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SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

MAR 17 2014

J. REGALADO

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9 WINDERMERE REAL ESTATE SOUTHERN CALIFORNIA (erroneously sued as
10 "WINDERMERE REAL ESTATE SOCAL, INC.") and FAITH MESSENGER

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE - PALM SPRINGS BRANCH

11 GEORGE GLANCZ, individually and)
12 as Trustee of the Glancz Family)
13 Trust U/T/D April 21, 2005,)

14 Plaintiff,

15 vs.

16 WINDERMERE REAL ESTATE SOCAL,)
17 INC., a California corporation;)
18 and FAITH MESSENGER, an)
19 individual,)

20 Defendants.

CASE NO.: PSC 1400430

ANSWER OF DEFENDANTS BENNION &
DEVILLE FINE HOMES, INC. dba
WINDERMERE REAL ESTATE SOUTHERN
CALIFORNIA and FAITH MESENGER
TO COMPLAINT

JUDGE: Hon. David M. Chapman
DEPT.: PS-2
Complaint Filed: 01/23/2014
Trial Date: Not Yet Assigned

21 COME NOW Defendants BENNION & DEVILLE FINE HOMES, INC. dba
22 WINDERMERE REAL ESTATE SOUTHERN CALIFORNIA (erroneously sued as
23 "WINDERMERE REAL ESTATE SOCAL, INC.") and FAITH MESSENGER
24 (hereafter referred to as "Answering Defendants"), and in answer
25 to the Complaint filed by Plaintiff GEORGE GLANCZ, individually
26 and as Trustee of the Glancz Family Trust U/T/D April 21, 20015
27 (hereinafter referred to as "Plaintiff") allege as follows:

28 / / /

1 Pursuant to §431.30(d) of the Code of Civil Procedure,
2 these Answering Defendants deny generally and specifically each
3 and every allegation contained in the Complaint, the whole
4 thereof and each and every cause of action set forth therein.
5 These Answering Defendants specifically deny that Plaintiff has
6 been damaged in the amounts therein alleged, or in any other
7 amounts, or at all by reason of any act, breach or omission on
8 the part of these Answering Defendants. As used herein, words
9 including singular numbers shall include plural, words including
10 the plural shall include the singular, and words importing the
11 masculine gender shall include the feminine gender.

12 FIRST AFFIRMATIVE DEFENSE

13 (Failure to State a Cause of Action)

14 1. These Answering Defendants are informed and believe
15 and thereon allege that each and every allegation contained in
16 the Complaint fails to state facts sufficient to constitute a
17 Cause of Action against these Answering Defendants.

18 SECOND AFFIRMATIVE DEFENSE

19 (Comparative Negligence)

20 2. These Answering Defendants are informed and believe
21 and thereon allege that Plaintiff is barred from any recovery or
22 relief on the basis that his own negligence was the sole and
23 proximate cause of any damages he may have sustained or will
24 sustain. In the event that a determination is made that these
25 Answering Defendants were negligent and/or otherwise responsible
26 to Plaintiff and such negligence and/or responsibility
27 proximately contributed to Plaintiff's damages, the amount of
28 recovery, if any, shall be reduced on the basis of Plaintiff's

1 own comparative negligence which contributed to the damages
2 sought by Plaintiff against these Answering Defendants.

3 THIRD AFFIRMATIVE DEFENSE

4 (Laches)

5 3. These Answering Defendants are informed and believe
6 and thereon allege that each and every allegation and cause of
7 action alleged in the Complaint against these Answering
8 Defendants is barred under the equitable doctrine of laches.

9 FOURTH AFFIRMATIVE DEFENSE

10 (Unclean Hands)

11 4. These Answering Defendants are informed and believe
12 and thereon allege that each and every cause of action alleged
13 in the Complaint against these Answering Defendants is barred by
14 the doctrine of unclean hands in that Plaintiff, by his own
15 conduct, has acted in such a manner as to preclude any recovery
16 against these Answering Defendants.

