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10
11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 BENNION & DEVILLE FINE)
14 HOMES, INC., a California)
15 corporation, BENNION & DEVILLE)
16 FINE HOMES SOCAL, INC., a)
17 California corporation,)
18 WINDERMERE SERVICES)
19 SOUTHERN CALIFORNIA, INC., a)
20 California corporation,)

19 Plaintiffs,

21 v.

22 WINDERMERE REAL ESTATE)
23 SERVICES COMPANY, a)
24 Washington corporation; and DOES)
25 1-10.)

26 Defendants.

27 AND RELATED COUNTERCLAIMS)
28)

) Case No. 5:15-cv-01921-R-KK
) *Hon. Manual L. Real*

) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **PLAINTIFFS BENNION & DEVILLE**
) **FINE HOMES, INC., BENNION &**
) **DEVILLE FINE HOMES SOCAL,**
) **INC., AND WINDERMERE**
) **SERVICES SOUTHERN**
) **CALIFORNIA, INC.’S MOTION TO**
) **DISMISS FIRST AMENDED**

) Date: December 7, 2015
) Time: 10:00 a.m.
) Courtroom: 8

) First Amended Counterclaim filed:
) October 14, 2015
) Complaint filed: September 17, 2015

1 Plaintiffs and Counter-Defendants Bennion & Deville Fine Homes, Inc. (“B&D
2 Fine Homes”), Bennion & Deville Fine Homes SoCal, Inc. (“B&D SoCal”) and
3 Windermere Services Southern California, Inc. (“Windermere SoCal”) (collectively, the
4 “B&D Parties”) present the following memorandum in support of their Motion to
5 Dismiss Defendant and Counterclaimant Windermere Real Estate Services Company’s
6 (“WSC”) First Amended Counterclaim (the “FACC”).¹

7 **I. INTRODUCTION**

8 WSC is the franchisor of the Windermere franchise system. (FACC, ¶ 1.) The
9 B&D Parties are former franchisees and an area representative of the Windermere
10 franchise system. (FACC, ¶¶ 32-57, 62-69.) Following a 14-year relationship, the B&D
11 Parties terminated their franchise agreements with WSC, effective September 30, 2015,
12 and subsequently filed a lawsuit against WSC for breach of contract and tortious
13 interference with contractual and economic relationships. (FACC, ¶¶ 40, 56, 66, 79; D.E.
14 1.) Now, in retaliation for the B&D Parties’ lawsuit, WSC has asserted its own claims for
15 breach of contract along with claims for cybersquatting, trademark infringement, and
16 unfair completion. (FACC, ¶¶ 165-193.)

17 The evidence that the B&D Parties plan to introduce in this case will show that
18 WSC’s retaliatory claims are both factually and legally flawed. But, for purposes solely
19 of this 12(b)(6) motion, the B&D Parties do not challenge WSC’s contract claims.
20 Instead, the focus of this Motion to Dismiss is to challenge WSC’s ill-fated attempt to re-
21 characterize this franchise dispute into a Lanham Act cybersquatting case. WSC’s
22 motivation to re-characterize the case is transparent – its breach of contract claims are not
23 viable in light of its own breaches of the contracts. Nonetheless, WSC still must plead
24 sufficient facts in support of its non-contract claims.

25
26 ¹ WSC has also asserted claims against third-party defendants Robert L. Bennion and
27 Joseph R. Deville. At the time of filing the instant motion, these third-party defendants
28 had not been served with the FACC and are therefore not included as part of this Motion
to Dismiss.

1 For the reasons set forth in detail below, the FACC fails to state plausible claims
2 for cybersquatting, trademark infringement, and unfair completion. Accordingly, WSC’s
3 fifth, sixth, and seventh counts should be dismissed for failure to state viable claims.

