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11 Attorneys for Defendant and Counterclaimant
12 Windermere Real Estate Services Company

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

15 BENNION & DEVILLE FINE
16 HOMES, INC., a California
corporation, BENNION & DEVILLE
17 FINE HOMES SOCIAL, INC., a
California corporation, WINDERMERE
18 SERVICES SOUTHERN
CALIFORNIA, INC., a California
19 corporation,

20 Plaintiffs,

21 v.

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

24 Defendant.

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

Hon. Manuel L. Real

**DECLARATION OF JEFFREY A.
FEASBY IN SUPPORT OF
COUNTERCLAIMANT'S
OPPOSITION TO COUNTER-
DEFENDANTS' MOTION *IN*
LIMINE TO EXCLUDE EVIDENCE
OF WORK PERFORMED ON THE
SUNDBERG REPORT PRIOR TO
OCTOBER 2013**

Date: May 15, 2017

Time: 10:00 a.m.

Courtroom: 880

27 **AND RELATED COUNTERCLAIMS**
28

1 I, Jeffrey A. Feasby, declare:

2 1. I am an attorney at law, duly licensed to practice law in the State of
3 California, and am one of the attorneys for defendant Windermere Real Estate
4 Services Company (“WSC”) in the above-captioned matter. I have personal
5 knowledge of the facts set forth in this declaration, and if called upon to testify
6 thereto, would do so competently.

7 2. As one of the attorneys for WSC, I am intimately familiar with the
8 discovery that has taken place in this case, including the production of documents by
9 all parties and documents received from third parties pursuant to subpoenas. These
10 documents are maintained in my office.

11 3. Attached hereto as Exhibit A is a true and correct copy of excerpts from
12 the transcript of the Deposition of York Baur taken on August 26, 2016 in this
13 matter.

14 4. Attached as Exhibit B to this declaration is a true and correct copy of
15 two emails produced by WSC in this matter Bates labeled WSC017449 and
16 WSC017451.

17 5. The documents attached as Exhibit B to this declaration were produced
18 by Counter-Defendants on April 25, 2016. Attached as Exhibit C to this declaration
19 is a true and correct copy of a letter dated April 25, 2016 from me to Kevin A.
20 Adams, Esq., counsel for Counter-Defendants in this action. This was the cover
21 letter enclosing the production that included the above referenced documents.

22 I declare under penalty of perjury under the laws of the State California that
23 the foregoing is true and correct, and that this declaration was executed on April 24,
24 2017.

25

26

27

28

/s/ Jeffrey A. Feasby
Jeffrey A. Feasby

EXHIBIT A

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA
3

4 BENNION & DEVILLE FINE HOMES,)
INC., a California corporation,)
5 BENNION & DEVILLE FINE HOMES)
SOCAL, INC., a California)
6 corporation, WINDERMERE SERVICES)
SOUTHERN CALIFORNIA, INC., a)
7 California corporation,)
)
8 Plaintiffs,)
) No.
9 vs.) 5:15-cv-01921-R-KK
)
10 WINDERMERE REAL ESTATE SERVICES)
COMPANY, a Washington)
11 corporation; and DOES 1-10,)
)
12 Defendants,)
)
13)
14 AND RELATED COUNTERCLAIMS)
)

15
16 VIDEOTAPED DEPOSITION UPON ORAL EXAMINATION OF:
17 YORK BAUR
18

19
20 Seattle Deposition Reporters

21 600 University Street, Suite 320

22 Seattle, Washington

23
24 DATE TAKEN: August 26, 2016
25 REPORTED BY: CYNTHIA A. KENNEDY, RPR, CCR 3005

Page 1

1 A. I see that, yes.

2 Q. And you understand that you are going to be
3 providing deposition testimony today as a corporate
4 representative for categories 22, 23, 25, 27, 36, 37,
5 38, 55, and 56?

6 A. Yes.

7 Q. Okay. Great. And we'll get into these
8 categories specifically in just a little bit, so we can
9 keep these exhibits handy.

