² Upon the issuance of a preliminary award by the Court granting Plaintiffs' their fees
28 and costs, Plaintiffs will provide the Court with the necessary declaration and supporting
documents setting forth those fees and costs incurred by Plaintiffs in bringing this
motion.

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF ORANGE

3 I am employed in the County of Orange, State of California. I am over the age of 18 and not
4 a party to the within action; my business address 4 Park Plaza, Suite 1230, Irvine, CA 92614.

5 On May 23, 2016, I served document(s) described as **SUPPLEMENTAL**
6 **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL PRODUCTION**
7 **OF DOCUMENTS AND RESPONSES [L.R. 37-2.3]** on the following person at the addresses
and/or facsimile number below:

8 Pérez Wilson Vaughn & Feasby
9 John Vaughn
750 B. Street, 33rd Floor
10 San Diego, CA 92101
vaughn@perezwilson.com

11 [] VIA FACSIMILE – Based on an agreement by the parties to accept service by fax
12 transmission, I faxed the documents from a fax machine in Irvine, California, with the
13 number 949-252-0090, to the parties and/or attorney for the parties at the facsimile
14 transmission number(s) shown herein. The facsimile transmission was reported as complete
without error by a transmission report, issued by the facsimile transmission upon which the
transmission was made, a copy of which is attached hereto.

15 [X] BY ELECTRONIC SERVICE – Based on a court order or agreement of the parties to accept
16 service by electronic transmission, I caused the documents to be sent to the persons at the
17 electronic notification addresses listed herein on the above referenced date. I did not receive,
18 within a reasonable time after the transmission, any electronic message or other indication
that the transmission was unsuccessful.

19 [] BY MAIL - I am "readily familiar" with the firm's practice of collection and processing
20 correspondence for mailing. Under that practice it would be deposited with the U.S. postal
21 service on that same day, with postage thereon fully prepaid, at Irvine, California in the
22 ordinary course of business. I am aware that on motion of the party served, service is
presumed invalid if postal cancellation date or postage meter date is more than one day after
date of deposit for mailing in affidavit.

23 [] BY CERTIFIED MAIL - I am "readily familiar" with the firm's practice of collection and
24 processing correspondence for mailing. Under that practice it would be deposited with the
25 U.S. postal service on that same day, with postage thereon fully prepaid, at Irvine, California
26 in the ordinary course of business. I am aware that on motion of the party served, service is
presumed invalid if postal cancellation date or postage meter date is more than one day after
date of deposit for mailing in affidavit.

27 [] BY FEDERAL EXPRESS – I am readily familiar with the firm's practice of collection and
28 processing correspondence for Federal Express. Under that practice it would be deposited

1 with Federal Express on that same day in the ordinary course of business for overnight
2 delivery with delivery costs thereon fully prepaid by sender, at Irvine, California.

3 [] BY MESSENGER SERVICE – I served the documents by placing them in an envelope or
4 package addressed to the persons at the addresses listed herein and providing them to a
5 professional messenger service for service. A declaration by the messenger service will be
6 filed separately.

7 I declare under penalty of perjury under the laws of the State of California and the United
8 States of America that the above is true and correct.

9 Executed on **May 23, 2016** at Irvine, California.

10 By: /s/ Barbara Calvert
11 Barbara Calvert