

MULCAHY LLP

James M. Mulcahy (SBN 213547)

jmulcahy@mulcahyllp.com

Kevin A. Adams (SBN 239171)

kadams@mulcahyllp.com

Douglas R. Luther (SBN 280550)

dluther@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.

AND RELATED COUNTERCLAIMS

Case No. 5:15-CV-01921 R (KKx)

Hon. Manual L. Real

**DECLARATION OF KEVIN A.
ADAMS IN SUPPORT OF
PLAINTIFFS AND COUNTER-
DEFENDANTS' MOTION IN
LIMINE TO PRECLUDE WSC
FROM INTRODUCING EVIDENCE
WITHHELD ON GROUNDS OF
PRIVILEGE**

Date: May 15, 2017
Time: 10:00 a.m.
Courtroom: 880

Action Filed: September 17, 2015
Disc. Cut-Off: August 29, 2016
Pretrial Conf.: November 15, 2016
Trial: May 30, 2017

1 I, Kevin A. Adams, state as follows:

2 1. I am one of the attorneys of record for Plaintiffs/Counter-Defendants
3 Bennion & Deville Fine Homes, Inc., Bennion & Deville Fine Homes SoCal, Inc.,
4 Windermere Services Southern California, Inc., and Counter-Defendants Robert L.
5 Bennion and Joseph R. Deville (collectively, the "B&D Parties") in the above-named
6 action. I am a member in good standing of the State Bar of California, and duly admitted
7 to practice law before all of the courts of the State of California, including the United
8 States District Court, Central District of California and the United States Court of
9 Appeals for the Ninth Circuit. I make this Declaration in support of the B&D Parties
10 motion in limine to preclude Windermere Real Estate Services Company ("WSC") from
11 introducing any evidence, testimony, argument, or comment regarding WSC's failure to
12 respond to the B&D Parties' requests for updates concerning Windermere Watch.
13

14 2. As counsel for the B&D Parties, I am intimately familiar with the discovery
15 that has taken place in this action, including deposition testimony.

16 3. On August 22, 2016, I deposed Paul S. Drayna, WSC's general counsel.
17 During the deposition, I asked Mr. Drayna to explain why WSC failed to respond to the
18 B&D Parties emails requesting an update concerning WSC's efforts to curtail the effects
19 of Windermere Watch. Mr. Drayna reviewed the three emails that the B&D Parties sent
20 to WSC to inquire about the same. Each time I would ask about WSC's failure to
21 respond, Mr. Drayna asserted the attorney client privilege. Attached hereto as Exhibit A
22 is a true and correct copy of portions of the transcript of Mr. Drayna's deposition.
23 Attached as Exhibits B-D are true and correct copies of emails from the B&D Parties
24 requesting an update about WSC's efforts to curtail the effect of Windermere Watch used
25 as deposition exhibits as reflected in the deposition transcript.

26 ///

27 ///

28 ///

1 I declare under penalty of perjury under the laws of the United States of America
2 that the foregoing is true and correct and that this Declaration was executed this 17th day
3 of April, 2017 in Irvine, California.

4 /s/ Kevin A. Adams

5 Kevin A. Adams
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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,)
vs.) No.
WINDERMERE REAL ESTATE SERVICES) 5:15-cv-01921-R-KK
COMPANY, a Washington) VOLUME I
corporation; and DOES 1-10,)
Defendants,)
AND RELATED COUNTERCLAIMS)

VIDEOTAPED DEPOSITION OF PAUL S. DRAYNA
600 University Street, Suite 320
Seattle, Washington
Monday, August 22, 2016

REPORTED BY:
CYNTHIA A. KENNEDY, RPR, CCR 3005
JOB No. 2364301
PAGES 1 - 354

1 APPEARANCES
2
3 FOR THE PLAINTIFF:
4
5 BY: KEVIN A. ADAMS, ESQ.
6 Mulcahy LLP
7 Four Park Plaza, Suite 1230
8 Irvine, CA 92614
9 (949) 252-9377
10 kadams@mulcahyllp.com
11
12 FOR THE DEFENDANT:
13
14 BY: JEFFREY A. FEASBY, ESQ.
15 Perez Wilson Vaughn & Feasby
16 Symphony Towers
17 750 B Street, 33rd Floor
18 San Diego, CA 92101
19 (619) 702-8044
20 feasby@perezwilson.com
21
22 ALSO PRESENT:
23 JOSEPH DEVILLE
24 ROBERT BENNION (morning session only)
25 LUCAS CHEADLE, VIDEOGRAPHER

