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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. Defendants.	Case No. 5:15-cv-01921-R-KK *Hon. Manual L. Real* **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PURSUANT TO F.R.C.P. 12(b)(6)** Date: November 6, 2015 Time: 10:00 a.m. Courtroom: 6 Complaint filed: September 17, 2015

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Plaintiff s Bennion & Deville Fine Homes, Inc. ("B&D Fine Homes"), Bennion & Deville Fine Homes SoCal, Inc. ("B&D SoCal"), Windermere Services Southern California, Inc. ("Windermere SoCal") (collectively, "Plaintiffs") hereby file this opposition to Defendant Windermere Real Estate Services Company's ("WSC") motion to dismiss the Complaint for the reasons set forth below:

I. INTRODUCTION

Plaintiffs' initiated this action by filing a comprehensive, 35-page, 172-paragraph Complaint asserting eight separate claims against WSC. The claims generally arise from WSC's (1) breaches of several of express terms of the parties' five contracts, (2) conduct frustrating Plaintiffs' reasonable expectations under the contracts, and (3) intentional interference with Plaintiffs' contractual and business relationships with third parties. Now, WSC has asked this Court to dismiss all but one of Plaintiffs' claims pursuant to Fed. Rule Civ. Pro. 12(b)(6).[1] WSC's motion to dismiss should be denied in its entirety.

This is franchise case. Like most franchisor/franchisee relationships, the relationships between WSC (franchisor) and Plaintiffs (franchisees) are governed by a series of contracts. These contracts were created by WSC, impose very few obligations on WSC, and constitute contracts of adhesion under California law. *See Nagrampa v. MailCoups, Inc*., 469 F.3d 1257 (9th Cir. 2006)("California courts have long recognized that franchise agreements have some characteristics of contracts of adhesion because of the 'vastly superior bargaining strength' of the franchisor."). Nonetheless, WSC has still managed to breach specific obligations owed to Plaintiffs under the Coachella Valley Franchise Agreement (Count I), the SoCal Franchise Agreement (Count III), the Modification Agreement (Count IV), and the Confidentiality Agreement (Count V). As explained below, the allegations in the Complaint satisfy all of the elements of each of these breach of contract claims.

[1] WSC does not move to dismiss Plaintiffs' second claim for breach of the area developer agreement.

In an attempt to circumvent its few contractual obligations, WSC asks the Court to dismiss the contract claims because the obligations they impose upon WSC are either (1) "too indefinite to support an actionable claim" for breach of contract (*see* Oppo., pp. 4:22-23, 5:8-9, 5:15-21, 9:5-10), or (2) left to WSC's discretion – thereby relieving it from liability for not acting consistent with that discretion (*see* Oppo., pp. 5:27-6:5, 7:9-16, 7:19-25). WSC's arguments either mischaracterize the language of the language of the contract, or give way to Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing (Count VI). *See McNeary-Calloway v. JP Morgan Chase Bank, N.A.*, 863 F. Supp. 2d 928, 956 (N.D. Cal. 2012) ("The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith."); *Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 923 (1985) ("[W]here a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing."). Because the Complaint correctly captures WSC's breaches of its express and implied obligations under the contracts, its motion to dismiss Plaintiffs' contract claims must be denied.

Finally, Plaintiffs have advance tort claims against WSC for intentional interference with contractual relations (Count VII) and intentional interference with prospective economic advantage (Count VIII). As explained in detail below, the Complaint sets forth allegations specific enough to provide WSC sufficient notice of the particular misconduct alleged in connection with these tort claims. *See Vess v. Ciba-Geigy Corp. U.S.A.*, 317 F.3d 1097, 1106 (9th Cir. 2003).

For these reasons, set forth in detail below, Plaintiffs respectfully request that the Court deny the motion to dismiss in its entirety.

II. PLAINTIFFS' BREACH OF CONTRACT CLAIMS SATISFY THE PLEADING REQUIREMENTS

In order to properly plead a claim for breach of contract, the complaining party must assert factual allegations sufficient to satisfy the following elements of the claim:

(1) the existence of a contract; (2) plaintiff's performance of the contract or excuse for nonperformance; (3) defendant's breach; and (4) the resulting damage to plaintiff. *Lortz v. Connell*, 273 Cal. App. 2d 286, 290 (1969); *McNeary-Calloway v. JP Morgan Chase Bank, N.A.*, 863 F. Supp. 2d 928, 954 (N.D. Cal. 2012).

When confronted with a motion to dismiss, the court must accept all allegations of material fact in the complaint as true and construe those facts in the light most favorable to the non-movant. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996).

