

AMERICAN ARBITRATION ASSOCIATION

GMAC REAL ESTATE, LLC,)
)
 Complainant,)
)
 v.)
)
 JOSEPH CARL SECURITIES, INC.,)
 JOSEPH CARL REAL ESTATE d/b/a)
 DIAMOND GMAC REAL ESTATE,)
 MICHAEL BARRERAS and RACHELLE)
 STROLE f/n/a RACHELLE SMITH,)
)
 Respondents.)

No: 51 115 Y 01329 07

09CV3007
 JUDGE GOTTSCHALL
 MAGISTRATE JUDGE SCHENKIER
 BR

FIRST AMENDED DEMAND FOR ARBITRATION

Complainant, GMAC Real Estate, LLC ("GMACRE"), by its attorneys, Williams Montgomery & John Ltd. and for its Demand against Respondents, Joseph Carl Securities, Inc. ("JCS"), Joseph Carl Real Estate d/b/a Diamond GMAC Real Estate ("Diamond"), Michael Barreras ("Barreras"), and Rachelle Strole f/n/a Rachelle Smith ("Smith") alleges as follows:

Parties

1. GMACRE is a limited liability company organized and existing under the laws of the State of Delaware having its principal place of business in the State of Illinois. GMACRE is engaged in the business of granting to others ("franchisees") the right to operate residential real estate brokerage offices using various trade and service marks, including the mark "GMAC® Real Estate" (the "GMACRE Marks").
2. Upon information and belief, Barreras is a resident and citizen of the State of Arizona. Barreras is a former franchisee of GMACRE, and owner of JCS.



3. Upon information and belief, JCS is a corporation organized and existing under the laws of the State of Arizona. JCS owns Diamond.

4. Upon information and belief, Smith is a resident and citizen of the state of Arizona. Smith is a former franchisee of GMAC, and owner of JCS.

5. Upon information and belief, Diamond is a limited liability corporation organized and existing under the laws of the State of Arizona. Diamond is a former franchisee of GMACRE.

6. Upon information and belief, Casey C. Strunk ("Strunk") is a resident and citizen of Arizona. On or about July 2, 2007, Strunk filed for Chapter 7 bankruptcy. Strunk is a former owner of JCS and former franchisee of GMACRE, but is not named as a Respondent.

7. This is an action for breach of contract and for an accounting.

8. For many years prior to the acts complained of herein, GMAC has been continuously engaged in the business of operating a real estate brokerage franchise system.

Facts Common To All Counts

The Parties' Written Real Estate Service Contracts

9. On or about May 10, 2004, Diamond, Barreras and Strunk entered into a written GMAC Real Estate, LLC Real Estate Franchise Agreement ("Franchise Agreement No. 1") with GMACRE pursuant to which GMACRE granted Diamond, Barreras and Strunk the right to operate residential real estate franchise offices in Arizona. A true and correct copy of the May 10, 2004 Franchise Agreement No. 1 is attached hereto as Exhibit A.

10. From time to time Franchise Agreement No. 1 was amended, including on March 1, 2006, to, among other reasons, add Smith as an Owner and to change to Annual

Franchise Fee Minimum paid to GMACRE by Diamond ("Amendment 4"). A true and correct copy of Amendment 4 is attached as Exhibit B. Pursuant to Amendment 4, Smith and Barreras executed an Endorsement of Principals/Ownership Interest Holders document ("Owner Endorsement") which, among other things, acknowledged that each of them would be personally liable to GMACRE for all financial obligations of Diamond for one year following a termination. (See Ex. B, p. 4).

11. On or About April 1, 2006, Diamond, Barreras, Smith and Strunk executed another Franchise Agreement for an additional residential real estate franchise office in Tucson, Arizona ("Franchise Agreement No. 2"). A true and correct copy of Franchise Agreement No. 2 is attached hereto as Exhibit C. Barreras and Smith again executed an Owner Endorsement for Franchise Agreement No. 2 acknowledging their individual responsibilities. (See Ex. C, p. 31).

12. Under both Franchise Agreements, Diamond, Smith and Barreras received, among other things, a limited license to use the GMACRE Marks in connection with the operation of their real estate offices. (See Section 1 of each Franchise Agreement.) The term of each Franchise Agreement was approximately ten (10) years.

13. Under the Franchise Agreements, Diamond, Smith and Barreras agreed, among other things, to pay to GMACRE certain fees, including Franchise Fees (sometimes also referred to as Royalty Fees), Referral Fees, Referral Office Fees, Advertising Fees, and Business Conference Registration Fees. (See § 10 of each agreement.) The Franchise Fees, were computed as a percentage of the commissions and fees income Diamond generated from the sale of residential real property at each location. Pursuant to Amendment 4, Diamond, Smith

and Berreras agreed to an Annual Franchise Fee Minimum of \$238,125 for the years 6/1/06 through 5/31/14 for Franchise Agreement No. 1. (See Ex. B).

