SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
NORTH COUNTY

MINUTE ORDER

DATE: 08/01/2019 TIME: 02:37:00 PM DEPT: N-29

JUDICIAL OFFICER PRESIDING: Robert P Dahlquist
CLERK: Lynn Arthur
REPORTER/ERM: Not Applicable
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2017-00023673-CU-BC-NC** CASE INIT.DATE: 06/29/2017
CASE TITLE: **Welk Resort Group Inc vs. Aviara Residence Club Owner's Association [IMAGED]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Breach of Contract/Warranty

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EVENT TYPE: Civil Court Trial

APPEARANCES

The Court, having taken the above-entitled matter under submission on July 16, 2019 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

On June 24, 25, 26, 27 and July 1, 2, 8 and 9, 2019, the Court conducted a bench trial in this case. The trial was conducted in Dept. N-29, Judge Robert P. Dahlquist presiding. Plaintiff Welk Resort Group, Inc. ("Welk") was represented at the trial by its counsel, Gregory S. Markow and Sean M. Gaffney of Crosbie Gliner Schiffman Southard & Swanson, and by Alison M Bihn of Welk. Defendant Aviara Residence Club Owners Association (the "Owners Association") was represented at the trial by its counsel, Charles S. LiMandri and Mary Walker of LiMandri & Jonna, and by Howard J. Franco and Kevin J. Healey of Collins Collins Muir & Stewart. At the trial, the parties presented evidence and argument. At the conclusion of the trial, the Court took the matter under submission.

The Court has carefully considered the evidence and arguments, and is now prepared to render its decision.

This document constitutes the Court's tentative decision. It will become the Court's statement of decision in accordance with the California Rules of Court unless, within 10 days after service of this tentative decision, a party specifies those principal controverted issues as to which the party is requesting a statement of decision or makes proposals not included in this tentative decision.

OVERVIEW
This case arises from the adoption by the Owners Association of a rule limiting the number of vacation timeshare units that can be reserved at one time at the Four Seasons Aviara timeshare resort.

Some background information about the parties and this dispute may be helpful to the reader.

The Four Seasons Aviara Resort is an upscale vacation timeshare resort in Carlsbad. The resort has 132 units available for timeshare vacationers to use. Timeshare owners own the right to vacation at the resort for a certain amount of time each year, or in some cases, every other year.

The resort is a "common interest development" governed by the Davis-Stirling Common Interest Development Act. The Aviara timeshare owners are members of defendant Owners Association. The Owners Association largely functions the same as would a homeowners association for a neighborhood common interest development in which owners own homes. Here, the owners own timeshare interests, instead of homes. The Owners Association is governed by an elected board of five volunteer directors. When a person purchases a timeshare interest in the Aviara Resort, the purchaser is deeded a real property interest giving the purchaser the right to use the resort property for a specified amount of time. As such, the owners of the timeshare interests in the Aviara Resort own a recorded real property interest in the property.

The Aviara Resort is called the Four Seasons Aviara Resort because the Owners Association has hired the Four Season company, a well-known entity within the hospitality industry, to manage the resort on behalf of the Owners Association. The Four Seasons company does not own the resort; it merely manages the resort for the Owners Association.

Aviara timeshare owners typically own the right to use the Aviara resort on a "per week" basis. The parties refer to each week as an "interval." So, an owner who owns three "intervals" owns the right to use a suite at the Aviara resort for three weeks. An owner of three "intervals" can chose to use their ownership rights in different ways. One way is to use a suite at the resort for three weeks in a row. This is referred to as a "consecutive" use. Another way for an owner to use three intervals is to use three separate resort suites during the same week, so that extended family members could stay at the resort, in three separate suites, at the same time, as an example. This is referred to as a "concurrent" use.

Since the Aviara Resort has 132 rooms, and there are 52 weeks in a year, the total number of intervals available at the Aviara Resort is 6,864 per year. These intervals are owned by about 3,400 owners. Many owners own one interval; other owners own more than one interval. As of mid-2016, there were 377 owners who owned four or more intervals. Prior to the events that gave rise to this lawsuit, the most Aviara intervals owned by a single owner was 50.