WSC's has moved to dismiss Plaintiffs' breach of contract claims involving the Coachella Valley Franchise Agreement (Count I), the SoCal Franchise Agreement (Count III), the Modification Agreement (Count IV), and the Confidentiality Agreement (Count V). Each of these claims will be addressed, in turn, below.

A. Plaintiffs have properly pled a claim for breach of the Coachella Valley Franchise Agreement

Count I of the Complaint is brought by Plaintiffs B&D Fine Homes and Windermere SoCal against WSC for breach of the Coachella Valley Franchise Agreement. As explained below, the factual allegations set forth in the Complaint satisfy all four elements of this claim. Thus, WSC's motion to dismiss Count I should be denied.

1. The Coachella Valley Franchise Agreement is a valid contract

Plaintiffs contend – and WSC does not dispute – the existence of the Coachella Valley Franchise Agreement between B&D Fine Homes, Windermere SoCal, and WSC. (Comp., ¶¶ 21, 114, Ex. A.) The first element of the breach is therefore satisfied.

2. Plaintiffs' fully performed or where otherwise excused from performance under the Coachella Valley Franchise Agreement

Plaintiffs contend that they performed under the terms of the Coachella Valley Franchise Agreement, unless otherwise excused by WSC's breach of the agreement. (Comp., ¶¶ 27, 39-41, 115.) Again, this is not disputed by WSC in its motion to dismiss. Thus, the performance element of the breach of contract claim has been satisfied.

3. WSC breached the Coachella Valley Franchise Agreement

Plaintiffs have identified several specific breaches of the Coachella Valley Franchise Agreement by WSC. These breaches involve Section 1, and Section 2/Recital A, among others. (Comp., ¶¶ 5, 22-27, 116, Ex. A.) These breaches will be addressed in turn, below.

a. WSC breached Section 1 by failing to provide certain services

Section 1 expressly obligated WSC to provide "a variety of services to Licensee [– *i.e.*, Plaintiffs –] for the benefit of Licensee and other licensees, designed to complement the real estate brokerage business activities of Licensee and to enhance its profitability."[2] (Comp., Ex. A.) The complaint identifies a number of services that WSC failed to provide Plaintiffs in breach of this broad obligation, including the following:

- Technology Services: WSC provided inferior technology services. Although the technology services required to properly operate a real estate brokerage business like those offered by WSC were integral to Plaintiffs' (and other franchisees') real estate businesses, "[t]he technology made available by WSC had become outdated, unstable, and not a viable option for the needs of the Southern California region" (Comp., ¶¶ 2, 4, 24);

- Franchise Support Services: WSC failed to provide Plaintiffs with the basic support services integral to a franchisor-franchisee relationship. (*Id*., ¶ 68.) This included access to trained staff that would be able to assist and advise Plaintiffs and the franchisees within California in all aspects of the franchised business, including marketing support (*Id*., ¶ 69); and

- Marketing Services and Support: WSC failed to provide effective and current marketing materials and systems for the Southern California region, including the creation, distribution and ongoing maintenance of local and regional marketing and advertising materials critical for any franchise system to be successful in a competitive marketplace (*Id*., ¶¶ 32, 70).

[2] B&D Fine Homes is identified as the Licensee in the agreement. (Comp., Ex. A.)

Each of these services was to be provided by WSC to complement Plaintiffs' real estate brokerage business activities. By failing to provide these services, WSC has breached the Coachella Valley Franchise Agreement.

By their very nature, franchise agreements identify numerous obligations of the franchisee and very few responsibilities of the franchisors. The Coachella Valley Franchise Agreement is no exception. (Comp., Ex. A.) Section 1 represents one of the few contractual obligations of WSC – *i.e.*, to provide Plaintiffs with a "variety of services" designed to complement their real estate brokerage business activities and to enhance its profitability. (*Id*.) Incredibly, WSC now attempts to evade its breach of Section 1 by arguing that the provision cannot be enforced because it "is not 'definite enough that a court can determine the scope of the duty and the limits of performance […]'" (Mtn. to Dismiss, p. 19-21.) As explained below, WSC's attempt to characterize Section 1 as superfluous fails on multiple grounds.

First, the Court should reject WSC's interpretation as it attempts to read Section 1 out of the Coachella Valley Franchise Agreement.[3] "Courts must interpret contractual language in a manner which gives force and effect ***to every provision***, and not in a way which renders some clauses nugatory, inoperative, or meaningless. The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties." *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 68 Cal. App. 4th 445 (1998)(emphasis added, internal citations omitted); *see Kennecott Corp. v Union Oil Co*., 196 Cal. App. 3d 1179, 1190 (1987)("Civil Code § 1641, which provides that each clause of a contract is to be given effect, if possible, rules out such an interpretation that effectively would nullify [a provision in the contract]."). Thus, WSC's attempt to evade its obligations under Section 1 by rendering it meaningless should be rejected.

