

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

JAMES R. HARDING

Plaintiff,

v.

CASE NO. 6:11-cv-00085-PCF-DAB

**ORLANDO APARTMENTS, LLC
and BEHRINGER HARVARD DISTRICT
REIT, LLC**

Defendants.

**DEFENDANT BEHRINGER HARVARD DISTRICT REIT, LLC'S RESPONSE TO
PLAINTIFF'S MOTION FOR ENLARGEMENT OF TIME FOR DISCLOSURE OF
EXPERT REPORT AND INCORPORATED MEMORANDUM OF LAW**

Defendant **BEHRINGER HARVARD DISTRICT REIT, LLC** (“District REIT”), by and through its undersigned attorneys, files this Response to Plaintiff James R. Harding’s (“Plaintiff” or “Harding”) Motion for Enlargement of Time for Disclosure of Expert Report (“Motion for Enlargement”) and Incorporated Memorandum of Law, and states as follows:

I. INTRODUCTION

Harding seeks to extend the deadline for filing his expert report despite his having had ample opportunity for his expert to inspect the portions of the property relevant to his Complaint and despite having known for more than four months that District REIT would not permit his expert to wander freely on District REIT’s property, searching for new claims. He never conducted an inspection on the relevant portions, and his expert filed no report at all. Not until the day before his deadline to file an expert report did he bring before the Court the issue concerning the scope of his

expert's investigation, and, by then, the inspection and subsequent issuance of the expert report would significantly delay discovery and the procession of this case.

II. ANALYSIS

Harding's counsel and District REIT's counsel came to an agreement on the appropriate deadlines for this case and submitted them to the Court in their Case Management Report on April 22, 2011. *See* Case Management Report, Docket Entry 31. This Court adopted the deadlines submitted by the parties and entered a Case Management and Scheduling Order on May 2, 2011 requiring that Harding provide his expert report by December 2, 2011. *See* Case Management and Scheduling Order, Docket Entry 33. Until the day he filed his Motion for Enlargement, Harding's counsel had never mentioned anything about the need to extend his deadline to issue an expert report. Affidavit of Dana G. Bruce, ¶ 3, attached as Exhibit 1; Affidavit of Bobby G. Pryor, attached as Exhibit 2.

Harding contends in his Motion for Enlargement that "the parties have had numerous discussions regarding a comprehensive site inspection sought by Plaintiff, and Defendant's request for an inspection limited to the areas containing the architectural barriers alleged by Plaintiff in his First Amended Complaint." Harding fails to mention, though, that the last of such discussions took place on July 25, 2011, more than four months before he brought the matter before the Court. On June 30, 2011, Harding's counsel sent a letter to District REIT's requesting, for the first time, that his expert be permitted to conduct a full-day site inspection of the District Universal Boulevard Apartments and the District Shops (the "District"). *See* June 30, 2011 David Oliver letter to Douglas Lang, attached as Exhibit 3; Affidavit of Dana G. Bruce, ¶ 4. District REIT's counsel responded on July 7, 2011, that it was agreeable to Harding's expert inspecting the property, but

such inspection would need to be limited to the specific locations enumerated in Harding's First Amended Complaint. *See* July 7, 2011 Douglas Lang letter to David Oliver, attached as Exhibit 4. After a further exchange of emails and letters, Harding's counsel acknowledged in a letter on July 25, 2011 that the parties had failed to reach an agreement on the site inspection and stated that he would make a Rule 34 Request for access to the entire property "to preserve [his] client's appellate rights in the event the District Court rules against us." July 25, 2011 Oliver letter to Lang, attached as Exhibit 5.