Plaintiff Welk is an owner of its own timeshare resorts. "Welk develops vacation ownership properties in California, Missouri and Cabo San Lucas, Mexico. Welk sells the right to use timeshare properties to its clients." (Second Amended Complaint, at paragraph 5)

Welk has at least nine of its own resorts, with about 50,000 timeshare members. Welk timeshare owners are not owners of deeded interests in specific parcels of real property but instead are owners of timeshare "points," which can be used to reserve and occupy a room at any of Welk's timeshare properties.

About three years ago, Welk developed a business strategy of expanding its "inventory" of timeshare opportunities for its members by buying timeshare intervals in existing timeshare resorts owned and operated by others. Welk management identified the Four Seasons Aviara Resort as a high-quality, desirable vacation destination. Welk decided to purchase Aviara resort intervals that were available on the open market. These Aviara intervals, together with intervals from other high-end timeshare resort

properties, became part of an "Experiences Collection" of resort properties which Welk promoted, and made available, to its own timeshare members.

Welk acquired 329 Aviara intervals on the open market in 2016.

At about the same time as Welk was in the process of conducting due diligence with respect to acquiring these Aviara intervals, the Aviara Owners Association adopted the rule that is the subject of this lawsuit. The rule limits the number of "concurrent" reservations that any owner may make to six per week unless otherwise approved by the board of the Owners Association. In other words, an owner can only reserve up to six suites for use in any given week, unless otherwise approved by the board.

All of Welk's claims in this lawsuit arise from the Owner Association's adoption of this rule. Welk asserts that the adoption of the rule violated Aviara's governing documents, violated various statutes governing timeshare operations and common interest developments, breached fiduciary duties, constituted fraud and otherwise harmed Welk. Welk claims that it did not learn of the existence of the rule until December 2016, after Welk's open-market purchase of its initial set of intervals was completed in August 2016.

Meanwhile, regardless of when Welk supposedly learned of the rule (whether in December 2016 or earlier), Welk decided to buy more Aviara intervals on the open market after it knew of the rule. Welk purchased more Aviara intervals in 2017 and 2018, and even purchased more Aviara intervals after this lawsuit was filed.

At the end of 2016, Welk owned 329 Aviara intervals. By the end of 2017, Welk owned 500 intervals. By the end of 2018, Welk owned 731 intervals. (Trial Ex. 1016, at page 6)

Welk indicates that it now owns 736 Aviara intervals. (Trial Ex. 1008, at page 15) Welk has purchased at least 236 Aviara intervals since the filing of this lawsuit.

The rule limiting the number of concurrent reservations per week was adopted by the Aviara Owners Association board of directors at a meeting held on July 26, 2016. The board minutes state that the board "adopt[ed] the policy that owners cannot utilize more than 6 weeks at a concurrent time during the 13 month reservation window, unless approved by the board." Trial Ex. 82, at page 2.

The "13 month reservation window" refers to a policy that allows owners of multiple Aviara intervals to make reservations 13 months in advance of the desired date of occupancy. *See* Trial Ex. 88, at page 3. Owners of a single interval are allowed to make reservations 12 months in advance of the desired date of occupancy.

Shortly after the board meeting at which the rule was adopted, the rule was incorporated into the Owner Association's Rules and Regulations. The Rules and Regulations are written in a plain language, "question and answer" format, in an effort to make the rules user friendly for Aviara owners. Consistent with this format, the rule is stated as follows:

"[Question:] I own multiple intervals. Is there a limit to the number of intervals I can reserve in a single use week?

Answer: Yes. The maximum number of 'concurrent' intervals which can be reserved in any *use week* is six regardless of the 13 month or 12 month reservation windows (i.e., 2 for Friday check-in, 2 for

Saturday check-in, and 2 for Sunday check-in, or 5 for Friday check-in and 1 for Sunday check-in), unless approved by the Board." Trial Ex. 83.

