

1 **MULCAHY LLP**
James M. Mulcahy (SBN 213547)
2 *jmulcahy@mulcahyllp.com*
3 Kevin A. Adams (SBN 239171)
4 *kadams@mulcahyllp.com*
Five Park Plaza, Suite 1230
5 Irvine, California 92614
6 Telephone: (949) 252-9377
7 Facsimile: (949) 252-0090

8 *Attorneys for Plaintiffs and Counter-Defendants*

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

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

18 Plaintiffs,

19
20 v.

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

24 Defendants.

25 **AND RELATED COUNTERCLAIMS**
26
27
28

Case No. 5:15-cv-01921-R-KK
Hon. Manual L. Real

**ANSWER OF COUNTER-
DEFENDANT JOSEPH R.
DEVILLE TO FIRST AMENDED
COUNTERCLAIM**

1 Counter-Defendant Joseph R. Deville (“Deville”) hereby submits this
2 answer to Defendant/Counter-Claimant Windermere Real Estate Services
3 Company’s (“WSC”) First Amended Counterclaim (“FACC”) as follows:

4 **NATURE OF ACTION**

5 1. In answer to Paragraph 1 of the FACC, Deville is without sufficient
6 knowledge or information to admit or deny the allegations therein, but states that
7 he is informed and believes that the allegations are true.

8 2. In answer to Paragraph 2 of the FACC, Deville is without sufficient
9 knowledge or information to admit or deny the allegations therein, but states that
10 he does not have any reason to contest the truth of the allegations.

11 3. In answer to Paragraph 3 of the FACC, Deville denies the allegations
12 contained therein.

13 4. In answer to Paragraph 4 of the FACC, Deville is without sufficient
14 knowledge or information to admit or deny the allegations therein.

15 5. In answer to Paragraph 5 of the FACC, Deville denies the allegations
16 therein.

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

26 7. In answer to Paragraph 7 of the FACC, Deville admits the allegations
27 contained therein.

1 8. In answer to Paragraph 8 of the FACC, Deville admits the allegations
2 contained therein.

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

11 10. In answer to Paragraph 10 of the FACC, Deville denies that the loan
12 was an “additional personal loan” and that the loan “remains outstanding,” but
13 otherwise admits the allegations in the Paragraph.

14 11. In answer to Paragraph 11 of the FACC, Deville admits that “WSC
15 agreed to waive” certain franchise and technology fees, but denies that the
16 \$1,151,060.00 amount was ever owed to WSC and the remaining allegations
17 contained therein.

18 12. In answer to Paragraph 12 of the FACC, Deville denies that WSC
19 provided “extraordinary support” or that “Bennion and Deville’s earlier success
20 could not be duplicated,” and admits the rest of the allegations contained therein.

21 13. In answer to Paragraph 13 of the FACC, Deville denies the allegations
22 contained therein.

23 14. In answer to Paragraph 14 of the FACC, Deville denies the allegations
24 contained therein.

25 15. In answer to Paragraph 15 of the FACC, Deville admits that WSC is
26 seeking the relief set forth in the Paragraph, but denies the validity of the requested
27 relief.
28

1 27. In answer to Paragraph 27 of the FACC, Deville admits the
2 allegations contained therein.

3 28. In answer to Paragraph 28 of the FACC, Deville admits that WSC's
4 Counterclaim is compulsory and that the Court may exercise
5 supplemental/ancillary jurisdiction over the Counterclaim.

6 29. In answer to Paragraph 29 of the FACC, Deville admits that venue is
7 proper in the Central District of California.

8 **RELEVANT FACTUAL BACKGROUND**

9 30. In answer to Paragraph 30 of the FACC, Deville admits that he and
10 Bennion each personally guaranteed certain franchise fees and costs, but that the
11 personal guarantees were later modified by the parties' execution of the
12 Modification Agreement.

13 31. In answer to Paragraph 31 of the FACC, Deville denies the allegations
14 contained therein.

15 32. In answer to Paragraph 32 of the FACC, Deville admits the
16 allegations contained therein.

17 33. In answer to Paragraph 33 of the FACC, Deville admits that the fees
18 in this Paragraph are identified in the original terms of the Coachella Valley
19 Franchise Agreement, but that those terms were later amended by the parties.

