IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BROWN DOG, INC.,

Plaintiff,

v.

THE QUIZNO'S FRANCHISE COMPANY, LLC,

Defendant.

OPINION AND ORDER

04-C-0018-C

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This is a civil action for injunctive and monetary relief. Plaintiff Brown Dog, Inc. is suing defendant The Quizno's Franchise Company, LLC, for violation of an Area Director Marketing Agreement under which plaintiff was appointed an area director for defendant in certain territories in Wisconsin and in Michigan. Jurisdiction is present. 28 U.S.C. § 1332. The parties are of diverse citizenship and more than $75,000 is in controversy.

The case is before the court on defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(3) for improper venue on the ground that the parties agreed to litigate all disputes in Colorado, or in the alternative, to transfer venue to the District of Colorado pursuant to 28 U.S.C. § 1404(a). I conclude that Wisconsin's strong public policy of protecting dealers

against unfair treatment by grantors overrides the parties' contractual agreements on forum and choice of law and requires denial of the motion to dismiss. In addition, the balance of the factors to be considered in deciding the propriety of venue weighs in favor of plaintiff's choice of venue in this district.

From the facts alleged in the complaint, the facts contained in the copies of the agreement attached to defendant's brief in support of the motion to dismiss and the facts averred in the affidavits submitted by the parties, I find for the sole purpose of deciding this motion that the following are undisputed and material.

FACTS

Plaintiff is incorporated in Wisconsin and has its principal place of business in Eau Claire, Wisconsin. Defendant is a limited liability corporation with its principal place of business in Denver, Colorado. It has one member, The Quizno's Master LLC, another Colorado limited liability corporation. This LLC has two members: The Quizno's Holding Company and Restaurant Retail Management, LLC. The Quizno's Holding Company is a Nevada corporation with its principal place of business in Colorado. Restaurant Retail Management, LLC, is a Colorado limited liability corporation with one member: RES LLC, another Colorado limited liability corporation. RES LLC has two members: Richard E. Schaden and The Sandwich Trust. The sole trustee of The Sandwich Trust is Patrick E.

Meyers. He and Richard E. Schaden are residents of the state of Colorado.

Defendant is a franchisor of Quizno's Restaurant franchises that allow buyers to operate restaurants that sell submarine sandwiches and other food products. In addition to the restaurant franchises, defendant franchises Quizno's Area Directors, including plaintiff.

On May 1, 2000, plaintiff entered into an Area Director Marketing Agreement with defendant, under which plaintiff became an area director for 22 Wisconsin counties. Under the agreement, plaintiff had the right to distribute plaintiff's services by offering restaurant franchises within the 22-county region that made up the "Western Territory" and developing, supporting and providing services to the new restaurants. Plaintiff had the right to use certain proprietary commercial marks of defendants. To become an area director, plaintiff paid defendant a non-refundable initial area marketing fee of $75,000. The marketing agreement included a forum selection clause, which provided that the agreement was to be interpreted under the laws of the state of Colorado and that the exclusive venue for disputes was to be in the District Court for the City & County of Denver, Colorado, or in the United States District Court for the District of Colorado.

Effective June 15, 2001, the parties executed an addendum to the agreement adding 14 Wisconsin counties and one Michigan county to plaintiff's territory. Plaintiff paid defendant a second non-refundable initial area marketing fee of $73,738.

In a letter dated November 13, 2002, The Quizno's Master LLC wrote plaintiff to

notify it that it was in default of § 4.1 of the agreement for failure to meet the development quota. (The Quizno's Master LLC is not a party to the agreement.) On September 24, 2003, defendant's lawyers sent plaintiff a termination notice that did not describe any then-existing default that plaintiff could cure within 60 days.

In a termination notice dated December 3, 2003, defendant alleged that plaintiff had failed to cure its development defaults within the 60-day cure period and informed plaintiff that the parties' agreement would be terminated on December 24, 2003.

Plaintiff alleged in its complaint that defendant was a dealer within the meaning of the Wisconsin Fair Dealership Law, Wis. Stat. § 135.01-135.14, and that it had violated the law by failing to give plaintiff the notice required under the law and by terminating the agreement without having good cause for termination. In addition, plaintiff alleged that defendant had violated § 17.2(d) of the agreement and that plaintiff had performed substantially all of its obligations under the agreement, entitled it to unpaid commissions and its actual damages suffered as a result of defendant's breaches of contract and violation of the fair dealership law.