Among other contentions in this case, Welk contends that the rule, as written into the Association's rules and regulations, is materially different from the rule adopted by the board, as reflected in the meeting minutes. Welk contends that the Association acted illegally by changing the wording from that reflected in the board's meeting minutes to the wording reflected in the Aviara Rules and Regulations. The Owners Association contends that, while the wording is obviously somewhat different, the wording in the Rules and Regulations is accurate and properly reflects the board's intentions when the board adopted the rule.

Welk further contends, among other things, that the board did not following proper procedures when the rule was adopted. For example, Welk contends that inadequate notice of the board meeting was given, and the board meeting was not conducted properly. Welk also contends that the board lacks authority to adopt this type of rule.

Welk's complaint asserts the following causes of action pertaining to the adoption and implementation of the rule: (1) breach of the CC&R's because the rule prevents Welk from exercising its right to use all of Welk's intervals; (2) breach of the CC&R's because the rule was not approved by the Association's members; (3) breach of the CC&R's and bylaws because the Association failed to give proper notice of the proposed consideration of the rule; (4) breach of statutory requirements pertaining to common interest developments; (5) breach of statutory requirements pertaining to timeshares by prohibiting Welk from using its intervals; (6) breach of statutory requirements pertaining to timeshare disclosure requirements; (7) breach of the implied covenant of good faith and fair dealing; (8) breach of fiduciary duty; (9) fraud by concealment; (10) fraud by intentional misrepresentation; (11) negligent misrepresentation; and (12) violation of California's unfair competition law.

Judge Fraser previously granted the Owners Association's motion for summary adjudication as to the sixth and tenth causes of action. This ruling will address all of Welk's remaining causes of action.

FINDINGS AND ANALYSIS

- Unclean hands.

"The [unclean hands] rule is settled in California that whenever a party who, as actor, seeks to set judicial machinery in motion and obtain some remedy, has violated conscience, good faith or other equitable principle in his prior conduct, then the doors of the court will be shut against him *in limine*; the court will refuse to interfere on his behalf to acknowledge his right, or to afford him any remedy." *Pond v. Insurance Co. of North America* (1984) 151 Cal.App.3d 280, 289 – 290 (quotation marks and citations omitted)

"The rule is qualified by the requirement that the party against whom the doctrine is sought to be invoked directly 'infected' the actual cause of action before the court, and is not merely guilty of unrelated improper past conduct. The actions of the party alleged to have soiled hands must relate 'directly to the transaction concerning which the complaint is made; i.e., it must pertain to the very subject matter involved and affect the equitable relations between the litigants.'" *Pond v. Insurance Co. of North America, supra,* 151 Cal.App.3d at 290 (citations omitted).

"The equitable principles underlying the clean hands doctrine do not require a finding that [the plaintiff] was guilty of perjury, concealment or other illegal conduct, 'for it is not only fraud or illegality which will

prevent a suitor from obtaining equitable relief. *Any unconscientious conduct* upon his part which is connected to the controversy will repel him from the forum whose very foundation is good conscience.'" *Pond v. Insurance Co. of North America, supra,* 151 Cal.App.3d at 291 (emphasis in original) (citations omitted)

The unclean hands doctrine is available in California in cases involving equitable claims or legal claims or both. *See, e.g., Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 728 ("the equitable defense of unclean hands is available in this state as a defense to a legal action").

In this case, Welk has unclean hands. Its hands are unclean because: (1) it has failed to pay the assessments that are due on the majority of Aviara intervals that it owns, despite agreeing to pay the assessments; and (2) it is renting its Aviara intervals to its own timeshare customers, in an attempt to make a profit, despite agreeing not to do so.

The Court believes that either of these two things, standing alone, would be sufficient to find that Welk is acting with unclean hands. The two things combined make this a particularly compelling case for application of the unclean hands doctrine.

- Welk's failure to pay assessments that are due.