1 A. Yes.

2 Q. Okay. So you are being -- you've been
3 designated to testify on behalf of Windermere,
4 correct?

5 A. Yes.

6 (Whereupon Exhibit 1 was
7 marked for the record.)

8 Q. Okay. I'm going to hand you a document that
9 has been marked as Exhibit 1.

10 Have you seen this document before?

11 A. Yes.

12 Q. Okay. This document is titled Amended
13 Notice of Deposition of Paul Drayna.

14 A. Forgive me. I don't know that I've seen the
15 amended one. I saw the original one.

16 Q. Okay. And you are being produced today to
17 testify pursuant to this Deposition Notice, correct?

18 A. Yes.

19 (Whereupon Exhibit 2 was
20 marked for the record.)

21 Q. I'm handing you a document that has been
22 identified as Exhibit 2.

23 MR. FEASBY: Counsel, for the record, I
24 don't know that it matters. This depo notice had the
25 date of August 23rd. We're here on the 22nd by

1 agreement of the parties.

2 MR. ADAMS: Very good. Thank you,
3 Counsel.

4 BY MR. ADAMS:

5 Q. Mr. Drayna, this document that I just handed
6 you marked as Exhibit 2 is titled Amended Notice of
7 Deposition of Defendant Windermere Real Estate
8 Services Company Pursuant to Federal Rules of Civil
9 Procedure Rule 30(b)(6).

10 Do you see that?

11 A. Yes.

12 Q. And have you seen this document before?

13 A. Yes.

14 Q. And you are being produced today to testify
15 pursuant to several of the categories identified in
16 this document, correct?

17 A. Correct.

18 Q. Okay. And this document contains, if you
19 look for me on page 7, 60 categories.

20 Do you see that?

21 A. Yes.

22 Q. And I'll represent to you that your counsel,
23 Mr. Feasby, who is here today, has identified a series
24 of -- has -- I'm sorry, strike that.

25 Mr. Feasby has provided an email to me

1 identifying the categories that you will testify to.
2 Did you know that?
3 A. Yes.
4 (Whereupon Exhibit 3 was
5 marked for the record.)
6 Q. Okay. I'm handing you a document that has
7 been marked as Exhibit 3. This document is an email
8 from Mr. Feasby to myself dated August 19, 2016.
9 Have you seen this document before?
10 A. Yes.
11 Q. Okay. And do you agree that those numbers
12 next to your name are the categories that you are
13 being produced today to testify to?
14 A. Yes.
15 Q. And we'll go back to these categories
16 throughout the deposition today. Okay?
17 Are you okay with that?
18 A. Yes.
19 Q. Mr. Drayna, you currently work for
20 Windermere?
21 A. Yes.
22 Q. And what is your title?
23 A. Secretary and general counsel.
24 Q. And how long have you had the title
25 secretary?

1 A. I do not.
2
3 (Whereupon Exhibit 27 was
4 marked for the record.)
5 Q. I'm handing you a document that has been
6 numbered Exhibit 27. This is another multi-page email
7 chain. The email at the top of the page is from
8 Mr. Bennion to Mr. Deville, cc'ing you and others,
9 dated March 29, 2013.
10 Do you see that?
11 A. I do.
12 Q. And does this email chain refresh your
13 recollection, as to Lloyd's of London pulling their
14 quote after learning of Windermere Watch?
15 A. Give me a moment while I read it.
16 (Reviewing Exhibit 27.) I see that this was an email,
17 that I was one of the addressees. I -- I don't
18 actually remember this or, if I received it, I don't
19 remember reading the portion talking about the
20 insurance issue.
21 Q. Okay. What about the email from
22 Mr. Deville, the second one down on the page, where he
23 states, "Please advise where we are with the WRE
24 watch"?
25 Do you see that?
 A. I do.

