

MULCAHY LLP

James M. Mulcahy (SBN 213547)

jmulcahy@mulcahyllp.com

Kevin A. Adams (SBN 239171)

kadams@mulcahyllp.com

Four Park Plaza, Suite 1230

Irvine, California 92614

Telephone: (949) 252-9377

Facsimile: (949) 252-0090

Attorneys for Plaintiffs and Counter-Defendants

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

BENNION & DEVILLE FINE
HOMES, INC., a California
corporation, BENNION & DEVILLE
FINE HOMES SOCAL, INC., a
California corporation, WINDERMERE
SERVICES SOUTHERN
CALIFORNIA, INC., a California
corporation,

Plaintiffs,

v.

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

Defendant.

Case No. 5:15-CV-01921-DFM

Hon. Douglas F. McCormick

**PLAINTIFFS AND COUNTER-
DEFENDANTS' OBJECTION TO
[PROPOSED] JUDGMENT**

Complaint Filed: September 17, 2015

Counterclaim Filed: October 13, 2015

AND RELATED COUNTERCLAIMS

Pursuant to this Court's Minute Order of August 2, 2018 [D.E. 221],
Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion &
Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc.,
Counter-Defendants Robert L. Bennion and Joseph R. Deville (all collectively, the

1 “B&D Parties”) respectfully submit the following Objection to the Proposed
2 Judgment filed by Defendant Windermere Real Estate Services Company
3 (“Proposed Judgment” [D.E. 222]).¹

4 **Objection #1:** The Proposed Judgment is improper because it purports to
5 enter judgment, jointly and severally, against Robert L. Bennion and Joseph R.
6 Deville in the amount of \$1,095,239.12. This is inconsistent with, and
7 mischaracterizes the special verdict. It also improperly seeks to double the
8 individual liability of each of the individual counter-defendants.

9 Robert L. Bennion and Joseph R. Deville are guarantors of the certain
10 amounts owed by Bennion & Deville Fine Homes, Inc. and Bennion and Deville
11 Fine Homes SoCal, Inc. to Windermere Real Estate Services Company (“WSC”).
12 The jury found that amount to be \$547,619.56. The Proposed Judgment seeks to
13 hold each Robert L. Bennion and Joseph R. Deville accountable for double the
14 amount identified by the jury. This is improper.

15 **Objection #2:** The Proposed Judgment is improper because it purports to
16 enter judgment against Bennion & Deville Fine Homes, Inc. on WSC’s
17 counterclaim for Open Book Account in the amount of \$1,264,555.32, instead of
18 judgment on WSC counterclaim for breach of contract in the amount of
19 \$837,323.36. This proposed result is inconsistent with the law.

20 Under California law, “moneys due under an express contract cannot be
21 recovered in an action on an ‘open book account’ in the absence of a contrary
22 agreement between the parties.” *Martini E Ricci Iamino S.P.A.--Consortile Societa*
23 *Agricola v. Trinity Fruit Sales Co.*, 30 F. Supp. 3d 954, 975 (E.D. Cal. 2014)
24 (citing *H & C Global Supplies SA DE CV v. Pandol Assocs. Marketing, Inc.*, 2013
25 WL 5954812, *2, 2013 U.S. Dist. LEXIS 159185, *6–*7 (E.D.Cal. Nov. 6, 2013);

26
27 ¹ The B&D Parties intend to file post-trial motions under FRCP 50(b) and FRCP
28 59. Nothing stated in this Objection should be viewed as a waiver of those rights or
any legal arguments to be raised by the B&D Parties in their post-trial motions.

1 *Dreyer's Grand Ice Cream, Inc. v. Ice Cream Distributors of Evansville, LLC*,
2 2010 WL 1957423, *4 n. 5, 2010 U.S. Dist. LEXIS 47738, *11 n. 5 (N.D.Cal. May
3 14, 2010); *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.*, 116
4 Cal.App.4th 1375, 1396 n. 9, 11 Cal.Rptr.3d 412 (2004)). “[C]ourts require that the
5 parties expressly intend to be bound because accruing debts under an express
6 contract are not normally considered the subject of an open book account.” In re
7 Roberts Farms, Inc., 980 F.2d 1248, 1252 n. 3 (9th Cir.1992). The “mere incidental
8 keeping of accounts does not alone create a book account.” *Maggio, Inc. v. Neal*,
9 196 Cal.App.3d 745, 752 (1987).

