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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DONALD VARNEY AND MARIA
VARNEY, husband and wife,

Plaintiff,

v.

AIR & LIQUID SYSTEMS
CORPORATION; et al.,

Defendants.

CASE NO. C18-5105 RJB

ORDER SETTING EVIDENTIARY
HEARING

This matter comes before the Court on the motions for summary judgment filed by defendants (Dkts. 217, 219, 224, 235, 237, 239, 257 and 285).

At issue is the admissibility of the Affidavit of Donald Varney (Dkt 231-1) and the Report of John C. Maddox Regarding Donald A. Varney (Dkt. 231-28). Questions have been raised by defendants under Rule of Civil Procedure 56(c)(2) that the material in the affidavit cannot be presented in a form that would be admissible in evidence. Questions are raised regarding whether the affidavit, in spite of its hearsay nature, should be admitted as a dying declaration under Evidence Rule 804(b)(2) or under Evidence Rule 807. The competence of the affiant, Mr. Varney, is also challenged by the defendants under Federal Rule of Civil Procedure 56(c) (2) and (4).

1 While it is unusual in this procedural context to conduct an evidentiary hearing, it appears
2 appropriate under the circumstances presented here. The subject affidavit appears to be a critical
3 document and its admissibility in support of plaintiffs' response to the summary judgment
4 motions needs to be decided, and also its admissibility at trial needs to be decided. An
5 evidentiary hearing should be considered to be an *in limine* hearing to determine the
6 admissibility of the documents at trial as well as in regard to the summary judgment motions.

7 The court notes that, while there is some written showing from Mrs. Varney regarding the
8 signing of the subject document, there is no evidence from other people that were present at the
9 signing, including the notary, priest, and lawyer for Mr. Varney. The court would also welcome
10 Mrs. Varney's testimony where cross-examination is available. There is no evidence as to the
11 source of the information in the affidavit, or who prepared it. The court is aware that it may be
12 necessary for one or more of Mr. Varney's lawyers to testify, which may put their position as
13 advocates in the case in question.

14 For the foregoing reasons, it is now

15 ORDERED that the court will conduct an evidentiary hearing on the admissibility of Mr.
16 Varney's affidavit, both in opposition to the motions for summary judgment and at trial, on April
17 15, 2019, at 9:30 a.m.

18 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
19 to any party appearing pro se at said party's last known address.

20 Dated this 19th day of March, 2019.

21 

22 ROBERT J. BRYAN
23 United States District Judge
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