Harding served his Request for Entry upon Land Pursuant to Rule 34, Federal Rules of Civil Procedure ("Request for Entry") on August 15, 2011, and District REIT timely served its objections on September 19, 2011. Harding did nothing concerning these objections, though, despite having known of the nature of such objections since July 7 and having known no resolution would be reached by, at latest, July 25. Importantly, Harding also did not seek to allow his expert to inspect those portions of the District relevant to his Complaint, despite knowing that his expert was required to issue a report by the December 2, 2011 deadline. Neither did he move then to extend his deadline to submit an expert report so the Court could decide this issue before the report was due. Instead, he waited until the day of the deadline to file the expert report to bring the issue regarding the scope of inspection before the Court, putting the Court in a position of either ignoring its deadline or denying him an opportunity to submit the report. Harding cannot be permitted to gain advantage through this delayed filing while increasing costs for the Court and the parties.

Seventy-three days passed between the time the dispute concerning the scope of inspection was ripe for a motion by Harding and the time he actually filed such a motion. Remarkably, Harding offers the Court no excuse, not even a flimsy one, for this delay. Without some

justification from Harding on why he ignored the Court's expert report deadline, the Court has no basis for extending that deadline.

IV. CONCLUSION

WHEREFORE, Defendant BEHRINGER HARVARD DISTRICT REIT, LLC, respectfully requests that this Court enter an Order denying Plaintiff's Motion for Enlargement and granting District REIT such other and further relief to which it may be justly entitled.

PRYOR & BRUCE

By: s/Bobby G. Pryor

Bobby G. Pryor
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State Bar No. 16373720
Dana G. Bruce
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State Bar No. 03232032

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**BLEDSON, JACOBSON, SCHMIDT, WRIGHT,
LANG & WILKINSON**

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1301 Riverplace Boulevard, Suite 1818
Jacksonville, Florida 32207
(904) 398-1818 (904) 398-7073 (Fax)

**ATTORNEYS FOR DEFENDANT BEHRINGER
HARVARD DISTRICT REIT, LLC**

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December 2011, a copy of the foregoing has been electronically filed with the Clerk, United States District Court, Middle District of Florida by using the CM/ECF system and has been furnished by electronic notification via the CM/ECF system to David S. Oliver, Morgan & Morgan, PA, 20 N. Orange Ave., 14th Flr., PO Box 4979, Orlando, FL 32802.

s/ Bobby G. Pryor
Bobby G. Pryor

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

JAMES R. HARDING

Plaintiff,

v.

CASE NO. 6:11-cv-00085-PCF-DAB

**ORLANDO APARTMENTS, LLC
And BEHRINGER HARVARD DISTRICT
REIT, LLC**

Defendants.

_____ /

AFFIDAVIT OF DANA G. BRUCE

STATE OF TEXAS §
 §
COUNTY OF ROCKWALL §

Before me, the undersigned authority, personally appeared Dana G. Bruce, who, being by me duly sworn, deposed as follows:

1. “I am over 21 years of age, of sound mind and have never been convicted of a felony or misdemeanor involving moral turpitude, and am competent to make this affidavit. I have personal knowledge of the facts stated herein and they are true and correct.

2. My name is Dana G. Bruce. Along with Bobby G. Pryor, I am the primary counsel for Behringer Harvard District REIT, LLC in the above-styled litigation.

3. I am not aware that at any time before December 2, 2011 David Oliver, counsel for James R. Harding, mentioned anything about the need to extend the deadline for Harding to issue an expert report. Such request was made, from my recollection, for the first time on December 2, 2011 in an email directed to me.

4. The June 30, 2011 letter from David Oliver to Doug Lang was the first time Mr.

EXHIBIT 1

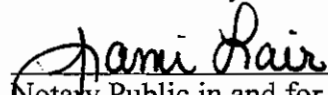
Oliver had requested that his expert be permitted to conduct a full-day site inspection of the District Universal Boulevard Apartments and the District Shops.

5. Further, affiant sayeth not.”


Dana G. Bruce

SUBSCRIBED AND SWORN TO BEFORE ME this 16th day of December 2011.




Notary Public in and for
the State of Texas

My Commission Expires:
4-17-15

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

JAMES R. HARDING

Plaintiff,

v.

CASE NO. 6:11-cv-00085-PCF-DAB

**ORLANDO APARTMENTS, LLC
And BEHRINGER HARVARD DISTRICT
REIT, LLC**

Defendants.

