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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 JCG
Hon. Jay C. Gandhi

**DECLARATION OF KEVIN A.
ADAMS IN SUPPORT OF
PLAINTIFFS AND COUNTER-
DEFENDANTS' OPPOSITION TO
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Date: March 1, 2018

Time: 10:00 a.m.

Courtroom: 6A

Action Filed: September 17, 2015

Pretrial Conf.: None Set

Trial: None Set

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

2 1. I am one of the attorneys of record for Plaintiffs and Counter-
3 Defendants Bennion & Deville Fine Homes, Inc. ("B&D Fine Homes"), Bennion
4 & Deville Fine Homes SoCal, Inc. ("B&D SoCal") and Windermere Services
5 Southern California, Inc. ("Services SoCal"), and Counter-Defendants Robert
6 Bennion ("Bennion") and Joseph R. Deville ("Deville") (all collectively, the
7 "B&D Parties") in the above-named action. I am a member in good standing of the
8 State Bar of California, and duly admitted to practice law before all of the courts of
9 the State of California, including the United States District Court, Central District
10 of California and the United States Court of Appeals for the Ninth Circuit.

11 2. I make this Declaration in support of Plaintiffs and Counter-
12 Defendants' Opposition to Motion for Partial Summary Judgment, filed by
13 Windermere Real Estate Services Company ("WSC"). [See D.E. 154.]

14 3. As counsel for the B&D Parties, I am intimately familiar with the
15 discovery that has taken place in this action, including the deposition testimony.
16 The deposition transcripts have all been reviewed by me and are maintained at my
17 office.

18 4. On August 22, 2016, I deposed Paul S. Drayna in Seattle,
19 Washington. Attached hereto as **Exhibit A** is a true and correct copy of portions of
20 the transcript of Mr. Drayna's deposition.

21 5. Counsel for WSC failed to meet and confer as required by Local Rule
22 7-3 prior to filing WSC's instant motion for partial summary judgment. The first I,
23 or anyone in our office, heard of this motion was when we received notice that it
24 was filed in the CM/ECF system.

25 6. WSC has never mentioned their intent to file this motion. In fact,
26 WSC failed to list it as a contemplated motion when we filed the joint Proposed
27 Final Pretrial Conference Order last year. [D.E. 130.]
28

7. On February 2, 2018, I emailed WSC's counsel informing them of their failure to meet and confer, and asking them to withdraw their motion. Jeffrey A. Feasby, WSC's counsel, responded to me on February 5, 2018, telling me that they would not withdraw the motion unless we stipulated to the relief sought by WSC in the motion. A true and correct copy of the email exchange described above is attached hereto as **Exhibit B**.

I declare under penalty of perjury under the laws of the State of California and the laws of the United States of America that the foregoing is true and correct and that this Declaration was executed this 8th day of February, 2018 at Irvine, California.

/s/ Kevin A. Adams
Kevin A. Adams

EXHIBIT A

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

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1 APPEARANCES

2

3 FOR THE PLAINTIFF:

4

5 BY: KEVIN A. ADAMS, ESQ.

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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

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1 A. It states that it is a suggested donation.
2 Q. And why, if you know, was the Windermere
3 Foundation fee changed from a required transaction to
4 a suggested donation?
5 MR. FEASBY: Objection, to the extent
6 that it calls for disclosure of attorney/client
7 communications.
8 THE WITNESS: I agree that to answer
9 that question, I would have to divulge discussions I
10 had with my clients that I believe to be privileged.
11 BY MR. ADAMS:
12 Q. And without identifying what those
13 discussions are, which clients are you referring to?
14 A. Windermere Services Company and the
15 Windermere Foundation.
16 Q. And did you speak to an individual at those
17 companies?
18 A. Yes.
19 Q. Who were the individuals?
20 A. The individuals -- probably numerous
21 individuals. They would have included Geoff Wood and
22 Christine Wood.
23 Q. Who is your direct report at Windermere?
24 A. Geoff Wood.
25 Q. And do you report to anyone else?

1 A. No.

2 Q. And what's Geoff Wood's role --

3 A. He --

4 Q. -- with Windermere? I'm sorry.

5 A. He was the CEO.

6 Q. And do you also report to Geoff Wood in

7 connection with your work performed for these other

8 affiliated or related entities?

