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Windermere Real Estate Services Company

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13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

14

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

19 Plaintiffs,

20 v.

21 WINDERMERE REAL ESTATE
22 SERVICES COMPANY, a Washington
corporation; and DOES 1-10

23 Defendant.

24

25 **AND RELATED COUNTERCLAIMS**

26

27

28

Case No. 5:15-CV-01921 R (KKx)

Hon. Manuel L. Real

**DEFENDANT WINDERMERE
REAL ESTATE SERVICES
COMPANY'S OPPOSITION TO
PLAINTIFFS AND COUNTER-
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Date: November 21, 2016

Time: 10:00 a.m.

Courtroom: 8

1 **I. INTRODUCTION**

2 Plaintiffs and counter-defendants Bennion & Deville Fine Homes SoCal, Inc.
3 (“Fine Homes SoCal”), Windermere Services Southern California, Inc. (“WSSC”)
4 and counter-defendants Robert L. Bennion and Joseph R. Deville (collectively,
5 “Counter-Defendants”) bring this motion for partial summary judgment as a rifle
6 shot, seeking to extricate themselves for specific portions of specific claims. As set
7 forth in Counter-Defendant’s notice of motion, Counter-Defendants are seeking
8 partial summary judgment on three issues. However, disputed issues of material
9 fact exist regarding issues two and three identified by Counter-Defendants such that
10 the Court should deny Counter-Defendants’ request for summary judgment as to
11 those issues.¹

12 Specifically, regarding Counter-Defendants’ issue two, that WSSC is entitled
13 to partial summary judgment on the FACC’s Second Cause of Action, paragraph
14 130, the evidence establishes that WSC suffered damages as a result of WSSC
15 failure to collect fees owing by Fine Homes SoCal and plaintiff and counter-
16 defendant Bennion & Deville Fine Homes, Inc. (“Fine Homes”). This failure
17 breached WSSC’s obligation to provide “prompt, courteous and efficient service”
18 and to deal “fairly and honestly” with WSC. At the very least, there are disputed
19 issues of material fact regarding this claim.

20 Disputed issues of material fact also exist regarding Counter-Defendants’
21 issue three, whether Bennion, Deville, Fine Homes SoCal, or WSSC, can be liable
22 for failure to cease using the Windermere name and trademarks. First, Bennion and
23 Deville personally guaranteed Fine Homes and Fine Homes SoCal’s performance of
24 their contractual obligations, including their obligations to cease using the
25 Windermere name and trademarks. Moreover, the evidence establishes that Fine

26 _____
27 ¹ WSC hereby abandons any claim asserted in the FACC’s Fourth Cause of Action
28 that WSSC is liable under the liquidated damages provision of the Modification
Agreement. This is the first issue identified in Counter-Defendants’ motion.

1 Homes, Fine Homes SoCal, and WSSC all continue to use the Windermere name.
2 Therefore, summary judgment is not proper on this issue.

3 For these reasons, and for those set forth more fully below, Counter-
4 Defendants' motion for partial summary judgment on issues two and three as set
5 forth in their notice of motion should be denied.

6 **II. LEGAL ARGUMENT**

7 **A. Disputed Issue of Fact Exist Regarding Whether the Damages**
8 **Sustained by WSC Were the Result of WSSC's Breaches of Contract**
9 **as Set Forth in Paragraph 130 of the FACC**

9 Paragraph 130 of the FACC's Second Cause of Action alleges that WSSC
10 breached the Area Representation Agreement by failing to provide "prompt,
11 courteous and efficient service" to Windermere franchisees and by failing to deal
12 "fairly and honestly" with members of the Windermere System as required by
13 Section 3 of that agreement. Counter-Defendants argue that they are entitled to
14 summary judgment regarding this alleged breach because WSC cannot establish
15 damages resulting therefrom. Counter-Defendants support their argument by
16 claiming that the only proof damages that WSC has provided through discovery and
17 its expert disclosures are fees owing by Fine Homes and Fine Homes SoCal under
18 their respective franchise agreements. This argument ignores that these damages
19 were also the result of WSSC's failure to collect those fees due to Bennion and
20 Deville's choice to spend lavishly on themselves rather than have WSSC use its best
21 efforts to collect those amounts.