OPINION

A. Propriety of Venue

The parties' dispute about the propriety of venue in this district rests on the forum

selection clause in § 19.1 of the marketing agreement. Defendant does not argue that venue would be improper if the forum selection clause did not control.

The Supreme Court has held that forum selection clauses should be enforced unless they are shown to have been affected by fraud, undue influence or overweening bargaining power; if trial in the contractual forum would be so difficult and inconvenient as to deprive the party of his day in court; or if enforcement "would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12, 18, 15 (1972). Wisconsin has a strong public policy to "protect dealers against unfair treatment by grantors." The policy is expressed in Wis. Stat. § 135.025(3), which provides that the effect of the Wisconsin Fair Dealership Law "may not be varied by contract or agreement. Any contract or agreement purporting to do so is void and unenforceable to that extent only." This statutory provision has been read as preventing parties to dealership contracts from avoiding the fair dealership law by including a contrary choice of law provision in their contracts. Bush v. National School Studios, 139 Wis. 2d 635, 644-45, 407 N.W.2d 883 (1987). See also Wright-Moore Corp. v. Ricoh Corp., 908 F.2d 128, 134 (7th Cir. 1990) (affirming district court's determination that enforcement of forum selection clause would violate Indiana's strong public policy protecting dealers).

Wis. Stat. § 135.06 provides that dealers may bring actions against grantors that

violate the fair dealership law "in any court of competent jurisdiction." It would be contrary to Wisconsin's strong public policy to permit enforcement of contractual provisions that limit dealers' rights to bring actions in their choice of courts of competent jurisdiction.

I conclude that the forum selection clause in the parties' agreement cannot be enforced without violating Wisconsin's strong public policy of protecting dealers from overweening grantors. This conclusion cannot be a surprise to defendant. In the Uniform Franchise Offering Circular it provided plaintiff in accordance with the requirements of the Federal Trade Commission, defendant anticipated the possibility that the clause would not be enforceable in Wisconsin. In that circular, defendant advised prospective area directors of certain "risk factors," including the agreement's requirement that area directors could bring suits against the franchisors only in Colorado. It went on to note that "SOME STATE FRANCHISE LAWS PROVIDE THAT CHOICE OF LAW PROVISIONS ARE VOID OR SUPERSEDED. YOU MIGHT WANT TO INVESTIGATE WHETHER YOU ARE PROTECTED BY A STATE FRANCHISE LAW." Aff. of Stuart Brown, dkt. #12, exh. #1 at second unmarked page.

In its reply brief, defendant argues for the first time that plaintiff is not a dealership within the meaning of that term as used in the Wisconsin Fair Dealership Law. I will ignore that argument because it was raised for the first time in a reply brief. Plaintiff's allegations make out a plausible claim that the agreement between the parties is covered by the

Wisconsin Fair Dealership Law.

B. Motion to Transfer under 28 U.S.C. § 1404(a)

Defendant asks the court to consider transferring the case even if it finds that the forum selection clause is not enforceable. It makes little sense to take up the question of transfer once I have decided that Wisconsin's public policy outweighs the parties' choice of forum and applicable law. For the sake of completeness, however, I note that the motion would be denied if I were to reach it. Defendant has made no showing that transfer to Colorado would be proper for the convenience of the parties and witnesses and in the interests of justice. If the case were tried in Colorado, it might be more convenient for defendant's officers and employees but it would be inconvenient for plaintiff's officers and employees and for the area franchisors plaintiff might call as witnesses. This factor does not tip in defendant's favor, especially when there are direct flights between Denver and Madison. Plaintiff chose the forum; its choice is entitled to deference. (Its "choice" of Denver in the area director marketing agreement is not one that is entitled to deference.

The interests of justice favor keeping the case in Wisconsin. Colorado judges do not have experience with the intricacies of the Wisconsin Fair Dealership Law. It would be an imposition on them to require them to become familiar with it.

Neither side has furnished statistics about the workload of the Colorado state courts

in Denver, but the federal court statistics show that the average civil case takes 26 months from filing to get to trial; in this court, the average time is 8.4 months. Colorado's pending case load is 424 per judge; here it is 186. In these circumstances, it would not be in the interests of justice to transfer this case to the overworked court in Colorado.

ORDER

IT IS ORDERED that the motion to dismiss this action for improper venue filed by defendant The Quizno's Franchise Company LLC is DENIED, as its motion in the alternative to transfer venue pursuant to 28 U.S.C. § 1404(a).

Entered this 13th day of May, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge