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Windermere Real Estate Services Company  
12

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

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

19 Plaintiffs,

20 v.

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

24 Defendant.

25 AND RELATED COUNTERCLAIMS  
26  
27  
28

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

*Hon. Manual L. Real*

**DECLARATION OF JEFFREY A.  
FEASBY IN SUPPORT OF JOINT  
STIPULATION RE: PLAINTIFFS'  
MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS  
AND RESPONSES**

Courtroom: 8

Complaint Filed: September 17, 2015

1 I, Jeffrey A. Feasby, hereby declare,

2 1. I am an attorney for Defendant and Counterclaimant Windermere Real  
3 Estate Services Company (“WSC”) in this matter. I am licensed to practice law in  
4 all state and federal courts in the State of California. I am the attorney at Pérez  
5 Wilson Vaughn & Feasby who was primarily responsible for preparing WSC’s  
6 discovery responses, working with WSC’s employees to locate and collect  
7 potentially responsive documents, reviewing those documents, and producing those  
8 that were responsive. I have personal, firsthand knowledge of the facts set forth  
9 below, and if called as a witness, I could and would competently testify to the  
10 information set forth herein.

11 2. On January 14 and 15, 2016, my partner John Vaughn and I met with a  
12 number of WSC officers and employees at their offices in Seattle, Washington. The  
13 purpose of our trip was to interview potential witnesses, finalize WSC’s discovery  
14 responses, and to determine the location of potentially responsive documents and the  
15 identity of custodians who may have responsive documents.

16 3. During this time, I also met with Robert Sherrell and Josh Christenson,  
17 who are employees of WSC’s IT consultant, Moxi Works. They had been assigned  
18 to help me with the location, review, and production of WSC’s electronically stored  
19 information. I discussed with them WSC’s email systems, how the emails are  
20 stored, and their search capabilities, among other things. They also set up a VPN  
21 site onto which WSC employees could upload documents that I could then access  
22 from San Diego.

23 4. Based on my meeting with WSC’s employees and consultants, I put  
24 together a list of individuals, or “custodians,” who likely had sent or received emails  
25 that were potentially responsive to Plaintiffs’ discovery requests. I then went  
26 through each of Plaintiffs’ document requests and created a list of search terms and  
27 large categories of emails (e.g. all emails to or from anyone using an email with the  
28 domain windermeresocal.com, which was Plaintiffs’ email domain) that I believed

1 would capture the emails that were potentially responsive. I contacted Plaintiffs’  
2 attorney, Kevin Adams, and asked him if Plaintiffs had any other custodians or  
3 search terms they wanted us to include in our email searches. He said they did not.  
4 As I result, I provided Mr. Christenson with my list of custodians and search terms  
5 for him to run searches for all potentially responsive emails.

6 5. Shortly after my return from Seattle, I spoke with Mr. Adams regarding  
7 the parties’ document production. During that conversation, I estimated based upon  
8 our meetings in Seattle that WSC had over 150,000 pages of potentially responsive  
9 documents that would need to be reviewed before they could be produced.  
10 Ultimately, Mr. Adams and I agreed that we would produce documents on a rolling  
11 basis as they were reviewed. Plaintiffs’ “final” production of documents in response  
12 to WSC’s first set of Requests for Production was served on April 19, 2016. Those  
13 requests were propounded on December 25, 2015.

14 6. Upon returning from Seattle, I received two boxes of documents from  
15 Mr. Drayna. I immediately began reviewing these documents as well as the  
16 documents that had been uploaded to the VPN site. Those documents were  
17 produced as they were reviewed and processed and Bates Stamped by my outside  
18 vendor. To the extent I did not locate any documents responsive to a particular  
19 request, I would reach out to Mr. Drayna by phone or email and he would contact  
20 the proper custodians for those documents or put me directly in contact with those  
21 custodians. The responsive documents would then be uploaded to the VPN site or  
22 emailed to me directly.

23 7. I attempted to review the emails in the PST files that Mr. Christenson  
24 had uploaded to the VPN site but I had trouble accessing those documents.  
25 Mr. Christenson and Mr. Drayna worked together to resolve that issue. Mr. Drayna  
26 also began organizing and reviewing the emails for privileged materials.