[3] Tellingly, WSC argues that the services identified by Plaintiffs were not contemplated by Section 1, but then fails to identify any services that were to be provided by WSC pursuant to its obligation under Section 1.

Second, because Section 1 does not expressly identify those "varied services" that WSC is obligated to provide Plaintiffs, parole evidence can be used to explain the services the parties intended. In California, terms in a contract "may be explained or supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement." Cal. Code Civ. Proc. § 1856(b). In determining whether a writing is the complete and final expression of the parties' agreement, courts consider, among other things, "the language and completeness of the written agreement." *Cal. Bagel Co., LLC v. Am. Bagel Co.*, 2000 U.S. Dist. LEXIS 22898, 2000 WL 35798199, *36 (C.D. Cal. June 2, 2000) (internal citations omitted). Here, even though the Coachella Valley Franchise Agreement purports to be a fully integrated agreement (*see* Comp., Ex. A, § 12), parole evidence is necessary to clarify the "varied services" the parties intended WSC would provide. *See* Cal. Code Civ. Proc. § 1856(c) (course of dealing, usage of trade, or course of performance may be used to explain or supplement an ambiguous provision in a contract). Plaintiffs have alleged that those services consist of the technology services, franchise support services, and marketing services identified in the Complaint. Because each of these services is "designed to complement the real estate brokerage business activates" of Plaintiffs as franchisees of WSC, they are covered by Section 1. (Comp., Ex. A, § 1.) Because these are the services that the parties contemplated in Section 1, WSC's failure to provide such services constitutes a breach of the Coachella Valley Franchise Agreement.

Finally, WSC's interpretation of Section 1 should be disregarded as any ambiguities in the Coachella Valley Franchise Agreement must be construed against WSC as the drafter of the agreement. Ca. Civ. Code § 1654 ("In case of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."). This rule is applied more strongly in the case of adhesion contracts. *Badie v. Bank of America*, 67 Cal.App.4th 779, 801 (1998). California courts typically find franchise agreements to be contracts of adhesion. *See Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257 ("California courts have long

recognized that franchise agreements have some characteristics of contracts of adhesion because of the 'vastly superior bargaining strength' of the franchisor."). Because any ambiguities involving the actual services WSC was obligated to provide Plaintiffs pursuant to Section 1 must be construed against WSC, WSC's attempt to evade its breach of Section 1 should be rejected.

b. WSC breached its obligation under Section 2 and Recital A to provide Plaintiffs with the "Windermere System"

Count I also identifies WSC's breach of the Coachella Valley Franchise Agreement for failing to provide Plaintiffs with the "Windermere System." (Comp., ¶¶ 22, 116.) This obligation can be found in a collective reading of Recital A and Section 2 of the Coachella Valley Franchise Agreement. Specifically, Recital A defines the "Windermere System" as "the standards, methods, procedures, techniques, specifications and programs developed by WSC for the establishment, operation and promotion of independently owned real estate brokerage offices," and Section 2 contains WSC's obligation to provide Plaintiffs a "revocable non-exclusive right" to use the "Windermere System" to conduct real estate brokerage and sales activities in Southern California. (Comp., Ex. A, Recital A, § 2.) Plaintiffs have sufficiently pled breach of these obligations under the Coachella Valley Franchise Agreement by alleging WSC's failure to provide Plaintiffs "with a viable 'Windermere System' as defined in the agreement." (Comp., ¶ 116.)

WSC's opposition to Plaintiffs' pleading is intentionally misleading. In an attempt to avoid its breach for failing to provide Plaintiffs with the "Windermere System," WSC argues that Recital A imposed no such obligation. This is true – Recital A identified the Windermere System – Section 2 required WSC to provide Plaintiffs with it. These differences are made clear in the Complaint (¶ 22) and in the Coachella Valley Franchise Agreement attached as Exhibit A to the Complaint. Regardless, WSC's opposition ignores Section 2 in an attempt to mislead the Court.

Because WSC breached the Coachella Valley Franchise Agreement by failing to provide Plaintiffs with the Windermere System, and this breach is properly pled in the Complaint, WSC's motion to dismiss Count I should be denied.

4. Plaintiffs have been damaged by WSC's breaches

As the final element in a breach of contract claim, Plaintiffs have sufficiently alleged that WSC breaches of the Coachella Valley Franchise Agreement resulted in damage to them. (Comp., ¶¶ 117.) Because the allegations in the Complaint satisfy all of the elements of a breach of contract claim, WSC's motion to dismiss Count I should be denied.

B. Plaintiffs have properly pled a claim for breach of the SoCal Franchise Agreement

Count III of the Complaint is brought by Plaintiffs B&D SoCal and Windermere SoCal against WSC for breach of the SoCal Franchise Agreement. As explained below, the factual allegations set forth in the Complaint satisfy all four elements of this claim. Thus, WSC's motion to dismiss Count III should be denied.

