

HONORABLE JOHN P. ERLICK
Calendar Date: Wednesday, November 25, 2009

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

MOD SYSTEMS INCORPORATED, and
ROBERT M. ARNOLD, individually and
derivatively on behalf of BANANA
CORPORATION,

Plaintiffs,

v.

MARK PHILLIPS, KENNETH
GORDON, JANE DOE GORDON, and
the marital community composed thereof;
and BANANA CORPORATION,

Defendants.

No. 09-2-07963-3 SEA

**PLAINTIFF MOD SYSTEMS
INCORPORATED'S MOTION TO
VOLUNTARILY DISMISS ITS CLAIMS
UNDER CR 41(a)(1)(B)**

1 **I. RELIEF REQUESTED**

2 Plaintiff MOD Systems Incorporated (“MOD”) moves to voluntarily dismiss without
3 prejudice its claims against defendants Mark Phillips, Kenneth Gordon, Jane Doe Gordon, and
4 the marital community composed of the Gordons (collectively, “Defendants”), as a matter of
5 right under CR 41(a)(1)(B), and respectfully requests that the Court enter the proposed
6 dismissal order submitted in conjunction with this motion.

7 **II. STATEMENT OF FACTS**

8 In the Verified Complaint filed in this action on February 18, 2009 (the “Verified
9 Complaint”), plaintiff Robert M. Arnold asserted claims against Defendants derivatively on
10 MOD’s behalf. MOD assumed control of its claims via the Amended Verified Complaint filed
11 in this action on October 5, 2009. MOD has not rested its opening case, and, as of the date of
12 this motion, no counterclaim has been asserted in this lawsuit.

13 Based on extensive independent investigation, conducted by MOD and others, of the
14 actions alleged in the Amended Verified Complaint, the claims against Defendants in this
15 lawsuit clearly have merit. But MOD has very limited resources and has determined not to
16 devote further resources to this lawsuit at this time.

17 **III. STATEMENT OF ISSUES**

18 Whether MOD’s claims against Defendants should be voluntarily dismissed without
19 prejudice, as a matter of right under CR 41(a)(1)(B).

20 **IV. EVIDENCE RELIED UPON**

21 This motion is based on the pleadings filed in this action.

22 **V. AUTHORITY**

23 Under CR 41(a)(1)(B), voluntary dismissal of a plaintiff’s claims is *mandatory*
24 “[u]pon motion of the plaintiff at any time before plaintiff rests at the conclusion of his
25 opening case.” *See also Goin v. Goin*, 8 Wn. App. 801, 802, 508 P.2d 1405 (1973) (Unless a
26 counterclaim has been pleaded, “[t]he plaintiff’s right [to voluntary dismissal under CR 41] is
27 absolute and involves no element of discretion on the part of the trial court.”). MOD has not

1 rested its opening case, and no counterclaim has been filed in this action as of the date of this
2 motion.

3 Accordingly, this Court must dismiss MOD's claims against Defendants, without
4 prejudice and without awarding costs or attorneys' fees to any party.

5 **VI. CONCLUSION**

6 For the foregoing reasons, MOD respectfully requests that the Court enter the proposed
7 dismissal order submitted in conjunction with this motion, dismissing MOD's claims against
8 Defendants without prejudice and without awarding costs or attorneys' fees to any party.

9 DATED this 17th day of November, 2009.

10 **FENWICK & WEST LLP**

11
12 By: s// Brian D. Buckley

13 Brian D. Buckley, WSBA No. 26423
14 Kit W. Roth, WSBA No. 33059

15 1191 Second Avenue
16 10th Floor
17 Seattle, WA 98101
18 Phone: 206-389-4521
19 Fax: 206-389-4511
20 Email: bbuckley@fenwick.com
21 krth@fenwick.com

22 Attorneys for Plaintiff MOD Systems Incorporated
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on the 17th day of November, 2009, I caused the foregoing document to be filed with the Clerk of the King County Superior Court of the State of Washington, and have caused a copy to be served on:

Jeffrey Alan Smyth Smyth & Mason, PLLC 701 Fifth Avenue Suite 7100 Seattle, WA 98104 Tel: 206-621-7100 Fax: 206-682-3203 Email: jeff@smythlaw.com Attorneys for Plaintiff ❑ By E-Service ❑ United States Mail, First Class ❑ By Messenger ❑ By Facsimile ❑ By Overnight Courier - By Email	James A. Smith, Jr. Geoffrey P. Knudsen Smith & Hennessey, PLLC 316 Occidental Avenue South Suite 500 Seattle, Washington 98104 Tel: 206-292-1770 Fax: 206-292-1790 Email: jas@smithhennessey.com gknudsen@smithhennessey.com Attorneys for Defendant Banana Corp. ❑ By E-Service ❑ United States Mail, First Class ❑ By Messenger ❑ By Facsimile ❑ By Overnight Courier - By Email
David A. Leen Leen & O'Sullivan, PLLC 520 East Denny Way Seattle, WA 98122 Tel: (206) 325-6022 Fax: (206) 325-1424 Email: david@leenandosullivan.com Attorneys for Defendants Kenneth Gordon, Jane Doe Gordon ❑ By E-Service ❑ United States Mail, First Class - By Messenger ❑ By Facsimile ❑ By Overnight Courier ❑ By Email	P. Arley Harrel Jacob M. Downs Williams Kastner Two Union Square 601 Union Street, Suite 4100 P.O. Box 21926 Seattle, Washington 98101 Tel: (206) 628-6625 Fax: (206) 628-6611 Email: aharrel@williamskastner.com jdowns@williamskastner.com Attorneys for Defendants Anthony Joel Bay and Nancy Lillian Bay - By E-Service ❑ United States Mail, First Class ❑ By Messenger ❑ By Facsimile ❑ By Overnight Courier ❑ By Email

Mark Alan Johnson
Donovan Russell Flora
Johnson Flora PLLC
2505 Second Avenue, Suite 500
Seattle, WA 98121
Tel: (206) 386-5566
Fax: (206) 682-0675
Email: mark@johnsonflora.com
donovan@johnsonflora.com

Attorneys for Defendant Mark Phillips

- ❑ By E-Service
- ❑ United States Mail, First Class
- By Messenger
- ❑ By Facsimile
- ❑ By Overnight Courier
- ❑ By Email

FENWICK & WEST LLP

By: s/ Brian D. Buckley

Brian D. Buckley, WSBA No. 26423
Kit W. Roth, WSBA No. 33059

1191 Second Avenue
10th Floor
Seattle, WA 98101
Phone: 206-389-4521
Fax: 206-389-4511
Email: bbuckley@fenwick.com

Attorneys for Plaintiff MOD Systems Incorporated

DOCS/2149853.1

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

MOD SYSTEMS INCORPORATED, and
ROBERT M. ARNOLD, individually and
derivatively on behalf of BANANA
CORPORATION,

Plaintiffs,

v.

MARK PHILLIPS, KENNETH
GORDON, JANE DOE GORDON, and
the marital community composed thereof;
and BANANA CORPORATION,

Defendants.

No. 09-2-07963-3 SEA

**ORDER GRANTING PLAINTIFF MOD
SYSTEMS INCORPORATED'S
MOTION TO VOLUNTARILY DISMISS
ITS CLAIMS UNDER CR 41(a)(1)(B)**

[PROPOSED]

THIS MATTER came before the Court on Plaintiff MOD Systems Incorporated's Motion to Voluntarily Dismiss its Claims Under CR 41(a)(1)(B) (the "Motion"). Having considered the Motion and all briefing, materials, and argument presented in support of and in opposition to the Motion, and having been fully advised, the Court finds that Plaintiff MOD Systems Incorporated is entitled to the relief sought in the Motion. Now therefore,

\\\\\\

\\\\\\

\\\\\\

\\\\\\

\\\\\\

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on the 17th day of November, 2009, I caused a copy of the foregoing document to be served on:

