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JAMES N. HATTEN, Clerk
By: [Signature] Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GMAC REAL ESTATE, LLC,)
)
Plaintiff,)

v.)

CIVIL ACTION FILE

METRO BROKERS, INC., KEVIN R.)
LEVENT and CLYDE W. CARVER,)
)
Defendants.)

NO. 1 09-CV-2838

JEC

**COMPLAINT FOR DAMAGES, INJUNCTIVE RELIEF AND
DECLARATORY JUDGMENT**

Plaintiff GMAC Real Estate, LLC ("GRE"), by and through its undersigned attorneys, pursuant to FED. R. CIV. P. 57 and 65 and 28 U.S.C. § 2201, files its Complaint for Damages, Injunctive Relief and Declaratory Judgment against Defendants Metro Brokers, Inc. ("Metro"), Kevin R. Levent ("Levent") and Clyde W. Carver ("Carver") as follows:

Overview

On October 1, 2004, GRE entered into a franchise agreement (the "Agreement") with Metro. Pursuant to the Agreement, GRE provided to Metro limited use of the GRE name and other marks, facilitated referrals between Metro

and other franchisee-strategic partners and provided systems and programs to deliver sales training and education, as well as other benefits. In turn, Metro agreed to abide by the terms of the Agreement, including the periodic payment of certain fees to GRE. Beginning in late 2008, Metro ceased paying to GRE the fees that it was required to make under the Agreement. GRE and Metro entered in a series of discussions in an attempt to give some relief to Metro as to the fee payments, in light of the depressed state of the real estate market; those discussions included a possible deferral of fees, in return for the amendment of certain provisions of the Agreement. In fact, in or about early to mid April 2009, Metro orally accepted the basic terms of an amendment, subject to approval and acceptance by GRE. John B. Bearden, the former President of GRE, at the request of Levent, went so far as to meet with Metro's banker in Atlanta and followed that meeting with a letter to the banker confirming GRE's willingness to enter into an agreement with Metro, which would include a fee "holiday" for Metro. When it became clear that Levent was negotiating with GRE's competitors as to joining one of their franchise networks and that Metro and GRE would be unable to come to a resolution of their differences, on August 18, 2009, GRE sent a notice of default of the Agreement to Metro. On October 1, 2009, Metro sent a notice to GRE terminating the Agreement, purportedly pursuant to a provision in the

Agreement that permitted early termination by Metro. On October 13, 2009, simultaneously with filing this Complaint, GRE served on Metro a notice of termination of the Agreement, for Metro's failure to pay the fees required of it under the Agreement. GRE files this suit against Metro, Levent and Carver in order to: obtain a declaratory judgment that it may immediately attempt to seek to enter into franchise agreements with other brokers within the former Licensed Territory of Metro, as specifically permitted by the Agreement; recover the fees owed by Metro to GRE pursuant to the Agreement; enjoin Metro from continuing the use of GRE's protected service marks and trademarks pursuant to the terms of the Agreement; enjoin Metro, Levent and Carver from violating the non-compete provisions in the Agreement; and receive a declaratory judgment that GRE has properly terminated the Agreement.

The Parties

1.

GRE is a Delaware limited liability company, with its headquarters in the State of Illinois.

2.

Metro is a Georgia corporation, with its principal place of business in Atlanta, Georgia, and may be served through its registered agent for service of

process, Kevin R. Levent, 5775 Glenridge Dr. NE, #D, Ste. 200, Atlanta, Georgia 30328-5380.

3.

Defendant Kevin R. Levent is a resident of the State of Georgia and may be served with process at his regular place of business, 5775 Glenridge Dr. NE, #D, Ste. 200, Atlanta, Georgia 30328-5380.

4.

Defendant Clyde W. Carver is a resident of the State of Georgia and may be served with process at his regular place of business, 5775 Glenridge Dr. NE, #D, Ste. 200, Atlanta, Georgia 30328-5380.

5.

Jurisdiction is proper in this Court because Metro, Levent and Carver are citizens of Georgia, the amount in controversy exceeds \$75,000, and there is diversity of citizenship pursuant to 28 U.S.C. § 1332.

6.

