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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.

AND RELATED COUNTERCLAIMS

Case No. 5:15-CV-01921 JCG
Hon. Jay C. Gandhi

OPPOSITION TO DEFENDANT WINDERMERE REAL ESTATE SERVICES COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT [D.E. 154]

Date: March 1, 2018
Time: 10:00 a.m.
Courtroom: 6A

[Concurrently filed with Declarations of Joseph R. Deville, Kevin A. Adams and Separate Statement of Disputed Facts]

Action Filed: September 17, 2015
Pretrial Conf.: Not Set
Trial: Not Set

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Plaintiffs Bennion & Deville Fine Homes, Inc. ("B&D Fine Homes"), Bennion & Deville Fine Homes SoCal, Inc. ("B&D SoCal"), and Windermere Services Southern California, Inc. ("Services SoCal") (collectively, "Plaintiffs") hereby file this Opposition to Defendant Windermere Real Estate Services Company's ("WSC") Motion for Partial Summary Judgment [D.E. 154] (hereafter, the "Motion") for the reasons set forth below:

I. INTRODUCTION

For nearly a year leading up to this lawsuit, WSC engaged in unlawful conduct in its business relationship with Services SoCal that artificially depressed the fair market value of Services SoCal's business. Now, through this Motion, WSC is implicitly asking the Court to enter an order finding that this depressed fair market value is the full extent of the damages available to Services SoCal. Not only is WSC's position inequitable, it is not supported by law and inappropriate for summary judgment.

As a preliminary matter, WSC's Motion should be summarily denied as WSC made no effort (and refused) to comply with the meet and confer obligation of Local Rule 7-3 before filing the instant motion. This failure by WSC has unfairly prejudiced Service SoCal by limiting its time to properly respond to the

Motion. WSC's noncompliance with the Local Rules of this Court should result in the automatic denial of the Motion.

In the event the Court considers WSC's improperly filed Motion, the Motion should still be denied on each of the following grounds:

First, WSC's proposed interpretations of the Termination Obligation cannot be entered as a matter of law because they far exceed the language of the ARA. For instance, the ARA makes clear that the Termination Obligation identified only applies to a termination of the ARA after the terminating party provides a 180 day notice of termination. [*See* ARA § 4.1(b).] Despite this clear limitation, WSC asks the Court to find that the Termination Obligation applies to any without cause termination of the ARA. Each of WSC's other proposed findings also go far beyond the language of ARA. As a result, WSC's requested relief should be denied.

Second, WSC's proposed interpretations of the Termination Obligation ignore the condition precedent that must – but was not – satisfied by WSC before terminating the ARA. At a minimum, this is a disputed fact inappropriate for decision on summary judgment. Because WSC's proposed interpretations of the Termination Obligation ignore the condition precedent clearly present in the language of the ARA, the proposed findings of WSC should be rejected.

Third, WSC seeks an order that would limit Service SoCal's damages to a

fair market valuation during a time period in which WSC's conduct had crippled Service SoCal's revenue. WSC cannot engage in unlawful conduct that artificially depresses Services SoCal's business and then rely upon the Termination Obligation to limit Services SoCal's recovery to the crippled fair market value of the business. Such a result does not conform to basic contract damage principles.

For these reasons, explained in detail below, the Court should deny WSC's motion for partial summary judgment in its entirety.

II. STATEMENT OF RELEVANT FACTS

Although the lawsuit involves a series of franchise relationships, WSC's Motion concerns only the Area Representation Agreement ("ARA") between WSC (as franchisor) and Services SoCal (as the Southern California area representative of WSC), and the related contract claims advanced by Services SoCal against WSC. [Plaintiffs' Statement of Uncontroverted Facts ("SUF") 7.] The facts relevant to these two areas of the case are set forth below.