Timeshare owners generally are required to pay annual assessments. These assessments are used to maintain the timeshare resort(s).

Owners of Aviara intervals are required to pay annual assessments. For 2019, the amount of the annual assessment per interval ranges from about $2,100 to about $2,500, depending on whether the interval pertains to a one-bedroom suite or a two-bedroom suite. *See* Trial Ex. 1008.

Welk has paid the annual assessments for 312 of its Aviara intervals. But Welk has not paid the assessments on its remaining 424 Aviara intervals. Welk asserts it is justified in not paying the assessments on these 424 intervals because, according to Welk, the rule that is the subject of this lawsuit prevents Welk from using those intervals. The aggregate amount of unpaid assessments is over $1 million.

Welk is violating the commitment it specifically made to the Aviara Owners Association when Welk purchased its Aviara intervals. In connection with the purchase of an Aviara interval, each purchaser signs a "Purchaser's Acknowledgement Form." *E.g.,* Trial Ex. 158, at pages 4 - 6. The acknowledgement form contains many of the policies and regulations pertaining the Aviara resort. The purchaser signs the form, and also places the purchaser's initials next to each item on the form.

The third item on the form is entitled "annual assessments," and states: "As the owner of a Residence Club Interval, you are obligated to pay an annual assessment to the Association as long as you own your Residence Club Interval (s). *The assessment is payable whether or not you use your Residence Club in any particular year.* Failure to pay such assessment may result in the suspension of your use privileges and a lien against your Residence Club Interval." Trial Ex. 158, at page 4 (emphasis added). The amount of the annual assessment then in effect is identified on the form.

Welk signed purchaser's acknowledgement forms when it purchased its Aviara intervals. *E.g.,* Trial Ex. 158, at pages 4 - 6) *See also* Trial Ex. 157 (an email from Four Seasons Aviara Director of Residences to a Welk Senior Vice President stating "as far as Assessments payments are concerned all owners are

required to pay assessments whether or not the interval(s) are used, as per the Purchases Acknowledgement Form signed at the time of purchase")

Welk is a sophisticated member of the timeshare industry. It is well aware of how timeshare assessments work. And Welk specifically agreed to the obligation to pay assessments "whether or not [it] use[s] [its intervals] in any particular year." Trial Ex. 158, at page 4. Welk is reneging on the commitment it made to the Owners Association when Welk purchased its Aviara intervals.

Welk is also violating the Aviara CC&R's by failing to pay the assessments due for all of the intervals owned by Welk. An entire "article" of the Aviara CC&R's, consisting of about three single-spaced typewritten pages, spells out the manner by which assessments are determined, and explains the owners' obligations to pay assessments. (Trial Ex. 1000, at pages 31 – 34) Section 5.1 of the CC&R's states, in part: "No Owner may waive or otherwise avoid liability for the Assessments by non-use of his Residence Club Interval or any part thereof or any abandonment thereof."

The assessments are the life blood of a timeshare resort. A resort is able to function as intended only when owners pay their assessments. A substantial shortfall in assessment income results in the resort having to cut or eliminate products and services. The testimony in this case credibly establishes that the Aviara Owners Association is on the verge of cutting personnel and services as a result of Welk's failure to pay the more than $1 million in past due assessments.

To put Welk's withholding of more than $1 million in context, the total amount of assessments received each year by the Aviara Owners Association is about $16 million. (Trial Ex. 1016, at page 16) So, Welk is depriving the Aviara Owners Association of about 6% of the Association's normal assessment income.

Not surprisingly, Welk requires its own timeshare members to pay assessments regardless of whether those members actually use their Welk timeshares in any given year. For example, Welk advises its members: "You have a duty to pay assessments even if you are unsuccessful in reserving an accommodation." Trial Ex. 264, at page 5. Welk further advises its timeshare members: "Failure to pay assessments levied by the time-share association will prevent you from occupying and using the time-share accommodation and, if you are purchasing, result in a lien on your interest." Trial Ex. 264, at page 4.

