1st Civil Case No. A109721
Mendocino County Superior Court Case No. SCUK CVG 0185465

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CLIFFORD JOHNSON,

Plaintiff and Appellant,

vs.

COLDWELL BANKER REAL ESTATE CORPORATION AND CENDANT CORPORATION,

Defendants and Respondents.

Appeal from the Superior Court of Mendocino County
The Honorable Leonard LaCasse, Dept. E

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INTRODUCTION

The trial court correctly ruled that, as a matter of law, Johnson cannot prevail on the only claim at issue in this appeal—a fraud claim asserting direct liability against Coldwell-Banker Real Estate Corporation ("CBREC") and its parent, Cendant Corp. ("Cendant"), based on statements appearing on the coldwellbanker.com website and in certain television advertisements. Under clear-cut black-letter law, the allegedly fraudulent statements are mostly generic, non-specific, and non-factual, and hence, as a matter of law, are not actionable or cannot support a finding of reliance. The rest, while factual, are trivial, and Johnson has produced no evidence of their falsity. Accordingly, the trial court correctly entered judgment on the pleadings for CBREC and Cendant.

Because Johnson's fraud claim asserts direct liability against CBREC as a franchisor, this Court has no need to evaluate Johnson's further argument that the local defendants in this lawsuit (the Gualala real-estate office with which Johnson dealt and two of its realtors) are ostensible agents of CBREC and Cendant. Johnson has already recovered at trial against the local defendants. Moreover, Johnson's unequivocal admission that he read on the website that the franchisee was an independently owned and operated entity defeats any claim of ostensible agency as a matter of law. Hence, to the extent it is relevant here (and it is not), the long-established general rule applies whereby the franchisor is not vicariously liable for the acts of the franchisee. (See *Cislaw v. Southland Corp.* (1992) 4

Cal.App.4th 1284; *Wickham v. Southland Corp.* (1985) 168 Cal.App.3d 49.)

STATEMENT OF FACTS

Johnson sues, claiming Dodds and Pacific sold him a defective property.

Clifford Johnson filed the underlying lawsuit, alleging that in 1999 he bought a house in Gualala in Mendocino County. (JA64.) His real-estate agent for that transaction was Bev Dodds, who was an agent associated with Coldwell Banker Pacific Real Estate ("Pacific"), an independently owned and operated real-estate office in Gualala. (JA64.)

Johnson's complaint contends that the property was sold to him with certain "defects" (e.g., the property was subject to colluvial creep, the garage floor had a crack, the septic system was not in compliance with the building code, there was substandard fill, problems with retaining walls, etc.), and that Dodds had, and breached, a duty to Johnson to conduct an inspection and to disclose to him all facts materially affecting the property's value. (JA65-66.) Johnson claimed, among other things, that Dodds discouraged him from getting a soil inspection and told him that she didn't know of a soil inspector. (JA67, 70-71.)

Johnson initially sued Dodds, Pacific, and Pacific's owner/broker, Lenny Balter.

Johnson amends complaint to add claims against Pacific's franchisor.

Later, and on the eve of trial, Johnson amended his complaint to add claims against Pacific's franchisor, CBREC and Cendant. (JA67.)

Johnson's first two causes of action against CBREC and Cendant—for breach of statutory duty under C.C.P. § 2079 and breach of fiduciary duty—were, according to the complaint, based on ostensible agency only, and thus were an attempt to hold the franchisor vicariously liable for the acts of the franchisee. (JA63-73.) In connection with these claims, Johnson alleged that he "consciously and justifiably" relied on CBREC's and Cendant's "televised and internet publications." (JA 67.)

A third cause of action asserted direct liability against CBREC and Cendant based on what Johnson called "intentional misrepresentations," such as the assertion on the CBREC website (coldwellbanker.com) that Coldwell Banker realtors are "honest and knowledgeable" who put "the customer's best interest above all," and an agent list on the website describing Pacific as a "Premier Office" and describing Dodds and Balter as in the "President's Circle." (JA74-77.)

CBREC filed a cross-claim against Pacific for indemnity. (JA141-46.)

Before trial, Johnson abandoned his entire first cause of action, as well as all his claims against the individual defendants. This left only his claims against Pacific and CBREC and Cendant for breach of fiduciary duty and fraud. (JA370 fn.1.)