17 FIFTH AFFIRMATIVE DEFENSE

18 (Superseding Acts of Third Parties)

19 5. These Answering Defendants are informed and believe
20 and thereon allege that the damages alleged in the Complaint
21 were exclusively caused or contributed to by the negligence or
22 other acts or omissions of other defendants, persons, or
23 entities, whether parties to this action or not. Said
24 negligence or other acts or omissions were an intervening and
25 superseding cause of injuries and damages, if any, and that such
26 superseding forces are unforeseeable, independent, intervening
27 actions breaking the chain of causation and barring recovery by
28 Plaintiff against these Answering Defendants.

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SIXTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

6. These Answering Defendants are informed and believe and thereon allege that Plaintiff failed to take reasonable steps toward mitigating the losses alleged in his Complaint; therefore, Plaintiff's right to recover damages against these Answering Defendants must be barred or diminished accordingly.

SEVENTH AFFIRMATIVE DEFENSE

(Assumption of the Risk)

7. These Answering Defendants are informed and believe and thereon allege that Plaintiff was aware of, perceived, appreciated, comprehended and understood the terms, conditions and hazards, including the risk of pecuniary loss associated with the purchase of the Subject Property. Despite his appreciation of such risk, Plaintiff unreasonably exposed himself to the risk of harm, thereby causing and/or contributing to his own damages, if any. Plaintiff's assumption of said risk bars any recovery herein, or diminishes Plaintiff's recovery to the extent the alleged damages are attributed to Plaintiff's assumption of the risk.

EIGHTH AFFIRMATIVE DEFENSE

(Estoppel)

8. These Answering Defendants are informed and believe and thereon allege that Plaintiff was estopped from seeking relief requested in his Complaint against these Answering Defendants due to Plaintiff's own acts or omissions with reference to the subject matter of the Complaint.

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1 NINTH AFFIRMATIVE DEFENSE

2 (Fault of Others)

3 9. These Answering Defendants are informed and believe
4 and thereon allege that at all times and places set forth in the
5 Complaint, certain parties, defendant(s)/co-defendant(s), other
6 than these Answering Defendants, named or unnamed herein,
7 whether served or unserved, failed to exercise ordinary care,
8 caution or circumspection on their behalf, which negligence and
9 carelessness was a proximate cause of some portion, up to and
10 including the whole thereof, of the injuries and damages
11 complained of by Plaintiff in this action. The fault, if any,
12 of these Answering Defendants should be compared with the fault
13 or contributory negligence of other defendant(s), and damages,
14 if any, should be apportioned among the same in direct relation
15 to each such defendant(s)'/cross-defendants' comparative fault.
16 These Answering Defendants should be obligated to pay only such
17 damages, if any, which are directly attributable to their
18 percentage of comparative fault. To require these Answering
19 Defendants to pay any more than their percentage of comparative
20 fault violates the Equal Protection and Due Process Clauses of
21 the Constitution of the United States and the Constitution of
22 the State of California.

23 TENTH AFFIRMATIVE DEFENSE

24 (Waiver)

25 10. These Answering Defendants are informed and believe
26 and thereon allege that Plaintiff has engaged in conduct and
27 activities sufficient to constitute a waiver of any alleged
28

1 breach of contract claim, negligence, or any other conduct, if
2 any, as set forth in the Complaint.

3 ELEVENTH AFFIRMATIVE DEFENSE

4 (Several Liability)

5 11. These Answering Defendants are informed and believe
6 and thereon allege that their liability, if any, for non-
7 economic general damages is several only and not joint pursuant
8 to California Civil Code §1431.2.

9 TWELFTH AFFIRMATIVE DEFENSE

10 (Improper Prosecution of Action)

11 12. These Answering Defendants are informed and believe
12 and thereon allege that Plaintiff is prosecuting this litigation
13 in bad faith and for an improper purpose. The claims of
14 Plaintiff are frivolous and therefore entitle these Answering
15 Defendants to an award of reasonable expenses and attorneys'
16 fees.

17 THIRTEENTH AFFIRMATIVE DEFENSE

18 (Absence of Probable Cause/Presence of Malicious Intent)

19 13. These Answering Defendants are informed and believe
20 and thereon allege that Plaintiff is prosecuting this litigation
21 without probable cause against these Answering Defendants and
22 with malicious intent.