4 **II. LEGAL STANDARD**

5 A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the
6 complaint. A Rule 12(b)(6) dismissal is proper where there is either a “lack of cognizable
7 legal theory” or “the absence of sufficient facts alleged under a cognizable legal theory.”
8 *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1014 (9th Cir.
9 2013). As explained by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 678
10 (2009), a complaint may survive a motion to dismiss only if, taking all well-pleaded
11 factual allegations as true, it contains enough facts to “state a claim to relief that is
12 plausible on its face.” “Threadbare recitals of the elements of a cause of action, supported
13 by mere conclusory statements do not suffice.” *Id.*

14 As explained below, WSC’s fifth, sixth and seventh causes of action are based on
15 conclusory statements without any factual basis. These conclusory statements merely
16 suggest there may be some possibility of misconduct, they do not set forth the implied
17 misconduct. This does not suffice. “[F]or a complaint to survive a motion to dismiss, the
18 non-conclusory factual content, and reasonable inferences from that content, must be
19 plausibly suggestive of a claim entitling the plaintiff to relief.” *Iqbal*, 556 U.S. at 678.
20 “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more
21 than a sheer possibility that a defendant has acted unlawfully.” *Id.* “[W]here the well-
22 pleaded facts do not permit the court to infer more than the mere possibility of
23 misconduct, the complaint has alleged – but it has not ‘show[n]’ – ‘that the pleader is
24 entitled to relief.’” *Id.* at 679.

25 **III. WSC CANNOT FIT THE FACTS OF THIS CASE INTO A** 26 **CYBERSQUATTING CLAIM**

27 WSC’s fifth count purports to state a claim for violation of the Anticybersquatting
28 & Consumer Protection Act (the “ACPA”) codified at Lanham Act 15 U.S.C. § 1125(d).

1 (FACC ¶¶ 165-175.) In 1999, Congress passed the ACPA as an amendment to the
2 Lanham Act to prohibit cybersquatting. *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672,
3 680-81 (9th Cir. 2005). “Cybersquatting is the Internet version of a land grab.
4 Cybersquatters register well-known brand names as Internet domain names in order to
5 force the rightful owners of the marks to pay for the right to engage in electronic
6 commerce under their own name.” *Garden of Life, Inc. v. Letzer*, 318 F. Supp. 2d 946,
7 960 (C.D. Cal. 2004) (internal citation omitted).

8 The Senate Judiciary Committee Report on the ACPA explained that “the
9 purpose of the bill” is to protect consumers and businesses by “prohibiting the bad-faith
10 and abusive registration of distinctive marks as Internet domain names with the intent to
11 profit from the goodwill associated with such marks – a practice commonly referred to as
12 ‘cybersquatting.’” Sen. Rep. No. 106-140, at 4 (1999). The Report further identifies
13 cybersquatters as those who: (1) “register well-known domain names in order to extract
14 payment from the rightful owners of the marks;” (2) “register well-known marks as
15 domain names and warehouse those marks with the hope of selling them to the highest
16 bidder;” (3) “register well-known marks to prey on customer confusion by misusing the
17 domain name to divert customers from the mark owner’s site to the cybersquatter’s own
18 site;” and (4) “target distinctive marks to defraud customers, including to engage in
19 counterfeiting activities.” Sen. Rep. No. 106-140, at 5-6. None of these features of
20 cybersquatting are present in the FACC.

21 The FACC acknowledges that the B&D Parties were franchisees of WSC from
22 August 1, 2001 until September 30, 2015. (FACC ¶¶ 32-79, Exs. A, F, L.) Pursuant to the
23 parties’ franchise agreements, the B&D Parties were granted several licenses to use (and
24 contractually obligated to use) the Windermere marks in the operation of their real estate
25 businesses. (*See* FACC, Exs. A at § 2, F at § 2, L at § 1.) The FACC further
26 acknowledges that it was during the B&D Parties’ time as franchisees of Windermere
27 that they lawfully registered all of the Internet domains at issue in this case – *i.e.*, the
28 domains “that include the name Windermere or a close derivative thereof.” (FACC, ¶¶

1 98, 103, 171.) Following the termination of the parties’ franchise agreements, WSC
2 demanded that the domains be transferred to it, but instead, the B&D Parties “may have
3 [...] surrendered all requested domain names to the domain registrar.” (FACC, ¶¶ 104-
4 108.) WSC’s allegations do not show the existence of cybersquatting nor do they fit
5 within the stated purpose or intent of the APCA.² Sen. Rep. No. 106-140, at 4.