1. The SoCal Franchise Agreement is a valid contract

Plaintiffs contend – and WSC does not dispute – the existence of the SoCal Franchise Agreement between B&D SoCal, Windermere SoCal, and WSC. (Comp., ¶¶ 43, 126, Ex. D.) The first element of the breach is therefore satisfied.

2. Plaintiffs' fully performed or where otherwise excused from performance under the SoCal Franchise Agreement

Plaintiffs contend that they performed under the terms of the SoCal Franchise Agreement, unless otherwise excused by WSC's breach of the agreement. (Comp., ¶¶ 49, 127.) Again, this is not disputed by WSC in its motion to dismiss. Thus, the performance element of the breach of contract claim has been satisfied.

3. WSC breached the SoCal Franchise Agreement

Plaintiffs have identified several specific breaches of the SoCal Franchise Agreement by WSC. These breaches involve Section 3, and Section 1/Recital A, among

others. (Comp., ¶¶ 5, 22-27, 128, Ex. D.) These breaches will be addressed in turn, below.

a. WSC breached Section 3 by failing to provide Plaintiffs any guidance

Section 3 of the SoCal Franchise Agreement obligated WSC to provide "guidance to Licensee with respect to the Windermere System." (Comp., ¶ 45, Ex. D.) While the form of "guidance" to be provided by WSC was subject to some "discretion" – consistent with the implied covenant of good faith and fair dealing, as discussed below – WSC's obligation to provide the guidance was fixed. (Comp., Ex. D.) As part of the Complaint, Plaintiffs identify that "WSC provided little to no 'guidance' and instead left Bennion and Deville to provide all of the services to B&D SoCal and to all of the other Windermere franchised businesses in Southern California." (Comp., ¶¶ 45, 128.) It was WSC's failure to provide this "guidance" that breached Section 3 of the SoCal Franchise Agreement.

Attempting to alter the language of Section 3, WSC argues that its "guidance" obligation set forth above is discretionary – *i.e.*, "there was no legal obligation on the part of WSC to provide any specific 'guidance.'" (Oppo., p. 7:11-12.) Again, WSC's interpretation of the agreement is in error. Section 3 makes clear that "WSC shall provide guidance to the Licensee." (Comp., Ex. D, § 3.) This is not subject to WSC's whim. While the agreement provides WSC with some discretion on the form of guidance it was to provide, WSC's obligation to provide guidance was fixed. Because the Complaint clearly asserts WSC's failure to provide any guidance as the breach of Section 3, WSC's motion to dismiss Count III fails.

b. WSC breached its obligation under Section 1 and Recital A to provide Plaintiffs with the "Windermere System"

Similar to that of the Coachella Valley Franchise Agreement, the SoCal Franchise Agreement also required WSC to provide Plaintiffs with a viable "Windermere System" – *i.e.*, "the revocable and non-exclusive right to use the Windermere Trademark and

Windermere System in the conduct of real estate brokerage services" in certain specified locations. (Comp., ¶¶ 22, 128, Ex. D, §§1.) Also similar to the Coachella Valley Franchise Agreement, Recital A of the SoCal Franchise Agreement contained the definition of the "Windermere System," and Section 1 identified WSC's obligation to provide Plaintiffs with a "revocable non-exclusive right" to use the "Windermere System." (Comp., Ex. D, Recital A, § 1.) As reflected in the Complaint, Plaintiffs have sufficiently pled breach of the SoCal Franchise Agreement by identifying WSC's failure to provide Plaintiffs "with a viable 'Windermere System' as defined in the agreement." (Comp., ¶ 128.)

WSC's opposition again ignores its obligations under Section 1 and focuses solely on Recital A. WSC's attempt to distort its obligations under the agreement do not defeat the pleading or the actual language of the SoCal Agreement attached as Exhibit D to the Complaint. Because the pleading sufficiently alleges WSC's breach of its obligation to provide Plaintiffs with the Windermere System, WSC's motion to dismiss Count III should be denied.

4. Plaintiffs have been damaged by WSC's breaches

As the final element in a breach of contract claim, Plaintiffs have sufficiently alleged that WSC breaches of the SoCal Franchise Agreement resulted in damage to them. (Comp., ¶ 129.) Because the allegations in the Complaint satisfy all of the elements of a breach of contract claim, WSC's motion to dismiss Count III should be denied.