The franchise agreement provides that Pacific is an independent contractor, and requires Pacific to identify itself as the business owner.

Under California law, a franchise is a contract whereby the franchisee gets the right to offer goods or services under a marketing plan or system prescribed in substantial part by the franchisor. (Corp. Code § 31005.) The operation of the franchisee's business under that plan or system is substantially associated with the franchisor's trademark or service mark. (*Id.*)

As is typical, the franchise agreement between CBREC and Pacific established that both franchisor and franchisee were independent contractors as to each other:

> Independent Contractors: The parties are and shall be independent contractors with each other. Nothing contained in this Agreement or arising from the conduct of the parties is intended to make any party a general or special agent, legal representative, joint venture, partner, trustee, fiduciary or employee of any other party for any purpose whatsoever....

(JA39.)

Further, in order to prevent a client or anyone else from mistakenly thinking there was any agency relationship between CBREC and its franchisees, the franchise agreement also required a franchisee like Pacific to identify itself "conspicuously" in all dealings with others, including advertisements, as the owner of the franchised business:

> Franchisee shall conspicuously identify itself in all dealings with customers, lessors, contractors, suppliers, public officials, personnel of Franchisee and

> others as the owner of the Franchised Business. Such notices of independent ownership as Franchisor may require in the Policy Manual shall be placed by Franchisee on forms, business cards, stationery signs, advertising and other materials.

(JA39.)

Johnson admits that, before buying his home, he knew that Pacific was independently owned and operated, and he could not recall seeing any Coldwell Banker television ads.

It is undisputed that such notices of Pacific's independently-owned-and-operated status appeared on the website that Johnson says he relied on. Furthermore, Johnson admitted, in deposition, that he knew, *before entering into the sales transaction at issue*, that the CBREC website advised the public that its franchises are independently owned and operated because he had read it. (JA221-22.) And further still, although his complaint alleged reliance on certain vague statements in Coldwell Banker television advertisements, at deposition Johnson could not recall seeing any specific Coldwell Banker television ads before entering into the transaction at issue here. (JA223.)

CBREC and Cendant move for summary judgment.

After the parties conducted discovery, CBREC and Cendant moved for summary judgment. (JA2.) They argued that there was no evidence that they held their franchisees out to be agents, and thus could not be vicariously liable for their acts. (JA12-17.) CBREC and Cendant further argued that Johnson's admission that he knew of Pacific's independent status before he entered into the sales transaction negated the element of reliance, which was a necessary element of ostensible agency. (JA392-93.)

As to the fraud claim, CBREC and Cendant argued that the statements on which Johnson purported to rely—*e.g.*, that Coldwell Banker's real-estate professionals were "honest and knowledgeable" and put "the customer's best interest above all," etc.—constituted non-specific and non-factual sales superlatives that no person would reasonably consider to be factual assertions. (JA17-21.) Hence, they were non-actionable. (*Id.*)

Johnson filed his opposition (JA367); CBREC and Cendant filed a reply (JA387); and Johnson filed an unauthorized supplemental memorandum of points and authorities in response to the reply (JA400). The trial court heard oral argument on the motion. (JA411.)

Trial court grants summary judgment.

The trial court (Hon. Leonard J. LaCasse) granted CBREC's and Cendant's motion. (JA427.) The court, in its discretion, held that most of the evidence Johnson had submitted to defeat summary judgment was inadmissible because it either was not authenticated or was not in the proper form. (JA427-28.) Nevertheless, the court considered all non-conforming evidence anyway, and held that nothing in it created a triable question of fact. The court noted that Johnson testified in his deposition that, before entering into the real-estate contract, he had seen the language that the real-estate offices were independently owned and operated. The court found that this testimony doomed Johnson's claim of ostensible agency. (JA428-29.) And the court granted judgment on the pleadings on the fraud claim, holding that the statements Johnson pointed to in his attempt to establish fraud were "hyperbolic statements that nobody can

realistically use for a basis for a cause of action for intentional misrepresentation." (JA429.) The court entered judgment for CBREC and Cendant on January 3, 2005. (JA518.)

This Court denies Johnson's petition for writ.

Johnson moved for a "new trial," but the court denied the motion. (JA435, 548.)