20 34. In answer to Paragraph 34 of the FACC, Deville admits that the late
21 fee required by the Coachella Valley Franchise Agreement is 10% of the
22 delinquent amount, but denies the rest of the allegations contained therein.

23 35. In answer to Paragraph 35 of the FACC, Deville admits that the terms
24 referenced in the Paragraph are set forth in the Coachella Valley Franchise
25 Agreement, but denies WSC's summary interpretation of those terms.

26 36. In answer to Paragraph 36 of the FACC, Deville admits the
27 allegations contained therein.
28

1 37. In answer to Paragraph 37 of the FACC, Deville admits the
2 allegations contained therein.

3 38. In answer to Paragraph 38 of the FACC, Deville denies that “WSC
4 went out of its way to accommodate Bennion and Deville and B&D Fine Homes
5 and to assist them with financial troubles,” but admits the rest of the allegations
6 contained therein.

7 39. In answer to Paragraph 39 of the FACC, Deville denies the
8 representation that “extraordinary accommodations” were provided, but admits the
9 rest of the allegations contained therein.

10 40. In answer to Paragraph 40 of the FACC, Deville denies that B&D
11 Fine Homes was “financially untenable,” but admits the rest of the allegations
12 contained therein.

13 41. In answer to Paragraph 41 of the FACC, Deville admits that he and
14 Bennion provided personal guarantees in connection with the Coachella Valley
15 Franchise Agreement, but denies that the amounts are due and owing from them
16 as the personal guarantees were later amended by the Modification Agreement.

17 42. In answer to Paragraph 42 of the FACC, Deville admits that he,
18 Bennion and B&D Fine Homes have refused to remit Franchise Fees to WSC since
19 July 2014 despite demands for payment, but denies the rest of the allegations
20 contained therein.

21 43. In answer to Paragraph 43 of the FACC, Deville denies the allegations
22 contained therein.

23 44. In answer to Paragraph 44 of the FACC, Deville admits the
24 allegations contained therein.

25 45. In answer to Paragraph 45 of the FACC, Deville admits the
26 allegations contained therein.

27 46. In answer to Paragraph 46 of the FACC, Deville denies that WSC had
28 “the right to assign each new franchisee to an area representative that made the

1 most sense” and that “[n]ew offices would be assigned to an area in WSC’s sole
2 discretion,” but admits the rest of the allegations contained therein.

3 47. In answer to Paragraph 47 of the FACC, Deville admits that the terms
4 referenced in subsections a, b, and c of the Paragraph, but denies WSC’s summary
5 interpretation of the remaining obligations.

6 48. In answer to Paragraph 48 of the FACC, Deville denies the first
7 sentence of this Paragraph and admits the second sentence.

8 49. In answer to Paragraph 49 of the FACC, Deville denies that the Area
9 Representation Agreement could be lawfully terminated by WSC without cause,
10 but admits the rest of the allegations therein.

11 50. In answer to Paragraph 50 of the FACC, Deville admits that WSC has
12 accurately quoted from the Area Representation Agreement.

13 51. In answer to Paragraph 51 of the FACC, Deville denies the allegations
14 contained therein.

15 52. In answer to Paragraph 52 of the FACC, Deville denies the allegations
16 contained.

17 53. In answer to Paragraph 53 of the FACC, Deville denies the allegations
18 contained therein.

19 54. In answer to Paragraph 54 of the FACC, Deville denies the allegations
20 contained.

21 55. In answer to Paragraph 55 of the FACC, Deville admits the
22 representations to the extent that WSSC was unable to collect License and
23 Technology Fees from all of the franchisees in their territory, but denies the rest of
24 the allegations contained therein.

25 56. In answer to Paragraph 56 of the FACC, Deville admits the
26 allegations contained.

27 57. In answer to Paragraph 57 of the FACC, Deville admits that WSC
28 provided WSSC with a second notice of termination of the Area Representation

1 Agreement on February 2, 2015, but denies the rest of the allegations contained
2 therein.

3 58. In answer to Paragraph 58 of the FACC, Deville denies the allegations
4 that “Bennion and Deville approached WSC explaining that they were in such
5 financial distress they were in imminent danger of insolvency, and could be forced
6 to close their business,” that the Plaintiffs asked for a “personal loan,” that WSC’s
7 affiliated entity provided Deville, Bennion, and/or the Plaintiffs with a “personal
8 loan,” and that the Plaintiffs “were unable to timely pay the final payment,” but
9 admits the remaining allegations in the Paragraph.

