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6 Attorneys for Answering Defendant, AUSTIN McBRIDE CORPORATION D/B/A RE/MAX
7 REAL ESTATE CONSULTANTS

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF SAN DIEGO – HALL OF JUSTICE**

11 GEORGE J. SEROCHI, JR. AND VICTOR E.
12 BIANCHINI, on Behalf of Themselves, All Others
13 Similarly Situated and the General Public,

14 Plaintiffs,

15 vs.

16 BOSA DEVELOPMENT CALIFORNIA II, INC.,
17 BOSA DEVELOPMENT CALIFORNIA, INC.,
18 IRVINE RESIDENTIAL HIGHRISE LLC, BOSA
19 CALIFORNIA LLC, BOSA DEVELOPMENT
20 CORPORATION, NATALE BOSA, AUSTIN
21 McBRIDE CORPORATION d/b/a RE/MAX REAL
22 ESTATE CONSULTANTS and DOES 6-50,
23 inclusive,

24 Defendants.

) Case No: 37-2009-00096686

)

) Complaint Filed: August 21, 2009

) Re-Assigned to:

) Honorable Yuri Hoffman, Dept.: C-60

)

) **ANSWER OF DEFENDANT AUSTIN**

) **MCBRIDE CORPORATION D/B/A**

) **RE/MAX REAL ESTATE**

) **CONSULTANTS TO SECOND**

) **AMENDED COMPLAINT OF**

) **PLAINTIFFS**

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23 Defendant, AUSTIN McBRIDE CORPORATION D/B/A RE/MAX REAL ESTATE
24 CONSULTANTS (“Answering Defendant”), severing itself from all other Defendants, answers the
25 Second Amended Complaint (hereinafter “SAC”) of Plaintiffs, GEORGE J. SEROCHI, JR. AND
26 VICTOR E. BIANCHINA, on Behalf of Themselves, All Others Similarly Situated and the General
27 Public (hereinafter “Plaintiffs”) as follows:
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1 **FIFTH AFFIRMATIVE DEFENSE**

2 (Statute of Limitations)

3 6. Plaintiffs' Causes of Action are barred by the Statute of Limitation provisions
4 contained in, but not limited to Code of Civil Procedure sections 337, 337.2, 338, 339 and/or 340.

5 **SIXTH AFFIRMATIVE DEFENSE**

6 (Estoppel)

7 7. Plaintiffs are estopped to assert any cause of action by his acts and conduct upon which
8 this Answering Defendant relied to its prejudice.

9 **SEVENTH AFFIRMATIVE DEFENSE**

10 (Failure to Mitigate)

11 8. Plaintiffs and/or their agents and representatives were negligent in failing to mitigate,
12 minimize, or avoid the damages alleged, and Answering Defendant is therefore entitled to have any
13 sum to which Plaintiffs are entitled, if any, reduced by such sums as could have been mitigated,
14 minimized or avoided.

15 **EIGHTH AFFIRMATIVE DEFENSE**

16 (Comparative Negligence)

17 9. Answering Defendant alleges that the injuries and damages of which Plaintiffs
18 complains, if any, were directly and proximately caused and contributed to by Plaintiffs' own
19 negligence and the negligence of others, whether parties to this action or not. If Plaintiffs are
20 entitled to recover at all for the damages alleged in the SAC, Plaintiffs' recovery is diminished to
21 the extent that the damages alleged in the SAC are attributable to such negligence.

22 **NINTH AFFIRMATIVE DEFENSE**

23 (Unclean Hands)

24 10. Plaintiffs have filed their SAC with "unclean hands", and is in some manner
25 responsible for the alleged damages described in the SAC, and therefore should be estopped from
26 obtaining any relief by virtue of this action.

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1 **TENTH AFFIRMATIVE DEFENSE**

2 (Consent)

3 11. Plaintiffs and/or their agents and representatives had full knowledge of the true facts
4 and consented to all acts and omissions complained of in the SAC.

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6 **ELEVENTH AFFIRMATIVE DEFENSE**

7 (Waiver)

8 12. The SAC and each and every cause of action purportedly stated therein is barred by
9 the doctrine of waiver.

10 **TWELFTH AFFIRMATIVE DEFENSE**

11 (Plaintiff acted in Bad Faith)

12 13. Plaintiffs are guilty of bad faith in the circumstances alleged, and Answering
13 Defendant is thus entitled to have liability, if any, reduced or abated in accordance with Plaintiffs'
14 bad faith in the premises.