Johnson also filed, in this Court, a petition for writ of mandate and a request to stay the then-pending trial against Pacific, which had not moved for summary judgment. (*See* Docket No. A109218.) Division Three of this Court denied the petition on April 22, 2005.

By then, a jury trial had been held against Pacific, Dodds, and Balter, in which Johnson recovered $38,500 in damages for breach of fiduciary duty and intentional misrepresentation. (JA556.)

SUMMARY OF THE ARGUMENT

Johnson's arguments on appeal are so devoid of merit as to be frivolous. The only claim Johnson still urges as to CBREC and Cendant is his third cause of action, for fraud. The trial court, however, correctly granted judgment on the pleadings for CBREC and Cendant on this claim. Under clear-cut California authority, the statements Johnson relies on are either (a) vague superlatives without any factual content or meaning, or (b) there is no evidence of their falsity (or their significance). Either way, the statements are not actionable and, as a matter of law, cannot support a fraud claim.

This leaves the issue of ostensible agency. Johnson thinks it is still relevant. We do not see how: in connection with his fraud claim, Johnson is not trying to hold CBREC or Pacific vicariously

liable for any of Pacific's actions. Indeed, Johnson has already recovered against Pacific at trial. Nevertheless, if the issue of ostensible agency is, in fact, relevant, Johnson also failed to establish it as a matter of law. Johnson knowingly, expressly, and voluntarily admitted at his deposition that, before the transaction at issue, he read the disclaimer on the CBREC website informing him that Coldwell Banker's real-estate offices are independently owned and operated. As a matter of law, this admission precludes any reasonable belief on Johnson's part that CBREC and Cendant were holding Pacific out as their authorized agent.

ARGUMENT

I. The trial court correctly granted summary judgment for CBREC and Cendant on Johnson's fraud claim.

The trial judge correctly disposed of Johnson's hapless fraud claim. The statements on which the claim is based are either vague and non-factual superlatives on which nobody could reasonably think he could rely, or are recitations of trivial facts as to which Johnson produced no evidence of falsity.

Specifically, the sum total of the alleged misrepresentations set forth in Johnson's third amended complaint consists of complaints about:

- a statement that Coldwell Banker offices have "honest and knowledgeable real estate people" who put "the customer's best interest above all," furthering a "tradition of integrity, exceptional service and customer satisfaction that [are] the company's hallmark";

- a statement that "[o]ur company was founded in 1906 on a commitment to professionalism and philosophy";
- a reference to "our local offices" and a designation of Pacific as a "Coldwell Banker premier office";
- a statement that Dodds is a "President's Circle designee, top 5% at Coldwell Banker nationally," and a statement by Dodds that "Care giving is an enormous component of real estate"; and
- a statement that Balter is a member of the "President's Circle" with "28 years in real estate, 18 years on the co[a]st, 13 years as owner broker."

(JA74.)

Johnson claimed that each of these assertions was an intentional misrepresentation, which is defined as a "suggestion, as a fact, of that which is not true, by one who does not believe it to be true." (Civ. Code § 1710.) His claim fails, however, because the complained-of statements are either (a) not assertions of fact, or (b) not false.

A. The vague and non-specific statements on the website and in the television ads are non-factual and thus non-actionable.

Courts in California and across the country have long held that statements like those here describing "honest" people who "put the customer's best interest above all" and are "commit[ted] to professionalism and customer service," etc., are not assertions of fact

but rather are classic non-specific sales superlatives that, as a matter of law, cannot give rise to an action for fraud. Stated otherwise, a representation that merely reflects a seller's "judgment as to quality, value, authenticity, or other matters of judgment" is not actionable. (*Gentry v. Ebay, Inc.* (2002) 99 Cal.App.4th 816, 835.)

For example, in *Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1361, the court held that Echostar's claims describing satellite television reception as "crystal clear digital" and of "CD quality" were "not factual representations that a given standard is met." Rather, "they are boasts, all-but-meaningless superlatives....which no reasonable consumer would take as anything more weighty than an advertising slogan." (*Id.*) Likewise, eBay's statement on its website that a positive eBay rating is "worth its weight in gold" is similarly a "vague, highly subjective statement" that is "not the sort or statement that a consumer would interpret as factual or upon which he or she could reasonably rely." *Gentry*, Supra, 99 Cal.App.4th at 835. The statements in the case at bar are nearly identical to the non-actionable statements in these cases, and should be treated similarly.