10 At trial, WSC’s Open Book Account counterclaim rested entirely upon
11 moneys allegedly owed under the parties’ express agreements. This is improper
12 under the law. As a result, judgment on the Open Book Account claim should be
13 entered in favor of Bennion & Deville Fine Homes, Inc. as a matter of law. The
14 Proposed Judgment should have identified judgment against Bennion & Deville
15 Fine Homes, Inc. in the amount of \$837,323.36, consistent with the special verdict
16 on WSC counterclaim for breach of contract.

17 **Objection #3:** The Proposed Judgment is improper because it purports to
18 enter judgment against Bennion & Deville Fine Homes SoCal, Inc. on WSC’s
19 counterclaim for Open Book Account in the amount of \$310,234.98, instead of
20 judgment on WSC counterclaim for breach of contract in the amount of
21 \$257,915.77. This proposed result is inconsistent with the law.

22 Under California law, “moneys due under an express contract cannot be
23 recovered in an action on an ‘open book account’ in the absence of a contrary
24 agreement between the parties.” *Martini E Ricci Iamino S.P.A.--Consortile Societa*
25 *Agricola v. Trinity Fruit Sales Co.*, 30 F. Supp. 3d 954, 975 (E.D. Cal. 2014)
26 (citing *H & C Global Supplies SA DE CV v. Pandol Assocs. Marketing, Inc.*, 2013
27 WL 5954812, *2, 2013 U.S. Dist. LEXIS 159185, *6–*7 (E.D.Cal. Nov. 6, 2013);
28 *Dreyer's Grand Ice Cream, Inc. v. Ice Cream Distributors of Evansville, LLC*,

1 2010 WL 1957423, *4 n. 5, 2010 U.S. Dist. LEXIS 47738, *11 n. 5 (N.D.Cal. May
2 14, 2010); *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.*, 116
3 Cal.App.4th 1375, 1396 n. 9, 11 Cal.Rptr.3d 412 (2004)). “[C]ourts require that the
4 parties expressly intend to be bound because accruing debts under an express
5 contract are not normally considered the subject of an open book account.” In re
6 Roberts Farms, Inc., 980 F.2d 1248, 1252 n. 3 (9th Cir.1992). The “mere incidental
7 keeping of accounts does not alone create a book account.” *Maggio, Inc. v. Neal*,
8 196 Cal.App.3d 745, 752 (1987).

9 At trial, WSC’s Open Book Account counterclaim rested entirely upon
10 moneys allegedly owed under the parties’ express agreements. This is improper
11 under the law. As a result, judgment on the Open Book Account claim should be
12 entered in favor of Bennion & Deville Fine Homes SoCal, Inc. as a matter of law.
13 The Proposed Judgment should have identified judgment against Bennion &
14 Deville Fine Homes SoCal, Inc. in the amount of \$257,915.77, consistent with the
15 special verdict on WSC counterclaim for breach of contract.

16 **Objection #4:** The Proposed Judgment is improper because it includes an
17 amount for pre-judgment interest that is inconsistent with the contract on which the
18 judgment is based.

19 The special verdict included liquidated damages in favor of WSC and
20 against Bennion & Deville Fine Homes, Inc. and Bennion & Deville Fine Homes
21 SoCal, Inc. under Section 3 of the parties’ Modification Agreement. (*See* Trial
22 Exhibit 87, §§ 3(B)-(F).) WSC also argued in favor of, and the jury awarded,
23 interest on this liquidated damages amount totaling \$107,249.69. This interest is
24 inconsistent with the express language of the Modification Agreement and should
25 not be allowed.

26 Specifically, Section 3(F) of the Modification Agreement states that, in the
27 event that the B&D Parties terminate their franchise relationship with WSC prior
28 to the expiration of five years from the date of the Modification Agreement, “the

1 waiver and forgiveness as set forth within Sections 3, B (i)-(iii) shall be pro-rated
2 against the total elapsed years from said date (including any increment thereof) on
3 a straight line basis **with no additional interest and/or other accrued fees.**
4 (Trial Exhibit 87, emphasis added.) Despite this clear contractual prohibition on
5 interest and other accrued fees, the jury's award included WSC's request for
6 prejudgment interest. On this ground, the B&D Parties object to the Proposed
7 Judgment.

8
9 DATED: August 8, 2018

MULCAHY LLP

10
11 By: /s/ Kevin A. Adams
12 Kevin A. Adams
13 *Attorneys for Plaintiffs/Counter-*
14 *Defendants Bennion & Deville Fine*
15 *Homes, Inc., Bennion & Deville Fine*
16 *Homes SoCal, Inc., Windermere*
17 *Services Southern California, Inc.,*
18 *and Counter-Defendants Robert L.*
19 *Bennion and Joseph R. Deville*
20
21
22
23
24
25
26
27
28