Jeffrey Alan Smyth Smyth & Mason, PLLC 701 Fifth Avenue Suite 7100 Seattle, WA 98104 Tel: 206-621-7100 Fax: 206-682-3203 Email: jeff@smythlaw.com Attorneys for Plaintiff ❑ By E-Service ❑ United States Mail, First Class ❑ By Messenger ❑ By Facsimile ❑ By Overnight Courier - By Email	James A. Smith, Jr. Geoffrey P. Knudsen Smith & Hennessey, PLLC 316 Occidental Avenue South Suite 500 Seattle, Washington 98104 Tel: 206-292-1770 Fax: 206-292-1790 Email: jas@smithhennessey.com gknudsen@smithhennessey.com Attorneys for Defendant Banana Corp. ❑ By E-Service ❑ United States Mail, First Class ❑ By Messenger ❑ By Facsimile ❑ By Overnight Courier - By Email
David A. Leen Leen & O'Sullivan, PLLC 520 East Denny Way Seattle, WA 98122 Tel: (206) 325-6022 Fax: (206) 325-1424 Email: david@leenandosullivan.com Attorneys for Defendants Kenneth Gordon, Jane Doe Gordon ❑ By E-Service ❑ United States Mail, First Class - By Messenger ❑ By Facsimile ❑ By Overnight Courier ❑ By Email	P. Arley Harrel Jacob M. Downs Williams Kastner Two Union Square 601 Union Street, Suite 4100 P.O. Box 21926 Seattle, Washington 98101 Tel: (206) 628-6625 Fax: (206) 628-6611 Email: aharrel@williamskastner.com jdowns@williamskastner.com Attorneys for Defendants Anthony Joel Bay and Nancy Lillian Bay - By E-Service ❑ United States Mail, First Class ❑ By Messenger ❑ By Facsimile ❑ By Overnight Courier ❑ By Email

Mark Alan Johnson
Donovan Russell Flora
Johnson Flora PLLC
2505 Second Avenue, Suite 500
Seattle, WA 98121
Tel: (206) 386-5566
Fax: (206) 682-0675
Email: mark@johnsonflora.com
donovan@johnsonflora.com

Attorneys for Defendant Mark Phillips

- ❑ By E-Service
- ❑ United States Mail, First Class
- By Messenger
- ❑ By Facsimile
- ❑ By Overnight Courier
- ❑ By Email

FENWICK & WEST LLP

By: s/ Brian D. Buckley

Brian D. Buckley, WSBA No. 26423
Kit W. Roth, WSBA No. 33059

1191 Second Avenue
10th Floor
Seattle, WA 98101
Phone: 206-389-4521
Fax: 206-389-4511
Email: bbuckley@fenwick.com

Attorneys for Plaintiff MOD Systems Incorporated

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

MOD SYSTEMS INC., et al.,

Plaintiffs,

v.

PHILLIPS, et al.,

Defendants,

NO. 09-2-07963-3 SEA
NOTICE FOR HEARING
SEATTLE COURTHOUSE ONLY
(Clerk's Action Required) (NTHG)

TO: THE CLERK OF THE COURT and to all other parties listed on Page 2:
PLEASE TAKE NOTICE that an issue of law in this case will be heard on the date below and the Clerk is directed to note this issue on the calendar checked below.

Calendar Date: NOVEMBER 25, 2009 Day of Week WEDNESDAY

Nature of Motion: **MOTION TO VOLUNTARILY DISMISS MOD'S CLAIMS UNDER CR 41(a)(1)(B)**

CASES ASSIGNED TO INDIVIDUAL JUDGES - Seattle

If oral argument on the motion is allowed (LCR 7(b)(2)), contact staff of assigned judge to schedule date and time before filing this notice. **Working Papers:** The judge's name, date and time of hearing must be noted in the upper right corner of the Judge's copy. **Deliver Judge's copies to Judges' Mailroom at C203.**