See also *Schonfeld v. City of Vallejo* (1975) 50 Cal.App.3d 401, 412 (city manager's representations that a marina was "a first class harbor" and "the best berthing facility in Northern California" were matters of opinion "not referring to an existing fact"); *Cook, Perkiss & Liehe, Inc. v. Northern Calif. Collection Serv. Inc.* (9th Cir. 1990) 911 F.2d 242, 245-46 (affirming dismissal of false-advertising claim against collection agency; its statements that it charged lower cost and was superior to collection attorneys

constituted non-actionable puffery); 5 Witkin, Summary of Calif. Law (9th ed. 2004) Torts, § 678, p. 779-80 ("[A]ssertions to the effect that a particular article is the 'best,' or speculative statements about possible profits, are 'dealer's talk,' and a party is not entitled to rely upon them").

These principles are not unique to California—they are mainstays of the common law. (*See e.g., Tietsworth v. Harley-Davidson, Inc.* (Wisc. 2004) 677 N.W.2d 233, 246 (affirming dismissal of fraud claim; advertising statements describing motorcycle engine as "a masterpiece," of "premium quality," and "filled to the brim with torque and ready to take you thundering down the road," held not actionable as a matter of law); *Boud v. SDNCO, Inc.* (Utah 2002) 54 P.3d 1131, 1135-36 (affirming summary judgment for seller on warranty and fraud claims; "unreasonable as a matter of law" for anyone to rely on statements that yacht offered the "best performance" and had "superb handling" as statements of fact); *McGowan v. Chrysler Corp.* (Ala. 1994) 631 So. 2d 842, 846-47 (affirming summary judgment for seller on fraud claim; auto dealer's statements that car was "top-of-the-line" and "smooth-riding" held not actionable as a matter of law).)

There is no better indication of the vague and non-specific nature of the complained-of assertions than Johnson's own utter failure to articulate how he was misled by them. All he says, repeatedly, is that he thought the website's statements *implied* the existence of some sort of "nationally assured standards of customer service." Appellant's Opening Brief ("AOB") at p. 29; *see also* pp. 25, 26, 32, 33, 37, 38, 40, 41.) What this means we are never told.

How and why he would have so thought is also never explained. We are also never told what these purported "nationally assured standards" would be, or how CBREC or Cendant fell short of them.

At one point Johnson appears to argue that, if these unspecified nationally assured standards existed, somehow he would have received more satisfaction *after the fact* when he complained to the franchisor CBREC about his experience with Pacific. (AOB P. 39-40.) That, too, is patently unreasonable. First, there was no reason to believe that CBREC would have agreed with Johnson that Dodds or anyone at Pacific was in the wrong. Moreover, as discussed further below (Point II), Johnson had no right to expect the franchisor to assume liability for the acts of a realtor affiliated with an independently owned and operated franchisee brokerage.

In his complaint, Johnson also claimed that he was misled by unspecified television advertisements (JA74), but at his deposition he admitted that he couldn't recall seeing any particular advertisement. (JA223.) This lack of specificity in Johnson's allegations and discovery responses was fatal to his fraud claim insofar as it was based on television advertisements. (*Union Bank v. Superior Court of Los Angeles County* (1995) 31 Cal.App.4th 573, 579-81, 592-93.) Later, however, in the "evidentiary" materials Johnson submitted with his opposition to the summary-judgment motion, he included purported transcripts—that Johnson himself apparently typed out—of several Coldwell Banker television ads. (JA134-37.) But of course, you cannot create a question of fact and avoid summary judgment by relying on declarations—even in proper form—that contradict your own previous admissions. (*Roddenberry*

v. Roddenberry (1996) 44 Cal.App.4th 634, 652-53; *Rivera v. Southern Pacific Transportation Co.* (1990) 217 Cal.App.3d 294, 299-300; *Gray v. Reeves* (1978) 76 Cal.App.3d 567, 573-74. And, more fundamentally, the purported assertions in those television ads (*e.g.*, "[n]o matter where people buy and sell homes, we'll be there;" "Coldwell Banker is your perfect partner. They're with you every step of the way;" "Coldwell Banker Concierge is designed to help home buyers and sellers take care of the details of moving") are as just as vague and non-factual as the non-actionable statements in the website discussed above. Thus, even if the television advertisements had been properly alleged (they weren't) and documented (they weren't), they, too, were not actionable.