6 Nowhere in the FACC does WSC allege (nor can it) that the B&D Parties: (1)
7 registered the Internet domains in order to extract payment from WSC, (2) registered the
8 Internet domains with the hope of selling them to the highest bidder, (3) registered the
9 Windermere domains in order to prey on customer confusion by misusing the domains to
10 divert customers from Windermere, or (4) targeted the Windermere mark to defraud
11 customers and to engage in counterfeiting activities. *See* Sen. Rep. No. 106-140 at 5-6.
12 Because the types of activities that give rise to cybersquatting are not present in the FAC,
13 the fifth count for violation of the ACPA should be dismissed for failure to state a claim.

14 Moreover, even if this case did involve cybersquatting (it does not), the fifth count
15 should still be dismissed for WSC’s failure to plead the required elements of its claim.
16 Pursuant to the language of the ACPA, “[a] person shall be liable in a civil action by the
17 owner of a mark [...] if, without regard to the goods or services of the parties, that person

18 --

- 19 (i) has a ***bad faith intent to profit from that mark*** [...]; and
20 (ii) registers, traffics in, or uses a domain name that [is confusingly
21 similar to another’s mark or dilutes another’s famous mark].

22 15 U.S.C. § 1125(d)(1)(A) (2004)(emphasis added); *Garden of Life, Inc. v. Letzer*, 318 F.
23 Supp. 2d 946, 960 (C.D. Cal. 2004). In *DaimlerChrysler v. Net Inc.*, 388 F.3d 201 (6th
24 Cir. 2004), the Sixth Circuit held that a trademark owner asserting a claim under the

26 ² Interestingly, and in stark contrast to its description of the B&D Parties’ alleged
27 cybersquatting activities, WSC identifies actual cybersquatters as those people located
28 “in Hong Kong and/or other locations beyond the jurisdiction of U.S. Courts” who
“snatch[] up” domain names as soon as they are released to the public. (FACC, ¶ 110.)

1 ACPA must establish the following: (1) it has a valid trademark entitled to protection; (2)
2 its mark is distinctive or famous; (3) the defendant’s domain name is identical or
3 confusingly similar to, or in the case of famous marks, dilutive of, the owner’s mark; and
4 (4) the defendant used, registered, or trafficked in the domain name (5) ***with a bad faith***
5 ***intent to profit***. *Id.* at 204.

6 “The requirement of bad faith intent to profit from the mark is distinct from the
7 requirement that defendant ‘register[], traffic[] in, or use[] a domain name.’” *Solid*
8 *Host, NL v. Namecheap, Inc.*, 652 F. Supp. 2d 1092, 1108-11 (C.D. Cal. 2009) (citing 15
9 U.S.C. § 1125(d)(1)(A)(ii)) ; *see DSPT Int’l, Inc. v. Nahum*, 624 F.3d 1213, 1221 (9th
10 Cir. 2010)(“[I]t is bad faith to hold a domain name for ransom, where the holder uses it to
11 get money from the owner of the trademark rather than to sell goods.). In evaluating the
12 potential “bad faith intent” of the defendant, the ACPA provides nine non-exclusive
13 factors that a court “may consider.”³ 15 U.S.C. § 1125(d)(1)(B)(i). In addition to the nine
14 factors, the statute contains a safe harbor. The safe harbor provision states that bad faith
15 intent “shall not be found in any case in which the court determines that the person
16 believed and had reasonable grounds to believe that the use of the domain name was fair
17 use or otherwise lawful.” 15 U.S.C. § 1225(d)(1)(B)(ii). The bad faith element has not
18 been pled in this case.