23 FOURTEENTH AFFIRMATIVE DEFENSE

24 (Absence of Actual/Proximate Causation)

25 14. These Answering Defendants are informed and believe
26 and thereon allege that any and all damages or injuries alleged
27 by Plaintiff were not, and are not, the result of acts or
28 omissions by these Answering Defendants.

1 FIFTEENTH AFFIRMATIVE DEFENSE

2 (Apportionment of Fault)

3 15. These Answering Defendants are informed and believe
4 and thereon allege that all of the acts and/or omissions alleged
5 in the Complaint were solely, entirely, and fully those of
6 defendant(s)/cross-defendants and/or parties named or unnamed
7 therein, other than these Answering Defendants and, therefore,
8 such parties are fully and solely liable to Plaintiff. As a
9 result, these Answering Defendants are entitled to total
10 indemnification from said parties including, but not limited to,
11 any and all damages, costs, and attorneys' fees that these
12 Answering Defendants may sustain as a result of Plaintiff's
13 claims. In the alternative, if it should be found that these
14 Answering Defendants are in some manner legally responsible for
15 injuries or damages sustained by Plaintiff, if any, and it
16 should be found that Plaintiff's injuries or damages were
17 proximately caused or contributed to by other defendant(s) in
18 this case, whether served or unserved, and/or other persons or
19 entities not parties to this action, then these Answering
20 Defendants are entitled to a finding that the negligence and
21 fault of each of the aforesaid person and/or parties, whether
22 parties to this action or not, shall be determined, apportioned
23 and prorated, and that any judgment rendered against these
24 Answering Defendants shall be reduced not only by the degree of
25 comparative negligence of the Plaintiff, but also shall be
26 reduced by the percentage of negligence and/or fault and/or
27 unreasonable conduct attributed to the aforesaid other
28 defendant(s)/cross-defendants and/or third persons or entities,

1 whether parties to this action or not. Under the doctrine of Li
2 v. Yellow Cab, Plaintiff's contributory negligence and/or fault
3 shall reduce any and all damages sustained by Plaintiff.

4 SIXTEENTH AFFIRMATIVE DEFENSE

5 (Ratification)

6 16. These Answering Defendants are informed and believe
7 and thereon allege that Plaintiff is barred from asserting each
8 and all of his causes of action by reason of his ratification of
9 the conduct of these Answering Defendants.

10 SEVENTEENTH AFFIRMATIVE DEFENSE

11 (Prevention)

12 17. These Answering Defendants are informed and believe
13 and thereon allege that Plaintiff and/or other parties prevented
14 and precluded these Answering Defendants from performing their
15 obligations, if any were unperformed at all.

16 EIGHTEENTH AFFIRMATIVE DEFENSE

17 (Compliance with Law)

18 18. These Answering Defendants are informed and believe
19 and thereon allege that at all times herein mentioned and in
20 connection with their representation of Plaintiff in the listing
21 and sale of the Subject Property, these Answering Defendants
22 complied with all applicable laws and statutory regulations.

23 NINETEENTH AFFIRMATIVE DEFENSE

24 (Statute of Limitations)

25 19. These Answering Defendants are informed and believe and
26 thereon allege that the Complaint, and each and every cause of
27 action contained therein, are barred by the statute of
28 limitation provisions contained in, but not limited to Code of

1 Civil Procedure §§337, 338, 339, 340, 343 and/or Civil Code
2 §2079.

3 TWENTIETH AFFIRMATIVE DEFENSE

4 (Conduct not a Substantial Factor)

5 20. These Answering Defendants are informed and believe
6 and thereon allege that their conduct was not a substantial
7 factor in causing Plaintiff's alleged damages in this action,
8 and therefore, they cannot be held liable to Plaintiff.

9 TWENTY-FIRST AFFIRMATIVE DEFENSE

10 (Complaint Presented for an Improper Purpose)

11 21. These Answering Defendants are informed and believe
12 and thereon allege that Code of Civil Procedure §128.7 provides
13 that an attorney or party who presents a document to the Court
14 certifies, to the best of his/her knowledge, that after a
15 reasonable inquiry, that certain conditions have been met.
16 Those conditions are as follows:

17 "1. That the document/pleading is not being presented
18 primarily for an *improper purpose*, such as to harass
19 or to cause unnecessary delay or needless increase in
20 the cost of litigation. 2. That the claim or other
21 legal contention presented in the document/pleading is
22 *warranted by existing law* or by a nonfrivolous
23 argument for the extension, modification or reversal
24 of existing law or the establishment of new law. 3.
25 That the allegations or other factual contentions have
26 evidentiary support or, if specifically so identified,
27 are likely to have evidentiary support *after a*
28 *reasonable opportunity for further investigation or*

1 discovery. 4. The denials of factual contentions are
2 warranted on the evidence or, if specifically so
3 identified, are reasonably based on a lack of
4 information or belief."