The Court has personal jurisdiction over Metro, Levent and Carver and venue is proper in this Court pursuant to 28 U.S.C. § 1391, as Metro resides in Atlanta, Georgia.

7.

GRE operates a real estate brokerage franchise system and is a provider of real estate brokerage services. GRE and its predecessors have developed a system that permits use of certain service marks and trademarks ("GRE's Marks") in the promotion and sale of residential real estate.

8.

Metro is and was at all relevant times in the business of providing real estate brokerage services in Northern Georgia.

9.

During all relevant times, Levent was the Chief Executive Officer for Metro.

10.

During all relevant times, Carver was the Chief Financial Officer and Secretary for Metro.

The Parties' Agreement

11.

On or about October 1, 2004, GRE entered into a written real estate franchise agreement with Metro (the "Agreement"). A true and correct copy of the Agreement is attached hereto as Exhibit 1.

12.

The Agreement authorized Metro to operate a GRE franchise in a defined territory in Northern Georgia.

13.

Among other things, Metro was obligated to pay to GRE certain franchise fees, referral office fees, referral fees, new office fees and advertising fees, as well as submit to GRE certain reports. Ex. 1 at Section 10 and Section 11.

14.

If Metro failed to make payment of any fee owed to GRE within 15 days of its due date, Metro agreed to pay to GRE interest on the payment due at the annual rate of prime plus 4% but, in any event, not less than 12% nor more than 15%. Ex. 1 at Section 12.

15.

During the term of the Agreement, Metro, Levent and Carver agreed to refrain from becoming affiliated with, establishing or having an interest in any real estate brokerage franchising or similar system or service, other than one operated by GRE or any real estate brokerage operation or business or real estate information center which was not licensed by GRE. Ex. 1 at Section 8.

16.

Pursuant to its terms and Georgia law, the Agreement is to be construed in accordance with Georgia law. Ex. 1 at Section 23.

17.

Pursuant to the Agreement, GRE "may seek to enforce, through litigation, its rights that require the entry of injunctive or similar relief, as determined by the court to which an application for such relief is made." Ex. 1 at Section 23 (b).

GRE's Service Marks And Trademarks

18.

The Agreement authorized Metro to use certain of GRE's Marks in accordance with the terms of the Agreement. Ex. 1.

19.

GRE's Marks appear on the principal register of the United States Patent and Trademark Office.

20.

GRE has the exclusive right to use and license GRE's Marks and the derivatives thereof, as well as GRE's distinctive real estate system for the promotion and sale of real property to the public under GRE's name.

21.

GRE and its predecessors have continuously used each of GRE's Marks since their date of registration, and GRE has the exclusive right to use and sublicense GRE's Marks in the United States, including the right to sue for infringement.

22.

Registration of GRE's Marks are in full force and effect, un-revoked and un-cancelled pursuant to 15 U.S.C. §1065.

23.

GRE has given notice to the public of the registration of GRE's Marks as provided in 15 U.S.C. §1111.

24.

GRE uses or has used the words "GMAC Real Estate" as variations of its brand name. These include protected elements of the GMAC Real Estate brand tag line associated with the Premier Service initiative: "Trusted Advisor," "Skilled Negotiator" and "Expert Facilitator." It also includes the service mark "Service You Deserve. People You Trust" which is registered on the principal register of the United States Patent and Trademark Office

25.

The "GMAC" mark was registered under United States' Trademark Number 2,612,792 and has been in use since June 16, 1998.

26.

The "Home Rewards" mark was registered under the United States' Trademark Number 3,453,746 and has been in use since January 1, 1998.

27.

The "Elegant Homes" mark was registered under the United States' Trademark Number 3,498,192 and has been in use since October 1, 1978.

28.

The "Premier Service" mark was registered under United States' Trademark Number 2,914,178 and has been in use since July 1, 2002.

29.

Through its franchise system, GRE markets, promotes and provides service to its franchisees throughout the United States.

30.

To identify the origin of the services it provides, GRE allows its franchisees to use GRE's Marks and to promote the GRE name.

31.

The value of the goodwill developed in GRE's Marks cannot be determined by a precise monetary calculation, because GRE is a national real estate service franchise and a widely known provider of such service, the value of its goodwill is substantial.

32.

GRE's Marks are famous in the United States.