Before Welk acquired any Aviara intervals, it made presentations to the Aviara Owners Association, in which Welk pitched the advantages to the Owners Association of Welk becoming an owner of Aviara intervals. One of the advantages pitched by Welk was that Welk's ownership of Aviara intervals would assure the Aviara Owners Association of timely and complete payment of assessments. *See, e.g.,* Trial Ex. 72, at page 2 (an email from a Welk Senior Vice President to representatives of the Owners Association, stating that one of the benefits of Welk acquiring Aviara intervals was that Welk's ownership would "insure full payment of annual fees from a single source").

Welk's Senior Vice President in charge of the acquisition of Aviara intervals told Aviara representatives that Aviara could expect to get "guaranteed" assessment payments from a well-resourced entity, and the Association wouldn't have to worry about collecting assessments from numerous owners. (Trial testimony of Kris Jamtass)

Contrary to the representations made by Welk before Welk purchased the Aviara intervals, Welk is now attempting to use its economic muscle to coerce the Aviara Owners Association to capitulate to Welk's demand that the Association not limit the way that Welk (or any other owner of multiple intervals) can

reserve and use the Aviara resort. This type of attempted economic coercion is particularly unseemly here, where Welk made specific commitments and representations to the Aviara Owners Association that Welk would not do so.

By these actions, Welk "has violated conscience, good faith or other equitable principle[s] in [its] prior conduct" pertaining to the matters that are in dispute in this case. *Pond v. Insurance Co. of North America, supra,* 151 Cal.App.3d at 289 – 290. Welk has engaged in "*unconscientious conduct* . . . which is connected to the controversy.'" Id. at 291. Welk has unclean hands.

- Welk is violating the Aviara CC&R's and other written agreements by renting its Aviara intervals to its customers for profit.

The Aviara CC&R's provide: "Use and occupancy of the Residence Club Project is limited to private, residential use pursuant to procedures for reserving usage by Owners, Permitted Users and Exchange Users and non-residential and/or commercial use of the Residence Club Project by any Owner is prohibited . . . ." Trial Ex. 1000, at page 24, section 2.5.

The Court finds that Welk's conduct here runs afoul of this provision. Welk is selling timeshare "points" to customers, and then charging the customers those "points" to use the Aviara intervals. This is a prohibited commercial use of the Aviara "Residence Club Project."

Welk also intends to "deposit" some of its Aviara intervals with an exchange company to attempt to make a profit. This is also a prohibited commercial use of the Aviara "Residence Club Project."

Prior to purchasing any Aviara intervals, Welk had notice that its intended use of the Aviara intervals would be inconsistent with Aviara's CC&R's. *See e.g.,* Trial Ex. 140.

The Court finds that Welk's conduct in this regard warrants the application of the unclean hands doctrine.

This conclusion -- that Welk is acting with unclean hands by renting its Aviara intervals to its timeshare customers -- is bolstered by Welk's commitment to follow the terms contained the "purchaser's acknowledgement forms" executed by Welk in connection with its acquisition of Aviara intervals. *See e.g.,* Trial Ex. 158, at page 4.

The "purchaser's acknowledgement forms" signed by Welk state: "The Residence Club Interval being sold is a fee simple deeded ownership and is being represented to the public as something to be used by you, your family and guests. It is not intended as something from which you may expect a profit or financial return in any way. You acknowledge that no representation of investment potential of the Residence Club Interval has been made, including potential for rental income, resale at a profit or tax benefit." Trial Ex. 158, at page 4.

The Aviara intervals owned by Welk are not being used by Welk, Welk's "family" and Welk's "guests," as those terms are typically understood. Welk is using its ownership of Aviara intervals to market products and services to Welk's 50,000 existing timeshare customers, and to potential new timeshare customers. *E.g.,* Trial Ex. 10 (Welk's Senior Vice President states, "We also know that adding the amazing Four Seasons Aviara name recognition and quality product to our program will add strength as we market for new owners.")