1 Q. Did you respond to this email?
2 A. I don't recall.
3 Q. Do you know if anyone responded to this
4 email from Windermere?
5 A. I don't know.
6 Q. Where was Windermere at that time with the
7 Windermere Watch issue?
8 A. In March 2013, so this was a month after we
9 had -- we had the conference call in February, where
10 the agreement was to try and do something technical
11 with search engine optimization. I'm -- I don't
12 recall where we were with Mr. Baur and his consultant,
13 in terms of their work in trying to identify possible
14 courses of action.
15 Q. Had they done anything, between the meeting
16 in January and this March 2 -- 29th date?
17 A. I don't know.
18 Q. Who would know?
19 A. You'd have to ask Mr. Baur.
20 Q. And who was Mr. Baur's direct report?
21 A. Mr. Baur reports to himself. He's the CEO
22 of Windermere Solutions.
23 Q. And he doesn't report to Mr. Wood at all?
24 A. He doesn't -- he reports to the shareholders
25 of that entity. I believe that -- I believe that

1 Mr. Wood is involved in ongoing discussions about
2 Windermere Solutions and its activities, but I don't
3 believe that there's a formal reporting. I don't
4 believe that Mr. Baur formally reports to Geoff Wood.

5 Q. And as you sit here, you have no idea what,
6 if anything, Mr. Baur did between the January meeting
7 and March 29, 2013, as to Windermere Watch?

8 A. There was a -- the meeting was in February,
9 not in January.

10 Q. Thank you. I'm sorry.

11 You have no idea, as you sit here, if
12 Mr. Baur did anything between the February meeting and
13 March 29, 2013, with respect to Windermere Watch?

14 A. I do not.

15 Q. And you see the top email in this chain from
16 Mr. Bennion? It says that a client was very concerned
17 if Windermere was on, and if we're going to be
18 closing.

19 Would that concern you at all?

20 A. Again, I don't -- I don't specifically
21 remember receiving this email at the time. And as I
22 read it now, I'm -- I'm frankly not sure I know what
23 that means. Was very concerned if Windermere was on,
24 and if we're going to be -- I don't actually
25 understand that sentence.

1 Q. You don't understand that sentence to mean
2 whether or not Wind -- Windermere is going to continue
3 in business, in light of these posts from Windermere
4 Watch?

5 A. No, that's I -- not at all how I would read
6 that.

7 Q. April 20th, 2013, Windermere still hasn't
8 gotten back to Mr. Deville concerning that last email
9 we just looked at, has it?

10 A. I don't --

11 MR. FEASBY: Object to form.

12 BY MR. ADAMS:

13 Q. You hadn't gotten back to Mr. Deville by
14 April 20th, had you?

15 A. I -- probably not.

16 Q. Who was tasked with getting back to
17 Mr. Deville's email?

18 A. Here we are beginning to get into areas of
19 attorney/client communications between me and my
20 clients.

21 Q. Okay. You were not tasks -- tasked with
22 responding to Mr. Deville's email?

23 A. I was not.

24 Q. And do you have any reason to believe anyone
25 responded before April 20th?

1 A. Again, that -- I don't think I can answer
2 that question without divulging communications with my
3 clients.

4 Q. Let me put it this way. Did you observe a
5 communication from one of your clients to Mr. Deville
6 in response to his last email we just identified as
7 Exhibit 27?

8 A. I don't remember. I don't remember this
9 email, I don't remember seeing Exhibit 27, nor do I
10 remember if there was a response to it.

11 (Whereupon Exhibit 28 was
12 marked for the record.)

13 Q. And on April 20th, Mr. Deville again sent an
14 email to you and others, asking where we are with
15 Windermere Watch.