19 There are no allegations in the FACC to show that the B&D Parties made any
20 effort or expressed any intent – bad faith or otherwise – to profit from the Internet
21 domains following the termination of the parties’ franchise relationships. Instead, the
22 FACC merely alleges that the B&D Parties may have cancelled – instead of transferring
23 to WSC – the Internet domain names at issue. (FACC, ¶¶ 103-108.) Based on these
24

25 ³ The ACPA notes that use of these nine listed factors is permissive. 15 U.S.C. §
26 1125(d)(1)(B)(i); *see also Sport’s Farm L.L.C. v. Sportsman’s Mkt., Inc.*, 202 F.3d 489,
27 498 (2d Cir. 2000) (The factors are “expressly described as indicia that ‘may’ be
28 considered along with other facts.”); *Virtual Works, Inc. v. Volkswagen of Am., Inc.*, 238
F.3d 264, 268 (4th Cir. 2001) (a court is not limited to considering these nine permissive
factors when determining the presence or absence of bad faith).

1 allegations, WSC later concludes that the B&D Parties “plainly registered and/or use, and
2 are using, the Infringing Domains in bad faith.” (FACC, ¶ 170); *see Bell Atl. Corp. v.*
3 *Twombly*, 550 U.S. 544, 590 (2007) (the court need not accept legal conclusions cast as
4 factual allegations). WSC’s failure to plead the bad faith intent to profit element is fatal to
5 its APCA claim.

6 Because this is not a cybersquatting case and WSC has not pled facts sufficient to
7 support the legal conclusion that the B&D Parties acted with a bad faith intent to profit
8 from the Internet domains, as that term is used in 15 U.S.C. § 1225(d), the fifth count in
9 the FACC should be dismissed without leave to amend.

10 **IV. WSC FAILS TO STATE A CLAIM FOR TRADEMARK INFRINGEMENT**

11 WSC’s sixth count purports to state a claim for “Federal Trademark Infringement.”
12 (FACC, ¶¶ 176-186.) To make out a claim for trademark infringement, a plaintiff must
13 plead (1) that the plaintiff owns valid registrations of the trademark; (2) defendant’s mark
14 is a counterfeit, imitation, or reproduction; (3) defendant’s goods have been used in
15 commerce; (4) such use was without plaintiff’s consent; and (5) such use is likely to
16 cause confusion or deceive. *See e.g. E&J Gallo Winery v. Gallo Cattle Co.*, 1989 U.S.
17 Dist. LEXIS 7950 (E.D. Cal. 1989) *aff’d*, 967 F.2d 1280 (9th Cir. 1992); *see also* 15
18 U.S.C. § 1114. As explained below, WSC’s claim for trademark infringement should be
19 dismissed because WSC has ***not*** pled facts sufficient to show that (1) the B&D Parties
20 used the Windermere mark after their licenses to use the mark terminated; (2) any
21 subsequent use of the mark by the B&D Parties occurred in connection with the sale,
22 distribution or advertising of goods and services; or (3) any such use was likely to cause
23 confusion. Because WSC failed to plead the above elements of its trademark
24 infringement claim, its sixth count should be dismissed for failure to state a claim.

25 As stated above, the B&D Parties were granted several licenses to use the
26 Windermere marks in the operation of their franchised real estate businesses. (*See* FACC,
27 Exs. A at § 2, F at § 2, L at § 1.) These licenses terminated with the franchise agreements
28 on September 30, 2015. (FACC, Exs. E, M.) Although WSC alleges that the B&D Parties

1 “continue to use the Windermere Marks” (FACC, ¶ 178), and that WSC’s counsel alerted
2 the B&D Parties’ counsel of this “misuse of WSC’s intellectual property” (FAC, ¶ 99),
3 outside of these conclusory allegations, the FACC fails to identify any facts of
4 subsequent use by the B&D Parties. “Mere conclusory allegations of law and
5 unwarranted inferences are insufficient to defeat a motion to dismiss.” *Adams v. Johnson*,
6 355 F.3d 1179, 1183 (9th Cir. 2008), *accord Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

