

STATE OF NORTH CAROLINA  
COUNTY OF HENDERSON

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NOS: 08-CVS-691  
08-CVS-1120

J FREEMAN FLOOR COMPANY, LLC,  
A North Carolina Limited Liability Corporation,  
and ARD, LLC, A North Carolina  
Limited Liability Corporation,

Plaintiffs,

vs.

MOTION FOR RECUSAL

JOHN KENNETH FREEMAN, Individually,  
JON DAVIS a/k/a JONATHAN DAVIS, Individually,  
and GIGI PHILLIPS,  
Defendants.

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COMES NOW Plaintiffs and respectfully requests that the Honorable Judge Diaz be  
recused from this cause of action and that another Judge be assigned to this case for the  
following reasons:

1. Mr. Winson's conduct by petitioning Judge Diaz to sanction Plaintiffs and make Plaintiff's pay Defendants Freeman and Phillips attorney's fee is highly unusual and irregular because:
  - Case file 08-CVS-691 was closed on June 19, 2008.
  - A new complaint based upon substantially similar claims was filed on July 3, 2006 in case file 08-CVS-1120.
  - Mr. Winson was served with a copy of the new complaint on July 16, 2008 by certified mail.
  - Mr. Winson asked the court to re-open the closed case file 08-CVS-691 and he filed a Rule 11 motion in the re-opened case file 08-CVS-691 despite the fact that

he had received a copy of the new complaint on July 16, 2008, knew that the complaint was based upon substantially similar claims, and could have filed his Rule 11 motion in the active new case file 08-CVS-1120.

- Although Mr. Winson acknowledged the existence of the new July 3, 2008 complaint which was based upon substantially similar claims in his Rule 11 motion, he used that fact that his clients had not been served with the complaint as a reason to justify his request that 08-CVS-691 be re-opened and his Rule 11 Motion which he filed in 08-CVS-691.
- Even though Mr. Winson and his clients had actual notice of the new complaint for 22 days (service on Mr. Winson July 16<sup>th</sup>), Plaintiffs had been attempting service on his clients since July 3<sup>rd</sup> by certified mail, and the Sheriff's Department served his clients on August 7<sup>th</sup> and 8<sup>th</sup>, Mr. Winson did not file the Rule 11 motion in the new case file 08-CVS-1120. Instead, he opted to file the Rule 11 motion in 08-CVS-691, a closed case file.
- Mr. Winson representation that his clients had not been served with the complaint on August 7, 2008 is misleading and false since his clients had actual notice of the complaint by virtue of service upon Mr. Winson by certified mail on July 16, and by virtue of service of a copy of the complaint on Defendant Freeman who lives at the same address as Defendant Phillips on August 7, 2008.
- On August 25, 2008 Plaintiffs filed an amended complaint in file no. 08-CVS-1120. By summons for the amended complaint, the Henderson County Sheriff's Department served Mr. Winson's clients on September 2, 2008.

- The amended complaint raises new material issues related to cessation of membership pursuant to NCCGS 57C-3-02, judicial appointment of receivership pursuant to NCCGS 57C-3-02.2, and judicial assistance with winding up of corporate business pursuant to NCCGS 57C-6-04. These issues substantially alter the nature of the lawsuit.
- On September 5, 2008 Mr. Winson filed a notice of designation in the new case file 08-CVS-1120 and specifically requested that Judge Diaz (assigned to file 08-CVS-691) be assigned to the new case. The designation is based upon the July 3, 2008 complaint instead of the August 28, 2008 amended complaint, which is permissible by business court rules.
- In file no. 08-CVS-1120 on September 4, 2008 at 2:55 p.m. at the Henderson County Courthouse, **Mr. Winson filed a motion and order for extension of time to file responsive pleadings based upon the July 3<sup>rd</sup> complaint (note the August 28<sup>th</sup> amended complaint). Two day's prior to the filing of the motion for extension of time Mr. Winson's clients were served with the amended complaint.**
- The return of service for the amended complaint was filed in the Henderson County Clerk's office in file 08-CVS-1120 at **8:41 a.m. on September 4, 2008.** Mr. Winson filed the motion and order to extend time on **September 4, 2008 at 2:55 p.m.**
- The return of service for the amended complaint clearly shows on its face that it pertains to the amended complaint.