22 WSC's corporate representatives and its damages expert identified damages
23 sustained because of WSSC failure to make best efforts to collect fees from Fine
24 Homes and Fine Homes SoCal as required under the Area Representation
25 Agreement. (Feasby Decl. Ex. G, Oster Dep. pp. 21-24; Docket No. 67 (Adams
26 Decl.) Ex. H, pp. 55, 61-65 of 206; Feasby Decl., Ex. B, § 3.) In addition, WSC's
27 franchising expert concluded that WSSC's failure to collect fees owing by Fine
28 Homes and Fine Homes SoCal was a breach of industry standards. (Docket No. 67

1 (Adams Decl.) Ex. H, pp. 105-106 of 206.) These breaches of contract and failures
2 to meet industry standards breached WSSC's obligation to provide prompt,
3 courteous and efficient service and to deal fairly and honestly with members of the
4 Windermere system – to wit, WSC. At the very least, there are disputed issues of
5 material fact regarding this claim. Therefore, summary judgment is not appropriate.

6 **B. Counter-Defendants Used WSC's Trademarks After They**
7 **Terminated the Applicable Agreements**

8 After the termination of the Area Representation Agreement, and after
9 Counter-Defendants terminated the franchise agreements, Counter-Defendants were
10 required to immediately cease using any of WSC's trademarks or the "Windermere"
11 name. Counter-Defendants argue that they are entitled to summary judgment because
12 all the internet domain names at issue were registered solely to Fine Homes.
13 However, Bennion and Deville personally guaranteed Fine Homes' performance
14 under its franchise agreement. Therefore, to the extent Fine Homes breached that
15 agreement by failing to cease use of the domains, or by failing to promptly transfer
16 or surrender those domains – none of which is at issue for purposes of Counter-
17 Defendants' motion – Bennion and Deville are also liable for those breaches.
18 Moreover, record evidence shows that Fine Homes SoCal and WSSC are still using
19 the "Windermere" name and other WSC trademarks.

20 1. **Counter-Defendants Were Required to Stop Using WSC's**
21 **Trademark and the Windermere Name Upon Termination of the**
Agreements

22 Both Fine Homes and Fines Homes Socal's franchise agreements, as well as
23 WSSC's Area Representation Agreement, required Counter-Defendants, upon
24 termination of the agreements, to discontinue all use of WSC's trademarks, the
25 "Windermere" name, and all variations thereof. (WSC's Additional Facts ("AF")
26 No. 50; Declaration of Jeffrey A. Feasby ("Feasby Decl.") ¶ 3, Ex. A, Coachella
27 Valley Franchise Agreement § 7; ¶ 4, Ex. B, Area Representation Agreement § 6;
28 ¶ 5, Ex. C, Southern California Franchise Agreement § 9.) Upon termination of the

1 Coachella Valley Franchise Agreement, Fine Homes was required to “discontinue
2 all use of the Trademark, the name ‘Windermere Real Estate,’ or variations of the
3 name, including the name ‘Windermere.’” (Feasby Decl. Ex. A, Coachella Valley
4 Franchise Agreement § 7.) The SoCal Franchise Agreement states that, upon
5 termination, Fine Homes SoCal “shall immediately discontinue all use of the
6 Trademark, the name ‘Windermere,’” and all variations of the “Windermere” name.
7 (Feasby Decl., Ex. C, Sothern California Franchise Agreement § 9.) Similarly, the
8 Area Representation Agreement states that, upon termination, WSSC “will change
9 its name to a name not containing any reference to Windermere or Windermere Real
10 Estate and will discontinue all use or reference to the tradename or Trademark.”
11 (Feasby Decl. Ex. B, Area Representation Agreement § 6.)