15 **THIRTEENTH AFFIRMATIVE DEFENSE**

16 (Other Remedies Available)

17 14. Answering Defendant alleges that Plaintiffs have failed to pursue or exhaust other
18 administrative and legal remedies available to them.

19 **FOURTEENTH AFFIRMATIVE DEFENSE**

20 (Standing)

21 15. Answering Defendant alleges that Plaintiffs lack standing to assert the claims made.

22 **FIFTEENTH AFFIRMATIVE DEFENSE**

23 (Plaintiffs' damages are limited)

24 16. Answering Defendant alleges that Plaintiffs' injuries and damages, if any exist, are
25 limited to the application of Civil Code section 1947.7.

26 **SIXTEENTH AFFIRMATIVE DEFENSE**

27 (Waiver of Claims)

28 17. Answering Defendant alleges that Plaintiffs have expressly and implicitly waived

1 their alleged claims for injuries and damages, if any exist.

2 **SEVENTEENTH AFFIRMATIVE DEFENSE**

3 (Duplicative Causes of Action)

4 18. Answering Defendant alleges that Plaintiffs' claims are limited and/or barred as
5 duplicative and/or inconsistent causes of action which, if allowed to be asserted at trial, would
6 expose Answering Defendant to the potential for double recovery.

7 **EIGHTEENTH AFFIRMATIVE DEFENSE**

8 (Punitive Damages)

9 19. This Answering Defendant alleges that Plaintiffs' SAC does not state facts sufficient
10 to constitute a cause of action for punitive damages against this Answering Defendant.

11 **NINETEENTH AFFIRMATIVE DEFENSE**

12 (Violation of Due Process Rights)

13 20. This Answering Defendant alleges that the punitive damages, as prayed for in said
14 SAC, are in violation of these Answering Defendant's due process rights and the Eighth
15 Amendment to the United States Constitution.

16 **TWENTIETH AFFIRMATIVE DEFENSE**

17 (Assumption of the Risk)

18 21. This Answering Defendant alleges that Plaintiffs and/or their agents and
19 representatives had full knowledge of the true facts and that said matters, of which Plaintiffs have
20 assumed the risk, proximately contributed to and proximately caused their loss, if any.

21 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

22 (Failure to Minimize Damages)

23 22. Plaintiffs failed to minimize their alleged damages by not exercising regular care and
24 diligence.

25 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

26 (Excuse for Non-Performance)

27 23. The SAC and all causes of action therein against Answering Defendant are barred,
28 because Answering Defendant is excused from performance under the contract(s) alleged in the

1 SAC due to the acts, omissions, and/or material breaches of Plaintiffs with respect to the matters
2 and things alleged in the SAC.

3 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

4 (Inducement in the Contract)

5 24. The SAC and all causes of action alleged therein against Answering Defendant are
6 barred due to Plaintiffs' improper inducement of Answering Defendant in the execution of the
7 contract.

8 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

9 (Inadequacy of Consideration)

10 25. The SAC and all causes of action alleged therein against Answering Defendant are
11 barred due to an inadequacy of consideration on the part of Plaintiffs at the time the contract was
12 made.

13 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

14 (Mistake)

15 26. The SAC and all causes of action alleged therein against Answering Defendant are
16 barred by reasons of the provisions of sections 1567, 1576, 1577, and 1578 of the Civil Code
17 regarding mistake of law or fact.

18 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

19 (Reservation of Rights)

20 27. Answering Defendant presently has insufficient knowledge or information on which
21 to form a belief as to whether it may have additional, as yet unstated, affirmative defenses
22 available. Answering Defendant reserves the right to assert additional defenses in the event that
23 discovery indicates that they would be appropriate.

24 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

25 (Unconscionability)

26 28. The SAC and all causes of action alleged therein against Answering Defendant is
27 barred due to the unconscionable nature of the agreement at issue in the SAC.

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TWENTY-EIGHTH AFFIRMATIVE DEFENSE

(Fraud)

29. The SAC and all causes of action alleged therein against Answering Defendant is barred by reasons of the provisions of sections 1567(3) and 1571-1574 of the Civil Code regarding fraud.

TWENTY-NINTH AFFIRMATIVE DEFENSE

(Contract Contrary to Public Policy)

30. The SAC and all causes of action alleged therein against Answering Defendant are barred by reasons of the provisions of sections 1667(2), (3), and 1668 of the Civil Code regarding contracts contrary to public policy.

THIRTIETH AFFIRMATIVE DEFENSE

(No Duty)

31. The causes of action directed to the Answering Defendant fail and are barred in that, as a matter of law, there is no duty of a real estate agent to discover defects which are unknown to him or her and which could not be discovered through a diligent visual observation.

THIRTY-FIRST AFFIRMATIVE DEFENSE

(Absence of Act or Omission)

32. No act or omission, if any, of this Answering Defendant was a substantial factor in bringing about the damages, if any, alleged by Plaintiffs, nor were any such acts or omissions, if any, a contributing cause thereof.

THIRTY-SECOND AFFIRMATIVE DEFENSE

(Full Disclosure)

33. At all times herein mentioned, this Answering Defendant fully disclosed to Plaintiffs all facts concerning the nature of the transaction, and Plaintiffs fully recognized and accepted the terms of the transaction that led to the Purchase Agreement that is the subject of this litigation.

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1 **THIRTY-THIRD AFFIRMATIVE DEFENSE**

2 (Full Compliance)

3 34. A Disclosure upon Transfer of Residential Property as required by Civil Code section
4 1102.4 et seq. was provided to Plaintiffs therefore this Answering Defendant is immune from
5 liability for any error, inaccuracy or omission of any information delivered to Plaintiffs not within
6 this Answering Defendants personal knowledge.

7 **THIRTY-FOURTH AFFIRMATIVE DEFENSE**

8 (Full Compliance With Civil Code Section 2079.4, et seq.)

9 35. At all times herein mentioned, this Answering Defendant fully complied with Civil
10 Code section 2079.4, et seq., and this Answering Defendant is therefore immune from liability for
11 any error, inaccuracy or omission of any information delivered to Plaintiffs which was not within
12 the personal knowledge of this Answering Defendant.

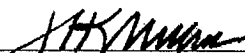
13 **THIRTY-FIFTH AFFIRMATIVE DEFENSE**

14 (Failure to Use Reasonable Diligence)

15 36. Plaintiffs' injuries, losses, or damages, if any, were aggravated by Plaintiffs' failure to
16 use reasonable diligence.

17 Dated: January 20, 2011

CARLSON LAW GROUP, INC.

18
19 By: 
20 Mark C. Carlson, Esq.
21 Warren K. Miller, Esq., Of Counsel
22 Attorneys for Answering Defendant, AUSTIN
23 McBRIDE CORPORATION D/B/A RE/MAX REAL
24 ESTATE CONSULTANTS
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my present address is: 21031 Ventura Boulevard, Suite 1100, Woodland Hills, California 91364.

On January 21, 2011 I served the foregoing document described as **ANSWER OF DEFENDANT AUSTIN MCBRIDE CORPORATION D/B/A RE/MAX REAL ESTATE CONSULTANTS TO SECOND AMENDED COMPLAINT OF PLAINTIFFS** on the parties by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

XX BY MAIL as follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Woodland Hills, California in the ordinary course of business.

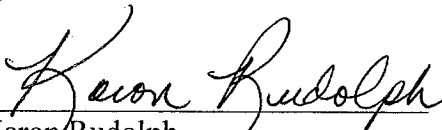
BY OVERNIGHT EXPRESS DELIVERY. I deposited it in a box or other facility regularly maintained by GOLDEN STATE OVERNIGHT/FEDERAL EXPRESS, or delivered it to a driver or courier authorized by GOLDEN STATE OVERNIGHT/FEDERAL EXPRESS to receive documents, in an envelope designated by GOLDEN STATE OVERNIGHT/FEDERAL EXPRESS, with deliver fees provided for, and with delivery requested for the next business day.

BY FACSIMILE TRANSMISSION, by use of facsimile machine telephone number (818) 884-4285, in accordance with Code of Civil Procedure §1013(e) and California Rules of Court 2.306, to the within parties at the facsimile number(s) indicated. The fax machine I used complied with Rule 2.301 and this transmission was reported as complete and without error. Under Rule 2.304, I caused the machine to print a transmission record of the transmission report which was issued by the transmitting facsimile machine, a copy of which is attached to the original thereof.

Executed on January 21, 2011 at Woodland Hills, California.

XX (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.


Karon Rudolph

1 **George J. Serochi, Jr. v. Bosa Development California II, Inc.**
2 San Diego Superior Court Case No.: 37-2009-00096686

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