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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BENNION & DEVILLE FINE HOMES,)	CASE NO. EDCV 15-1921-R
INC., a California corporation, et al.,)	
Plaintiffs,)	ORDER GRANTING IN PART AND
)	DENYING IN PART PLAINTIFFS AND
v.)	COUNTER-DEFENDANT’S MOTION
)	FOR PARTIAL SUMMARY JUDGMENT
)	
WINDERMERE REAL ESTATE SERVICES)	
COMPANY, a Washington corporation, and)	
DOES 1-10,)	
)	
Defendant.)	
)	
)	
)	

Before the Court is Plaintiffs’ and Counter-Defendant’s Motion for Summary Judgment, which was filed on October 3, 2016. (Dkt. No. 67). Having been thoroughly briefed by all parties, this Court took the matter under submission on November 15, 2016.

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). To meet its burden of production, “the moving party must either produce evidence negating an essential element of the nonmoving party’s claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. v. Fritz Cos.*, 210 F.3d 1099 (9th Cir. 2000). Once the moving party meets its initial burden of showing there is no genuine issue of

1 material fact, the opposing party has the burden of producing competent evidence and cannot rely
2 on mere allegations or denials in the pleadings. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio*
3 *Corp.*, 475 U.S. 574 (1986). Where the record taken as a whole could not lead a rational trier of
4 fact to find for the non-moving party, there is no genuine issue for trial. *Id.*

5 Plaintiffs and Counter-Defendants Bennion & Deville Fine Homes SoCal, Inc. (“B&D
6 SoCal”) and Windermere Services Southern California, Inc. (“Services SoCal”), and Counter-
7 Defendants Robert Bennion (“Mr. Bennion”) and Joseph R. Deville (“Mr. Deville”) (collectively
8 “Moving Parties”) filed a Motion for Partial Summary Judgment of the First Amended
9 Counterclaim (“FACC”). First, the Moving Parties argue that partial summary judgment should
10 be entered in favor of Services SoCal as to the fourth cause of action for breach of the
11 Modification Agreement because Services SoCal was not bound by the applicable portion of that
12 agreement. In its Opposition, Counter-Plaintiff Windermere Real Estate Services Company
13 (“WSC”) abandons this claim as to Services SoCal. Accordingly, summary judgment is granted in
14 favor of Services SoCal on the fourth cause of action in the FACC.

15 Moving Parties next argue that summary judgment should be granted as to two of the four
16 breaches of contract alleged in the FACC’s Second Cause of Action. The second cause of action
17 alleges that Services SoCal breached the Area Representation Agreement by: (1) failing to provide
18 “prompt, courteous and efficient service,” (2) failing to deal “fairly and honestly” with members
19 of the Windermere System, (3) “failing and refusing to collect and remit fees from Windermere
20 franchisees”, and (4) by misusing “the Windermere name and trademarks following
21 expiration/termination of the Area Representation Agreement.” The Moving Parties argue that
22 Counter-Plaintiff has not shown evidence of damage as a result of the first and second breaches.

23 In order to sustain a claim for breach of contract, a plaintiff must show that it has been
24 damaged by the breach. *Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1015 (9th Cir.
25 2000). Here, Services SoCal points to deposition testimony of WSC’s General Counsel, WSC’s
26 damage expert, and discovery responses indicating that WSC was damaged to the tune of 1.3
27 million dollars as a result of unpaid or past-due franchise fees and related fees. These damages,
28 Moving Parties contend, should be attributed to the third breach for failure to collect and remit

1 fees. In opposition, Counter-Plaintiff argues summarily that the failure to provide prompt service
2 and deal fairly and honestly also caused the 1.3 million dollars of damages. Such conclusory
3 statements, without factual support, are insufficient to carry WSC's burden to produce competent
4 evidence of damages. Absent any evidence of damage as a result of Service SoCal's alleged
5 failure to provide prompt and fair service, WSC's counter claim for breach of contract cannot
6 stand. Accordingly, the Motion for Partial Summary Judgment is granted as to Counter-Plaintiff's
7 claim for breach of contract based on an alleged failure to provide prompt, courteous, and efficient
8 service as well as any failure to deal fairly and honestly.

9 Finally, the Moving Parties argue that summary judgment should be granted on WSC's
10 breach of contract claims as they relate to trademark violations and misuse of trademarks. The
11 Moving Parties contend that the only party liable for the trademark-based claims is Bennion and
12 Deville Fine Homes, Inc. ("B&D Fine Homes") because it owns the domain names which WSC
13 claims violate the trademarks. WSC argues in Opposition that Mr. Bennion and Mr. Deville are
14 personal guarantors of B&D Fine Homes' performance under the SoCal Franchise Agreement. As
15 personal guarantors, a material fact exists as to Mr. Bennion and Mr. Deville's personal liability
16 for B&D Homes' trademark violations and misuse. Therefore, summary judgment is denied on
17 Counter-Plaintiff's trademark violations and misuse claims against Mr. Bennion and Mr. Deville.

18 Similarly, Counter-Plaintiff has raised a material issue of fact as it relates to alleged
19 trademark violations and misuse by Services SoCal and B&D SoCal. WSC claims that Services
20 SoCal and B&D SoCal have continued to use Windermere trademarks after the termination of the
21 agreements as evidenced by their registrations with the California Bureau of Real Estate and the
22 California Secretary of State, respectively. The registrations of both counter-defendants indicate
23 that they use the term "Windermere" in their identifying information. While it may be uncertain
24 to what extent both counter-defendants are using the "Windermere" trademark, the fact that
25 Counter-Defendants both used the term in their registration documentation raises a dispute of
26 material fact as to their use of the trademarked term. Counter-defendant's objections to the
27 admission of the registration evidence is unpersuasive. The registration documents presented by
28 WSC are publicly available government records. As such they are easily authenticated, their

1 accuracy is not reasonably questioned, and they may be relied upon by this Court. Thus, summary
2 judgment is denied on Counter-Plaintiff's trademark violations and misuse claims against Services
3 SoCal and B&D SoCal.

4 **IT IS HEREBY ORDERED** that the Moving Parties' Motion for Partial Summary
5 Judgment is GRANTED in part and DENIED in part.

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7 Dated: November 30, 2016.

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MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

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