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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BENNION & DEVILLE FINE HOMES, INC., a California corporation, BENNION & DEVILLE FINE HOMES SOCAL, INC., a California corporation, WINDERMERE SERVICES SOUTHERN CALIFORNIA, INC., a California corporation, Plaintiffs, v. WINDERMERE REAL ESTATE SERVICES COMPANY, a Washington corporation; and DOES 1-10 Defendant.	Case No. 5:15-CV-01921-JCG Hon. Jay C. Gandhi **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF WINDERMERE REAL ESTATE SERVICES COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT** Date: March 1, 2018 Time: 10:00 a.m. Courtroom: 6A
AND RELATED COUNTERCLAIMS	

I. STATEMENT OF ISSUES

Defendant and Counterclaimant Windermere Real Estate Services Company's ("WSC") respectfully brings this motion for partial summary judgment and asks the Court to interpret a clear and unambiguous provision in one of the parties' contracts as a matter of law.[1]

Plaintiffs and Counter-Defendants Bennion & Deville Fine Homes, Inc. ("B&D Fine Homes") and Bennion & Deville Fine Homes, Inc. ("B&D SoCal") were former franchisees of WSC. Plaintiff and Counter-Defendant Windermere Services Southern California, Inc. ("WSSC") was WSC's former area representative for Southern California.[2] Plaintiffs allege a number of claims against WSC, including a claim by WSSC that WSC breached the *Windermere Real Estate Services Company Area Representation Agreement for the State of California* ("ARA"). Pursuant to this claim, WSSC asserts that it is entitled to a payment under a provision in the ARA governing the termination of that agreement without cause.[3]

The ARA limits liability of any party terminating the agreement without cause to payment of the "fair market value of the Terminated Party's interest in the Agreement" which is to be determined "in accordance with the provisions of" the ARA. This payment owed to the non-terminating party is called the "Termination Obligation" and is determined using a ***specific contractual procedure*** the parties ***expressly agreed to*** at the time of contracting. In calculating the Termination Obligation, the parties must exclude "speculative factors including, specifically,

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[1] WSC brings this motion as the Court invited at the Status Conference held in this matter on November 1, 2017.

[2] B&D Fine Homes, B&D SoCal, and WSSC are referred to collectively herein as "Plaintiffs." Plaintiffs were all owned and operated by Counter-Defendants Robert B. Bennion and Joseph R. Deville. (*See* Document No. 31, FAC, ¶¶ 18, 25, 39.)

[3] Although not relevant for purposes of this motion, WSC maintains that it properly terminated the ARA for cause, in which case WSSC would be entitled nothing. (*See* Document No. 31, FAC ¶ 25, Ex. B, p. 4, § 4.1 (c), p. 5, § 4.2.)

future revenue" and can only consider gross revenue actually received from licensees who stayed with WSC following the termination.

In spite of this clear and unambiguous language, Plaintiffs wrongfully seek to include future revenue through 2020 and over $1 million in franchise and other fees owed but never paid by B&D Fine Homes and B&D SoCal – two licensees who did not remain with WSC following termination of the ARA.[4] Plaintiffs' damages analysis violates the express language of the ARA in an obvious effort to improperly inflate their damages claim.

With this motion, WSC asks this Court to find, as a matter of law, that: (1) future revenues cannot be considered when determining the Termination Obligation; and (2) only revenue actually received by WSSC from licensees other than B&D Fine Homes and B&D SoCal in the 12 months preceding termination of the ARA can be considered in determining the Termination Obligation.

II. STATEMENT OF FACTS

Plaintiffs are former Windermere representatives and franchisees of WSC in Southern California. (Document No. 31, FAC ¶ 1.) The parties' relationship was governed by a number of different contracts, including two separate license agreements and the ARA. On August 1, 2001, WSC and B&D Fine Homes entered into a *Windermere Real Estate License Agreement for Coachella Valley* (the "Coachella Valley Agreement"). (Document No. 31, FAC, ¶ 18, Ex. A.) On March 29, 2011, WSC and B&D SoCal entered into a *Windermere Real Estate Franchise License Agreement* (the "SoCal Agreement"). (Document No. 31, FAC, ¶ 39, Ex. D.) In brief, these agreements provided B&D Fine Homes and B&D SoCal with a license to use the Windermere trademark and gave them access to WSC products and services in exchange for various fees.

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[4] *See* Declaration of Jeffrey A. Feasby ("Feasby Decl."), ¶ 4, Ex. 2, p. 1.

On May 1, 2004, WSC and WSSC entered into the ARA. (Separate Statement of Undisputed Material Fact ["SSUMF"] No. 1; Document No. 31, FAC ¶ 25; Feasby Decl., ¶ 3, Ex. 1.) Pursuant to the ARA, WSC agreed to provide WSSC with the non-exclusive right to offer WSC licensees use of the "Windermere System" throughout California. (Feasby Decl., Ex. 1, p. 2, § 2.) As the Area Representative, WSSC was responsible for, among other things, collecting, accounting for, and remitting all license fees, technology fees, administrative fees, and other amounts due under franchise agreements between WSC and licensees in California. (*Id*. at p. 3, § 3, ¶ 2.) WSSC retained 50% of all license fees it collected and remitted all remaining fees to WSC. (*Id*. at p. 8, § 10.)

