UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHELLE LEE TANNLUND, on behalf of herself and all others similarly situated, Plaintiffs, v. REAL TIME RESOLUTIONS, INC., Defendant.	Case No.: 1:14-cv-5149 Honorable Edmond E. Chang

OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL SPECIFIC PERFORMANCE AND SANCTIONS

Plaintiff Michelle Lee Tannlund, on behalf of herself, and all others similarly situated ("Plaintiff"), has filed the instant motion for this Court to compel specific performance [Dkt. No. 103] (the "Motion") as to the Class Action Settlement Agreement ("Agreement") in this matter, and for sanctions against Defendant Real Time Resolutions, Inc. ("Defendant").

To date, Defendant has performed all of its obligations required under the Agreement. As detailed in Plaintiff's Motion, however, the parties disagree as to the proper distribution of the remaining settlement funds pursuant to the terms of the Agreement. Defendant asserts that the express terms of the Agreement require that these funds be paid to a non-profit organization(s) agreed to by the parties and approved by this Court. Plaintiff, on the other hand, erroneously claims that these funds should be distributed to 10,766 class members a second time. In her Motion, Plaintiff never mentions that the sole economic reason a dispute exists is that Defendant will needlessly and inappropriately incur additional out-of-pocket administration costs if a second distribution is made in contravention of the express provisions of the Agreement. Despite multiple attempts at resolving this issue, the parties have now reached an impasse and

require this Court's guidance.[1]

Pursuant to the express terms of the Agreement, if a second pro rata distribution of the remaining funds would yield an amount ***less than*** $4.00 per person, after administration costs, the funds must go to a non-profit organization(s) to be agreed upon by the parties and approved by the Court. Conversely, if a second pro rata distribution would yield an amount equal to or greater than $4.00 per person, after administration costs, then a second such distribution to the class is required. Here, after administration costs, a second pro rata distribution would only yield $0.95 per person, well below the $4.00 threshold contained in the Agreement. Accordingly, the express terms of the Agreement require all currently remaining funds to be paid to a non-profit organization(s).

As outlined herein, Plaintiff's arguments are unsupported by the express terms of the Agreement. Therefore, Defendant asks that the Court order that the remaining funds of $261,815.62 be distributed to a non-profit organization(s) to be agreed upon by the parties and approved by this Court per the Agreement.

I. Legal Standard

The correct interpretation of a contract presents a question of law for the court. *Hanover Ins. Co. v. Northern Bldg. Co.*, 751 F.3d 788, 791 (7th Cir. 2014). Well-established Illinois contract law requires that: "[a]n agreement, when reduced to writing, must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used. It is not to be changed by extrinsic evidence." *Western Illinois Oil Co. v. Thompson*, 26 Ill.2d 287, 291, 186 N.E.2d 285 (1962).

[1] The Court should deny Plaintiff's request for sanctions outright. As evident from Plaintiff's own motion, the parties have engaged in good faith efforts to resolve the current dispute. In fact, just before Plaintiff filed the instant motion, the parties agreed to submit a joint motion for clarification. To Defendant's surprise, Plaintiff filed the instant motion instead. Regardless, sanctions are unwarranted as Defendant is performing under the Agreement.

This approach is sometimes referred to as the "four corners" rule. *See, URS Corp. v. Ash*, 101 Ill.App.3d 229, 234, 56 Ill.Dec. 749, 427 N.E.2d 1295 (1981); *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462, 706 N.E.2d 882, 884 (1999). Thus, in interpreting contract terms, a court must first look to the plain language of the contract itself. *Wilson v. Career Educ. Corp.*, 729 F.3d 665, 671 (7th Cir. 2013). The court must examine the "entire text of the agreement," *LaSalle Nat. Bank v. Serv. Merch. Co.*, 827 F.2d 74, 79 (7th Cir. 1987), "reviewing each part in light of the others." *Wilson v. Wilson*, 217 Ill.App.3d 844, 160 Ill.Dec. 752, 756, 577 N.E.2d 1323, 1327 (Ill.App.Ct.1991).