27 ///

28 ///

1           8.       As soon as I could access the PST file I began reviewing emails. The  
2 first set of responsive emails was provided to my vendor for conversion and Bates  
3 Stamping on April 15, 2016. Despite Mr. Christenson's best efforts, there were still  
4 a few emails that I could not access. However, on May 4, 2016, he and I came up  
5 with a work-around that has allowed me to view these few remaining emails.

6           9.       On April 18, 2016, I received a letter from Plaintiffs' attorney James  
7 Mulcahy regarding WSC's document production and outstanding supplemental  
8 discovery responses. A copy of that letter is attached to Mr. Mulcahy's declaration  
9 as Exhibit A. Mr. Mulcahy's letter set forth a number of Plaintiffs' requests for  
10 production of documents in response to which Mr. Mulcahy contended that WSC  
11 had not produced documents. As set forth in the first paragraph of that letter, Mr.  
12 Mulcahy threatened a motion to compel unless, within 10 days, WSC produced its  
13 responsive documents or gave assurances that they would be produced forthwith.

14           10.      Upon receipt of Mr. Mulcahy's letter, I prepared a matrix of the  
15 document requests at issue and compared that to the documents that WSC had  
16 produced. I also took into account the emails I had reviewed and sent out to my  
17 vendor to be converted to pdf files and Bates Stamped, as well as the remaining  
18 documents that I was in the process of reviewing. I also reached out to Mr. Drayna  
19 regarding any additional potentially responsive documents, and he reached out to the  
20 appropriate WSC employees regarding the same.

21           11.      Based upon my review, I concluded that WSC had produced  
22 documents in response to Plaintiffs' Requests for Production Nos. 7, 10, 18, 24, 26,  
23 27, 34, 35, 37, 38, 42, 48, 51, 53, 54, 55, 57, 59, 60, 65, 66, 67, 68, 71, 76, 77, 78,  
24 79, 80, 81, 82, 83, 84, 85, 86, and 88. I also determined that the emails I had been  
25 sent out for processing, the emails I was reviewing at that time, and the additional  
26 documents I had discussed with Mr. Drayna were responsive to Requests for  
27 Production Nos. 6, 10, 11, 12, 18, 19, 24, 26, 27, 28, 30, 32, 34, 35, 39, 40, 41, 44,  
28 47, 48, 59, 60, 71, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, and 87. After

1 consultation with Mr. Drayna and others at WSC, and based on my review of  
2 WSC's documents, I determined that there were no documents responsive to  
3 Requests for Production Nos. 4 and 43.

4 12. WSC produced over 25,000 pages of documents on April 25, 2016.  
5 WSC produced over 15,000 more pages of documents on April 27, 2016.

6 13. I detailed all of this in my April 27, 2016 letter to Mr. Mulcahy, which  
7 is attached to his declaration as Exhibit B. I also set forth that WSC would produce  
8 its remaining responsive documents and supplemental discovery responses by the  
9 end of the week of May 2, 2016.

10 14. Mr. Mulcahy sent me another letter on April 28, 2016, which is  
11 attached as Exhibit C to his declaration. This letter was accompanied by a draft of  
12 the Joint Stipulation Regarding Plaintiffs' Motion to Compel Production of  
13 Documents and Responses and Plaintiffs' supporting declarations.

14 15. On April 29, 2016, I sent Mr. Mulcahy another letter in a further effort  
15 to meet and confer on these issues. A true and correct copy of this letter is attached  
16 hereto as Exhibit 1. I did not receive a response to this letter.

17 16. I have spent more than 60 hours reviewing documents for production in  
18 this case. This includes reviewing hard copies of files mailed by the client as well  
19 as the documents and emails uploaded onto the VPN site. This does not include the  
20 time Mr. Vaughn and I spent at WSC's offices in Seattle, or the time I spent creating  
21 search terms for the search of the custodians' emails. This time also does not  
22 include my numerous conversations and emails with Mr. Drayna, Mr. Christenson  
23 and other WSC employees regarding the existence and location of all potentially  
24 responsive documents.