16 Do you remember that email?

17 A. Not specifically, but --

18 Q. Do you remember generally?

19 A. I remember generally that there were a
20 series of emails.

21 Q. And were you just ignoring those emails?

22 A. Again, I cannot answer that question without
23 disclosing communications between me and my clients.

24 Q. Did you respond to any of Mr. Deville's
25 emails?

1 A. I don't believe I did.

2 Q. I'm handing you single email, a single-paged
3 email that we've marked as Exhibit 28. This is an
4 email from Mr. Deville on April 20th to you and others
5 informing you again that "Windermere Watch has come to
6 bite us in the butt."

7 Do you see that, the first line?

8 A. I do.

9 Q. And he talks about a \$5 million listing that
10 they lost because of Windermere Watch.

11 Do you see that?

12 A. I do.

13 Q. And the last sentence in Mr. Deville's email
14 states, "Please advise what has been done since our
15 phone discussion months ago about Windermere Watch and
16 what the plan is to make this go away."

17 Do you see that?

18 A. I do.

19 Q. What had happened between your phone
20 discussion in April 20th?

21 A. Again, I'm not sure what the status was at
22 that point of efforts by Mr. Baur to identify or
23 pursue technical solutions.

24 Q. Is it possible Mr. Baur hadn't done anything
25 by April 20th?

1 CERTIFICATE
2

3 STATE OF WASHINGTON)
4) ss.
5 COUNTY OF KITSAP)
6

7 I, the undersigned Washington Certified Court
8 Reporter, hereby certify that the foregoing deposition
9 upon oral examination of PAUL S. DRAYNA was taken
10 stenographically before me on August 22, 2016, and
11 thereafter transcribed under my direction;

12 That the witness was duly sworn by me
13 pursuant to RCW 5.28.010 to testify truthfully; that
14 the transcript of the deposition is a full, true, and
15 correct transcript to the best of my ability; that I
16 am neither attorney for nor a relative or employee of
17 any of the parties to the action or any attorney or
18 financially interested in its outcome;

19 I further certify that in accordance with CR
20 30(e), the witness was given the opportunity to
21 examine, read, and sign the deposition, within 30
22 days, upon its completion and submission, unless
23 waiver of signature was indicated in the record.

24 IN WITNESS WHEREOF, I have hereunto set my
25 hand and 6th day of September, 2016.

21 _____
22 Cynthia A. Kennedy, RPR
23 NCRA Registered Professional Reporter
24 Washington Certified Court Reporter No. 3005
25 License expires November 16, 2016

EXHIBIT B

From: Bob Bennion <bbennion@windermere.com>
Sent: Friday, March 29, 2013 10:04 AM
To: Bob Deville
Cc: Paul Drayna; Geoff Wood; bbennion@windermereocal.com; attny-Robert Sunderland (rsunderland@sunmclaw.com)
Subject: Re: Windermere - EPLI

Yes this site was circulated among my Seattle clients and one very good client called to give me the heads up and thought I should know about it and was very concerned if Windermere was on and if we were going to be closing. Argh!

Sent from my iPhone

On Mar 29, 2013, at 8:54 AM, Bob Deville <bdeville@windermereocal.com> wrote:

See below

Please advise where we are with WRE Watch.

It has also cost us two listings on the coast (used by Sotheby's) and Bob B has had two clients in Seattle contact him directly about it.

I know we had one phone conversation a couple of months back but to date have had nothing else communicated on this issue.

Bob Deville

Bob Deville
Broker/Owner
Windermere Real Estate Southern California
A Division of Bennion & Deville Fine Homes, Inc.

From: Troy McFadin
Sent: Friday, March 29, 2013 8:32 AM
To: Robert Sunderland; Bob Deville
Subject: FW: Windermere - EPLI

Thought I would pass this on to you guys for review. I was able to get more clarification in a phone call with this broker. Apparently Lloyds of London had provided a fairly competitive quote for the EPLI insurance then pulled their quote after they found the Windermere Watch blog on the internet. I tried to get feedback directly from Lloyds but they didn't want anything to do with formal documentation, nor will they consider working with Windermere for any insurance purposes because of Windermere Watch.

Troy McFadin / Human Resource Director

Windermere Real Estate Southern California
A Division of Bennion & Deville Fine Homes, Inc.