An integration clause "states that a contract represents the entire agreement between the parties and by virtue of the parole evidence rule, 'prevents a party to a contract from basing a claim of breach of contract on agreements or understandings...they had not written into the contract itself." *Boscia v. Monroe/Wabash Dev., LLC*, No. 1-10-2250, 2011 WL 10069624, at *4 (Ill. App. Ct. June 13, 2011) (citing *Vigortone AG Prod., Inc. v. PM AG Prod., Inc.*, 316 F.3d 641, 644 (7th Cir. 2002)).

II. Legal Argument

1. The Agreement lays out a clear test to determine if a second pro rata distribution is required

Section 10.04 of the Agreement details how to determine (i) when a second pro rata distribution is required, and (ii) if such distribution is required, then who will pay the costs of such distribution. The first sentence of Section 10.04 lays out the test to determine if a second pro rata distribution is required:

> If settlement checks that remain uncashed after 210 calendar days after the first pro rata distribution yield an amount that, ***after administration costs***, would allow a second pro rata distribution to the qualifying Settlement Class Members equal to or greater than $4.00 per qualifying Settlement Class Member, the

> Claims Administrator will distribute any such funds on a pro rata basis to Settlement Class Members who have cashed settlement checks.

(Emphasis added).

If a second pro rata distribution is required pursuant to the above test, then the second sentence of Section 10.04 unequivocally affirms that Defendant is to pay the administration costs for any such second distribution (as an out-of-pocket cost), just as Defendant did with respect to the first distribution:

> ***The postage and administration costs for any such second distribution shall be paid by Real Time***.

(Emphasis added).[2]

If a second pro rata distribution is not required, however, then the third sentence of Section 10.04 dictates that the funds shall be distributed to one or more non-profit organization(s):

> If a second pro rata distribution is not made, the uncashed amount will be paid to one or more non-profit(s) to be determined with the approval of the Court.

Thus, the first sentence of Section 10.04 is the operative sentence that lays out the test for determining if a pro rata distribution is necessary, and depending on the outcome of this test, either the second sentence or the third sentence applies.

In her Motion, Plaintiff states that a second pro rata distribution is required because it would result in an additional $24.31 to each class member, which is "well above the negotiated threshold." *See* Motion p. 5. Plaintiff's calculation completely ignores the clause "after administration costs" contained in Section 10.04's first sentence. *See* Motion p. 3 (determining that the $4.00 threshold is surpassed by "[d]ividing the unclaimed funds by the total claimants who

[2] Because the initial distribution has already occurred, and has already been paid by Defendant, including out-of-pocket administration costs, Defendant's obligation to pay administration costs associated with the initial distribution is not discussed in Section 10.04.

cashed a check"). *See In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 787 (N.D. Ill. 2015) (holding in connection with a similar class action settlement, the term "after" to mean "After subtracting notice and administration costs", i.e. the term "after" is to be interpreted as after subtracting from the total costs)

Once "administration costs" are taken into account in this calculation, however, the resulting pro rata share is only $0.95, well below the $4.00 threshold. *See* Section 3, *infra*. As a result, a second pro rata distribution is not required and Section 10.04's third sentence dictates that the remaining funds be paid to one or more non-profit(s).

Section 8.03 of the Agreement states that Defendant shall be responsible out of pocket for the costs of class notice and settlement administration, including costs "required to send the Class Notice, establish the Settlement Website and establish a toll-free telephone number," as well as "any other initial administration costs." The second sentence of Section 10.04 of the Agreement specifies that Defendant is responsible for the "postage and administration costs" of any second distribution. Taken together, the two provisions determine what constitutes "administration costs" for purposes of the Agreement.

2. The Agreement is a fully integrated agreement governed by Illinois law

The parties specified that the Agreement is to be governed by Illinois law [*See* Motion Exhibit A at Section 18.02] and, accordingly, Illinois state rules of contractual interpretation apply. *Hanover Ins. Co. v. Northern Bldg. Co.*, 751 F.3d 788, 792 (7th Cir. 2014). Courts enforce the contract as the parties have written it, as the plain language of the contract is the best evidence of the parties' intent. *Id.*; *Marlowe v. Bottarelli*, 938 F.2d 807, 812 (7th Cir. 1991); *Smith v. West Suburban Med. Ctr.*, 397 Ill.App.3d 995, 337 Ill.Dec. 426, 922 N.E.2d 549, 552–53 (2010). The court must look to the contract as a whole in interpreting its individual terms,

adopting an understanding of the language that is natural and reasonable. *Id.* at 553; *see also Land of Lincoln Goodwill Indus., Inc. v. PNC Fin. Servs. Grp., Inc.*, 762 F.3d 673, 678–79 (7th Cir. 2014).