**Metro's Default And Subsequent Attempt To Avoid
Its Obligations Under The Agreement**

33.

At the request of Metro, in or about March 2009, GRE and Metro discussed amending the Agreement.

34.

Among other things, the parties discussed implementing a fee waiver, sometimes referred to as a "fee holiday" whereby certain delinquent fees owed by Metro to GRE could be deferred and paid at a later date.

35.

GRE and Metro exchanged drafts of a Franchise Agreement, Amendment 14 (the "Amendment") to the Agreement, which modified certain terms of the Agreement, including a proposed fee waiver to occur from January 1, 2009 through September 30, 2009.

36.

Among other things, the proposed fee waiver would have deferred to a later date Metro's obligations to pay franchise fees and advertising fees.

37.

In or about early to mid April 2009, Metro orally accepted the basic terms of the Amendment, subject to approval and acceptance by GRE.

38.

Between March 2009 and August 2009, GRE officials and Levent engaged in several phone calls and multiple in-person meetings to discuss, among other things, the terms of the Amendment, including the proposed fee waiver.

39.

Unable to agree on terms amending the Agreement, on August 18, 2009, GRE provided notice to Metro of its default under the Agreement based on Metro's failure to pay all amounts owed to GRE and based on Metro's failure to submit to

GRE certain required reports. A true and correct copy of the August 18, 2009 letter is attached hereto as Exhibit 2.

40.

Metro failed to cure these defaults within 30 days after receiving notice from GRE.

41.

Instead, on September 14, 2009, Metro sent a letter to GRE contending that Metro was not in default. A true and correct copy of the September 14, 2009 letter is attached hereto as Exhibit 3.

42.

Specifically, Metro contended that it was granted a "franchise fee holiday period" for "all of 2009" based on a February 26, 2009 letter from John B. Bearden, the former President of GRE, sent to Fidelity Bank, a third party. A true and correct copy of the February 26, 2009 letter is attached hereto as Exhibit 4.

43.

The February 26, 2009 letter from GRE to a third party did not grant Metro a "franchise fee holiday" or otherwise relieve Metro of any of its obligations owed to GRE under the Agreement. Rather, the letter indicated GRE's willingness to consider an amendment to the Agreement that might include a fee deferral. Such

an amendment would require agreement on a variety of other terms, as well as a formal writing.

44.

Falling far short of a binding agreement under Georgia law, the February 26, 2009 letter lacked nearly all the elements required to form a valid contract, including the lack of several critical material terms.

45.

Indeed, GRE and Metro continued to negotiate these critical material terms for several months after February 26, 2009, without reaching agreement.

46.

Instead, the February 26, 2009 letter merely communicated GRE's "*willingness* to provide [Metro] a franchise fee holiday for the foreseeable future." Ex. 4 (emphasis added).

47.

The February 26, 2009 letter did not define the fee or fees to be included in the "franchise fee holiday."

48.

The February 26, 2009 letter did not provide a time period during which the "franchise fee holiday" would apply.

49.

The February 26, 2009 letter did not specify when Metro would be required to repay the fees otherwise deferred during the "franchise fee holiday."

50.

The February 26, 2009 letter was silent on the issue of whether the fees were being completely forgiven, or whether the fees were being deferred, to be repaid by Metro to GRE at a later date.

51.

The February 26, 2009 letter failed to describe treatment of the outstanding fees already accrued by Metro and owed by Metro to GRE on or before February 26, 2009.

52.

Metro provided no consideration to GRE in exchange for the February 26, 2009 letter.

53.

Moreover, the Agreement contains a merger clause, requiring any modification to the Agreement be in writing and *signed by all parties*. Ex. 1 at Section 24 (emphasis added).

54.

The February 26, 2009 letter was not signed by all parties.

55.

The February 26, 2009 letter from GRE was addressed and sent to an unrelated third party - not to Metro.

56.

In addition, Metro's negotiation with GRE from March 2009 through August 2009 concerning a proposed fee waiver, flies in the face of Metro's contention that a "fee holiday" for "all of 2009" was already in place as of February 26, 2009.

57.