A. The Area Representation Agreement

As area representative, Services SoCal was tasked with two distinct responsibilities: (i) to offer and sell new Windermere real estate franchises in the Southern California region, and (ii) to provide certain support and auxiliary services to the new and existing Windermere franchisees in the Southern California region. [SUF 8.] In exchange for these services, Services SoCal was to receive (i)

50% of all initial franchise fees paid by new and renewing franchisees in Southern California, and (ii) 50% of all continuing royalties paid by all franchisees (new and existing) in Southern California. [SUF 9.]

The ARA was for a perpetual term and could only be terminated consistent with the "Term and Termination" language at Section 4 of the ARA.[1] [SUF 10.] Relevant here is Section 4.1(b), providing that either party may terminate the ARA "upon one hundred eighty (180) days written notice to the other party." [SUF 12.]

Termination of the ARA pursuant to Section 4.1(b) triggers the "Termination Obligation" identified in Section 4.2. [SUF 13.] The Termination Obligation expressly requires the terminating party to pay the terminated party "an amount equal to the terminated party's fair market value in the [ARA]." [SUF 14.] This fair market value is to be calculated as follows:

> The fair market value of the Terminated Party's interest in the Agreement will be determined by mutual agreement of the parties or, if unable to reach agreement, by each party selecting an appraiser and the two appraisers selecting a third appraiser. **The fair market value of the Terminated Party's interest will be determined by the appraisers without consideration of speculative factors including, specifically, future revenue. 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.** The median appraisal of the three appraisers shall determine price, and each party agrees to be bound by the determination.

[1] Importantly, WSC's general counsel, Paul S. Drayna ("Drayna"), drafted the ARA. [SUF 11.]

[SUF 15 (emphasis added).] The ARA, at Section 4.3, also identifies how the fair market value arrived at through the above methodology is to be paid by the terminating party to the terminated party. [SUF 16.]

B. WSC's Constructive Termination of the ARA and Resulting Claims of Services SoCal

In 2014, WSC engaged in a series of conduct that breached both the express and implied terms of the ARA. [SUF 18.] Among other things, WSC breached the ARA by refusing, in August 2014 and thereafter, to prepare and register with the California Department of Business Oversight the franchise disclosure documents required by law and essential to Services SoCal's operation as area representative. [SUF 19.] Without the franchise registration, Services SoCal could not legally offer or sell Windermere franchises. This deprived Services SoCal of its primary benefit under the ARA – *i.e.*, the initial franchise fees and royalty stream derived from new franchise sales. [SUF 20.] By taking away Services SoCal's ability to offer and sell new Windermere franchises, WSC constructively terminated the ARA. [SUF 21.]

WSC's conduct during 2014 breached the following provisions of the ARA:

1. Section 4.1(b) – by terminating the ARA without first providing 180 days written notice of termination [SUF 22];

2. Section 2 – by failing to provide Services SoCal with the

uninterrupted right to offer Windermere franchised businesses in Southern California [SUF 23];

3. Section 7 – by failing to (i) prepare and file all franchise registration materials required under the law, and (ii) maintain the registration of a franchise disclosure document for the Southern California region [SUF 24]; and

4. Section 10 – by depriving Services SoCal of its right to offer new Windermere franchises rendering it unable to collect initial franchise fees and continuing license fees from new franchisees. [SUF 25.]

WSC's 2014 conduct also breached the implied covenant of good faith and fair dealing in the ARA because it acted in a way that thwarted Services SoCal's ability to receive the benefits of being an area representative in the Windermere franchise system. [SUF 26.]

C. WSC's Formal Notice of Termination *Without Cause* and Alternative Claim of Services SoCal

Following the 2014 events described above, on January 28, 2015, WSC sent a letter to Services SoCal announcing that WSC was "exercising its right to terminate [the] Area Representation Agreement […] pursuant to the 180-day notice provision of Paragraph 4.1." [SUF 27.] Because WSC had already constructively terminated the ARA, Services SoCal contends that the January 28, 2015 termination letter has no legal effect. [*See* SUF 28.]

