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5 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

6
7 MONEY MAILER, LLC,

8 Plaintiff,

9 v.

10 WADE G. BREWER,

11 Defendant.

NO. C15-1215RSL

ORDER DISMISSING
COUNTERCLAIMS

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13 This matter comes before the Court on counterclaim defendants' "Motion for Summary
14 Judgment." Dkt. # 257. Counterclaim plaintiff Wade G. Brewer has asserted thirteen claims
15 against Money Mailer Franchise Corporation, Money Mailer, LLC, Gary M. Mulloy, John
16 Patinella, Joseph J. Craciun, and/or Ryan Carr (hereinafter, "Money Mailer" or "the franchisor"),
17 including contract, statutory, and common law claims. Dkt. # 139 at 5-23. Money Mailer seeks
18 summary judgment in its favor on all of the counterclaims.
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20 Summary judgment is appropriate when, viewing the facts in the light most favorable to
21 the nonmoving party, there is no genuine issue of material fact that would preclude the entry of
22 judgment as a matter of law. The party seeking summary dismissal of the case "bears the initial
23 responsibility of informing the district court of the basis for its motion" (*Celotex Corp. v.*
24 *Catrett*, 477 U.S. 317, 323 (1986)) and "citing to particular parts of materials in the record" that
25 show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56©)). Once the moving
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1 party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to
2 designate “specific facts showing that there is a genuine issue for trial.” *Celotex Corp.*, 477 U.S.
3 at 324. The Court will “view the evidence in the light most favorable to the nonmoving party . . .
4 and draw all reasonable inferences in that party’s favor.” *Colony Cove Props., LLC v. City of*
5 *Carson*, 888 F.3d 445, 450 (9th Cir. 2018). Although the Court must reserve for the trier of fact
6 genuine issues regarding credibility, the weight of the evidence, and legitimate inferences, the
7 “mere existence of a scintilla of evidence in support of the non-moving party’s position will be
8 insufficient” to avoid judgment. *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1049 (9th
9 Cir. 2014); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Factual disputes whose
10 resolution would not affect the outcome of the suit are irrelevant to the consideration of a motion
11 for summary judgment. *S. Cal. Darts Ass’n v. Zaffina*, 762 F.3d 921, 925 (9th Cir. 2014). In
12 other words, summary judgment should be granted where the nonmoving party fails to offer
13 evidence from which a reasonable fact finder could return a verdict in its favor. *Singh v. Am.*
14 *Honda Fin. Corp.*, 925 F.3d 1053, 1071 (9th Cir. 2019).

17 Having reviewed the memoranda, declarations, and exhibits submitted by the parties, and
18 taking the evidence in the light most favorable to Brewer, the Court finds as follows:

19 Brewer has abandoned his third, fourth, sixth, and tenth counterclaims, offered no
20 response to Money Mailer’s arguments regarding his twelfth counterclaim or discrete portions of
21 his first counterclaim,¹ and concedes that his breach of good faith and fair dealing counterclaim
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24 ¹ Brewer’s first counterclaim alleges violations of the Washington Consumer Protection Act
25 (“CPA”) arising out of eleven acts or practices. He has not offered evidence in support of his allegations
26 that Money Market “unreasonably discriminates between franchises,” “unlawfully required release,
27 waiver, or assignment liability,” imposes “unreasonable and unnecessary standards of conduct” on
franchisees, or “terminated Brewer’s franchise without good cause.” Dkt. # 139 at ¶ 4.2. In addition,
other acts or practices described in the first counterclaim, such as the repossession of valuable customer

1 is simply a defense against Money Mailer’s contract claim. Brewer has also waived any claim
2 for relief other than rescission and restitution.² Thus, the only claims at issue in this motion are:

3 First Cause of Action - a CPA claim based on allegations that Money Mailer violated
4 Washington’s Franchise Investment Protection Act (“FIPA”) by (i) charging franchisees
5 unreasonable and unfair fees for goods and services and (ii) making untrue statements or
6 omissions of material fact in connection with the purchase of a franchise;

7 Second Cause of Action - a declaratory judgment claim seeking a declaration of rights
8 and obligations under the Franchise Agreement, a March 2013 Agreement, a November
9 2013 Agreement, and a Management Agreement;

10 Fifth Cause of Action - a breach of contract claim related to a March 2013 Agreement;

11 Seventh Cause of Action - a breach of contract claim related to a Consulting Fee
12 Agreement;

13 Eighth and Ninth Causes of Action - intentional and/or negligent misrepresentation
14 claims regarding information provided (i) before the parties entered into the Franchise
15 Agreement and (ii) when Brewer was struggling to make his franchise profitable; and
16 Eleventh Cause of Action - a claim of aiding and abetting against the individual
17 defendants.

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20 information, mirror causes of action which have now been abandoned or, with regards to the good faith
and contract claims, are discussed elsewhere.

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22 ² See Dkt. # 198 at 2 (“[Brewer] is merely seeking disgorgement of the hidden, marked up fees
Money Mailer forced him to pay in violation of Washington Franchise Investment Protection Act (and/or
23 the CPA).”). See also Dkt. # 243 at 3 (seeking only restitution, not lost profits or other damages
associated with the loss of his business); Dkt. # 247 at 4 (“Brewer has elected his remedies and seeks
24 rescission and restitution.”); Dkt. # 247 at 20 (“He is only asking for (1) the illegal markups that Money
25 Mailer received from him in payments relating to printing, envelopes, other charges in violation of FIPA
(and the CPA); and (2) the monthly royalty franchise fees Brewer paid to Money Mailer.”). Brewer has,
26 however, preserved his claim for treble damages and attorney’s fees if he is successful on his CPA
claim.

1 The Court will assume, for purposes of this motion, that Brewer will ultimately be able to prove
2 liability under one or more of his claims.³ Nevertheless, dismissal of the counterclaims is
3 warranted. Regardless of whether Brewer shows that Money Market (a) violated FIPA by selling
4 products and services to its franchisees “for more than a fair and reasonable price” or by failing
5 to disclose a material fact that was necessary to make its other disclosures not misleading, (b)
6 breached one of the ancillary contracts negotiated by the parties as Brewer struggled to make his
7 franchise profitable, or (c) made affirmative misrepresentations on which Brewer relied, he has
8 failed to produce evidence from which a reasonable jury could conclude that he is entitled to the
9 relief he has requested in this litigation.
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12 Starting in July 2018, Brewer drastically narrowed the relief he was seeking an apparent
13 bid to close off certain avenues of discovery. *See* Dkt. # 179 at 3. Since that time, Brewer has
14 repeatedly confirmed that he has elected to pursue only the remedies of rescission and
15 restitution, waiving any claim for other forms of compensatory relief, such as lost wages, lost
16 profits, reputational injury, emotional distress, opportunity costs, etc.⁴ Consistent with his
17 statements to the Court and opposing counsel, he has not submitted any evidence that would
18 allow a jury to estimate, much less calculate, non-restitutionary damages.
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20 Brewer is bound by his election. Under Washington law, restitution may be required
21 when a person has been unjustly enriched at the expense of another. *Ehsani v. McCullough*
22 *Family P’shp*, 160 Wn.2d 586, 594-95 (2007) (citing Restatement of Restitution § 1). This
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24 ³ The Court therefore need not determine whether the Valpak evidence or the Printing Industries
25 of America publication are admissible or whether the Middlebrook and Brewer testimony were
adequately disclosed.

26 ⁴ As noted in footnote 2, Brewer has preserved his claim for treble damages and attorney’s fees if
27 he is successful on his CPA claim.

1 method of recovery allows Brewer to recover the value of any benefit retained by Money Mailer
2 following rescission of the contract under which those benefits were provided.

3 In such situations a quasi contract is said to exist between the parties. *Bill v.*
4 *Gattavara*, 34 Wn.2d 645, 650 (1949) (stating “the terms ‘restitution’ and ‘unjust
5 enrichment’ are the modern designations for the older doctrine of ‘quasi
6 contracts.’”); *State v. Cont'l Baking Co.*, 72 Wn.2d 138, 143 (1967) (“If the
7 defendant be under an obligation, from the ties of natural justice, to refund; the law
8 implies a debt, and gives this action, founded in the equity of the plaintiff’s case,
9 as it were upon a contract, (quasi ex contractu)”) (internal quotation marks
10 omitted) (quoting *State ex rel. Employment Sec. Bd. v. Rucker*, 126 A.2d 846 (Md.
11 1956) (quoting *Moses v. Macferlan*, 2 Burr. 1005, 97 Eng. Rep. 676, 678 (1760))).

12 *Young v. Young*, 164 Wn.2d 477, 484 (2008). In order to sustain a claim of restitution, one must
13 show that the enrichment of the defendant was unjust. *Lynch v. Deaconess Med. Ctr.*, 113 Wn.2d
14 162, 165 (1989). In other words, in order to have a quasi contractual right to restitution
15 following rescission of the underlying contracts, Brewer must show that Money Mailer received
16 a benefit at his expense and that the circumstances make it unjust for Money Mailer to retain that
17 benefit without payment. *Young*, 164 Wn.2d at 485.

18 Brewer has not made such a showing. As his expert readily acknowledged, amounts
19 Brewer paid Money Mailer to discharge third-party charges are not recoverable. *See* Dkt. # 189
20 at 16. Those payments, which merely cleared debts that Money Mailer had incurred on Brewer’s
21 behalf, in no way benefitted Money Mailer. The record shows that Money Mailer paid
22 \$2,296,969 to third parties for postage and freight related to Brewer’s mailings. Dkt. # 202 at 8.
23 Brewer’s expert opines that Money Mailer incurred costs of \$877,324 to print Brewer’s
24 mailings. Out-of-pocket expenses related to envelopes were another \$265,066. Dkt. # 251-8 at
25 14. Thus, Money Mailer incurred third-party charges of over \$3.4 million to print and deliver the
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1 mailings for Brewer's franchise. Over the course of his franchise, Brewer paid Money Mailer a
2 total of only \$2,509,799. Because that amount did not even cover the actual costs Money Mailer
3 incurred on Brewer's behalf, Brewer cannot show that Money Mailer was enriched by his
4 payments, much less that such enrichment was unjust. Restitution is therefore unavailable, and
5 Money Mailer is entitled to judgment on Brewer's counterclaims.
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7 Brewer argues, however, that injury cognizable under the CPA is a broad concept that
8 includes any proof of injury, including loss of professional/business reputation, lost opportunity
9 costs, and time/expenses spent investigating and untangling the deception. Following his
10 election of remedies, however, the only injury at issue is the mark up on the products and
11 services provided by Money Mailer during the franchise period. Because Brewer has failed to
12 provide evidence that could support a finding in his favor regarding the sole injury remaining in
13 the case, his CPA claim fails along with the others.⁵
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16 For all of the foregoing reasons, Money Mailer's motion for summary judgment on
17 Brewer's counterclaims (Dkt. # 257) is GRANTED.
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20 Dated this 8th day of September, 2020.

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22 _____
23 Robert S. Lasnik
24 United States District Judge

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26 ⁵ The Court recognizes that Brewer has used various formulations to describe the relief he is
27 requesting, some of which are broader than others. He cannot, however, avoid unequivocal and clear
28 representations to the Court, such as, "Brewer has elected his remedies and seeks rescission and
restitution," (Dkt. # 247 at 4) merely be equivocating elsewhere.