C. Plaintiffs have properly pled a claim for breach of the Modification Agreement

Count IV of the Complaint is brought by all of the Plaintiffs against WSC for breach of the Modification Agreement. As explained in the Complaint, the Modification Agreement modified several material terms of the Coachella Valley Franchise Agreement and SoCal Franchise Agreement as a concession to Plaintiffs for WSC's failure to protect the Windermere brand from the anti-marketing campaign waged by Gary Kruger and the Windermere Watch websites. (*See* Comp., ¶ 51, Ex. E, Recitals.) Again, WSC failed to

comply with these contractual modifications giving rise to Plaintiffs' claim for breach of the Modification Agreement.

As explained below, the factual allegations set forth in the Complaint satisfy all four elements of this claim. Thus, WSC's motion to dismiss Count IV should be denied.

1. The Modification Agreement is a valid contract

Plaintiffs contend – and WSC does not dispute – the existence of the Modification Agreement between Plaintiffs and WSC. (Comp., ¶¶ 50, 132, Ex. E.) The first element of the breach is therefore satisfied.

2. Plaintiffs where excused from performance under the Modification Agreement

Plaintiffs contend that they were excused from performance of the Modification Agreement as a result of WSC's breach of the agreement. (Comp., ¶¶ 56, 92-99, 127.) Again, this is not disputed by WSC in its motion to dismiss. Thus, the performance/excuse from performance element of the breach of contract claim has been satisfied.

3. WSC breached the SoCal Franchise Agreement by failing to make any effort to combat Windermere Watch

Plaintiffs have identified two breaches of the SoCal Franchise Agreement by WSC. (Comp., ¶ 134.) The principal breach concerns WSC's obligation under Section 3(A) to make commercially reasonable efforts to curtail Windermere Watch and related attacks on the Windermere brand in Southern California. (*Id*., ¶ 134, Ex. E.) The Complaint sets forth significant detail concerning the anti-marketing campaign initiated by Gary Kruger of Windermere Watch, the damage the anti-marketing campaign has caused Plaintiffs in Southern California, and WSC's enticement of Plaintiffs to remain in the Windermere system by agreeing to make "commercially reasonable efforts to actively pursue counter-marketing, and other methods seeking to curtail the anti-marketing activities undertaken by Gary Kruger, his Associates, Windermere Watch and/or the agents of the foregoing persons." (Comp., ¶¶ 92-99, Ex. E.) The Complaint further details WSC's subsequent

breach of the Modification Agreement by failing to make any material efforts to combat Windermere Watch, and the resulting injuries to Plaintiffs. (*Id*., ¶¶ 96-97.) These allegations are sufficient to support Plaintiffs' claim for breach of the Modification Agreement.

In an attempt to avoid its breach of the Modification Agreement, WSC again argues that its obligation under the contract is "not definite enough" to impose any real duty on WSC. (Oppo., p. 9:5-10.) In other words, WSC argues that its promise to take action against Windermere Watch in order to appease Plaintiffs and keep them in the Windermere system was really just superfluous with no real meaning. WSC's attempt to read its obligations out of the Modification Agreement should be rejected for the same reasons its attempt to avoid its obligations under Section 1the Coachella Valley Franchise Agreement fail – *i.e*., every provision in the contract must be given "force and effect" – not "nugatory, inoperative, or meaningless – in an attempt to capture the mutual intention of the parties. *See City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 68 Cal. App. 4th 445 (1998)(emphasis added, internal citations omitted); *Kennecott Corp. v Union Oil Co*., 196 Cal. App. 3d 1179, 1190; Ca. Civ. Code § 1641. It is clear from the language of the Modification Agreement that the parties intended WSC to make effort to curtail the anti-marketing activities of Windermere Watch. This intent was captured in Section 3(A) of the Modification Agreement.

Further, WSC's interpretation of Section 3(A) should be disregarded as any ambiguities in the Modification Franchise Agreement must be construed against WSC as the drafter of the agreement. Ca. Civ. Code § 1654 ("In case of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.").

Because Plaintiffs have sufficiently alleged a breach of the Modification Agreement in light of WSC's failure "to make commercially reasonable efforts to pursue counter marketing of Windermere Watch," WSC's motion to dismiss Count IV of the Complaint should be rejected. (*See* Comp., ¶ 99.)

4. Plaintiffs have been damaged by WSC's breaches

Similar to their other contract claims, Plaintiffs have again sufficiently identified the harm that has befallen them as a result of WSC's breaches of the Modification Agreement. (Comp., ¶¶ 98, 135.) Because the allegations in the Complaint satisfy all of the elements of a breach of contract claim, WSC's motion to dismiss Count III should be denied.