12 WSC’s First Amended Counter Claim (“FACC”) alleges that Counter-
13 Defendants continued to use WSC’s trademarks and the “Windermere” name after
14 termination of the agreements. (D.E. 16, ¶¶ 118-126; 133-141; 148-157.) In their
15 motion, Counter-Defendants do not dispute that they were required to stop using all
16 WSC Trademarks and stop using the “Windermere” name immediately upon
17 termination of the Agreements. The motion also does not contend that Fine Homes
18 did not WSC’s trademarks and/or the “Windermere” name after termination of the
19 Agreements. Instead, Counter-Defendants argue that only Fine Homes could use
20 the trademark and/or “Windermere” name in breach of the Agreements because Fine
21 Homes registered domain names using the “Windermere” name. (D.E. 67, pp. 13-
22 14.) This argument is without merit as established by the additional facts set forth
23 below.

24 2. Bennion and Deville Personally Guaranteed Performance of the
25 Franchise Agreements

26 Counter-Defendants do not contend that Fine Homes did not use WSC’s
27 trademarks and/or the “Windermere” name after the Agreements were terminated.
28 Instead, they argue that Bennion and Deville cannot be liable under WSC’s claim

1 for breach of contract for failure to cease use of the Windermere name and marks
2 since they did not register the domain names at issue. However, Bennion and
3 Deville personally guarantee performance of the Coachella Valley Franchise
4 Agreement and the SoCal Franchise Agreement. Therefore, Bennion and Deville
5 can be personally liable for Fine Homes' and Fine Homes SoCal's continued use of
6 the Windermere name marks after termination of the franchise agreements.

7 The original Coachella Valley Franchise Agreement did not contain any
8 personal guarantees. (Feasby Decl. Ex. A.) However, through seven addenda to
9 that agreement, and two subsequent agreements, Bennion and Deville personally
10 guaranteed Fine Homes' performance of the Coachella Valley Franchise Agreement.
11 (AF No. 51, Feasby Decl. ¶¶ 10-12, Exs. H-J.) On each of these nine occasions,
12 Bennion and Deville agreed they were personally responsible for performance of the
13 Coachella Valley Franchise Agreement. (*Id.*) Consequently, Bennion and Deville
14 are liable for Fine Homes' breaches of the Coachella Valley Franchise Agreement,
15 including without limitation, its continued use of Windermere name and marks after
16 termination of the Coachella Valley Franchise Agreement.

17 The SoCal Franchise Agreement also contains personal guarantees.
18 Appendix 2 of the SoCal Franchise Agreement, entitled "Personal Guaranty," states
19 that Bennion and Deville "absolutely and irrevocably guarantee[] to and for the
20 benefit of WSC and Area Representative the full, prompt and complete payment and
21 performance" of B&D Fine Homes SoCal's obligations under the SoCal Franchise
22 Agreement. (AF No. 52, Feasby Decl. Ex. C, Southern California Franchise
23 Agreement, Appendix 2.) As discussed below, Fine Homes SoCal is still using the
24 "Windermere" name in violation of the SoCal Franchise Agreement. Accordingly,
25 Bennion and Deville are personally liable for Fine Homes SoCal's breach of the
26 SoCal Franchise Agreement.

27 Counter-Defendants may argue that the Agreement Modifying Windermere
28 Real Estate Franchise License Agreements ("Modification Agreement") relieved

1 them from liability pursuant to their personal guarantees. Under the Modification
2 Agreement, WSC agreed to, *inter alia*, forgive and/or waive certain license and
3 other fees Counter-Defendants owed under the franchise agreements. (Feasby Decl.
4 ¶ 13, Ex. K, Modification Agreement § 3.) In addition to forgiving fees owed by
5 Fine Homes and Fine Homes SoCal, WSC agreed that neither Bennion or Deville
6 would be personally liable for the amounts forgiven in the Modification Agreement.
7 (*Id.*, Modification Agreement § 3(G).) Importantly, this modification of the
8 personal guarantee applied *only to amounts owed under the franchise agreements*
9 *prior to April 1, 2012*. It did not modify the guarantee of performance, and did not
10 affect the guarantee of performance or payment after April 1, 2012. (AF No. 53.)
11 Consequently, Bennion and Deville are still personally liable for Fine Homes and
12 Fine Homes SoCal's performance of the franchise agreements.