Assuming, however, that WSC's conduct in 2014 did not result in a breach

of the ARA, Services SoCal has pled an alternative claim for breach of contract arising out of WSC's January 28, 2015 termination notice. Under this alternative claim, Services SoCal alleges that WSC breached Section 4.2 of the ARA by terminating the ARA under Section 4.1(b) without complying with the Termination Obligation – *i.e.*, the payment of fair market value of Services SoCal's interest in the ARA – identified in Section 4.2. [SUF 29.]

III. LEGAL ARGUMENT

WSC has asked the Court to make three specific findings, as a matter of law, regarding the Termination Obligation under Section 4.2 of the ARA. [D.E. 154-5.] As explained below, WSC's Motion should be summarily denied because WSC made no effort to first meet and confer as required by L.R. 7-3 before filing the motion. In the event the Court sets aside WSC's procedural malfeasance, the Motion should still be denied because it is contrary to law and impermissibly seeks summary adjudication of disputed facts.

A. WSC's Motion Should Be Summarily Denied For Failing To Meet And Confer As Required By Local Rule 7-3

On January 31, 2018, WSC filed the Motion without first meeting and conferring with counsel for Services SoCal. [SUF 30; *see also*, D.E. 154.] The next day, Services SoCal's counsel wrote to counsel for WSC requesting that WSC withdraw its motion because, among other things, Local Rule 7-3 requires the

parties to meet and confer about motions no less than seven days before they are filed. [SUF 31.] WSC's counsel refused to withdraw the motion unless Services SoCal "would like to stipulate to the relief sought in the motion." [SUF 32.] Indeed, WSC's counsel's response evidences a blatant disregard for the meaning and purpose of this Court's Local Rules. WSC's failure to comply with L.R. 7-3 should result in a summary denial of the Motion.

The Central District Local Rule 7-3 mandates that, with respect to filing a motion such as this instant one, "counsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution. The conference shall take place at least seven (7) days prior to the filing of the motion." Then, "[i]f the parties are unable to reach a resolution which eliminates the necessity for a hearing, counsel for the moving party shall include in the notice of motion a statement to the following effect: 'This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on (date).'" Local Rule 7-3.

The required statement is not contained in WSC's Notice of Motion, nor anywhere else in WSC's moving papers. [*See* D.E. 154.] In truth, WSC did not, and could not, attest to its compliance with Local Rule 7-3 because it did not, at any point prior to filing the Motion attempt to meet and confer with Services SoCal regarding the Motion. [SUF 30.] Had WSC properly met and conferred, Services

SoCal could, and would, have informed WSC prior to filing its Motion that the relief sought far exceeds the language of the ARA.

More importantly, Services SoCal is unfairly prejudiced by WSC's failure to comply with L.R. 7-3 because WSC has effectively limited Services SoCal's time to respond to the Motion. As currently structured, the meet and confer process required by L.R. 7-3 provides the responding party with seven days to prepare an opposition to the arguments raised by the moving party during the meet and confer process. Then, after the motion is filed, the responding party receives seven additional days to file its opposition papers. L.R. 7-3. By ignoring the meet and confer process, WSC deprived Services SoCal of additional time needed to properly respond to the Motion. As a result, the Motion should not be allowed. *See Caldera v. J.M. Smucker Co.*, CV12–4936 GHK (VBKx), 2013 WL 6987905, at *1 (C.D. Cal. Jun. 3, 2013) ("The meet and confer requirements of Local Rule 7–3 are in place for a reason, namely to […] enable the parties to brief the remaining disputes in a thoughtful, concise and useful manner.").