In connection with these television advertisements, Johnson's reliance on *Boeken v. Philip Morris Inc.* (2004) 122 Cal.App.4th 684, *depublished and subsequent opinion on rehearing*, (2005) 127 Cal.App.4th 1640, is a far stretch indeed. (AOB Br. at p. 30.) That case involved Philip Morris's decades-long campaign to conceal from consumers the proven facts that cigarettes not only cause cancer but are addictive. In light of the overwhelming evidence of the concealment campaign, the court said that the plaintiff's inability to recall any specific *advertisement* did not preclude the jury from finding reliance. *Boeken, supra,* (127 Cal.App.4th at 1661.) The case at bar presents nothing of the sort, and even if Johnson could recall seeing any of the complained-of television ads, any reliance on the vague non-factual statements (*e.g.*, "Coldwell Banker is your perfect partner") in those ads would, as a matter of law, have been unreasonable.

In short, Johnson had no right to rely, and has never articulated how he did *reasonably* rely, on the vague and non-specific statements on CBREC's website or its television ads.

B. Johnson produced no evidence establishing the falsity of the few factual statements on which he purported to rely.

The other category of assertions on which Johnson purported to rely for his fraud claim need not detain the Court for long. These consist of assertions that Coldwell Banker was established in 1906; that Pacific is a "Coldwell Banker premier office"; that Dodds is in the top 5% of Coldwell Banker real estate agents; and that both she and Balter are in, or designees in, the President's Circle. (JA74.)

While these assertions are statements of fact, Johnson does not argue that they are false. Nor has he produced any evidence of their falsity. And without any substantial evidence of falsity, it is elementary that judgment was required as a matter of law for the defendants. True statements of fact simply do not give rise to a claim for fraud. (*Edmunds v. Valley Circle Estates* (1993) 16 Cal.App.4th 1290, 1300-01 (where complained-of statements are true, no liability for fraud); *Berven Carpets Corp. v. Davis* (1962) 210 Cal.App.2d 206, 214 (same).)

C. Johnson's reliance on Coldwell Banker marks is irrelevant.

Johnson also makes nebulous references to various signs and print advertisements that he says he saw containing a Coldwell

Banker logo. If this use of Coldwell Banker marks has any relevance to his fraud claim, which is his only remaining claim, it was never argued below and is certainly not explained in Johnson's appellate brief. The reply will be too late. (*See Dieckmeyer v. Redevelopment Agency* (2005) 127 Cal. App. 4th 248, 260 (point raised for the first time in a reply brief held waived).) Certainly Johnson has not identified any intentional misrepresentations in connection with the use of the Coldwell Banker marks. Nor is there any evidence cited that would help establish the required element of reasonable reliance.

* * * * *

For all these reasons, the trial court correctly granted judgment for CBREC and Cendant on Johnson's fraud claim, the only claim at issue in this appeal.

II. If ostensible agency is relevant, the trial court correctly concluded as a matter of law that Johnson cannot establish it.

Although Johnson's fraud claim asserts direct liability against CBREC and Cendant, Johnson argues that the issue of ostensible agency is still relevant. (AOB at p. 26.) We cannot figure how that is the case: in connection with the fraud claim, Johnson is not seeking to hold CBREC and Cendant vicariously liable for any actions of Pacific. Indeed, Johnson has already recovered against the Pacific defendants at trial. But if ostensible agency is still

relevant, Johnson's own admissions defeat this theory as a matter of law.

Since there is no evidence that CBREC or Cendant had a right of complete or substantial control over Pacific, *Cislaw v. Southland Corp.* (1992) 4 Cal.App.4th 1284, 1293-97, Johnson has never asserted an actual-agency theory against the franchisors here. And as the trial judge correctly observed, there is no material factual dispute that the elements of ostensible agency also cannot be satisfied in the case at bar.