Welk does not dispute that, as a for-profit enterprise, it is trying to make a profit by selling timeshare

points to its customers, and then charging its customers those points for staying at the Aviara resort.

The doctrine of "unclean hands" is based in equity. While Welk has constructed plausible technical arguments for why its conduct allegedly does not violate the Aviara CC&R's and the commitments made by Welk when Welk signed the purchaser's acknowledgement forms, Welk's arguments fail as a matter of equity. Welk is attempting to make a profit off of its Aviara intervals by renting those intervals to its customers and/or by depositing those intervals with an exchange company. The CC&R's and the purchaser acknowledgment form demonstrate a clear intent to prohibit this kind of use of Aviara intervals.

The Court finds that Welk is violating the letter and the spirit of the CC&R's and the commitments made by Welk when Welk signed the purchaser's acknowledgement forms. This conduct warrants the application of the unclean hands doctrine in this case.

- Balancing the equities

The unclean hands doctrine is an equitable doctrine. Before applying the doctrine in any particular case, the Court should weigh and consider all of the equities to determine if it is appropriate to apply the doctrine.

The Court has carefully considered whether the doctrine should be applied to any or all of Welk's claims in this case. The Court has concluded that, on balance, it is fair and equitable to apply the doctrine to all of Welk's claims.

As a practical matter, all of Welk's claims that assert intentional wrongful conduct or bad faith conduct on the part of the Owners Association fail for other reasons unrelated to the unclean hands doctrine. In particular, the evidence does not establish that the Owners Association engaged in any intentional misconduct or in any bad faith conduct associated with the matters in dispute in this case.

On the contrary, the evidence establishes that the Owners Association's volunteer board acted reasonably and in good faith in connection with all of the matters at issue in this case. Similarly, the Four Seasons management company hired by the board to manage the Aviara resort acted reasonably and in good faith in implementing the policies established by the board.

Long before Welk came onto the scene, the most common complaint made by Aviara timeshare owners was that the owners had difficulty being able to reserve, and use, the resort for the time periods that they desired. In the timeshare industry generally, and at Aviara in particular, there are certain high demand periods, when owners enjoy using their timeshare rights. The high demand periods include many of the major holidays: Independence Day, Thanksgiving Day, New Year's Day, Christmas Day, Memorial Day, Labor Day, and President's Day. The high demand periods also include the summer months and spring break weeks.

Before Welk was ever identified as a potential purchaser of Aviara intervals, the Owners Association asked its management company to investigate options for addressing the owners' complaints about the difficulty of obtaining reservations for peak demand periods. The rule that is the subject of this lawsuit was proposed by the management company to the Association's board of directors. The rule was intended to, and probably does, prevent an exacerbation of the pre-existing problem of owners having difficulty obtaining reservations for peak demand periods. The rule was intended to, and probably does, give all of the Aviara timeshare owners a reasonable opportunity to obtain reservations for high demand periods.

In the absence of the rule, or some other mechanism for allocating reservations for high demand periods, owners of large numbers of Aviara intervals, whether Welk or anyone else, could monopolize the high demand periods, to the detriment of all other owners.

For example, in the absence of a limitation on making reservations for concurrent use of Aviara intervals, an owner of a large number of Aviara intervals could book the entire Aviara resort for the 4th of July week or even the entire month of July, and thereby squeeze out all other owners from having the opportunity to use their own intervals during those high demand periods.

The absence of a reasonable limitation on the number of concurrent reservations would be especially problematic in this particular instance because Welk has a contractual arrangement with an independent timeshare exchange company, whereby Welk can "deposit" timeshare intervals with the exchange company to allow other timeshare owners throughout the world to use the intervals for a fee. If an Aviara interval owner – whether Welk or anyone else -- could reserve large numbers of concurrent intervals for peak demand periods, and then "deposit" those intervals with an exchange company for an intended profit, that would probably destroy the value of Aviara intervals owned by everyone else. Few people would want to own a timeshare which was not available for use when desired.