7 Moreover, while not entirely clear from the face of pleading, it appears that WSC’s
8 trademark infringement claim is entirely predicated upon the B&D Parties’ alleged use of
9 the Internet domains that contain the Windermere mark. If so, the allegations in the
10 FACC suggest that there was no subsequent use of these Internet domains by the B&D
11 Parties following the termination of the parties’ franchise agreements. (*See* FAC, ¶ 107 –
12 “WSC was provided with assurances that Defendants were in the process of transferring
13 those domain names identified and requested by WSC”; FAC, ¶ 108 – “WSC since
14 learned that Defendants may have instead surrendered all requested domain names to the
15 domain registrar”; FAC, ¶¶ 109-110 – if surrendered by the B&D Parties, the Internet
16 domains “are now available to the public, worldwide, for anyone to register,” including
17 “cybersquatters.”). These contradictory allegations alone are proper grounds for granting
18 the Motion to Dismiss. *See Weisbuch v. County of Los Angeles*, 119 F.3d 778, 783, fn. 1
19 (9th Cir. 1997) (“a plaintiff may plead [him]self out of court” if he “plead[s] facts which
20 establish that he cannot prevail on his...claim”). WSC cannot bring a claim for trademark
21 infringement on the mere possibility that WSC has continued to use the domain names
22 when the only facts plead by WSC cast doubt on the possibility.

23 Although the FACC expresses some doubt by WSC whether the B&D Parties have
24 relinquished the Internet domains, this doubt is not the equivalent of pleading the
25 subsequent use element of the trademark infringement claim. (*See* FACC, ¶¶ 108-111.)
26 “The plausibility standard is not akin to a ‘probability requirement...it asks for more than
27 the sheer possibility that a defendant has acted unlawfully.” *Adobe Sys. v. Blue Source*

28

1 *Grp, Inc.*, 2015 U.S. Dist. LEXIS 115686 (N.D. Cal. Aug. 31, 2015), *citing Iqbal*, 556
2 U.S. at 678. Thus, WSC’s allegations do not suffice to state a claim.

3 To the extent that WSC’s trademark infringement claim is predicated upon the
4 B&D Parties’ failure to turn over the Internet domains, this retention (or refusal to
5 surrender) a domain name without any connecting sale, distribution or advertising of
6 goods and services does not constitute trademark infringement. *See Lockheed*
7 *Martin Corp. v. Network Solutions, Inc.*, 985 F. Supp. 949, 957 (C.D. Cal. 1997) (because
8 defendant’s “acceptance of domain name registrations is connected only with the names’
9 technical function on the Internet to designate a set of computers” and defendant “is not
10 using the SKUNK WORKS mark in connection with the sale, distribution or advertising
11 of goods and services,” no “use” of the domain name occurred with respect to the
12 Lanham Act); *see also Bird v. Parsons*, 289 F.3d 865, 878-879 (6th Cir. 2002) (affirming
13 dismissal of trademark infringement and unfair competition claims against domain name
14 registrar and auction company for domain names because no “use” as required under the
15 relevant statutory provisions); *see also Academy of Motion Picture Arts and Sciences v.*
16 *Network Solutions, Inc.*, 989 F. Supp. 1276, 1279 (C.D. Cal. 1997)(“mere registration of
17 a domain name does not constitute a commercial use”). Here, WSC has not alleged any
18 facts to suggest that the domain names – even if they were still being used by the B&D
19 Parties – were used with any connecting sale, distribution or advertising of goods and
20 services. *See Lockheed Martin*, 985 F.Supp. at 957 (“This is not to say that a domain
21 name can never be used to infringe a trademark. However, something more than the
22 registration of the name is required before the use of the domain is infringing”). Thus,
23 since the FACC does not plead that the mark was used in connection with the sale,
24 distribution or advertising of goods and services, WSC fails to state a claim for trademark
25 infringement.

26 Lastly, WSC has not alleged any facts showing the alleged subsequent use of the
27 mark (assuming it occurred) gave rise to a “likelihood of confusion” in the consuming
28 public. “A likelihood of confusion exists when consumers are apt to assume the product