9 A. Some of them.

10 Q. Who else do you report to?

11 A. With respect to Windermere Real Estate

12 Company and the Windermere Real State Northwest, Inc.,

13 my primary reporting is to Jill Wood and John O.

14 Jacobi, who -- I should explain for the record that

15 John Jacobi -- there is a John Jacobi Sr. and a John

16 Jacobi Jr. John Jacobi Jr. is John O'Brien Jacobi.

17 He is commonly referred to as OB for short; OB, as in

18 O'Brien. So if I, today, refer to OB Jacobi, I am

19 referring to John O. Jacobi.

20 Q. Thank you. And I will try to do the same.

21 Okay. October 2003, you were providing

22 legal services for Windermere, correct?

23 A. Yes.

24 Q. Okay. And were you at all involved in

25 Mr. Deville and Mr. Bennion's discussions with

1 Windermere about the acquisition of the area
2 representative territory for Southern California?

3 A. I was involved in that project. I don't
4 know that I would characterize it that I was involved
5 in -- I don't know what you mean by "the discussions."

6 Q. Were you involved in any negotiations
7 involving the purchase of that -- of that region?

8 A. I don't believe that I was involved in the
9 negotiations, no.

10 Q. Were you involved in drafting any of the
11 legal documents relating to that transaction?

12 A. I was.

13 Q. What did you draft?

14 A. I drafted the Area Representation Agreement.

15 Q. And did you have any understanding as to who
16 the area representative was, if anyone, prior to
17 Mr. Deville and Mr. Bennion's purchase of that
18 territory?

19 MR. FEASBY: Objection. Form.

20 THE WITNESS: I am not sure that I --
21 it's accurate to say that they purchased that
22 territory.

23 Prior to them becoming area
24 representatives, my recollection is that there was an
25 existing area representative or an existing

1 responded.

2 (Whereupon Exhibit 52 was
3 marked for the record.)

4 Q. I'm handing you another document. This is
5 single-page letter I've identified as Exhibit 52.
6 This is another letter from the Department of Business
7 Oversight to you dated April 28th, 2014.

8 Do you recognize this letter?

9 A. I do.

10 Q. What -- why did you receive this letter?

11 A. This is a letter confirming that the -- our
12 application to renew our registration for our Northern
13 California franchise offering had been approved.

14 Q. And the Northern California offering was not
15 effective until April 28th, 2014, correct?

16 A. That's correct.

17 Q. Did you ever register the disclosure
18 document for Southern California in 2014?

19 A. It was filed, but it was not registered.

20 Q. Why not?

21 A. The filing was submitted. First of all, the
22 filing was not submitted until -- we did not receive
23 the audited financial statements from Mr. Bennion and
24 Mr. Deville until, I believe it was August. The
25 filing was submitted at some point after that. And

1 this was around the time that discussions were ongoing
2 about the potential for us to buy back, if you will,
3 the area of representation rights for Southern
4 California to negotiate a termination of the Area
5 Representation Agreement.

6 Q. But during those discussions, Mr. Bennion
7 and Mr. Deville still had a contractual right to
8 provide services in the Southern California region,
9 correct?

10 A. That's correct.

11 Q. If I represented to you that you received
12 the audited financials at the end of July 2014 for
13 Mr. Bennion and Mr. Deville's business, would you --
14 would that refresh your recollection as to when you
15 received them?

16 A. My recollection was that it was August, but
17 the end of July may be correct.

18 Q. And that you waited until the end of October
19 to register anything with the California department?

20 Does that -- does that refresh your
21 recollection?

22 A. I believe that that's correct.

23 Q. And why did you wait such a long period of
24 time before registering for the Southern California
25 disclosure documents?

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CERTIFICATE

STATE OF WASHINGTON)
) ss.
COUNTY OF KITSAP)

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

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

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

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

Cynthia A. Kennedy, RPR
NCRA Registered Professional Reporter
Washington Certified Court Reporter No. 3005
License expires November 16, 2016

EXHIBIT B

Kevin Adams

From: Jeff Feasby <feasby@pvflaw.com>
Sent: Monday, February 05, 2018 11:35 AM
To: Kevin Adams; John Vaughn
Cc: James Mulcahy; Barbara Calvert; Doug Luther
Subject: RE: Failure to Adhere to LR 7-3 & 16-7

Kevin – Thank you for your email. We believe that our motion is well taken and procedurally proper. Accordingly, we have no intention of withdrawing it.