"An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (Civ. Code § 2300; *see also* Civ. Code §§ 2317, 2334 (defining ostensible agency similarly).) Ostensible agency is thus based on an estoppel theory, *Van Den Eikhof v. Hocker* (1979) 87 Cal.App.3d 900, 906, essentially estopping a putative principal from relying on a lack of authority if the principal somehow engaged in some conduct that reasonably led a non-negligent plaintiff to believe that the agent had authority to do the complained of act. Accordingly, under California law, a plaintiff must establish three elements in order to recover against a putative principal for the acts of an ostensible agent: (1) the person dealing with the agent must do so with belief in the agent's authority, and this belief must be reasonable; (2) the belief must be generated by some act or neglect of the principal sought to be charged; and (3) the person relying on the agent's apparent authority must not be guilty of negligence. (*Seneca Insurance Co. v. County of Orange* (2004) 117 Cal.App.4th 611, 620.)

As a matter of law, Johnson cannot satisfy any of these elements because he was on notice that Pacific was an independently-owned-and-operated office. The trial court noted, correctly, that at Johnson's deposition, he admitted that, *before he engaged in the transaction at issue here*, he read the following statement in the Coldwell Banker website informing him that Coldwell Banker's real-estate offices are independently owned and operated:

> Coldwell Banker Real Estate Corporation, a subsidiary of Cendant Corporation (NYSE:CD), has more than 3,000 independently owned and operated residential and commercial real estate offices with over 75,000 Sales Associates globally.

(JA128.)

Specifically, at the deposition, Johnson was asked whether he read this statement before purchasing the property. (JA 221.) In response, he stipulated that he had: "As I said, I don't remember the details of what I read. But the stipulation I'm asking is that this is in fact what I would have read. So I'm not going to quarrel with that." (*Id.*) When he was given the opportunity to confirm unequivocally for the record that that response was correct, he plainly said that he would not deny reading the notice. (JA222.) (The Court can and should ignore Johnson's improper emendations and editorial comments handwritten into the deposition transcript in the joint appendix. *See, e.g.*, JA222.)

This admission dooms Johnson's claim of ostensible agency. It precludes him from establishing the first element of ostensible

agency, *i.e.*, that when he dealt with Pacific he believed Pacific was acting on behalf of CBREC, because it establishes that he was on notice that Pacific was independent of CBREC. It precludes him from establishing the second element of ostensible agency, *i.e.*, that some act or neglect of CBREC led him to believe that Pacific was acting on behalf of CBREC. Indeed, it establishes just the opposite—that CBREC did *not* want people believing that. And it precludes him from establishing the third element of ostensible agency, *i.e.*, Johnson's own lack of fault or responsibility. He was plainly on notice of Pacific's independent status.

On appeal, Johnson does not deny reading the statement informing him of Pacific's independent status. Instead, he insinuates that he didn't understand what "independent" means. (AOB at p. 40-41.) The Court should reject this disingenuous argument out of hand. Johnson has advanced degrees from Oxford University and Sussex University in England. Proceeding *in pro persona*, he managed not only to conduct his own trial against Pacific, which was represented by counsel, but to prevail at that trial. And he has filed in this Court a detailed 44-page appellate brief that demonstrates far more than a passing understanding of many sophisticated legal concepts.

Johnson's admission that he read the notification about Coldwell Banker's independently owned and operated real-estate offices also materially distinguishes this case from *Kaplan v. Coldwell Banker Residential Affiliates, Inc.* (1997) 59 Cal.App.4th 741. (AOB at p. 35-36.) Unlike Johnson here, the plaintiff in *Kaplan* testified that he had *not* seen the disclaimers informing him

that the individual real-estate offices are independently owned and operated. And on the defendant's motion for summary judgment, that testimony had to be accepted as true. Hence, there was a triable issue of fact whether *Kaplan* was reasonable in believing that the office he dealt with was an agent of the franchisor.

Finally, any connection between any issue in this appeal and the discussion of "naked licensing" in *Barcamerica International USA Trust v. Tyfield Importers, Inc.* (9th Cir. 2002) 289 F.3d 289, is not apparent. (AOB at p. 37-38.) *Barcamerica* was a trademark case. The court found that *Barcamerica* failed to engage in adequate quality control over its licensee, justifying the district court's determination that the trademark had been abandoned. (*Barcameria International USA Trust, supra*, 278 F.3d 289.) The case at bar, however, is not about abandonment of a trademark, and thus Johnson's extended reliance on *Barcamerica* is seriously misplaced.

CONCLUSION

For all the above reasons, the judgment for CBREC and Cendant should be *affirmed*.

Respectfully submitted,

Dated: August 5, 2005

GRAHAM & ROBERTS

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