- Mr. Winson would have checked the Henderson County court file 08-CVS-1120 on September 4, 2008 just prior to 2:55 p.m. to make sure that he was entitled to the extension of time. At this time he would have discovered the filed summons and the amended complaint. Add to this the fact that his clients had been served with the amended complaint on September 2<sup>nd</sup>.
- Based upon the circumstances, Mr. Winson knew about the amended complaint when he filed his motion and order extending time.
- Mr. Winson's motion and order for extension of time based on the July 3<sup>rd</sup> Complaint makes it appear that no other pleadings had been filed in the Henderson County Case file as of September 5, 2008 when he filed the Notice of Designation for file no. 08-CVS-1120 with the business court.
- To prove the above point, Mr. Winson, in his responsive brief (08-CVS-691), mentions the designation of the new case based upon the July 3, 2008 complaint in paragraph 2 page 6, and on page 7 paragraph 3 Mr. Winson states that the response to the new complaint (the July 3, 2008) is due on October 8, 2008. These statements are intentionally misleading because they imply that no other pleadings have been filed in 08-CVS-1120.
- To further prove the point, on page 10 of the notice of designation for file no. 08-CVS-1120 Mr. Winson, knowingly and intentionally misrepresents to the court that all pleading filed in Henderson County file 08-CVS-1120 have been attached to the Notice of designation as a matter of convenience for the court. This representation is absolutely and unequivocally false.

- Mr. Winson in his second notice of designation for case 08-CVS-1120, specifically requested that Judge Diaz, assigned to case no. 08-CVS-691, be assigned to the new case no. 08-CVS-1120.
2. According to his resume, Mr. Winson worked as general counsel for Carnival Corporation's Carnival Cruise Lines until 1991; after 1991, Mr. Winson worked as Vice-President and was on the board of directors of Carnival Corporation's Carnival Airlines and he represented Carnival Corporation's Crystal Palace. The undersigned was unable to determine when Mr. Winson's work relationship with Carnival ended. Also, the undersigned was unable to determine Mr. Winson's ownership interest, if any in the Carnival Corporation, Carnival Cruise Lines, Carnival Airlines and Carnival Crystal Palace.
  3. The multi-state and national law firm of Hunton & Williams is corporate counsel for Carnival Cruise Lines. In the case of Borcea v. Carnival Corporation, d/b/a Carnival Cruise Lines, Inc., 238 F.R.D. 664, 20 Fla. L. Weekly Fed. D. 138 (2006), Hunton & Williams, Miami Fl. office represented Carnival Cruise Lines. In the case of Larsen v. Carnival Corp., Inc. et al., 242 F.Supp2d 1333, 2003 A.M.C. 1337, 16 Fla. L. Weekly Fed. D 291 (2003) Hunton & Williams's Miami Fl. office represented Carnival Corporation and Carnival Cruise Lines.
  4. Judge Diaz's resume (See NC Court System website Mecklenburg County-Superior Court Judges) states that he worked for Hunton & Williams from 1991-2001.
  5. In the case of United States v. Duke Energy, 2003 WL 22025025 (M.D.N.C) (August 2003) which was not reported in the Federal Supplement 2d, Albert Diaz and T. Thomas Cottingham appear as attorneys of record on behalf of the law firm or Hunton &

William's Charlotte NC office. This is during the same period when Judge Albert Diaz was a sitting Special Superior Court Judge. (See resume posted on NC Court System website under Mecklenburg County Superior-Court Judges).

6. In the case of Volvo Trademark Aktiebolaget v. CLM Equipment Company, Inc., WL 2828768 (W.D.N.C) ( November 2006) which was not reported in the F.Supp.2d Albert Diaz and T. Thomas Cottingham appear as attorneys of record on behalf of the law firm of Hunton & William's Charlotte NC office. This is during the same time period when Judge Albert Diaz was a sitting Business Court Judge. (See resume posted on NC Court System website under Mecklenburg County-Superior Court Judges)

7. In the case of U.S. v. Duke Energy, 2004 W.L. 1118582 (M.D.N.C.) (April 2004) which is not reported in F. Supp. 2d Albert Diaz and T. Thomas Cottingham appear as attorneys of record on behalf of the law firm of Hunton & William's Charlotte NC office. This is during the same time period when Judge Albert Diaz was a sitting Special Superior Court Judge. (See resume.)