On September 24, 2009, GRE sent a letter to Metro's counsel, reiterating that Metro remained in default under the Agreement and had failed to timely cure its default. A true and correct copy of the September 24, 2009 letter is attached hereto as Exhibit 5.

58.

To date, Metro has failed to cure its default.

59.

On October 13, 2009, GRE terminated the Agreement pursuant to Section 18(d) of the Agreement. A true and correct copy of the October 13, 2009 termination letter is attached hereto as Exhibit 6.

Metro's Obligations Upon Termination

60.

As of October 13, 2009, Metro is required to pay to GRE all fees, charges and other amounts due to GRE, totaling \$206,660.45. Ex. 1 at Section 19(a)(2).

61.

Furthermore, Metro is obligated to pay to GRE all financial losses sustained by GRE as a result of the early termination, including the loss of reasonably anticipated fees, totaling \$140,486.70. Ex. 1 at Section 19(b)(1).

62.

To date, Metro owes at least \$347,147.15 to GRE, pursuant to the Agreement.

63.

On or before October 23, 2009, Metro is required to discontinue the use of GRE's Marks described and provided for in the Agreement and to refrain from holding itself out to the public in a manner that would suggest that it is a licensee or former licensee of GRE. Ex. 1 at Section 19(a)(1).

Metro's Failed Attempt To Terminate The Agreement

64.

On October 1, 2009, Metro attempted to terminate the Agreement, effective January 16, 2010, pursuant to Section 3(a), Section 18(a)(i) and Section 18 (a)(ii) of the Agreement. A true and correct copy of the October 1, 2009 termination letter is attached hereto as Exhibit 7.

65.

Pursuant to the Agreement, Metro was permitted to terminate the Agreement prior to its expiration only if certain conditions existed.

66.

Pursuant to Section 3(a), Metro could terminate the Agreement twelve months after GRE provided written notice to Metro of a change to GRE's relevant Marks. Ex. 1. at Section 3(a).

67.

Metro's attempted termination of the Agreement pursuant to Section 3(a) was ineffective because GRE had not – and has not - provided twelve months' written notice to Metro of a change to GRE's relevant Marks.

68.

Pursuant to Section 18(a)(i) of the Agreement, Metro could terminate the Agreement if GRE was in default under the Agreement and failed to cure that default within 30 days after written notice of the default from Metro. Ex. 1 at Section 18(a)(i).

69.

On October 1, 2009, Metro sent a letter to GRE, alleging that the August 18, 2009 letter from GRE – concerning outstanding fees *owed by Metro to GRE* – constituted an event of default *by GRE* under the Agreement. A true and correct copy of the October 1, 2009 default notice letter is attached hereto as Exhibit 8.

70.

Notably, Metro's letter describing GRE's purported default was sent after Metro attempted to terminate the Agreement. The October 1, 2009 default notice letter from Metro is time-stamped at 3:48 p.m., ten minutes *after* Metro's October 1, 2009 termination letter, which is time-stamped at 3:38 p.m.

71.

Metro's attempted termination of the Agreement pursuant to Section 18(a)(i) was ineffective because GRE was not then, and is not now, in default under the Agreement.

72.

Finally, pursuant to Section 18(a)(ii) of the Agreement, Metro could terminate the Agreement at Metro's option, effective 180 days after service upon GRE of notice of termination. Ex. 1 at Section 18(a)(ii).

73.

Metro's attempted termination of the Agreement pursuant to Section 18(a)(ii) was ineffective because Metro did not provide notice of its attempted termination at least 180 days before the effective date of the attempted termination.

74.

To date, Metro has not properly terminated the Agreement.

COUNT I
(Breach of Contract)

75.

GRE repeats and realleges each and every averment set forth in Paragraphs 1 through 74 hereof as if fully set forth herein.

76.

The Agreement was and is a valid contract between GRE and Metro.

77.

GRE has complied with its obligations under the Agreement.

78.

As described more fully above, Metro has breached the Agreement.

79.

As a direct and proximate result of Metro's breach of the Agreement, GRE has sustained damages in the amount of at least \$347,147.15.

COUNT II
(Preliminary Injunction)

80.

GRE repeats and realleges each and every averment set forth in Paragraphs 1 through 79 hereof as if fully set forth herein.

81.

Pursuant to Section 8 of the Agreement, Metro, Levent and Carver agreed to the following:

During the period beginning on [October 1, 2004] and ending on [January 31, 2014], neither [Metro] nor any of its principals or ownership interest holders (together, "Owners"), directly or indirectly, shall become affiliated with, establish or have an interest in: (a) any real estate brokerage franchising or similar system or service, other

than one operated by [GRE]; or (b) any real estate brokerage operation or business or real estate information center, which is not licensed by [GRE]. The provisions of this Section 8 shall remain in effect through [January 31, 2014], even if [Metro] attempts to voluntarily terminate this Agreement or ceases operations or if this Agreement is terminated as the result of an Event of Default attributable to [Metro].

Ex. 1 at Section 8.

82.

Pursuant to Section 19(a)(1) of the Agreement, Metro agreed to the following:

Upon termination of this Agreement, for whatever reason, [Metro] shall: (1) Within 10 days of such termination, discontinue use of all Marks, including the words "GMAC Real Estate", or any derivation of those words, and refrain from holding itself out to the public in a manner that would suggest that it is a licensee or former licensee of [GRE]. [Metro] agrees that [GRE] shall have the right to secure an order enjoining [Metro] from any use of the Marks."

Ex. 1 at Section 19(a)(1).

83.

GRE seeks a preliminary injunction from the Court enjoining Metro, Levent and Carver from violating the continuing terms of the Agreement, particularly Section 8 and Section 19 of the Agreement.

84.

Upon information and belief, Metro, Levent and Carver have in the past violated - and continue to violate - Section 8 of the Agreement.

85.

There is a substantial likelihood that GRE will be successful on the merits of its claims brought pursuant to Section 8 and Section 19 of the Agreement.

86.

Without the requested preliminary injunction, GRE will suffer irreparable injury.

87.

GRE's irreparable injury outweighs any potential injury to Metro, Levent or Carver.

88.

GRE's requested preliminary injunction is not adverse to public interest.

COUNT III
(Declaratory Judgment)

89.

GRE repeats and realleges each and every averment set forth in Paragraphs 1 through 88 hereof as if fully set forth herein.

90.

GRE is an interested party in the Agreement, seeking a declaration of its rights, status and other legal relations to Metro in light of GRE's October 13, 2009 termination of the Agreement. Ex. 6.

91.

In particular, GRE seeks an order declaring that it complied with its obligations under the Agreement and properly terminated the Agreement on October 13, 2009.

92.

GRE is entitled to a declaratory judgment in its favor, stating that, as of October 13, 2009, GRE adequately terminated the Agreement, GRE has no obligation to Metro under the Agreement and GRE may, among other things, attempt to enter franchise agreements in Northern Georgia with other parties.

COUNT IV
(Attorneys' Fees and Expenses of Litigation)

93.

GRE repeats and realleges each and every averment set forth in Paragraphs 1 through 92 hereof as if fully set forth herein.

94.

Pursuant to the Agreement, if Metro failed to comply with its obligations following termination, in addition to any other payments required to be made by Metro to GRE, Metro agreed to reimburse GRE for its costs related to any attempt to enforce GRE's rights, including the payment of reasonable attorneys' fees and costs. Ex. 1 at Section 19(c).

WHEREFORE, GRE prays that the Court will enter relief as follows:

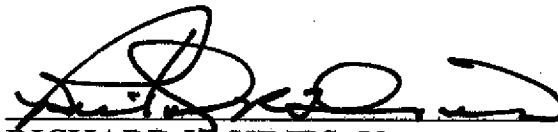
(a) Judgment in favor of GRE and against Metro on Count I and Count IV in the amount of at least \$347,147.15, plus GRE's attorneys' fees and expenses of litigation;

(b) Judgment in favor of GRE and against Metro, Levent and Carver on Count II, enjoining Metro, Levent and Carver from violating the terms of the Agreement;

(c) Judgment in favor of GRE and against Metro on Count III, declaring that as of October 13, 2009, GRE adequately terminated the Agreement, GRE has no obligation to Metro under the Agreement and GRE may, among other things, attempt to enter franchise agreements in Northern Georgia with other parties; and

(d) Any further relief deemed just and appropriate.

This 13th day of October, 2009.



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