NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: *CompensationMaster, LLC v. Long & Foster Real Estate, Inc. et. al.*, Case No. CL 2016-6091

Dear Counsel:

I am writing to address what appeared to be a lack of clarity in the Court's ruling this morning. Hopefully, this letter will clear up the findings and conclusions expressed at this morning's hearing.

The Court grants, in part, Defendant's Motion for Partial Summary Judgment. Counts I, II, IV and VI of the First Amended Complaint, filed on Setember 23, 2016 are accordingly dismissed. The sole surviving count under the First Amended Complaint is the Breach of Contract case against Defendant Long & Foster Real Estate, Inc., ("LFRE"), the subsidiary of Defendant Long & Foster Companies, Inc. ("LRC").

First, the decision to dimiss LRC from this lawsuit rests upon undisputed facts and principles of law, as stated in Defendant's brief. First, the 2009 contract is between the "Broker Member" and Plaintiff. LRC is not the Broker Member. If prior to or at trial it is proven that LRC is a Broker Member, the parties should bring this issue to the attention of the presiding judge or seek reconsideration from the undersigned judge. For purposes of summary judgment, LRC, as an agent of LFRE, is not liable under the contract between Plaintiff and the Broker Member ("LFRE").

Second, there is a valid contract that governs the relationship between the parties. The existence of a valid contract precludes any equitable relief. Consequently, all claims against LRC, either directly or on a theory of joint and several liability, are dismissed.

Third, with respect to the provision governing the calculation of the performance fee payment, the court does not interpret the phrase "[a]ny other mutually agreed upon additional or modified recoveries as components of the commission plans" to be an agreement to agree. The court interprets that phrase to mean that any agreed-upon fees or "recoveries" will be added to the formula. However, in the absence of an agreement, those fees are not included in the calculation. There is no promise to agree to agree. The illustration makes clear that the fee categories will be as set forth in the contract. Parties are always free to modify the numbers, but absent a mutual agreement, the categories should include only those numbers that are memorialized in the contract. If CompensationMaster wanted greater contractual protection from the business practices of LFRE, they should have insisted in inserting language into the agreement to add back into the revenue calculation the fees that LRFE paid over to selected agents which are above and beyond the compensation plan.

The determination of how they intended to credit CompensationMaster for the value of "exceptions" was left silent. The parties' intentions is an issue of fact. This is a contract that contemplated a regular reporting and an annual review. Summary judgment cannot be awarded on the contract claim against LFRE, specifically on the facts relevant to whether the monthly Profit and Loss Statements accurately reflect the four catergories of fees under 1(d) of the June 17, 2011 letter agreement, which outlines the methodology of determining the company dollar percentage. Plaintiff suggested that the financials have now been audited, and the Plaintiff is entitled to present evidence that shows the numbers were either under reported or over reported.

To the extent that CompensationMaster argues that the contract requires LFRE to act in good faith to agree to a value for clause 1(d), then the court agrees with LFRE that that provision would be an agreement to agree and unenforceable. If it is unenforceable, it is because there was no agreement between the parties; it would not be a circumstance where equity would step in to rewrite the agreement to provide benefits that were not otherwise carefully bargained for by CompensationMaster.

The plain meaning of words may not easily fit into the particular legal theory that a party may have adopted prior to the hearing. The Court, however, in interpreting the plain meaning of an agreement, is not bound by the parties' belief that the words used are ambiguous. The Court's interpretation may not completely align with either of the analyses offered by the parties.

The undisputed facts as reflected in the agreement resulted in the interpretation applied by the Court today. The polestar of the intent of the parties is found in the plain language of the agreement and the purpose of the contract. CompensationMaster was entitled to a performance fee if LFRE's bottom line or company dollar was improved. There was no express agreement that LFRE would change its business model to accommodate CompensationMaster's expectation of what that bottom line would be, and no express agreement that CompensationMaster would receive a specific credit if Long and Foster chose not to do so.

If the Court's ruling remains unclear, the Court invites the parties to obtain another hearing for further arguments and ruling.

Sincerely,

John M. Tran
Judge, Fairfax Circuit Court