On January 28, 2015, WSC gave WSSC notice that it was "exercising its right to terminate [the] Area Representation Agreement dated May 1, 2004, pursuant to the 180-day notice provision of Paragraph 4.1." (Document No. 31, FAC, ¶ 134, Ex. V.) Subsequently, on February 26, 2015, without waiving its right to terminate the ARA without cause, WSC provided WSSC with notice of its intent to terminate the ARA for cause due to WSSC's failure and refusal to collect and remit fees from licensees, including B&D Fine Homes and B&D SoCal, which WSC contended was a material breach of the ARA. (Document No. 16, WSC's First Amended Counterclaim, ¶ 57, Ex. H.) The parties subsequently agreed that the date of the termination of the ARA would coincide with the termination of B&D Fine Homes and B&D SoCal's franchise agreements. As of that date, September 30, 2015, B&D Fine Homes and B&D SoCal were no longer affiliated with WSC. (SSUMF No. 6; Declaration of Paul S. Drayna ("Drayna Decl.") ¶¶ 7-8.)

As it relates to this motion, WSSC is seeking damages resulting from WSC's alleged breach of the ARA "for failing to pay [WSSC] the termination fee – *i.e.* the fair market value of its interest in the Area Representation Agreement – following termination without cause." (Document No. 31, FAC, ¶163(e).) This termination fee is set forth in Section 4.2 and applies when the ARA is terminated without

cause. Pursuant to that section, the terminated party "will be paid an amount equal to the fair market value of the Terminated Party's interest in the Agreement (the "Termination Obligation"), in accordance with the provisions of this Agreement." (SSUMF No. 2; Feasby Decl., Ex. 1, p. 5, § 4.2.) That Section goes on to set forth the specific manner in which the Termination Obligation is to be determined: "The fair market value of the Terminated Party's interest will be determined [ ] without consideration of speculative factors including, specifically, future revenue." (SSUMF No. 3; Feasby Decl., Ex. 1, p. 5, § 4.2.) Instead, "[t]he appraisers shall look at the gross revenues received under the Transaction during the twelve months preceding the termination date from then existing licensees that remain with or affiliate with the Terminating Party." (SSUMF No. 4; Feasby Decl., Ex. 1, p. 5, § 4.2.)

Despite the parties' agree-upon method for calculating the amount owed when the ARA is terminated without cause, Plaintiffs' damages calculations include consideration of amounts that are expressly prohibited under the ARA. Specifically, Plaintiffs' expert, Peter D. Wrobel, has included damages for what he labels "Net Value of WSSC as of January 2015." Wrobel contends that this amount is equivalent to "the fair market value of [WSSC's] interest in the [ARA]." (Feasby Decl., ¶ 4, Ex. 2, p. 2; ¶ 5, Ex. 3, Wrobel Depo., p. 54, l. 8-p. 55, l. 4.) However, Wrobel's damages are improperly based on projected future revenues.[5] (Feasby Decl., ¶ 4, Ex. 2, p. 2, Schedule 2A, Schedule 2C, Schedule 2D.) Moreover, Wrobel's calculation of these future revenues include years of franchise fees that were owed by B&D Fine Homes and B&D SoCal but that were never paid. (*Id*. at Schedule 2B, Schedule 2D.) These future revenues are then projected out to beyond September 30, 2015, when B&D Fine Homes and B&D SoCal ceased their ///

[5] Wrobel has labeled these synonymously as "future earnings."

affiliation with WSC. (*Id*. at p. 2.) Thus, Wrobel's damages calculation brazenly violates the terms of the ARA in multiple ways.

The ARA's language regarding the method for calculating the Termination Obligation is clear and unambiguous. Therefore, the Court can interpret that provision as a matter of law and should hold that: (1) future revenues cannot be considered when determining the Termination Obligation; and (2) only revenue actually received by WSSC from licensees other than B&D Fine Homes and B&D SoCal in the 12 months preceding termination of the ARA can be considered in determining the Termination Obligation.

III. LEGAL ANALYSIS

A. Legal Standard for Partial Summary Judgment

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, 330 (1986). Rule 56 of the Federal Rules of Civil Procedure, which governs summary judgment, does not contain an explicit procedure entitled "partial summary judgment." As with a motion under Rule 56(c), partial summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). To meet its burden, "the moving party must either produce evidence negating an essential element of the non-moving 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, 1102 (9th Cir. 2000). Once the moving party meets its initial burden of showing there is no genuine issue of material fact, the opposing party has the burden of producing competent evidence and cannot rely on mere allegations or denials in the pleadings. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Where the record,

taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Id.*

As to a contract dispute, summary judgment is appropriate when the contract terms are clear and unambiguous, even if the parties disagree as to their meaning. *See International Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1406 (9th Cir. 1985). Interpretation of a contract is a matter of law, including whether the contract is ambiguous. *Beck Park Apts. v. United States Dept. of Housing*, 695 F.2d 366, 369 (9th Cir. 1982).