10 Now, Mr. Baur, I understand that you
11 currently work for Windermere, correct?

12 A. No.

13 Q. Okay. But you've been identified as a
14 corporate representative for Windermere.

15 How -- how did that come to be?

16 A. My title is I'm the CEO of Windermere
17 Solutions, LLC, DBA Moxi works. In my role there, I
18 also serve as the CIO of Windermere Services.

19 Q. And the Windermere Services that you're
20 referring to is the same Windermere that is the party
21 in this litigation?

22 A. Correct. The Seattle-based Windermere
23 Services.

24 Q. And as you understand it, the Seattle-based
25 Windermere Services is known as Windermere Real Estate

1 didn't come to my attention at the time.

2 Q. And after you came on board in September,
3 2012, was there a period of time where it came to your
4 attention that something was being done with respect
5 the Windermere Watch?

6 A. Yes.

7 Q. When?

8 A. As I testified earlier, I don't remember the
9 exact time, but it was when Windermere franchisor
10 approached us for help in combating Windermere Watch
11 specifically in Southern California.

12 Q. And I am entitled to your best estimate of
13 time or dates.

14 Can you give me an estimate as to when that
15 occurred?

16 A. Yeah, I -- if I recall correctly, it would
17 have been the beginning sometime, maybe during the
18 first quarter of 2013.

19 Q. Okay. And who was this that approached you
20 about Windermere Watch?

21 A. Probably Paul Drayna, who is counsel for --
22 for Windermere franchisor.

23 Q. And what did Mr. Drayna tell you?

24 MR. FEASBY: I -- okay. Objection to the
25 extent it calls for the discloser of attorney/client

1 conversation with Mr. Drayna where he talked to you
2 about the historical dealings with respect to
3 Windermere Watch.

4 What, if anything, did you do with respect to
5 Windermere Watch after that conversation with
6 Mr. Drayna?

7 A. At his request, I did research on the matter
8 inside my own company, which is why I'm aware of some
9 of the work that had been done historically in SEO and
10 the opinions of how that might influence the presence
11 of Windermere Watch. And I specifically hired one of
12 the foremost SEO experts in the country, his name is
13 Greg Sundberg, to advise us by doing research that we
14 funded and issuing a report with recommendations on how
15 we could help the local franchisee improve their search
16 engine visibility.

17 Q. When did you hire Mr. Sundberg?

18 A. I don't recall the exact date, but it would
19 have been not long after the discussions with
20 Mr. Drayna, so my guess would be in late first or
21 second quarter, sometime like that, in 2013.

22 Q. And isn't it true that that is your estimate
23 and not a guess?

24 A. Define the difference between estimate and a
25 guess.

1 Q. Sure. An estimate would be something that
2 you had perceived firsthand because you were there. A
3 guess is something that you don't have any firsthand
4 perception of.

5 A. Yeah.

6 Q. It's merely a guess?

7 A. I was the one that hired him to do the work,
8 so it is an estimate.

9 Q. So you estimate that you retained the
10 services of Mr. Sundberg sometime in late first quarter
11 2013, earlier second quarter?

12 A. Yeah. It's been a long time ago. Let's call
13 it the first six months, probably, of the year.

14 Q. And after you retained Mr. Sundberg, do you
15 know if he began doing work on this topic?

16 A. He did.

17 Q. And when did his work start?

18 A. Shortly after I contracted him. I don't
19 recall.

20 Q. Okay. And between your conversation with
21 Mr. Drayna and the retention of Mr. Sundberg, did you
22 discuss the Windermere Watch issue with anyone else at
23 Windermere franchisor?

24 A. It's easily possible. I don't recall.

25 Q. Okay. Did you discuss the Windermere Watch

1 Q. And this analysis, research, and report
2 provided -- strike that.

3 You testified that Mr. Sundberg was retained
4 to provide an analysis, research, and report regarding
5 Windermere Watch and these related issues.

6 Did Mr. Sundberg -- Sundberg, in fact,
7 provide Windermere Solutions with his analysis,
8 research, and report?

9 A. Yes, he did. It was supplied to -- to the
10 franchisee. It was very specific to Southern
11 California. It was not a -- an analysis targeted at
12 the issue generally. It was researched to help
13 Southern California specifically with recommendations.

14 Q. All right. Now, you understand that you've
15 also been produced in this litigation to testify as to
16 the technology being provided by Windermere franchisor
17 to its franchisees, correct?