In short, the limitation adopted by the Association in this instance is reasonable, and was enacted in good faith for the benefit of all Association members.

The majority of claims pursued by Welk in this case allege that the rule adopted by the Association, and the procedures used to adopt the rule, violate the Association's governing documents and/or statutes governing timeshare operations. In this regard, Welk's assertions rely primarily on alleged technical (or hyper-technical) interpretations of the governing documents and statutes. Assuming, without deciding, that any such violations actually occurred, the violations appear to be *de minimis* in nature. In addition, any such violations, if they occurred, did not harm Welk because Welk has never actually sought to use all of the Aviara intervals it has purchased.

When the nature and merits of Welk's claims are weighed against Welk's inequitable conduct, the Court is satisfied that it is proper to apply the unclean hands doctrine to all of Welk's claims in this case.

- Consent

Civil Code section 3515 states: "He who consents to an act is not wronged by it."

This principle is applicable here.

In connection with the purchases of Aviara intervals made after the adoption of the rule, Welk executed written agreements acknowledging, confirming and *consenting* to the rule. *E.g.,* Trial Ex. 158. Those agreements state: "Buyer [Welk] acknowledges, confirms, and *consents to* Letter I. (as shown below) of Section III (Regular Use Reservations) of the Rules and Regulations for Four Seasons Residence Club Aviara revised as of 7/26/16." Trial Ex. 158, at page 3 (emphasis added)

The rule is quoted verbatim in the written agreement, immediately following Welk's consent, as follows: "The maximum number of 'concurrent' Intervals which can be reserved in any use week is six regardless of the 13 or 12 month reservation windows (I.e. 2 for Friday check-in, 2 for Saturday check-in, and 2 for Sunday check-in, or 5 for Friday check-in and 1 for Sunday check-in), unless approved by the Board." Trial Ex. 158, at page 3

This "consent" provision is not a boilerplate provision buried deep in the middle of a voluminous document. It is prominently featured on a single page among the purchase agreement documents executed by Welk.

Welk was a sophisticated purchaser of the Aviara intervals. Welk's in-house counsel was thoroughly involved in Welk's acquisition of Aviara intervals. With respect to at least some of the intervals purchased by Welk, Welk was involved in a dispute with the Owners Association concerning the propriety of the rule at the time of Welk's written consent to the rule, and Welk was represented by counsel in connection with that dispute.

Welk made a knowing, intelligent and voluntary decision to consent in writing to the rule that is the subject of this lawsuit. Welk did not have to consent. Welk could have refused to consent, and gone to court to seek appropriate relief. Or it could have refused to sign the consent, to see if Welk could nevertheless proceed with the acquisition of additional Aviara intervals in the absence of consent. Or it could have delayed its acquisition of additional Aviara intervals until after this lawsuit had run its course.
In accordance with Civil Code section 3515, the Court finds that Welk has consented to the rule. In light of Welk's consent, Welk "is not wronged" by the Owner Association's adoption and enforcement of the rule.

Therefore, Welk is entitled to no relief on any of its causes of action.

- Failure of proof as to damages

All of Welk's causes of action, except the twelfth cause of action for violation of California's unfair competition law, assert that Welk has incurred monetary damages. Those causes of action seek an award of monetary damages from the Owners Association. The Court finds that Welk has failed to sustain its burden of proving any monetary damages.

In a nutshell, the evidence establishes that: (1) Welk has never sought to make reservations for all of its Aviara intervals, so it has never been prevented from using its Aviara intervals; (2) other than a "blanket waiver" request, by which Welk requested that the rule not be applied to Welk at all, the Owners Association has granted every other waiver request ever made by Welk for use of an interval for a specified time period; (3) if Welk would have used a combination of reservations for consecutive intervals and concurrent intervals, and if Welk would spread out its reservations throughout the entire year (including non-peak periods) and would have requested waivers for those periods, Welk could have made reservations for all of its Aviara intervals; and (4) Welk has insufficient demand among its members to use all of the Aviara intervals Welk has purchased.