Your threat re “sanctions” is as unfortunate as it is hypocritical. You rely on Local Rule 16-7 to argue that our motion is procedurally improper while plaintiffs have, at the same time, flagrantly ignored similar requirements for witness lists (Local Rule 16-2.4) in improperly and unjustifiably including Gary Kruger as a trial witness when he was not identified in plaintiffs’ Rule 26 disclosure or in their initial witness list. Regardless, as you know, defendant expressly disclosed to the Court its intent to file this motion in the joint status report that was filed with Judge Gandhi. Your clients set forth their objection to the motion in that same joint report, including their arguments that the motion was barred by Local Rule 16-7. Nevertheless, at the November 3, 2017 status conference, Judge Gandhi thanked the parties for the “comprehensive joint report” and invited defendant to bring the motion, which we did. It was certainly within Judge Gandhi’s discretion to allow the motion.

With regard to Local Rule 7-3, the parties have addressed at length their respective positions on the subject of this motion. The issue was raised in defendant’s motion in limine to exclude Peter Wrobel’s report and testimony, which plaintiffs thoroughly opposed. Plaintiffs also set forth their procedural objections to the motion in the status report. Thus, the fact that we did not sit down and specifically discuss the issue is form over substance. However, if plaintiffs would like to stipulate to the relief sought in the motion we would be happy to withdraw the motion as moot.

Best,

Jeff



Jeffrey A. Feasby | Partner

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From: Kevin Adams [mailto:kadams@mulcahyllp.com]
Sent: Friday, February 02, 2018 3:58 PM
To: Jeff Feasby (feasby@pvflaw.com) <feasby@pvflaw.com>; John Vaughn (vaughn@pvflaw.com) <vaughn@pvflaw.com>
Cc: James Mulcahy <jmulcahy@mulcahyllp.com>; Barbara Calvert <bcalvert@mulcahyllp.com>; Doug Luther

<dluther@mulcahyllp.com>

Subject: Failure to Adhere to LR 7-3 & 16-7

John/Jeff: We are in receipt of your motion for partial summary judgment filed on Wednesday. The filing violates Local Rules 16-7 and 7-3 and, therefore, must be withdrawn immediately.

Local Rule 16-7 required the parties to identify all anticipated motions as part of the Final Pretrial Conference Order. The instant motion for partial summary judgment was not identified in Windermere's portion of the document. In fact, Windermere represent to the court (and us) that it had "no other" "law and motion matters and motions in limine" to raise with the court. The arguments raised in the instant motion are not new to the case. The motion should have been identified in the Pretrial Conference Order. Because of Windermere's failure to identify the instant motion, it is precluded by Local Rule 16-7 from bringing it now.

Even if Windermere had identified the motion in its portion of the Final Pretrial Conference Order, your failure to make any effort to comply with the meet and confer obligations of Local Rule 7-3 still renders the motion improper. Local Rule 7-3, titled "Conference of Counsel Prior to Filing of Motions" applies to virtually all motions filed in the Central District. It is taken very seriously in this District. The rule requires that:

[C]ounsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution. The conference shall take place at least seven (7) days prior to the filing of the motion. If the parties are unable to reach a resolution which eliminates the necessity for a hearing, counsel for the moving party shall include in the notice of motion a statement to the following effect: "This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on (date)."

Not only does the meet and confer requirement give the parties and opportunity to discuss a potential resolution of the dispute, but perhaps, more importantly, the meet and confer time period is built into the response time for the opposing party to respond to the motion. In other words, by violating LR 7-3, you have effectively squeezed us on the time we have to effectively respond the motion. Please withdraw the motion immediately.

Notwithstanding your above violations, the motion should be withdrawn for practical reasons – next week we will be getting a new judge, presumably with a new calendar. If you insist to move forward with the motion, it should be after comply with LR 7-3 and with the new judge.

Please let us know by noon on Monday if you will be withdrawing the motion. If not, we will be going into court to seek sufficient time to respond and sanctions for your failure to adhere to LR 7-3.

Sincerely,

Kevin A. Adams*

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**Certified Specialist in Franchise & Distribution Law
by the State Bar of California Board of Legal Specialization*

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