18 A. Correct.

19 Q. And have you done any research to understand
20 the historical technology provided by Windermere
21 franchisor to its franchisees?

22 A. I have.

23 Q. Okay. And did you understand what technology
24 was being provided to its franchisees in August of
25 2001?

1 the September one because, if I recall correctly,
2 that's when we delivered our report to Mr. Forsberg,
3 but I can't recall the exact timing. It's three-
4 and-a-half years ago. I'm sorry.

5 Q. And I understand that. I'm not trying to put
6 you on the spot as to a day or time when this occurred.
7 But I'm just wondering if you remember generally, and,
8 if so, was it communicated to you in an email? Was it
9 communicated to you over the phone? There have been no
10 documents produced which identify when or how you were
11 involved until much later in the 2013 year.

12 A. Okay. The reason for that, I suspect, is
13 what I testified to earlier. And I -- I already
14 testified to Mr. Drayna calling me. That's the
15 problem, I don't -- I don't have -- I don't log phone
16 calls so I don't remember exactly when it was.

17 My suspicion it would have been, based on the
18 date you just gave, probably early to mid-Q2 in
19 response to the first email that you mentioned on March
20 29th. I would have then researched the topic
21 internally with my team, identified the need for an
22 outside expert, found an outside expert, and then hired
23 Mr. Sundberg.

24 So I could imagine that process taking 30 to
25 60 days perhaps. I don't recall exactly. And then it

1 would have taken some time for Mr. Sundberg to agree to
2 do it. I mean, he's a -- he was employed at the time,
3 and so he did it as a favor to me. And then some time
4 frame for him to do his research. Then we reviewed
5 that research and recommendation eternally and
6 ultimately then approached Mr. Forsberg.

7 So, I guess, I suspect that call probably
8 happened within days or a week at most probably of that
9 March 29th email, but I'm -- I'm just estimating. I
10 really don't remember.

11 Q. Okay. And you had an existing relationship
12 with Mr. Sundberg before working for Windermere
13 Solutions, correct?

14 A. Correct. He was an employee of mine when I
15 ran the search division at InfoSpace.

16 Q. And so do you believe that it took you 30 to
17 60 days to get ahold of Mr. Sundberg before he began an
18 SEO analysis?

19 A. I didn't know that I needed his services
20 until I was able to do the research inside the company
21 to determine what the history is, what the issue was,
22 and what needed to be done about it, and then it did
23 take me some time. Mr. Sundberg was at the time
24 running his own startup and was very, very busy and, as
25 I mentioned, ultimately did this as a favor to me. But

1 I was willing to trade a little bit of time because he,
2 as I mentioned earlier, is, in my opinion, the foremost
3 expert, so I -- I wanted to make sure that we supplied
4 the best resource we could.

5 Q. And so you took upwards of 60 days to get
6 Mr. Sundberg on board. Is that your testimony today?

7 A. I'm saying I don't recall the exact time
8 frame.

9 Q. And do you recall how long it took for
10 Mr. Sundberg to put together his report?

11 A. No.

12 Q. Do you know if it took him six months after
13 you first got ahold of him?

14 A. Well, it couldn't have if we started in April
15 and delivered to Mr. Forsberg in September.

16 Q. But as you sit here, do you have any
17 independent recollection of that?

18 A. Yes. I just told you.

19 Q. Of how long it took Mr. Sundberg?

20 A. I'm just doing the math. Based on your
21 telling me the date of March 29th and me knowing that
22 we delivered the report within less than six months of
23 that time.

24 Q. So you do have independent recollection of
25 how long it took for Mr. Sundberg to get you his report

1 Q. But you do recall that the report was
2 prepared -- let me strike that.

3 How long was the report prepared after you
4 engaged Mr. Sundberg's services?

5 A. I've testified that --

6 MR. FEASBY: Objection.

7 THE WITNESS: -- I don't recall.

8 MR. FEASBY: Asked and answered.

9 THE WITNESS: This is three years ago,
10 so, I appreciate that you're asking me the dates for a
11 reason, but it's three years ago.