Court's in this Judicial District routinely reject motions from parties that fail to comply with L.R. 7-3. *See Singer v. Live Nation Worldwide, Inc.*, 2012 WL 123146, at *2 (CD. Cal. Jan. 13, 2012) (denying motion for failing to comply with Local Rule 7-3, where defendant emailed and faxed letter a "mere three days" before the motion was filed, also finding that prior "'conversations about the merits

of Plaintiff's claims' do not equate with discussions regarding a contemplated motion."); *Alcatel–Lucent USA, Inc. v. Dugdale Communications, Inc.*, No. CV 09–2140 PSG (JCx), 2009 WL 3346784, *4 (C.D.Cal. Oct. 13, 2009) ("The meet and confer requirements of Local Rule 7–3 are in place for a reason, and counsel is warned that nothing short of strict compliance with the local rules will be expected in this Court. Thus, the motion is […] denied for failure to comply with Local Rule 7–3."); *BWP Media USA, Inc. v. Internet Brands, Inc.*, No. CV158009PSGMRWX, 2016 WL 7626445, at *1 (C.D. Cal. Oct. 13, 2016) ("This Court is 'unwilling to excuse noncompliance with the Local Rules' absent any evidence that there was a good faith effort to meet and confer.'"). Accordingly, WSC's motion should be summarily denied.

B. <u>WSC's Constructive Termination Of The ARA Did Not Trigger The Termination Obligation At Section 4.2</u>

WSC asks the Court to find that the Termination Obligation at Section 4.2 of the ARA limits the recovery of Services SoCal for ***any termination of the ARA without cause.*** [*See* D.E. 154-5.] This overly broad interpretation of the Termination Obligation cannot be allowed. As shown above, the crux of Services SoCal's claims arise from WSC's material breaches of the ARA that resulted in the constructive termination of the agreement in 2014. [SUF 19-21.] Because the constructive termination of the ARA did not comport with Section 4.1(b) of the

ARA, the fair market value limitation in the Termination Obligation was never triggered. Thus, WSC's broad interpretation of the Termination Obligation to all terminations of the ARA without cause must be rejected.

By its own terms, the Termination Obligation serves as a guide to the economic unwinding of the franchisor/area representative relationship only in the event the ARA is terminated pursuant to Section 4.1(b). Section 4.1(b) expressly requires 180 days written notice of termination before the ARA can be terminated. This notice period provides the terminated party with time to get its affairs in order and unwind the business relationship before termination. Section 4.1(b) represents an express condition precedent that must be satisfied for the Termination Obligation at Section 4.2 to apply. Because the facts of this case show that the ARA was terminated by WSC in 2014 without first satisfying the condition precedent at Section 4.1(b), the Termination Obligation has no application to this case.

Case law supports this conclusion. Although not called "liquidated damages" in the ARA, the Termination Obligation serves the same purpose as the parties have predetermined the final economic result of their contractual relationship if terminated consistent with Section 4.1(b). *See e.g.*, I*n re American Suzuki Motor Corp*., 494 B.R. 466, 482 (Bankr. C.D. Cal. 2013) (court treats contractual provision outlining the economic unwinding of dealer/distributor

relationship akin to that of a liquidated damages provision). It has long been the case that "[l]iquidated damages may be recovered only as intended by the parties and expressed by contract." *Hersch & Co. v. Mattel, Inc.*, No. B236198, 2013 WL 5806546, at *3 (Cal. Ct. App. Oct. 29, 2013) (citing *Olson v. Biola Coop. Raisin Grouwers Assn.*, 33 Cal.2d 664, 673-74 (1959). Where the contract limits the applicability of a liquidated damages provision, it is improper for a court to apply it outside of those limits. *Thompson v. Goubert*, 168 Cal. App. 2d 257, 260 (1959) ("The provision for liquidated damages was by the parties made applicable in the event of a sale of the property. For the court to apply that provision to a termination by eviction is in effect making a new agreement between the parties."); *see also Reed v. Methodist Hosp. of Indiana, Inc.*, No. IP96-0024-C-M/S, 2001 WL 1029075, *5 (S.D. Ind. Aug. 20, 2001) (declining to apply liquidated damages provision where contract limited provision to termination without cause).

Because the express language of the ARA requires 180 days' notice to trigger the Termination Obligation, WSC's constructive termination without notice did not satisfy that condition precedent. Services SoCal's recovery would not be limited by the Termination Obligation; it would be entitled to actual damages. Accordingly, WSC's current effort to apply the Termination Obligation to any without cause termination of the ARA must be rejected.

C. Damages For WSC's Breaches of the ARA Are Not Governed By The Termination Obligation At Section 4.2

Even without the prior constructive termination of the ARA, Service SoCal's damages are still not limited by the Termination Obligation at Section 4.2. Service SoCal seeks contract damages for the harm it suffered in not being able to sell new Windermere franchises after August 2014. This harm was a direct result of WSC's breach of the franchise registration obligations enumerated in the ARA. Service SoCal's inability to sell new franchises naturally depressed its revenue from August 2014 forward. Now, WSC argues that Service SoCal's damages should be limited to "only revenue actually received by [Services SoCal] from licensees […] in the 12 months preceding termination of the ARA." [D.E. 154-1, p. 2.] In other words, WSC is asking the Court to limit Service SoCal's damages to a fair market valuation during a time period in which WSC's conduct had crippled Service SoCal's revenue. This cannot be allowed.

It would be inequitable for WSC to engage in unlawful conduct that artificially depresses the fair market value of Services SoCal's interest in the ARA, and then rely upon the Termination Obligation to limit Services SoCal's recovery to the crippled fair market value of the business.

D. WSC's Proposed Interpretation Of Section 4.2 Is Flawed And Cannot Be Found As A Matter Of Law

As set forth above, the Termination Obligation does not limit Services SoCal's contract damages for any breaches by WSC prior to January 28, 2015. However, even assuming that WSC's conduct in 2014 did not breach the ARA, WSC's proposed interpretations of Section 4.2 are flawed and still cannot be found as a matter of law.

WSC has asked the Court to make three findings with respect to Section 4.2. [D.E. 154-5.] Each of these proposed findings is overbroad and fails to properly articulate the language and intent of the ARA.

First, WSC asks the Court to find that the ARA "specifically identifies the methodology for calculating the amount to which a party is entitled in the event the Agreement is terminated without cause (the 'Termination Obligation')." [D.E. 154-5.] WSC's proposed interpretation of Section 4.2 goes beyond the language of the agreement. Although the ARA does identify a methodology for calculating the terminated party's interest in the ARA, the application of that methodology is specifically limited to a termination of the ARA consistent with Section 4.1(b) – *i.e.*, after providing a 180 day notice of termination. [*See* ARA, Section 4.1(b).] As currently worded, WSC's proposed order asks the Court to find that this methodology – *i.e.*, the Termination Obligation – applies to any without cause

termination of the ARA. [D.E. 154-5.] This result would be inconsistent with the language of the ARA and contrary to the case law set forth above.

Next, WSC asks the Court to find that "[f]uture revenues cannot be considered when determining the Termination Obligation." [D.E. 154-5.] This proposed interpretation of the ARA conflicts with Section 4.2 and other language in the ARA. For instance, Section 4.2 expressly contemplates that future revenues be included when evaluating the fair market value. *See* Section 4.2 ("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***.) (Emphasis added). By requiring the appraisers to consider only those revenues from licensees that "remain with or affiliate with the Terminating Party" after the termination date, the fair market valuation inevitably requires the consideration of these non-speculative licensee revenues going forward. WSC's proposed finding contradicts this.

Likewise, Section 4.3 of the ARA shows that *non-speculative* future revenues must be considered in determining the fair market value to be paid out to the terminated party. In relevant part, Section 4.3 states: "[t]he Termination Obligation shall be paid in monthly installments […]. Monthly installments in an amount equal to [25%] of the Continuing License Fees, if any, received by the terminating Party from licensees in the Region ***existing at the termination date***

and remaining with or affiliating with the Terminating Party." (ARA, Section 4.3 (emphasis added).) Because the amounts to be paid out can only be calculated by licensee revenue generated after the date of termination, non-speculative future revenue must be considered in evaluating the Termination Obligation. WSC's attempt to exclude from consideration all future revenue – even non-speculative future revenue – is contrary to Section 4.3.

The language of Sections 4.2 and 4.3 of the ARA make it clear that non-speculative future revenues should (and must) be considered in calculating the fair market value of Services SoCal's interest in the agreement. This language of the ARA cannot be reconciled with WSC's proposed interpretation of the agreement.

Even if the ARA is ambiguous as to whether non-speculative future revenues should be considered, the ambiguity must be construed against WSC. It is undisputed that WSC's general counsel, Drayna, drafted the ARA. [SUF 11.] It is axiomatic that "[i]f an ambiguity persists in the contract after resort to extrinsic evidence, the doctrine of *contra proferentem* must be applied, which construes any ambiguity in the contract against the drafter." *United States v. Westlands Water Dist.*, 134 F. Supp. 2d 1111, 1137 (E.D. Cal. 2001) (citing *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187, 1194 (9th Cir. 1996)). It is Services SoCal's position that the ARA requires non-speculative future revenues to be considered when evaluating the fair market value of the terminated party's interest in the ARA. WSC contends

otherwise. Consequently, any ambiguity as to whether non-speculative future revenues should be considered must be construed against WSC.

Finally, WSC asks the Court to find that "[o]nly revenue actually received by [Services SoCal] 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." [D.E. 154-5.] This request should be summarily rejected as it contradicts the disputed evidence in the case and improperly limits the language of the ARA. As explained above, the evidence by Services SoCal shows that the ARA was terminated by WSC prior to January 28, 2015. [SUF 21-26.] Franchisees B&D Fine Homes and B&D SoCal did not depart the Windermere system until September 30, 2015, and well after the ARA was terminated. [SUF 33.] Because of this, it is necessary for any revenue of B&D Fine Home and B&D SoCal to be considered when calculating the fair market value under Section 4.2. WSC's proposed finding to the contrary cannot be entered as a matter of law.

Moreover, the actual language of Section 4.2 states that an "appraiser shall look at the gross revenue 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." [ARA, Section 4.2.] The plain language requires appraisers to look at this type of gross revenue in finding the fair market

value. However, it does not preclude the appraisers from looking at other information that would also aid in their fair market evaluation. However, WSC's requested interpretation of this language would only allow the appraiser to look at the licensee revenue for this limited period, and nothing else. Because this interpretation is contrary to the actual language of the ARA, it must be rejected.

IV. CONCLUSION

For the reasons set forth above, Services SoCal respectfully requests that the Court deny WSC's motion for partial summary judgment in its entirety. In the alternative, Services SoCal proposes the following findings consistent with the language of the ARA:

1. The Area Representation Agreement specifically identifies the methodology for calculating the amount to which a party is entitled to receive in the event the Agreement is terminated without cause pursuant to Section 4.1(b) of the Area Representation Agreement;

2. Speculative future revenues cannot be considered when determining the fair market value owed to the terminated party when the termination occurs consistent with Section 4.1(b) of the Area Representation Agreement; and

3. In the event the Area Representation Agreement is terminated without cause pursuant to Section 4.1(b) of the Area Representation Agreement, in determining the fair market value of Service SoCal's interest in the Area Representation Agreement, the appraisers shall consider the gross revenues received by Services SoCal from licensees during the twelve months preceding the termination date.

Dated: February 8, 2018 **MULCAHY LLP**

By: /s/ Kevin A. Adams
Kevin A. Adams
Attorneys for Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion & Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc., and Counter-Defendants Robert L. Bennion and Joseph R. Deville