AFFIDAVIT OF BOBBY G. PRYOR

STATE OF TEXAS §
 §
COUNTY OF ROCKWALL §

Before me, the undersigned authority, personally appeared Bobby G. Pryor, who, being by me duly sworn, deposed as follows:

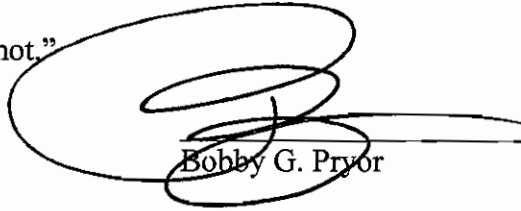
1. “I am over 21 years of age, of sound mind and have never been convicted of a felony or misdemeanor involving moral turpitude, and am competent to make this affidavit. I have personal knowledge of the facts stated herein and they are true and correct.

2. My name is Bobby G. Pryor. Along with Dana G. Bruce, I am the primary counsel for Behringer Harvard District REIT, LLC in the above-styled litigation.

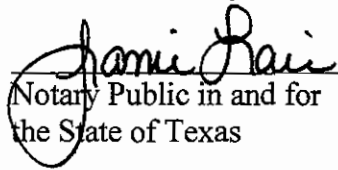
3. I am not aware that at any time before December 2, 2011 David Oliver, counsel for James R. Harding, mentioned anything about the need to extend the deadline for Harding to issue an expert report. Such request was made, to my recollection, for the first time on December 2, 2011 in an email.

EXHIBIT 2

4. Further, affiant sayeth not."


Bobby G. Pryor

SUBSCRIBED AND SWORN TO BEFORE ME this 16th day of December 2011.


Notary Public in and for
the State of Texas



My Commission Expires:
4-17-15

MORGAN & MORGAN®

Attorneys At Law

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(407) 420-1414
FAX: (407) 425-8171

June 30, 2011

VIA FACSIMILE

Douglas B. Lang, Esq.
Bledsoe, Jacobson, Schmidt,
Wright, Lang & Wilkinson
1301 Riverplace Boulevard, Suite 1818
Jacksonville, FL 32207

Re: *Harding v. Behringer Harvard District Reit, LLC*
Case No.: 6:11-CV-00085 (M.D. Fla)

Dear Doug:

Thank you for your letter of June 23. Due to an internal oversight at my office, it did not come to my attention until late yesterday.

In November of 2010, my expert, Soy Williams, accompanied J.R. Harding to the District Apartments. During that site visit, which I estimate was two hours or less, they were only able to observe limited areas of the apartment complex. Ms. Williams has advised that she will need approximately a full-day site inspection to adequately catalog the potential FHA violations at the complex. She is thus not currently in a position to provide the assessment which I do agree we discussed and thought would be a prudent course of action.

My suggestion would be that we schedule a day for Ms. Williams to conduct a site visit, without the need for a formal motion for entry onto land for inspection and other purposes under Federal Rule of Civil Procedure 34. It may additionally be helpful for your expert to be present during the inspection.

Ms. Williams will thereafter be able to prepare a detailed spreadsheet of those items which, in her professional opinion, are not in compliance with the requirements of the FHA.

We remain amenable to thereafter sitting down with you and your client (and expert(s)) to discuss a potential agreed upon scope of remediation.

EXHIBIT 3

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Douglas B. Lang, Esq.
June 30, 2011
Page 2 of 2

Please be assured that we do not wish for any party to incur unnecessary legal fees. If we can accomplish site inspection and meeting within sixty (60) days, it may make sense to abate discovery during that timeframe. Please discuss the conceptual framework described herein with your client, and then share with me the benefit of your thoughts as your schedule permits.