14. Diamond, Smith and Barreras also agreed to pay GMACRE a monthly Advertising Fee computed as a percentage of the commissions and fees income collected. Pursuant to both agreements, the Advertising Fee had a maximum of \$870 a month and a minimum of \$240 a month. (See A to each agreement.)

15. Under Section 18 of the Franchise Agreements, it is an event of default, and grounds for termination of the Franchise Agreements, if Diamond failed to comply with its payment obligations and failed to cure that breach within 30 days after their receipt of notice of breach. Under Section 18(f) Cross-Default, a Default of any Diamond Franchise Agreement constitutes a Default for every Diamond location.

16. Under Paragraph 23 of the Franchise Agreement any dispute with respect to the agreement shall be decided by binding arbitration in accordance with the American Arbitration Association (AAA) procedures related to commercial arbitrations. All arbitrations are to be conducted in the Chicago, Illinois metropolitan area. However, the laws of the state of Arizona shall apply. (See Ex. A and C, ¶ 23A).

Diamond, Smith and Barreras' Failure to Pay GMACRE

the Amounts Due Under the Franchise Agreements

17. By letter dated September 20, 2006, GMACRE advised Diamond, Barreras, Smith and Strunk that they were in default of their obligations under the Franchise Agreements for failing to make payments required under the Franchise Agreements and failing to submit the reports required by Section 11 of the agreements. The September 20, 2006 letter advised Diamond, Smith and Barreras that if they failed to fully cure each default

within 30 days of the date of the letter, the Franchise Agreements, could be terminated and amounts owed on any outstanding notes could be accelerated. A true and correct copy of the September 20, 2006 letter is attached hereto as Exhibit D.

18. Diamond, Smith and Barreras failed to cure the defaults referenced in the September 20, 2006 letter.

19. Accordingly, on January 23 and 24, 2007, GMACRE sent Diamond, Barreras, Smith and Strunk Notice of Termination letters advising them that the Franchise Agreements were terminated. A true and correct copy of the January 23 and 24, 2007 Notice of Termination letters are attached hereto as Exhibit E. The January 23, 2007 Notice reminded Diamond, Smith and Barreras of their post-termination obligations under the Franchise Agreements, including their obligation to pay to GMACRE all fees, charges and other amounts due to GMACRE, as well as all losses sustained by GMACRE as a result of the early termination of the Franchise Agreement.

The Parties' Written Franchise Development Costs Notes

20. On or about June 1, 2004, Diamond entered into a written Franchise Development Costs Note (the "Note") with GMACRE in the amount of \$300,000. A true and correct copy of the Franchise Development Note is attached hereto and made a part hereof as Exhibit F.

21. On or about May 10, 2004, Barreras and JCS executed a Personal Guaranty of Note, unconditionally guarantying the payment of the Note to GMAC. A true and correct copy of their Personal Guaranty of Note is attached hereto as Exhibit G.

22. On or about January 1, 2005, Diamond entered into another Franchise Development Costs Note for its Surprise Arizona location (the "Surprise Note") with

GMACRE in the amount of \$50,000. A true and correct copy of the Surprise Note is attached hereto as Exhibit H.

23. On or about January 1, 2005, Barreras and JCS executed separate Personal Guaranty of Note, unconditionally guarantying the payment of the Surprise Note. (See Exhibit H).

24. As of the date of termination of the Franchise Agreements solely due to the default of Respondents there remained due and owing on the Note and the Surprise Note a total balance of \$288,362.80 which remains unpaid.

Settlement Agreement

25. On or about February 2, 2007, GMACRE, JCS, Diamond, Strunk, Barreras and Smith entered into a letter agreement ("Letter Agreement") to address the Termination of the Franchise Agreements. A true and correct copy of the letter agreement is attached hereto as Exhibit I. (Attached to Ex. I is a legible, unsigned copy of the letter agreement).

26. The parties acknowledged in Letter Agreement that (a) GMACRE rightly terminated the Franchise Agreements in the January 23 and 24, 2007 Termination letters, and (b) that the Franchise Development Costs Notes were in default and accelerated.

27. Pursuant to the Letter Agreement, GMACRE agreed to temporarily reinstated the Franchise Agreement for 60 days based on the conditions and representations made in the letter.