1 or service is associated with a source other than its actual source due to similarities
2 between the two sources' marks or marketing techniques." *Metro Pub. Ltd. v. San Jose*
3 *Mercury News*, 987 F.2d 637, 640 (9th Cir. 1993). WSC argues that the B&D Parties'
4 website remained linked to one domain, *windermersocal.com* in the hours (October 1)
5 following termination of the agreements. (FACC, ¶ 121.) However, WSC pleads no facts
6 showing that the link between the websites caused **any** confusion between the parties'
7 relationships. In fact, WSC likely omitted such allegations as the B&D Parties' new
8 website explicitly make clear that the B&D Parties' new company was not affiliated with
9 Windermere. Further, even if WSC had pled instances of actual confusion (it did not) in
10 the alleged limited time *windermersocal.com* was still linked to the B&D Parties'
11 website, even this would not suffice to plead an infringement claim. *See George & Co.,*
12 *LLC v. Imagination Entm't Ltd.*, 575 F.3d 383, 398 (4th Cir. 2009) ("Evidence of only a
13 small number of instances of actual confusion may be dismissed as *de minimis*").

14 For all these reasons, the Court should dismiss WSC's claim for trademark
15 infringement without leave to amend.

16 **V. WSC FAILS TO STATE A CLAIM FOR UNFAIR BUSINESS PRACTICES**

17 WSC's unfair business practices claim is derivative of its trademark infringement
18 and ACPA claims. (*See* FACC, ¶¶ 187-193.) As those claims should be dismissed, so too
19 should the unfair business practices claim.

20 Section 17200 defines "unfair competition" to include "any unlawful, unfair or
21 fraudulent business act or practice." Here, WSC alleges that the B&D Parties have
22 engaged in the "unlawful use and possession of the Windermere Marks and Internet
23 domains that include the name Windermere or a close derivative thereof," and that this
24 conduct is both "unlawful and unfair" in violation of Section 17200. (FACC, ¶ 188.) As
25 explained below, WSC has not (and cannot) satisfy either the "unlawful" or "unfair"
26 elements of its Section 17200 claim.

27 The California Supreme Court has explained that "unlawful business practices"
28 prong of the Section 17200 claim is determined by looking at "violations of other laws."

1 *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163,
2 180 (1999). Here, since WSC’s Lanham Act claims fail (*i.e.*, violation of the ACPA and
3 trademark infringement), WSC also fails to show any unlawful business practices. *See*
4 *Acad. Of Motion Picture Arts & Scis. v. Creative House Promotions, Inc.*, 944 F.2d 1446
5 (9th Cir. 1991) (“An action for unfair competition under Cal. Bus. & Prof. Code §§
6 17200 *et seq.* is ‘substantially congruent’ to a trademark infringement claim under the
7 Lanham Act”). Accordingly, WSC cannot satisfy the “unlawful” prong of Section 17200.

8 Similarly, WSC has failed to plead any facts to suggest that the B&D Parties’
9 practices were “unfair.” The “word ‘unfair’ in [section 17200] means conduct that
10 threatens an incipient violation of an antitrust law, or violates the policy or spirit of one
11 of those laws because its effects are comparable to or the same as a violation of the law,
12 or otherwise significantly threatens or harms competition.” *Cel-Tech*, 20 Cal.4th at 187.
13 The FACC contains no facts showing unfair conduct under the *Cel-Tech* definition of
14 “unfair.” *See e.g. Celebrity Chefs Tour, LLC v. Macy’s, Inc.*, 16 F.Supp.3d 1141, 1156
15 (S.D. Cal. 2014) (Plaintiffs did “not allege unfair business practices within the meaning
16 of the UCL” where “Plaintiffs’ allegations fail to allege acts that more narrowly violate
17 the spirit of the antitrust laws, such as horizontal price fixing, exclusive dealing, or
18 monopolization”). Because the facts of the FACC suggest that – instead of harming
19 competition – the B&D Parties acted to increase competition by operating an independent
20 company, WSC does not (and cannot) satisfy the “unfair” prong of its Section 17200
21 claim.

22 Because WSC cannot show that the conduct of the B&D Parties’ was either
23 “unlawful” or “unfair” within the meaning of Section 17200, WSC’s seventh count for
24 unfair business practices should be dismissed.

25 **VI. CONCLUSION**

26 For the aforementioned reasons, the B&D Parties respectfully request that the
27 Court should grant their Motion to Dismiss.

1 DATED: November 4, 2015

MULCAHY LLP

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