5 As such, sanctions under §128.7 of the Code of Civil
6 Procedure are appropriate in an amount sufficient to deter
7 repetition, and further, the subject Court herein should award
8 to these Answering Defendants, if they are a prevailing party,
9 the reasonable expenses and attorneys' fees incurred in
10 presenting any such motion contemplated under said statute.

11 TWENTY-SECOND AFFIRMATIVE DEFENSE

12 (Offset)

13 22. These Answering Defendants are informed and believe
14 and thereon allege that the fault and damages, if any, of these
15 Answering Defendants should be reduced by an initial offset in
16 the amount of \$62,940.00 (Sixty-Two Thousand Nine Hundred Forty
17 Dollars and No Cents) pursuant to the terms and conditions of
18 the prior Mutual Release and Waiver of Claims between the
19 parties.

20 TWENTY-THIRD AFFIRMATIVE DEFENSE

21 (No Basis for Recovery of Emotional Distress Damages)

22 23. These Answering Defendants are informed and believe
23 and thereon allege that in so far as Plaintiff's claim for
24 emotional distress is based upon the listing and sale of real
25 property and the same conduct to show fraud, no recovery is
26 permitted and emotional distress is not recoverable. Kruse v.
27 Bank of America (1971) 18 Cal.App.3d 98, 103. Mental distress
28 is not an item of recoverable damage in the fraudulent purchase,

1 sale or exchange of real property. O'Neil v. Spillane (1975) 45
2 Cal.App.3d 147, 158-161.

3 TWENTY-FOURTH AFFIRMATIVE DEFENSE

4 (No Wrongful Intent)

5 24. These Answering Defendants are informed and believe
6 and thereon allege that in connection with their representation
7 of Plaintiff in the listing and sale of the Subject Property,
8 they did not act with wrongful intent and/or the intention to
9 wrongfully deprive Plaintiff of his interests in the property.

10 TWENTY-FIFTH AFFIRMATIVE DEFENSE

11 (No Basis for Punitive Damages)

12 25. These Answering Defendants at all times acted in a
13 proper, lawful, and legally permitted fashion without malice or
14 oppression. They exercised and possessed that degree of skill,
15 care, and knowledge required of a real estate licensee and
16 broker; and, therefore, there is not a basis upon which to base
17 an award of punitive or exemplary damages against these
18 Answering Defendants.

19 TWENTY-SIXTH AFFIRMATIVE DEFENSE

20 (Unasserted Defenses)

21 26. These Answering Defendants are informed and believe
22 and thereon allege that they may have additional, as yet
23 unasserted, defenses to the Complaint or the purported causes of
24 action contained therein. These Answering Defendants
25 specifically reserve the right to assert additional affirmative
26 defenses as deemed appropriate at a later time.

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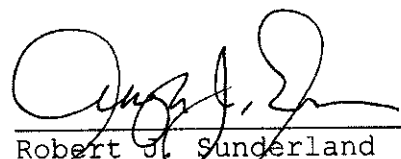
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WHEREFORE, these Answering Defendants pray for judgment in their favor and against Plaintiff as follows:

1. That Plaintiff take nothing by way of his Complaint;
2. For all costs of suit herein;
3. For reasonable attorneys' fees; and
4. For such other and further relief as the Court may deem just and proper.

DATED: March 17, 2014

SUNDERLAND | McCUTCHAN, LLP

By: 
Robert J. Sunderland
Angela J. Elpers
Attorneys for Defendants,
BENNION & DEVILLE FINE HOMES,
INC. dba WINDERMERE REAL ESTATE
SOUTHERN CALIFORNIA and FAITH
MESSENGER