Sincerely,

Morgan & Morgan, P.A.
Business Trial Group



David S. Oliver

DSO/dmf

cc: Soy Williams, via PDF
J.R. Harding, via PDF

BLEDSOE, JACOBSON, SCHMIDT,
WRIGHT, LANG & WILKINSON

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SAMUEL S. JACOBSON
STEPHANIE SUSSMAN EUBANKS
KENNETH B. WRIGHT*

*BOARD CERTIFIED CIVIL TRIAL LAWYER

July 7, 2011

via facsimile: (407) 418-2048

David S. Oliver, Esquire
Morgan & Morgan, PA
PO Box 4979
Orlando, FL 32802

Re: Harding v. Behringer Harvard District Reit, LLC.
Case No. 6:11-cv-00085 (M.D. Fla)

Dear David:

Thank you for your letter of June 30. We are generally agreeable to the site visit you suggest, but to ensure that it achieves its purpose, we would ask for several conditions on the inspection.

First, we would request that, before the inspection, Ms. Williams provide us with any notes, findings, communications, or other documents she has already generated and any documents she has reviewed. These documents will allow us to get up to speed in advance of the inspection.

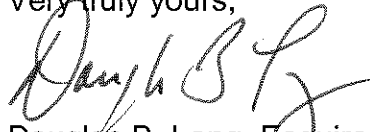
Second, we are only willing to permit an inspection of the specific locations enumerated in paragraph 25 of Mr. Harding's First Amended Complaint since those are the only alleged violations at issue in the suit. Inspection of any additional areas would not be relevant to the claims made by Mr. Harding and would instead constitute a fishing expedition. Additionally, we may have representatives (and potentially a consulting expert) present during the Ms. Williams' inspection. Also, we would require that the inspection not disrupt normal operations of The District or interfere with residents' use of their apartments or District facilities.

Finally, we would need for your expert to provide us with a report of her findings from that inspection within 20 days following the inspection.

Please let us know if these conditions are acceptable to you. If they are, please let us know dates on which you and Ms. Williams are available for the inspection, and we will

forward to you a draft agreement to abate discovery for sixty days. Finally, given the abatement of discovery, we will need to defer mediation for a similar period of time and seek to modify the scheduling order accordingly.

Very truly yours,



Douglas B. Lang, Esquire

cc: Dana Bruce (via email)

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July 25, 2011

VIA FACSIMILE & PDF E-MAIL

Douglas B. Lang, Esq.
Bledsoe, Jacobson, Schmidt,
Wright, Lang & Wilkinson
1301 Riverplace Boulevard, Suite 1818
Jacksonville, FL 32207

Re: *Harding v. Behringer Harvard District Reit, LLC*
Case No.: 6:11-CV-00085 (M.D. Fla)

Dear Doug:

Thank you for your follow-up letter dated July 22, 2011, regarding your Request for Production of Documents. I should have the responsive documents available to transmit to you electronically by this Wednesday, July 27. Similarly, I will advise you within that same timeframe as to whether we can reach agreement on the narrowed requests set forth in your letter of July 19, 2011.

I am sorry that we were not able to reach agreement on the scope of the site inspection. I do recognize, however, that the question is one which would appear to be unsettled in the Eleventh Circuit. I will proceed to make a Rule 34 Request for access to the entire property, as I need to preserve my client's appellate rights in the event the District Court rules against us. Eventually, the Eleventh Circuit will have to settle this question in this Circuit.

I also need to proceed to set the depositions of the persons identified in your Rule 26 Disclosures, as well as certain representatives of Perennial Properties. I will schedule those after the return date of the Subpoenas for Documents which I have previously served. Of course, I will carefully coordinate the deposition dates with you. Will you be handling the depositions by yourself, or should I also coordinate those dates with your co-counsel? Please let me know one way or the other. It would appear that at this point I also need to proceed with the filing of our Motion for Preliminary Injunction. I would anticipate filing our moving papers within the next two weeks.

EXHIBIT 5

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Douglas B. Lang, Esq.

July 25, 2011

Page 2 of 2

I continue to hope that we can move forward to resolve this matter amicably. A pragmatic solution would seem to be the best resolution given the facts of this case.

Sincerely,

Morgan & Morgan, P.A.
Business Trial Group



David S. Oliver

DSO/dmf

cc: J.R. Harding, via PDF e-mail
Soy Williams, via PDF e-mail