D. Plaintiffs have sufficiently pled a claim for breach of the Confidentiality Agreement against WSC

Plaintiffs' fifth claim for relief is for WSC's breach of the Confidentiality Agreement. As explained in the Complaint, after the parties' relationship had deteriorated to the point where they could not continue, the parties opened discussions concerning WSC's potential purchase of Plaintiffs' businesses. (Comp., ¶ 100.) Due to the highly sensitive information that the parties anticipated would be exchanged as part of these discussions, Plaintiffs, on one hand, and WSC's President John Jacobi and his associates, on the other hand, entered into a Confidentiality Agreement. (Comp., ¶ 101, Ex. J.) The Complaint clearly identifies that Jacobi was acting on behalf of, and in concert with, WSC at the time he signed the Confidentiality Agreement. (Comp., ¶ 101.) The Complaint also sets forth detailed facts showing that after the parties were ultimately unable to come to an agreement, WSC took the confidential and proprietary information provided by Plaintiffs and brandished it as weapon to use in its campaign against Plaintiffs. (Comp., ¶ 103.) This conduct of WSC violated Sections 1, 2, and 3 of the Confidentiality Agreement. (*Id*., ¶¶ 104, 140.)

In moving to dismiss Count V of the Complaint, WSC argues that it is not a party to the Confidentiality Agreement and cannot be subject to a claim for breach of that agreement now. (Oppo., p. 4:5-17.) This argument ignores the pleading and the parties' intent at the time the Confidentiality Agreement was signed. As reflected above, the Complaint makes clear that Jacobi signed the Confidentiality Agreement as the President of WSC, and on behalf of the company. (Comp., ¶ 101.) Jacobi was named in the

agreement instead of WSC because the parties only intended Jacobi, as the decision maker for WSC, (and his accountant) to view the sensitive information – not WSC's other representatives (*i.e.*, "Jacobi's agents, representatives, employees, affiliates, associates, family members or any person associated with [WSC].") (Comp., Ex. J, § 1.) Because the Complaint sufficiently identifies' Jacobi's entry into the Confidentiality Agreement as an agent for WSC, WSC's motion to dismiss Count V should be denied.[4]

III. PLAINTIFFS HAVE SUFFICIENTLY PLED A CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Plaintiffs' sixth claim is for WSC's breach of the implied covenant of good faith and fair dealing in connection with each of the parties' agreement. (Comp., ¶¶ 142-147.) The duty of good faith and fair dealing is implied by law into every contract, functioning "as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract." *Gonzalez v. JP Morgan Chase Bank, N.A.*, No. 14-cv-2558 EMC, 2014 U.S. Dist. LEXIS 152674, *19-20 (N.D. Cal. Oct. 28, 2014) (quoting *Thrifty Payless, Inc. v. Americana at Brand, LLC*, 218 Cal. App. 4th 1230, 1244 (2013)).

Plaintiffs' good faith and fair dealing claim is predicated, in part, on WSC's following conduct:

a. Failing to provide a viable Windermere System in the Southern California region. To the extent WSC provided services or assistance it was worthless;
b. Failing to make commercially reasonable efforts to curtail the Windermere Watch;
c. Marketing franchisees in Windermere SoCal's territory without consultation;

[4] To the extent the Court is persuaded by WSC's arguments, Plaintiffs are prepared to amend the Complaint to name Jacobi as a defendant in this action.

d. Granting Windermere branch offices to third parties in markets served by Windermere SoCal;
e. Soliciting Windermere SoCal's participation in offers and sales of franchises in violation of the franchise laws;
f. Improperly recruiting B&D Fine Homes and B&D SoCal's sales associates and other employees to join WSC and other Windermere offices;
g. Disclosing to other franchisees in its system Plaintiffs' proprietary information;
h. Failing to provide a modern and up to date technology system platform;
i. Increasing the technology fees to amounts that on information and belief bear no relationship to the amounts spent on Windermere's technology system; and
j. Failing to act in good faith and conduct its business such that Plaintiffs received the benefits of being part of a franchise system.

(Comp., ¶ 146.)

In its moving papers, WSC asks the Court to dismiss Plaintiffs' good faith and fair dealing claim because the identified misconduct is (1) duplicative of the contract claims, or (2) imposes obligations on WSC beyond those set forth in the parties' agreements. (Oppo., pp. 12-13.) WSC's arguments are misplaced.

As a preliminary matter, WSC's arguments in opposition to the good faith and fair dealing claim are in stark contrast to the arguments that it raises in opposition to Plaintiffs' contract claims. (Oppo., pp. 4-9.) As reflected above, in opposition to Plaintiffs' contract claims, WSC repeatedly argues that the terms and obligations imposed upon it by the parties' agreements were either (1) "too indefinite to support an actionable claim" for breach of contract (*see* Oppo., pp. 4:22-23, 5:8-9, 5:15-21, 9:5-10), or (2) subject to WSC's discretion – relieving it from liability for not acting consistent with that discretion (*see* Oppo., pp. 5:27-6:5, 7:9-16, 7:19-25). If WSC's contract arguments were sound, then Plaintiffs' allegations would give rise to an implied covenant of good faith and fair dealing claim. *See McNeary-Calloway v. JP Morgan Chase Bank, N.A.*, 863 F. Supp. 2d 928, 956 (N.D. Cal. 2012)("The covenant of good faith finds particular

application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith."); *Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 923 (1985) ("[W]here a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing."). WSC cannot have the proverbial "*cake and eat it too*" – the vague and discretionary claims either sound in contract or under the implied covenant of good faith and fair dealing.