25 17. While it was my hope that I would be able to complete my review of  
26 the few potentially responsive documents that are left and serve the remaining  
27 responsive documents and WSC's supplemental discovery responses prior to the  
28 completion of this declaration, WSC's need to provide its portion of the joint

1 stipulation and supporting declarations have taken me away from these tasks.  
2 Nevertheless, those materials will go out tomorrow, within the time promised in my  
3 April 27 letter. This includes documents in response to Requests for Production  
4 Nos. 15 and 36. It will also include a further supplemental response to Interrogatory  
5 No. 25.

6 18. As a part of my preparation of WSC's portion of the joint stipulation  
7 and supporting declarations, I have gone through all of the document requests at  
8 issue, WSC's document production, and the documents that will be produced  
9 tomorrow. Using these materials, I have identified which Bates Numbers or series  
10 of Bates numbers are responsive to each request.

11 I declare under penalty of perjury under the laws of the United States of  
12 America that the forgoing is true and correct, executed this 5th day of May, 2016, at  
13 San Diego, California.

14 */s/ Jeffrey A. Feasby*  
15 Jeffrey A. Feasby  
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# EXHIBIT 1

JEFFREY A. FEASBY  
(619) 741-0242

EMAIL ADDRESS  
feasby@perezwilson.com

April 29, 2016

**VIA ELECTRONIC MAIL**

James M. Mulcahy, 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. Mulcahy,

I am in receipt of you April 28, 2016 letter, and I must say that I am disappointed. Your letter is *prima facie* evidence of your unwillingness to meet and confer on these issues in good faith.

In your April 18, 2016 letter you provided a 10-day deadline for Windermere Real Estate Services Company (“WSC”) to produce documents that you contended were outstanding or to provide assurances as to their immediate production. We responded to your letter within that deadline and produced an additional 40,000 pages of documents. Accordingly, your reference to a “last minute attempt” by WSC to comply is inaccurate and amounts to unproductive posturing.

Now you threaten to bring a motion to compel documents in response to certain of your clients’ requests for production despite your candid admission that you have not even reviewed the 40,000 pages of document produced this week. Instead, your proposed motion is based on your unsupported contention that “it is likely that all responsive documents have not been produced.” Gratuitous supposition is not substantial justification for bringing a motion to compel.

All of this leads to the inescapable conclusion that plaintiffs’ proposed motion to compel is nothing more than a thinly veiled attempt to coerce WSC to identify each of the documents it has produced in response to each of plaintiffs’ 88 requests for production. However, the Federal Rules of Civil Procedure do not require such a time-intensive and costly exercise. Rather, the



James M. Mulcahy, Esq.

April 29, 2016

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rules provide that a responding party can produce its documents “as they are kept in their usual course of business.” (Fed. Rule Civ. Proc. 34(b)(2)(E)(i).) That is what WSC has done.

As noted in my April 27 letter, with its productions this week, WSC has produced documents in response to Plaintiff Bennion & Deville Fine Homes’ First Set of Requests for Production Nos. 6, 7, 10, 11, 12, 18, 19, 24, 26, 27, 28, 30, 32, 34, 35, 37, 38, 39, 40, 41, 42, 44, 48, 51, 53, 54, 55, 57, 59, 60, 65, 66, 67, 68, 71, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86 and Plaintiff Bennion & Deville Fine Homes’ Second Set of Requests for Production Nos. 87 and 88. WSC also agreed to produce documents next week in response to Requests for Production Nos. 15 and 36 to the extent they can be located. WSC also agreed to supplement the interrogatories at issue next week.

Your continued assertion that WSC has failed to produce documents in response to the requests you have identified simply is not true. For instance, Request for Production No. 65 seeks the “settlement agreement” between WSC and Rich King. Although there was no “settlement agreement,” there was a Mutual Termination of Windermere Real Estate Franchise License Agreement between those parties, which WSC agreed to and did produce with its first production of documents at Bates Nos. WSC5-12. Requests for Production Nos. 6, 7, 26, 27, 38 and 42 seek documents related to WSC’s Franchise Disclosure Document for various years and related correspondence. Those documents were produced at Bates Nos. 11691-13520. Additional responsive correspondence was included with the emails produced this week.

In short, WSC has complied with its discovery obligations. Based on the forgoing, we suggest that you go back and review WSC’s production more carefully. To the extent we are required to oppose your proposed motion to compel, WSC will seek reimbursement of our attorneys’ fees and costs incurred in opposing such a baseless motion.

Best regards,



Jeffrey A. Feasby