28. The Note, Surprise Note, and any loans remained in default. Barreras and JCS acknowledged that their then current obligations under the notes and unpaid franchise fees was \$388,353.33, as well as the fact that they had obligations to GMACRE for future damages for anticipated revenue. (Ex. I, ¶ 4).

29. Smith failed to fulfill her obligations under the Letter Agreement, including among other things, failing to enter into a Franchise Agreement with GMACRE. Pursuant to the terms of the Letter Agreement, Smith's failure results in an acceleration of Smith, Barreras and JCS' liabilities and obligations under the notes and they became immediately liable to GMACRE for its anticipated lost revenue under the Franchise Agreements.

30. Diamond, Smith Barreras, and JCS have failed and refused to pay these outstanding amounts to GMACRE, the sum of which is at least \$2,504,044 remains due and owing to GMACRE.

31. Under the Franchise Agreements and Personal Guaranties, Diamond, Smith Barreras and JCS agreed to reimburse GMACRE for all of the costs it incurred, including reasonable attorneys' fees, in enforcing their post-termination payment obligations.

32. JCS, Smith and Barreras also executed Owner Endorsements agreeing to be personally bound by the provisions of the Franchise Agreement.

33. GMACRE has fully performed its obligations under the Franchise Agreement.

COUNT I

(Breach of Contract – Franchise Agreements)

34. GMACRE realleges and incorporates by reference paragraphs 1 through 33 of its Demand as Paragraph 34, as if fully set forth herein.

35. Diamond, Smith and Barreras breached the Franchise Agreements by, among other things, failing and refusing to pay Royalty Fees and other fees and charges due GMACRE.

36. As a direct and proximate result of Diamond, Smith and Barreras' breaches of the Franchise Agreements, GMACRE has suffered damages in an amount in excess of \$2,502,044. These damages include the balance of unpaid fees up to the termination date, and

unpaid fees through the term of the Franchise Agreement. Barreras and Smith each personally agreed to be liable for all outstanding fees through the termination date plus one year of Franchise Fees following termination of the agreement. These amounts will be established at the hearing.

WHEREFORE, Complainant prays for an entry of a judgment against Respondents in the amount of \$2,502,044 plus all attorneys fees and costs associated with this action plus all pre and post judgment interest.

COUNT II

(Breach of Contract Against Diamond, Barreras and JCS - Notes)

37. GMACRE realleges and incorporates by reference paragraphs 1 through 36 of its Demand as Paragraph 37, as if fully set forth herein.

38. Diamond, Barreras and JCS have breached the Note and Surprise Note by, among other things, failing and refusing to pay the balance due and owing to GMACRE.

39. As a direct and proximate result of Diamond, Barreras and JCS' breaches of the Note and Surprise Note, GMACRE has suffered damages in an amount in excess of \$288,362.

WHEREFORE, Complainant prays for an entry of a judgment against Respondents in the amount of \$288,362.80 plus all attorneys fees and costs associated with this action plus all pre and post judgment interest.

COUNT III

(Breach of Contract Against Barreras and JCS – Personal Guaranty)

40. GMACRE realleges and incorporates by reference paragraphs 1 through 39 of its Demand as Paragraph 40, as if fully set forth herein.

41. Barreras and JCS have breached the Personal Guaranty of Note for both the Note and Surprise Note by, among other things, failing and refusing to pay the balance due and owing to GMACRE.

42. As a direct and proximate result of Barreras and JCS' breaches of the Notes and their breaches of the Personal Guaranty of Notes, GMACRE has suffered damages in an amount in excess of \$288,362.

WHEREFORE, Complainant prays for an entry of a judgment against Respondents in the amount of \$288,362.80 plus all attorneys fees and costs associated with this action plus all pre and post judgment interest.

COUNT IV

(Accounting)

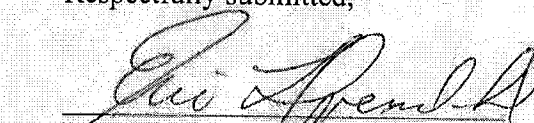
43. GMACRE realleges and incorporates herein by reference paragraphs 1 through 42 of this Demand, as if fully set forth herein.

44. GMACRE is entitled to an accounting from Respondents for all activity conducted by the business for the period prior to termination for which Respondents failed to furnish required reports, plus the period following termination of the Contract through April 2, 2007, pursuant to Section 13 of the Franchise Agreement.

WHEREFORE, Complainant prays for entry of a judgment against Respondents as follows:

A. For an accounting for all activity conducted by the business for the period prior to termination for which Respondents failed to furnish required reports, plus the period following termination of the Contract through April 2, 2007, the period covered by the Letter Agreement.

Respectfully submitted,


By: Eric R. Lifvendahl
One of the Attorneys for Plaintiff

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