> Summary judgment is appropriate in a contract case when the contract terms are clear and unambiguous, even though the parties may disagree as to their meaning. The test is whether the words are 'reasonably susceptible' to more than one construction or interpretation. Summary judgment is proper where the words in question are not reasonably susceptible to the interpretation offered by the party claiming ambiguity.

Krishan v. McDonnell Douglas Corp., 873 F.Supp. 345, 352 (C.D. Cal. 1994) (internal citations omitted).

Here, the ARA is crystal clear: "speculative factors including, specifically, future revenue" cannot be considered when calculating the Termination Obligation, and only gross revenue received from licensees that remained with WSC after termination can be considered. There is no ambiguity – the language conjures, manifestly and as a matter of law, only one reasonable meaning.

B. <u>The Court Can Interpret the ARA as a Matter of Law</u>

The ARA provides that it may be terminated (1) without cause "upon one hundred eighty (180) days written notice to the other party," or (2) for cause based on a material breach of the ARA following 90 days written notice and an opportunity to cure. (Document No. 31, FAC, ¶ 31.) If the ARA was terminated without cause, the non-terminating party is entitled to a "Termination Obligation." In drafting the ARA, the parties purposefully included a specific means to calculate the Termination Obligation in the event the ARA was terminated without cause. This calculation methodology is clearly set forth in Section 4.2. Pursuant to that

section, upon termination without cause, the terminated party "will be paid an amount equal to the fair market value of the Terminated Party's interest in the Agreement (the "Termination Obligation"), ***in accordance with the provisions of this Agreement***." (SSUMF No. 2; Feasby Decl., Ex. 1, p. 5, § 4.2 [emphasis added].)

Section 4.4 of the ARA states: "[e]xcept as specifically provided herein neither party will owe any obligation to the other following termination of the Agreement, except for final accounting and settlement of any previously accrued license fees, and excluding any accrued claim for damages and associated attorneys' fees and costs, or otherwise arising by law." (SSUMF No. 5; Feasby Decl., Ex. 1, p. 6, § 4.4.) This section further clarifies the parties' understanding and express agreement that liability for terminating the ARA without cause would be limited to the clear and unambiguous calculation methodology of the Termination Obligation set forth in Section 4.2.

1. <u>The ARA Clearly Excludes Future Revenue from the Termination Obligation Calculation</u>

The clear, unambiguous, agreed-upon language of the ARA prohibits consideration of future revenue in calculating the Termination Obligation.[6] Pursuant to "the provisions of this Agreement," the "fair market value of the Terminated Party's interest," or "Termination Obligation," is to be determined "[ ] ***without consideration of speculative factors including, specifically, future revenue***." (SSUMF No. 3; Feasby Decl., Ex. 1, p. 5, § 4.2 [emphasis added].) Accordingly, based on the clear, unambiguous language of Paragraph 4.2 of the ARA, the Court should find, as a matter of law, that future revenue cannot be considered when determining the Termination Obligation.

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[6] It should be noted that Plaintiffs have maintained throughout this litigation that the ARA is not ambiguous. (*See, e.g.*, Document No. 82, p. 3, ll. 4-7.)

2. The Termination Obligations Includes Only Gross Revenue Actually Received in the 12 Months Preceding Termination of the ARA

The plain and unequivocal language of the ARA requires the Termination Obligation to be calculated considering only the gross revenue received during the 12 months immediately preceding the termination: "The appraisers shall look at the ***gross revenues received*** under the Transaction during the twelve months preceding the termination date from then existing licensees that remain with or affiliate with the Terminating Party." (SSUMF No. 4; Feasby Decl., Ex. 1, p. 5, § 4.2.) The language and intended formula could not be more clear. Accordingly, the Court should find, as a matter of law, that only gross revenue actually received during the preceding 12 months may be considered when calculating the Termination Obligation. As a result, any revenue owed to WSSC but never actually received may ***not*** be considered when determining the Termination Obligation.

3. The Termination Obligation May Not Include Revenue WSSC Received From B&D Fine Homes and/or B&D SoCal

Finally, the clear and unambiguous language of the ARA states that only gross revenue received from licensees "that remain with or affiliated with" WSC can be considered in determining the Termination Obligation. (SSUMF No. 4; Feasby Decl., Ex. 1, p. 5, § 4.2.) Upon and after the termination of the ARA, B&D Fine Homes and B&D SoCal were no longer affiliated with WSC. (SSUMF No. 6; Drayna Decl., ¶¶ 7-8.) Therefore, the Court should find, as a matter of law, that any revenue WSSC received (or claimed to receive) from B&D Fine Homes and B&D SoCal must be excluded from any Termination Obligation calculation.

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IV. CONCLUSION

For the foregoing reasons, WSC respectfully requests that its motion for partial summary judgment be granted in its entirety.

DATED: January 31, 2018 PEREZ VAUGHN & FEASBY, Inc.

By: /s/ Jeffrey A. Feasby
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