Here, the Agreement contains an 'Entire Agreement provision' [*See* Motion Exhibit A Section 18.02], which is an integration clause. *Mukite v. Advocate Health and Hospitals Corp.*, No. 15 C 7604, 2016 WL 4036755, at *5-6 (N.D. Ill. July 28, 2016) (holding that a similar "Entire Agreement" provision was a classic integration clause). Thus, no additional terms may be added into the Agreement even if Plaintiff's counsel argues it would be consistent with the agreement.[3] *See Royce v. Michael R. Needle, P.C.*, 158 F. Supp. 3d 708, 719–20 (N.D. Ill. 2016), opinion amended and supplemented sub nom. *Royce v. Needle*, No. 15 C 259, 2016 WL 398182 (N.D. Ill. Feb. 2, 2016).

3. Application of the test contained in Section 10.04 of the Agreement dictates that the remaining funds be paid to one or more non-profit organization(s)

To complete the test contained in Section 10.04's first sentence, the parties need to know the balance of settlement checks that remain uncashed, the administration costs, and the qualifying class members who cashed settlement checks from the initial distribution. The balance of settlement checks that remain uncashed is $261,815.82. The administration costs are $251,541.80 (consisting of the $209,400 in initial distribution costs already paid by Defendant [per Section 8.03] and the $42,141.80 in estimated second distribution administration costs as quoted by the Claims Administrator [per the second sentence of Section 10.04]). The qualifying settlement class members total 10,766. With this information in hand, the test in Section 10.04's first sentence may be applied.

[3] Plaintiff's counsel erroneously invokes the term *cy pres* in reference to the provision that Defendant agreed to distribute the funds to a non-profit, however, nowhere in the Agreement is the term *cy pres* used.

Here, the balance of uncashed settlement checks is $261,815.82. After subtracting the "administration costs" of $251,541.80, the net remaining balance is $10,274.02. If this net remaining balance is divided by 10,766 (the number of class members who cashed their settlement checks), the result is only $0.95. Because $0.95 falls below the $4.00 threshold, no second distribution is required and the express terms of Section 10.04 require the remaining balance of $261,815.82 to be distributed to a non-profit organization(s) to be agreed upon by the parties and approved by this Court.

Plaintiff has failed to establish or even plead any ambiguity in the written Agreement. In her Motion, Plaintiff also never bothers to offer any competing explanation as to why the first sentence of Section 10.04 states "after administration costs" (other than the fact that the administration costs should be subtracted or removed from the amount of uncashed settlement checks) or to even cite Section 10.04 at all. Plaintiff's attempt to completely ignore Defendant's "administration costs," as well as the clear test required by Section 10.04, alters the meaning and requirements of both the first sentence of Section 10.04 and the Agreement as a whole because it forces Defendant to pay an additional round of out-of-pocket administration costs where none is required. Plaintiff's arguments are contradicted by the express terms of the Agreement and are unsupported by law.

Therefore, Defendant respectfully requests that the Court issue an order directing the parties to distribute the remaining funds to a non-profit organization(s) and to submit the proposed non-profit organization(s) for the Court's review and approval within a reasonable time.

III. Conclusion

In conclusion, Defendant opposes Plaintiff's Motion to Compel Specific Performance and for Sanction for the reasons stated above, and moves the Court for an order confirming the remaining funds should be distributed to a non-profit organization(s) to be agreed upon by the parties within a reasonable time and approved by this Court as provided by the third sentence of Section 10.04 of the Agreement.

Dated: June 10, 2019

Respectfully submitted,

By: */s/ Christopher R. Murphy*
Christopher R. Murphy

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing electronically and the foregoing is available for viewing and downloading via the Court's Electronic Case Filing System (ECF).

/s/ Christopher R. Murphy
Christopher R. Murphy