Even if WSC's inconsistent legal arguments were tenable, its motion to dismiss the good faith and fair dealing claim should still be rejected as the claim arises out of WSC's conduct that deprived Plaintiffs' of a benefit conferred by, but not express in, the agreements. For instance, the Complaint sets forth facts identifying WSC's granting of Windermere branch office to third parties in markets already served by Plaintiffs. (Comp., ¶¶ 64-67.) Although the contracts reveal that Plaintiffs were granted non-exclusive licenses to operate their Windermere businesses in the specified areas, under California law, a franchisee is still entitled to expect that the franchisor would not act to destroy the right of the franchisee under the contract by adding a new business to the existing territory. *In re Vylene Enters*., 90 F.3d 1472, 1477 (9th Cir. 1996)(9th Circuit Court upheld the bankruptcy court finding that that Naugles breached the covenant of good faith and fair dealing by constructing a competing restaurant within a mile and a half from its franchisee's restaurant); *see also, Scheck v. Burger King Corp*., 756 F. Supp. 543 (S.D. Fla. 1991)(Court found that the franchisee, although not entitled to an exclusive territory, was still entitled to expect that the franchisor would "not act to destroy the right of the franchisee to enjoy the fruits of the contract.").

Additionally, WSC's active solicitation and hiring of Plaintiffs' employees and agents is not expressly contradicted by the agreements, but clearly frustrates Plaintiffs' ability to operate the businesses granted by the agreements. (Comp., ¶¶ 61-63.)

Similarly, each of the agreements required Plaintiffs to pay technology fees to WSC in connection with their Windermere businesses. (Comp., Exs. A, D, E.) The

technology fees were "intended to support the operation and development of WSC's technology systems". (See Ex. B, § 13.) It is inferred by these technology fee premiums that WSC would provide state-of-the art technology to be used by the Plaintiffs in the operations of their businesses. In truth, however, WSC provided only antiquated, incomplete and obsolete technology systems that suffered from numerous deficiencies thereby rendering WSC's system unusable. (Comp., ¶¶ 71-80.) While not an express provision of the agreements, Plaintiffs at least anticipated competent technology required in the operation of a real estate franchise. Further, notwithstanding WSC's failure to provide these technology services, it has substantially increased these fees and threatened franchisees with termination for refusing to pay for this unstable, antiquated technology. (*Id*., ¶ 24.) This failure by WSC frustrated Plaintiffs' rights under the agreements.

Because WSC's conduct has frustrated Plaintiff's right under each of the agreements at issue, WSC's motion to dismiss the good faith and fair dealing claims is misplaced.

IV. PLAINTIFFS HAVE PROPERLY PLED CLAIMS FOR INTENTIONAL INTERFERENCE

A. Plaintiffs Adequately Pled A Claim For Intentional Interference With Contractual Relations

Plaintiffs' seventh claim for relief is composed of two distinct intentional interference claims. One, Windermere SoCal alleges that WSC interfered with Windermere SoCal's agreements with the franchisees in its region. (Comp., ¶¶ 149-152, 158-159.) Plaintiffs withdraw this portion of the claim and pursue the damages to this relationship through its eighth claim. Secondly, B&D Fine Homes and B&D SoCal allege that WSC interfered with their employment agreements with their employees/ agents. (*Id*. at ¶¶ 153-159.) This second part of the claim is properly pled.

WSC argues that Plaintiff's Complaint "fails to identify any third parties with whom they contracted". (Oppo., p. 10:21-22.) This is not true. Plaintiffs specifically allege that the employees wrongfully solicited include Plaintiffs' employees and sales

agents in San Diego and the head of Plaintiffs' technology department. (Comp., ¶¶ 61-62.) Although Plaintiffs do not identify by name the B&D Fine Homes and B&D SoCal agents whose employment agreements that WSC interfered with, WSC is on notice of the people involved.

Courts only "require a plaintiff to identify at least one such 'third party' to state a claim." *TeleAtlas N.V. v. NAVTEQ Corp*., 397 F.Supp.2d 1184, 1194 (N.D. Cal. 2005). Plaintiffs have done so here by naming the head of Plaintiffs technology department. Furthermore, Plaintiffs have identified the employees as being in its San Diego offices. The case law does not support that an entity or individuals' names be identified (although Plaintiffs are will to state such names where given leave to amend). The authority only stands for the principle that some indication as to whom the third party is must be given so that the defendant is on proper notice. *See e.g. TeleAtlas*, 397 F.Supp.2d at 1194 (claim dismissed where party alleged interference "with third parties" giving the defendant no notice of whom the third parties were); *see also UMG Recordings, Inc. v. Global Eagle Entertainment, Inc*., 2015 U.S. Dist. LEXIS 102659 *44 (C.D. Cal. June 22, 2015) (claimants provided "no facts concerning the identity of any third party with whom they had contracted").

The claim here is "specific enough to give [WSC] notice of the particular misconduct so that [it] can defend against the charge." *Vess v. Ciba-Geigy Corp. U.S.A.,* 317 F.3d 1097, 1106 (9th Cir. 2003); *see also Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (facts need only be alleged "to give fair notice and to enable the opposing party to defend itself effectively"). Moreover, from a practical perspective, this is much ado about nothing, as WSC knows perfectly well the agents it has improperly solicited and the details of WSC's interference can be fleshed out during discovery.

For this reason, the Court should deny WSC's Motion or otherwise allow leave to amend so that Plaintiffs can state the names of the employees solicited.

B. <u>Plaintiffs Adequately Plead A Claim For Intentional Interference With Prospective Economic Advantage</u>

Plaintiffs' eighth claim for relief is also composed of two distinct claims. One, Windermere SoCal alleges WSC disrupted its relationship with the franchisees in its region. (Comp., ¶¶ 151-152, 161-163, 167-168.) Secondly, B&D Fine Homes and B&D SoCal allege that WSC disrupted the economic relationship between B&D Fine Homes and B&D SoCal with its employees. (*Id*. at ¶¶ 164-168.) Plaintiffs withdraw the second part of the claim and will instead pursue the damages to this relationship through its seventh claim.

Plaintiffs allege that WSC intentionally disrupted Windermere SoCal's relationship with its franchisees by: (1) marketing franchisees in Windermere SoCal's territory without consultation; (2) granting Windermere branch offices to third parties in markets served by Windermere SoCal, including in particular, San Diego County; and (3) soliciting Windermere SoCal's participation in offers and sales of franchises in violation of the franchise laws. (Comp., ¶¶ 59-60, 64, 110, 111, 162.) This has interfered with Windermere SoCal's ability to service and grow its franchisees in the area and thus has directly negatively impacted its fees. (*Id*. at ¶ 152.) WSC has interfered to not only pressure Windermere SoCal to relinquish its rights but has also interfered to undermine Windermere SoCal's role and status as area representative. (*Id*. at ¶¶ 59, 111.)

WSC cheekily argues that the claims should be dismissed because the names of the third parties whose relationships are interfered with aren't mentioned. (Oppo., p. 11:23-27.) However, the category stated, Windermere SoCal's franchisees, puts WSC fully on notice of what entities are involved. The franchisees in Windermere SoCal's region are WSC's franchisees. They include B&D Fine Homes and B&D SoCal. WSC is fully aware of the identity of these franchisees. This makes the case factually distinct from *UMG Recordings* wherein the identity of the third parties was unknown to the defending party. *See UMG Recordings*, 2015 U.S. Dist. LEXIS 102659 at *49-51. For these reasons, the identities of the third parties and their relationships with Plaintiffs have been properly alleged. Thus, the Court should deny WSC's motion.

V. TO THE EXTENT THE COURT ACCEPTS ANY OF WSC'S ARGUMENTS, PLAINTIFFS SHOULD BE GIVEN LEAVE TO AMEND

"The standard for granting leave to amend is generous." *Balistreri v. Pacifica Police Dep't*, 901 F.3d 696, 701 (9th Cir. 1988). "The Ninth Circuit has repeatedly held that a district court should grant leave to amend…unless the court determines that the pleading could not possibly be cured by allegations of other facts." *Riding v. Cach, LLC*, 992 F.Supp.2d 987, 991 (C.D. Cal. 2014); *see also Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) ("a trial court shall grant leave to amend freely 'when justice so requires.'") To the extent the Court finds any of WSC's arguments persuasive, Plaintiffs respectfully request leave to amend the Complaint to correct the deficiency. "[L]eave to amend should be granted 'if it appears at all possible that the plaintiff can correct the defect." *Balistreri*, 901 F.3d at 701; *see Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000)("If a court grants a motion to dismiss, leave to amend should be granted unless the pleading could not possibly be cured by the allegation of other facts.").

VI. CONCLUSION

For the aforementioned reasons, the Court should deny WSC's motion to dismiss in its entirety.

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