71-691 HWY 111 / Rancho Mirage, CA 92270
Ofc 760-770-6801 / Mbl 760-898-3859
Fax 760-770-6951
www.windermereocal.com

Exhibit No.

27

DRAYNA

8-22-16

Cynthia A. Kennedy, CSR, RPR

B&D0044615

The information contained in this transmission may contain privileged and confidential information. It is intended only for the use of the person(s) named above. If you are not the intended recipient, you are hereby notified that any review, dissemination, distribution or duplication of this message is strictly prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message.

From: Brad Butlin [<mailto:brad@a-ains.com>]
Sent: Thursday, March 28, 2013 8:03 AM
To: Troy McFadin
Subject: Windermere - EPLI

Hi Troy,

I am working with a wholesaler to get Employer's Practices Liability Insurance quotes for your office.

During the process, the wholesaler mentioned that one of his markets ran across some information on the internet regarding Windermere and as result were hesitant to offer a quote.

THANKS!

Brad Butlin

AUSTIN & AUSTIN INSURANCE SERVICES INC
BROKER
CORP LICENSE # OC10853
PH: 800.987.1475 F: 925.416.1693 E-Fax: 925.226.7543
5890 STONERIDGE DRIVE #209 | PLEASANTON CA 94588
VISIT US ON THE WEB AT [HTTP://WWW.A-AINS.COM/](http://WWW.A-AINS.COM/)
BRAD@A-AINS.COM

<image001.jpg>

SERVING THE REAL ESTATE COMMUNITY SINCE 1988
E & O - WORKERS COMP - GENERAL LIABILITY

EXHIBIT C

From: Bob Deville
Sent: Saturday, April 20, 2013 9:12 AM
To: 'Paul Drayna'; Geoff Wood; 'bbennion@windermeresocal.com'; attny-Robert Sunderland (rsunderland@sunmclaw.com)
Subject: WRE Watch

Once again the WRE Watch has come to bite us in the butt.

I was in a listing presentation with an agent last week for a property in excess of \$5,000,000 with none of our agents and the seller Googled my name and Bob B name

Guess what popped up – WRE Watch.

Feel like we were set up in front of our agent but regardless the fact remains it is still directly affecting our business - we did not get the listing and I think I am going to lose the agent to Sotheby's.

Please advise has been done since our phone discussion months ago about WRE Watch and what the plans to make this go away.

Bob D

Bob Deville
Broker/Owner
Windermere Real Estate Southern California
A Division of Bennion & Deville Fine Homes, Inc.

EXHIBIT D

From: Bob Deville
Sent: Wednesday, June 12, 2013 9:49 AM
To: attny-Robert Sunderland
Subject: Fwd: WRE Watch

FYI

Begin forwarded message:

From: Bob Bennion <bbennion@windermere.com>
Date: June 12, 2013, 9:43:55 AM PDT
To: 'Bob Deville' <bdeville@windermereocal.com>, 'Paul Drayna' <pdrayna@windermere.com>, <bbennion@windermereocal.com>
Subject: RE: WRE Watch

Yes Paul I really need an update. This was extremely uncomfortable and I was really grilled on this. I have sent several emails in the past with no response which I find equally disheartening. Thank you. Bob

From: Bob Deville [<mailto:bdeville@windermereocal.com>]
Sent: Wednesday, June 12, 2013 8:48 AM
To: Paul Drayna (pdrayna@windermere.com); bbennion@windermereocal.com
Subject: WRE Watch

Paul,

Please let me know what is being done about the WRE Watch. It has now been months since we have discussed this problem and it is still affecting our business both in So CA as well as Seattle.

Bob B was on a listing appt in the Highlands and was grilled up and down about WRE Watch. It is definitely being used against us by other real estate companies by subtly bringing it up on listing presentations.

I met with a possible WRE Owner in So Cal last week and he kept bring this issue up to me as well. Have now heard he is doing a Sotheby's franchise.

Bob D

Bob Deville
Broker/Owner
Windermere Real Estate Southern California
A Division of Bennion & Deville Fine Homes, Inc.

Exhibit No.

29

DRAYNA

8-22-16

Cynthia A. Kennedy, CSR, RPR

B&D0034865