☒ Without oral argument (Mon - Fri) ☐ With oral argument Hearing

Date/Time: **WEDNESDAY, NOVEMBER 25, 2009**

Judge's Name: **HONORABLE JOHN P. ERLICK** Trial Date: **AUGUST 2, 2010**

CHIEF CRIMINAL DEPARTMENT - Seattle in E1201

☐ Bond Forfeiture 3:15 pm, 2nd Thur of each month

☐ Certificates of Rehabilitation- Weapon Possession (Convictions from Limited Jurisdiction Courts)
3:30 First Tues of each month

CHIEF CIVIL DEPARTMENT - Seattle -- (Please report to E209 for assignment)

Deliver working copies to Judges' Mailroom, Room C203. In upper right corner of papers write "Chief Civil Department" or judge's name and date of hearing

☐ Extraordinary Writs (Show Cause Hearing) (LCR 98.40) 1:30 p.m. Tues/Wed -report to Room E209

☐ Supplemental Proceedings
(1:30 pm Tues/Wed)(LCR 69)

☐ DOL Stays 1:30 pm Tues/Wed

☐ Motions to Consolidate with multiple judges assigned
(without oral argument) (LCR 40(b)(4))

Non-Assigned Cases:

☐ Non-Dispositive Motions M-F (without oral argument).

☐ Dispositive Motions and Revisions (1:30 pm Tues/Wed)

☐ Certificates of Rehabilitation (**Employment**) 1:30 pm
Tues/Wed (LR 40(b)(2)(B))

You may list an address that is not your residential address where you agree to accept legal documents.

Sign: Brian D. Buckley

Print/Type Name: **Brian D. Buckley**

WSBA # **26423** (if attorney)

Attorney for: **Plaintiff MOD Systems Incorporated**

Address: **1191 2nd Avenue, 10th Fl.**

City, State, Zip **Seattle, WA 98101**

Telephone: **(206) 389-4521**

Date: **11/17/09**

LIST NAMES AND SERVICE ADDRESSES FOR ALL NECESSARY PARTIES REQUIRING NOTICE

Jeffrey Alan Smyth
Smyth & Mason, PLLC
701 Fifth Avenue
Suite 7100
Seattle, WA 98104
Tel: 206-621-7100
Fax: 206-682-3203
Attorneys for Plaintiff Robert Arnold

James A. Smith, Jr.
Geoffrey P. Knudsen
Smith & Hennessey, PLLC
316 Occidental Avenue South
Suite 500
Seattle, Washington 98104
Tel: 206-292-1770
Fax: 206-292-1790
Attorneys for Defendant Banana Corp.

David A. Leen
Leen & O'Sullivan, PLLC
520 East Denny Way
Seattle, WA 98122
Tel: (206) 325-6022
Fax: (206) 325-1424
**Attorneys for Defendants Kenneth Gordon, Jane Doe
Gordon**

Mark Alan Johnson
Donovan Russell Flora
Johnson Flora PLLC
2505 Second Avenue, Suite 500
Seattle, WA 98121
Tel: (206) 386-5566
Fax: (206) 682-0675
Attorneys for Defendant Mark Phillips

P. Arley Harrel
Jacob M. Downs
Williams Kastner
Two Union Square
601 Union Street, Suite 4100
P.O. Box 21926
Seattle, Washington 98101
Tel: (206) 628-6625
Fax: (206) 628-6611
**Attorneys for Defendants Anthony Joel Bay and
Nancy Lillian Bay**

IMPORTANT NOTICE REGARDING CASES

Party requesting hearing must file motion & affidavits separately along with this notice. List the names, addresses and telephone numbers of all parties requiring notice (including GAL) on this page. Serve a copy of this notice, with motion documents, on all parties.

The original must be filed at the Clerk's Office not less than **six** court days prior to requested hearing date, except for Summary Judgment Motions (to be filed with Clerk 28 days in advance).

THIS IS ONLY A PARTIAL SUMMARY OF THE LOCAL RULES AND ALL PARTIES ARE ADVISED TO CONSULT WITH AN ATTORNEY.

The SEATTLE COURTHOUSE is in Seattle, Washington at 516 Third Avenue. The Clerk's Office is on the sixth floor, room E609. The Judges' Mailroom is Room C203.