10 59. In answer to Paragraph 59 of the FACC, Deville denies the allegations
11 that they “approached WSC requesting more funds,” and that the affiliated entity
12 provided Deville, Bennion, and/or the Plaintiffs with “another personal loan,” but
13 admits the remaining allegations in the Paragraph.

14 60. In answer to Paragraph 60 of the FACC, Deville denies the allegations
15 that the loan was a “personal loan,” but otherwise admits the allegations in the
16 Paragraph.

17 61. In answer to Paragraph 61 of the FACC, Deville denies the allegations
18 therein.

19 62. In answer to Paragraph 62 of the FACC, Deville admits that he and
20 Bennion opened offices in the San Diego area in early 2011, but denies the rest of
21 the allegations contained therein.

22 63. In answer to Paragraph 63 of the FACC, Deville admits the
23 allegations contained therein.

24 64. In answer to Paragraph 64 of the FACC, Deville admits the
25 allegations contained therein.

26 65. In answer to Paragraph 65 of the FACC, Deville admits that the initial
27 locations under the SoCal Franchise Agreement were La Mesa, Laguna Niguel,
28

1 Carmel Valley, and Solona Beach/Lomas Santa Fe, but denies the rest of the
2 allegations in the Paragraph.

3 66. In answer to Paragraph 66 of the FACC, Deville admits the
4 allegations contained therein.

5 67. In answer to Paragraph 67 of the FACC, Deville admits that he and
6 Bennion each personally guaranteed certain franchise fees and costs, but contents
7 that the personal guarantees were later modified by the parties' execution of the
8 Modification Agreement.

9 68. In answer to Paragraph 68 of the FACC, Deville admits that he and
10 Bennion and Bennion & Deville SoCal ("B&D SoCal") have refused to remit
11 Franchise Fees to WSC since July 2014 despite demands for payment, but denies
12 the rest of the allegations contained therein

13 69. In answer to Paragraph 69 of the FACC, Deville denies the allegations
14 contained therein.

15 70. In answer to Paragraph 70 of the FACC, Deville is without sufficient
16 knowledge or information to admit or deny the allegations therein, but states that
17 he is informed and believes that the allegations are true.

18 71. In answer to Paragraph 71 of the FACC, Deville denies WSC's
19 summary interpretation of the parties' agreement, but admits the rest of the
20 allegations contained therein.

21 72. In answer to Paragraph 72 of the FACC, Deville admits the
22 allegations contained therein.

23 73. In answer to Paragraph 73 of the FACC, Deville denies WSC's
24 summary interpretation of the parties' agreement, but admits the rest of the
25 allegations contained therein.

26 74. In answer to Paragraph 74 of the FACC, Deville denies WSC's
27 summary interpretation of the parties' agreement, but admits the rest of the
28 allegations contained therein.

1 75. In answer to Paragraph 75 of the FACC, Deville admits that the
2 Modification Agreement did not amend the Area Representation Agreement, but
3 denies the rest of the allegations contained therein.

4 76. In answer to Paragraph 76 of the FACC, Deville admits the
5 allegations contained therein.

6 77. In answer to Paragraph 77 of the FACC, Deville denies that the
7 “additional expenses” were not previously discussed, but admits the rest of the
8 allegations therein.

9 78. In answer to Paragraph 78 of the FACC, Deville admits that WSC has
10 properly quoted from the June 3, 2014 letter attached as Exhibit O to the FACC.

11 79. In answer to Paragraph 79 of the FACC, Deville admits the
12 allegations in the first sentence, but denies the allegations in the second sentence.

13 80. In answer to Paragraph 80 of the FACC, Deville admits that the
14 Plaintiffs did not stay in the Windermere System for 5 additional years, but denies
15 the rest of the allegations contained therein.

16 81. In answer to Paragraph 81 of the FACC, Deville denies the allegations
17 contained therein.

18 82. In answer to Paragraph 82 of the FACC, Deville is without sufficient
19 knowledge or information to admit or deny the allegations therein, but states that
20 he is informed and believes that the allegations are true.

21 83. In answer to Paragraph 83 of the FACC, Deville is without sufficient
22 knowledge or information to admit or deny the allegations therein.

23 84. In answer to Paragraph 84 of the FACC, Deville is without sufficient
24 knowledge or information to admit or deny the allegations therein, but states that
25 he is informed and believes that the allegations are true.

26 85. In answer to Paragraph 85 of the FACC, Deville admits the
27 allegations contained therein.

28

1 86. In answer to Paragraph 86 of the FACC, Deville admits the
2 allegations contained therein subject to a reasonable time for the Plaintiffs to
3 discontinue use of the Trademark.

4 87. In answer to Paragraph 87 of the FACC, Deville admits the
5 allegations contained therein.

6 88. In answer to Paragraph 88 of the FACC, Deville admits the
7 allegations contained therein.

8 89. In answer to Paragraph 89 of the FACC, Deville admits the
9 allegations contained therein.

10 90. In answer to Paragraph 90 of the FACC, Deville admits the
11 allegations contained therein.

12 91. In answer to Paragraph 91 of the FACC, Deville admits that WSC
13 provided Plaintiffs with notice of termination dated January 28, 2015 and a second
14 notice of termination dated February 26, 2015, but denies the remaining allegations
15 therein.

16 92. In answer to Paragraph 92 of the FACC, Deville admits the
17 allegations contained therein.

18 93. In answer to Paragraph 93 of the FACC, Deville admits the
19 allegations contained therein.

20 94. In answer to Paragraph 94 of the FACC, Deville admits the
21 allegations contained therein.

22 95. In answer to Paragraph 95 of the FACC, Deville admits the
23 allegations contained therein subject to a reasonable time for Plaintiffs to
24 discontinue use of the Trademark.

25 96. In answer to Paragraph 96 of the FACC, Deville admits the
26 allegations contained therein.

27 97. In answer to Paragraph 97 of the FACC, Deville admits the
28 allegations contained therein.

1 98. In answer to Paragraph 98 of the FACC, Deville denies the allegations
2 as to the 314 figure, but admits the remaining allegations in the Paragraph.

3 99. In answer to Paragraph 99 of the FACC, Deville does not have
4 sufficient information needed to admit or deny the date that counsel for WSC
5 “prepared” the October 1, 2015 email communication, but admits the remaining
6 allegations contained therein.

7 100. In answer to Paragraph 100 of the FACC, Deville denies the
8 allegation that “[c]ounsel for Defendants did not respond,” but admits the
9 remaining allegations in the Paragraph.

10 101. In answer to Paragraph 101 of the FACC, Deville admits that WSC
11 has properly quoted from the SoCal Franchise Agreement, subject to the inclusion
12 of underlining that is not in the original document.

13 102. In answer to Paragraph 102 of the FACC, Deville does not have
14 sufficient information to either admit or deny the allegations in this Paragraph.

15 103. In answer to Paragraph 103 of the FACC, Deville denies the 314
16 figure, but admits the rest of the allegations therein.

17 104. In answer to Paragraph 104 of the FACC, Deville admits the
18 allegations contained therein.

19 105. In answer to Paragraph 105 of the FACC, Deville denies that
20 Plaintiffs or he and Bennion had any legal obligation to transfer the domain names
21 to WSC, but admits the remaining allegations in the Paragraph.

22 106. In answer to Paragraph 106 of the FACC, Deville denies that
23 Plaintiffs had any legal obligation to transfer the domain names to WSC, but
24 admits the remaining allegations in the Paragraph.

25 107. In answer to Paragraph 107 of the FACC, Deville denies the
26 allegations contained therein.

27
28

1 108. In answer to Paragraph 108 of the FACC, Deville admits that
2 Plaintiffs have surrendered the domain names to the domain registrar, but denies
3 the remaining allegations in the Paragraph.

4 109. In answer to Paragraph 109 of the FACC, Deville does not have
5 sufficient information to admit or deny the allegations contained therein.

6 110. In answer to Paragraph 110 of the FACC, Deville does not have
7 sufficient information to admit or deny the allegations contained therein.

8 111. In answer to Paragraph 111 of the FACC, Deville denies the
9 allegations contained therein.

10 **FIRST CAUSE OF ACTION**

11 112. In answer to Paragraph 112 of the FACC, Deville contends that this
12 Paragraph does not make an allegation of fact or law, and thus cannot be admitted
13 or denied.

14 113. In answer to Paragraph 113 of the FACC, Deville admits the
15 allegations contained therein.

16 114. In answer to Paragraph 114 of the FACC, Deville denies the
17 allegations contained therein.