13 Bennion and Deville personally guaranteed performance of both franchise
14 agreements, and are therefore liable for Fine Homes and Fine Homes SoCal's
15 breaches of those agreements. Because there are disputed issues of material fact
16 regarding whether Fine Homes and Fine Homes SoCal breached either of the
17 franchise agreements by failing to cease use of the Windermere name and marks,
18 there are also disputed issues of material fact regarding whether Bennion and
19 Deville are liable for any breach(es) by Fine Homes and Fine Homes SoCal of the
20 franchise agreements. Therefore, summary judgment should be denied on these
21 claims against Bennion and Deville.

22 3. B&D Fine Homes and B&D Fine Homes So Cal are Still Using the
23 "Windermere" Name

24 On October 1, 2016, the day after the effective date of Fine Homes SoCal's
25 termination of the SoCal Franchise Agreement, counsel for WSC informed Counter-
26 Defendants that their continued use of the "Windermere" name and marks violated
27 the SoCal Franchise Agreement. (D.E. 16-17, Ex. Q.) Receiving no response,
28 counsel for WSC sent another notice the following day. (D.E. 16-18, Ex. R.)

1 Despite these notifications and this ongoing litigation, Fine Homes SoCal continues
2 to use the “Windermere” name in violation of the SoCal Franchise Agreement.

3 To become licensed as a real estate broker in California, corporations are
4 required to provide the California Department of Real Estate with information about
5 their licenses, their corporation, and their operations, including all their fictitious
6 business names (i.e. DBAs). *See e.g.*, Cal. Bus. & Prof. Code § 10159.5 (requiring
7 license holders to file fictitious business name statements). Information regarding
8 corporations licensed as real estate brokers in California is available from the
9 California Bureau of Real Estate’s website. According to the California Bureau of
10 Real Estate, Fine Homes is still using the fictitious business names “Windermere
11 Real Estate Coachella Valley” and “Windermere Real Estate Southern California.”
12 (AF No. 54, Feasby Decl. ¶ 14, Ex. L.)² Similarly, Fine Homes SoCal is still doing
13 business as “Windermere Real Estate SoCal.” (AF No. 55, Feasby Decl. ¶ 15, Ex.
14 M.)

15 Because Fine Homes and Fine Homes SoCal are still using a fictitious
16 business name that includes “Windermere,” they are both in breach of their
17 obligations under their franchise agreements. At the very least, there are disputed
18 issues of material fact that preclude summary judgment.

19 4. WSSC is Still Using the “Windermere” Name

20 Just like Fine Homes and Fine Homes SoCal, WSSC is still using the
21 “Windermere” name. According to the California Secretary of State website,
22 WSSC is still an active corporation using the name “Windermere Services Southern
23 California, Inc.” with its principle place of business at 71691 Highway 111, Rancho
24 Mirage, CA 92270, which is an address used by Fine Homes. (AF Nos. 56, Feasby
25

26 _____
27 ² Public records and documents printed from a website maintained by a public
28 authority are self-authenticating. *Adams v. Carey*, No. 07-1878, 2009 WL
4895545, *2 (E.D. Cal. Dec. 11, 2009) (citing Fed. R. Evid. 902(5) and *Williams v.*
Long, 585 F. Supp. 2d 679 (D.Md. 2008).)

1 Decl. ¶ 16, Ex. N; AF No. 57, Feasby Decl. Ex. K, Modification Agreement § 13.)
2 WSSC filed its most recent Statement of Information with the California Secretary
3 of State on September 12, 2016, during the pendency of this action. (Feasby Decl.
4 Ex. N.) Consequently, there is a disputed issue of fact regarding whether WSSC is
5 still using the “Windermere” name in violation of the Area Representation
6 Agreement. Therefore, summary judgment is also inappropriate on this issue.

7 **III. CONCLUSION**

8 For all the foregoing reasons, Counter-Defendants’ motion for partial
9 summary judgment on issues two and three as set forth in their notice of motion
10 should be denied.

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12 DATED: October 31, 2016 PEREZ VAUGHN & FEASBY Inc.

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By: /s/ Jeffrey A. Feasby

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Jeffrey A. Feasby

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Attorneys for

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Windermere Real Estate Services Company

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