8. In the case of Mascaro v. Mountaineer Land Group, LLC, 2006 WL 3334535 (N.C. Super.), 2006 NCBE 18,, (2006), Hunton & William's Charlotte office by **T. Thomas Cottingham** appeared before Judge Diaz on behalf of third party defendant, Buck Harless. Judge Diaz ruled in favor of Harless. This case is not reported in S.E. 2d. Plaintiffs' attorney, the undersigned, attempted to look this case up on the business court website, using 06CVS3016, using the name Mascaro, using the name Harless, using the name Mountaineer Land Group, LLC, and using 2006 NCBE 18. The search results show no business court records for the case based on these search queries. Using search

query 06-CVS-3016 counsel found the above referenced order under case opinions for 2006. Plaintiffs' counsel did not find any other business court records for this case based upon query 06-CVS-3016.

9. During 2006, Albert Diaz appeared as attorney of record for Hunton & Williams who was at the same time representing Carnival Corporation and Carnival Cruise Lines. (See above mentioned cases Volvo, Larsen, and Borcea) During this same time period, Judge Albert Diaz was a sitting Business Court Judge.

10. Mr. Winson has close and substantial ties with Hunton & Williams by virtue of his long and substantial relationship with Hunton & William's clients Carnival Corporation and Carnival Cruise Line. Judge Diaz has close and substantial ties with Hunton & Williams due to his long and recent association with Hunton & Williams. Mr. Winson's substantial ties to Hunton & Williams and Judge Diaz's substantial ties to Hunton and Williams creates a conflict of interest which Plaintiffs in good faith believe would prevent Judge Diaz from being fair and impartial to the Plaintiffs with regard to Mr.

Winson's Rule 11 motion which was purposefully set before Judge Diaz in a closed case file which had to be re-opened in order to bring said motion before Judge Diaz, despite the fact that Mr. Winson could have filed the Rule 11 motion in the new case file which would not have been heard by Judge Diaz. Thereafter, Mr. Winson removed the new case file to business court and purposefully requested that Judge Diaz be assigned to the case. For these reasons, Plaintiffs in good faith do not believe that they will receive a fair and impartial decision with regard to Mr. Winson's Rule 11 motion.

11. Mr. Winson's flagrant false and misleading representations, his unverified pleadings, and his underhanded attempt to put his Rule 11 motion before Judge Diaz, along with

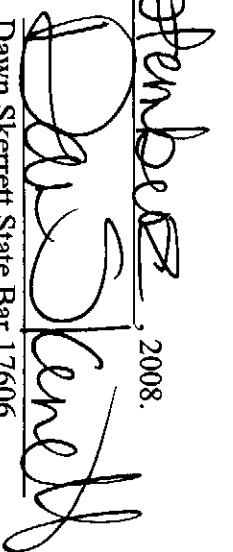
other circumstances stated herein, gives the appearance that there is a special relationship between Mr. Winson and Judge Diaz due to their associations with Hunton & Williams. Mr. Winson's conduct and the totality of the circumstances make it appear to the Plaintiffs that Mr. Winson is attempting to take advantage of these circumstances.

12. Given Judge Diaz's close relationship with Hunton & Williams and Mr. Winson's close relationship Carnival Cruise Lines and Carnival Corporation, Judge Diaz's handling of 08-CVS-691 and 08-CVS-1120 would tend to give the appearance of impropriety.

WHEREFORE PLAINTIFFS PRAY:

1. That the Honorable Ben F. Tennille, Chief Special Superior Court Judge for Complex Business Cases hears this motion for recusal.
2. That Judge Diaz be recused from cases 08-CVS-691 and 08-CVS-1120.
3. That another Business Court Judge be assigned to cases 08-CVS-691 and 08-CVS-1120.

This the 19<sup>th</sup> day of September, 2008.



Dawn Skerrett State Bar 17606  
Attorney for Plaintiffs  
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Hendersonville, NC 28791  
(828)692-8201



CERTIFICATE OF SERVICE

This is to certify that I have this day served the Defendants John Kenneth Freeman, Gigi Phillips and Jonathan Davis with a copy of the Motion for Recusal by:

XX by U.S. Mail, certified with return receipt requested and delivered to the United States Post Office, in a properly addressed envelope with adequate postage thereon to:

Lawrence D. Winson  
Attorney for Defendants Freeman & Phillips  
140 4<sup>th</sup> Avenue West, Suite 102  
Hendersonville, NC 28792

XX by U.S. Mail, in a properly addressed envelope with adequate postage thereon to:

Jonathan Davis  
127 Jesse Lamb Drive  
Hendersonville NC 28792

This is 19<sup>th</sup> day of September, 2008.

By:

Whitmore & Beeker  


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