18 115. In answer to Paragraph 115 of the FACC, Deville admits that
19 Plaintiffs have not paid fees since July 2014, but denies the remaining allegations
20 contained therein.

21 116. In answer to Paragraph 116 of the FACC, Deville denies the
22 allegations contained therein.

23 117. In answer to Paragraph 117 of the FACC, Deville denies the
24 allegations contained therein.

25 118. In answer to Paragraph 118 of the FACC, Deville denies the
26 allegations contained therein.

1 119. In answer to Paragraph 119 of the FACC, Deville admits the
2 allegations contained therein, subject to reasonable time for Plaintiffs to
3 discontinue use of the Trademark.

4 120. In answer to Paragraph 120 of the FACC, Deville admits the
5 allegations contained therein.

6 121. In answer to Paragraph 121 of the FACC, Deville denies the
7 allegation that Plaintiffs misused WSC's intellectual property, and admits the
8 remaining allegations in the Paragraph.

9 122. In answer to Paragraph 122 of the FACC, Deville does not have
10 sufficient information to admit or deny the date the October 1, 2015 letter was
11 prepared, but admits the remaining allegations in the Paragraph.

12 123. In answer to Paragraph 123 of the FACC, Deville denies the
13 allegation that "[c]ounsel for Defendants did not respond," but admits the
14 remaining allegations in the Paragraph.

15 124. In answer to Paragraph 124 of the FACC, Deville denies the
16 allegations contained therein.

17 125. In answer to Paragraph 125 of the FACC, Deville denies the
18 allegations contained therein.

19 126. In answer to Paragraph 126 of the FACC, Deville lacks sufficient
20 information to admit or deny the allegations in the first sentence of the Paragraph,
21 but denies the allegations in the second sentence of the Paragraph.

22 **THIRD CAUSE OF ACTION**

23 127. In answer to Paragraph 142 of the FACC, Deville contends that this
24 Paragraph does not make an allegation of fact or law, and thus cannot be admitted
25 or denied.

26 128. In answer to Paragraph 143 of the FACC, Deville admits the
27 allegations contained therein.

1 129. In answer to Paragraph 144 of the FACC, Deville denies the
2 allegations contained therein.

3 130. In answer to Paragraph 145 of the FACC, Deville denies the
4 allegations contained therein.

5 131. In answer to Paragraph 146 of the FACC, Deville denies the
6 allegations contained therein.

7 132. In answer to Paragraph 147 of the FACC, Deville denies the
8 allegations contained therein.

9 133. In answer to Paragraph 148 of the FACC, Deville denies the
10 allegations contained therein.

11 134. In answer to Paragraph 149 of the FACC, Deville admits the
12 allegations contained therein subject to a reasonable time for Plaintiffs to
13 discontinue use of the Trademark.

14 135. In answer to Paragraph 150 of the FACC, Deville admits the
15 allegations contained therein.

16 136. In answer to Paragraph 151 of the FACC, Deville denies that they
17 misused WSC's intellectual property, but admits the remaining allegations in the
18 Paragraph.

19 137. In answer to Paragraph 152 of the FACC, Deville does not have
20 sufficient information to admit or deny the date the October 1, 2015 letter was
21 prepared, but admits the remaining allegations in the Paragraph.

22 138. In answer to Paragraph 153 of the FACC, Deville denies the
23 allegation that "[c]ounsel for Defendants did not respond," but admits the
24 remaining allegations in the Paragraph.

25 139. In answer to Paragraph 154 of the FACC, Deville denies the
26 allegations contained therein.

27 140. In answer to Paragraph 155 of the FACC, Deville denies the
28 allegations contained therein.

1 141. In answer to Paragraph 156 of the FACC, Deville denies the
2 allegations contained therein.

3 142. In answer to Paragraph 157 of the FACC, Deville lacks sufficient
4 information to admit or deny the allegations in the first sentence of the Paragraph,
5 but deny the allegations in the second sentence of the Paragraph.

6 **EIGHTH CAUSE OF ACTION**

7 143. In answer to Paragraph 194 of the FACC, Deville contends that this
8 Paragraph does not make an allegation of fact or law, and thus cannot be admitted
9 or denied.

10 144. In answer to Paragraph 195 of the FACC, Deville denies the
11 allegations therein.