12 BY MR. ADAMS:

13 Q. So it's possible Mr. Sundberg could have been
14 engaged in September of 2013. You just don't recall,
15 correct?

16 A. I suspect it was before then, but, yeah, I
17 don't recall the exact engagement date. I could
18 certainly go find out, by the way. I mean, it's -- I
19 have a record of my exchanges with him, I'm sure.

20 Q. Well, we've asked for these materials in this
21 litigation, sir. Do you know if they were produced?

22 A. I have no idea. I presume they were.

23 Q. What makes you presume that they were?

24 A. Because we have excellent technical staff
25 that does their best to comply with these requests.

1 Q. And who was that staff that did their best to
2 comply with these requests?

3 A. I don't recall exactly whom. It would have
4 been members of my technical operations staff.

5 (Whereupon Exhibit 132 was
6 marked for the record.)

7 Q. I'm handing you a document that has been
8 marked an Exhibit 132. And this is a single-page email
9 from Mr. Sundberg to Mr. Forsberg and you dated October
10 17th, 2013.

11 Do you see that?

12 A. I do.

13 Q. And do you understand this email to be the
14 email in which Mr. Sundberg communicated his proposal
15 to Mr. Forsberg?

16 A. Yes.

17 Q. And do you understand that Mr. Sundberg was
18 relaying to Mr. Forsberg that he looked forward to
19 seeing Windermere Watch fall to the bottom of the
20 search results?

21 A. Yes, I see that.

22 Q. And do you know whether or not this was the
23 report that you are referring to today?

24 A. Yeah, it -- it looks like it's the attachment
25 to the email there.

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 YORK BAUR was taken stenographically before me on August 26, 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 th day of September 2016.

EXHIBIT B

From: Greg Sundberg <gregsu1@yahoo.com>
Sent: Tuesday, April 30, 2013 11:28 AM
To: York Baur
Subject: Draft Proposal - Confidential
Attachments: Windermere Reputation Management Proposal.docx

York,

Attached is a draft proposal for your review.

Thanks,
Greg

From: Greg Sundberg <gregsu1@yahoo.com>
Sent: Wednesday, May 01, 2013 9:44 AM
To: York Baur
Subject: Re: Draft Proposal - Confidential
Attachments: Windermere Reputation Management Proposal.docx

Good point. The attached breaks up each plan into 3 phases:
I - Research, build plan, create content, promote
II - Catch whatever phase I didn't catch
III - Monthly monitor

From: York Baur <york@windermere.com>
To: Greg Sundberg <gregsu1@yahoo.com>
Sent: Tuesday, April 30, 2013 7:37 PM
Subject: RE: Draft Proposal - Confidential

Good stuff, thx for cranking this out. Did you deliberately not propose a "phase 1" and its estimated cost, or are you still planning to add that? Let's discuss on the morrow

From: Greg Sundberg
Sent: Tuesday, April 30, 2013 11:28 AM
To: York Baur
Subject: Draft Proposal - Confidential

York,

Attached is a draft proposal for your review.

Thanks,
Greg

EXHIBIT C

PEREZ WILSON VAUGHN FEASBY

Attorneys at Law

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April 25, 2016

VIA FEDERAL EXPRESS

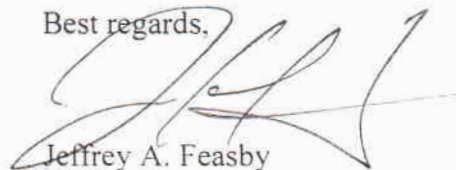
Kevin A. Adams, Esq.
Mulcahy LLP
Four Park Plaza, Suite 1230
Irvine CA 92614

Re: **Bennion & Deville Fine Homes, Inc. et al. v. Windermere Real Estate Services Company – USDC CDCA Case No. 5:15-cv-01921-R-KK**

Dear Mr. Adams,

Enclosed herewith is a thumb drive containing our client's fourth round of production of documents in this matter. These documents are Bates Stamp Nos. WSC014003 through 39285. Some of these documents have been marked "Confidential" pursuant to the terms of the protective order entered by the Court.

Best regards,

A handwritten signature in black ink, appearing to be 'J. Feasby', written over a light blue background.

Jeffrey A. Feasby