12 145. In answer to Paragraph 196 of the FACC, Deville denies the
13 allegations therein.

14 **AFFIRMATIVE DEFENSES**

15 As and for his affirmative defenses to the FACC, Deville pleads the
16 following:

17 **FIRST AFFIRMATIVE DEFENSE**

18 **(Failure to State a Cause of Action)**

19 1. As a separate and affirmative defense to the FACC on file herein,
20 and each and every cause of action set forth in said FACC, Deville alleges that
21 said FACC and each and every cause of action therein fails to state a cause of
22 action against Deville.

23 **SECOND AFFIRMATIVE DEFENSE**

24 **(Waiver)**

25 2. WSC's FACC and the causes of action stated therein are barred in
26 whole or in part by the doctrine of waiver since WSC intentionally relinquished
27 a known right to relief for Deville's alleged misconduct.
28

1 **THIRD AFFIRMATIVE DEFENSE**

2 **(Estoppel)**

3 3. WSC’s FACC and the causes of action stated therein are barred in
4 whole or in part by the doctrine of estoppel based upon WSC’s conduct.

5 **FOURTH AFFIRMATIVE DEFENSE**

6 **(Offset)**

7 4. Plaintiffs are entitled to an offset for all amounts owed by WSC to
8 them, or any of them, including but not limited to unpaid license fees and other
9 fees.

10 **FIFTH AFFIRMATIVE DEFENSE**

11 **(Justification, Privilege)**

12 5. WSC’s FACC and the causes of action stated therein are barred in
13 whole or in part because all alleged actions of Deville, Bennion, and/or the
14 Plaintiffs were justified and/or privileged, and were fair and reasonable under all
15 the circumstances based upon a balancing of all factors related to the actions at
16 issue.

17 **SIXTH AFFIRMATIVE DEFENSE**

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

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

22 **SEVENTH AFFIRMATIVE DEFENSE**

23 **(Performance)**

24 7. WSC’s FACC and the causes of action stated therein are barred in
25 whole or in part because Deville, Bennion, and the Plaintiffs performed all
26 obligations they had a duty to perform in light of WSC’s failure to perform all
27 obligations owed by it under the agreements.
28

1 **EIGHTH AFFIRMATIVE DEFENSE**

2 **(Damages Caused by Others)**

3 8. Deville denies that WSC has been damaged as alleged in the FACC.
4 However, to the extent WSC has been damaged, if at all, those damages were
5 proximately caused by and contributed to in whole or in part by either WSC's own
6 actions or omissions or the actions or omissions of third parties not under the
7 control of Deville at the time such actions or omissions occurred.

8 WHEREFORE, Deville prays that WSC take nothing by its FACC; and
9 the FACC be dismissed with prejudice; that FACC be denied recovery of any
10 portion of its costs and expenses incurred in bringing this action; that Deville
11 recover reasonable attorneys' fees and costs from WSC as may be available
12 under law and/or contract; and such other and further relief as the Court may
13 deem proper and just.

14
15 DATED: December 14, 2015

16 **MULCAHY LLP**

17 By: /s/ James M. Mulcahy
18 James M. Mulcahy
19 Kevin A. Adams
20 *Attorneys for Plaintiffs and Counter-*
21 *Defendants*
22
23
24
25
26
27
28

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 December 14, 2015, I served document(s) described as **ANSWER OF COUNTER-**
6 **DEFENDANT JOSEPH R. DEVILLE TO FIRST AMENDED COUNTERCLAIM** on the
following person at the addresses and/or facsimile number below:

7 Pérez Wilson Vaughn & Feasby
8 John Vaughn
9 750 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,
within a reasonable time after the transmission, any electronic message or other indication
that the transmission was unsuccessful.

18 [] BY MAIL - I am "readily familiar" with the firm's practice of collection and processing
19 correspondence for mailing. Under that practice it would be deposited with the U.S. postal
20 service on that same day, with postage thereon fully prepaid, at Irvine, California in the
21 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.

22 [] BY CERTIFIED MAIL - I am "readily familiar" with the firm's practice of collection and
23 processing correspondence for mailing. Under that practice it would be deposited with the
24 U.S. postal service on that same day, with postage thereon fully prepaid, at Irvine, California
25 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.

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

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 **December 14, 2015** at Irvine, California.

10 By: /s/ Barbara Calvert
11 Barbara Calvert
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28