Welk began acquiring Aviara intervals in 2016. In 2016, Welk made reservations for 19 intervals, and Welk customers used 15 of those reservations. (Trial Ex. 1016, at page 6)

In 2017, Welk made reservations for 168.5 intervals, and Welk customers used 145 of those reservations. (Trial Ex. 1016, at page 6)

In 2018, Welk made reservations for 216.5 intervals, and Welk customers used 191 of those reservations. (Trial Ex. 1016, at page 6 – 7)

Recently, Welk has begun to take steps to make reservations for 312 intervals per year but it appears that Welk did not have a system in place to make reservations for that many intervals during 2017 and

2018.

The Court is not entirely sure of the reasons why Welk has made, and used, so relatively few reservations over the past three years. The Court infers from the evidence that the main reason why Welk has not sought to use all of its Aviara intervals is a lack of demand among Welk's own timeshare owners for staying at the Aviara resort, in light of the relatively high price, in Welk timeshare "points," charged by Welk for its members to stay at the resort. Further, the Court infers that Welk lacks sufficient customer demand to actually use even the 312 intervals it is currently reserving for future use.

In any event, Welk's claim for monetary damages is based on a purely hypothetical inability to use or make reservations for all of its intervals. The evidence shows that Welk has never sought to use or make reservations for all of its intervals. As such, the limitation on the number of concurrent reservations has not caused any actual damages to Welk.

Because Welk has failed to prove any monetary damages, all of its causes of action seeking an award of monetary damages fail.

- Credibility findings

Several Welk witnesses testified, in essence, that Welk first learned in December 2016 of the limitation on the number of concurrent reservations that could be made per week at the Aviara resort. The Court believes that testimony is plainly incorrect. The testimony is contradicted by the clear weight of the evidence, including an internal Welk email indicating that Welk was aware of the limitation "since the beginning" of its involvement with Aviara. Trial Ex. 6. As mentioned above, Welk acquired its first Aviara intervals in August 2016.

The Court doubts the overall credibility of every Welk witness who testified, in essence, that Welk was unaware of the limitation until December 2016. To the extent that certain individuals within the Welk organization may have been unaware of the limitation, or unaware of the potential significance of the limitation, the Court believes that that unawareness stems from a lack of communication within the Welk organization, not any purported effort on the part of the Owners Association to conceal the limitation.

The Court specifically finds that the following witnesses were not credible: Ann Ellis and Melissa Toloumu.

The Court specifically finds that the following witnesses were credible: Larry Clemens, Dora Joyner, Nathan Learner and Demetrio Ortega.

ADJUDICATION OF THE CAUSES OF ACTION IN WELK'S COMPLAINT

The Court has already determined in the analysis above that Welk is not entitled to prevail on any of its causes of action due to Welk's unclean hands, consent and failure to prove damages. As such, it is unnecessary to address in detail each of Welk's twelve causes of action. However, certain of those causes of action have other fatal deficiencies which are readily apparent to the Court. The Court will briefly mention those deficiencies below. In the interest of conserving everyone's scarce resources, the Court will skip over some causes of action and some elements of some causes of action, where more detailed analysis might otherwise have been necessary in the absence of the dispositive issues mentioned above.

- Welk's first, second and third causes of action for breach of contract (breach of the CC&R's)

"To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4)

the resulting damage to the plaintiff." *Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186.

Assuming hypothetically that the Owners Association breached the CC&R's in some fashion, Welk failed to prove elements # 2 and # 4. In particular, the evidence establishes that Welk has not performed its obligations under the CC&R's, and Welk has no valid excuse for nonperformance. Among other things, Welk has not paid the assessments due on its Aviara intervals.

- Welk's seventh cause of action for breach of the covenant of good faith and fair dealing

The elements of a claim for breach of the covenant of good faith and fair dealing have been identified as follows: (1) plaintiff and defendant entered into a contract, (2) plaintiff did all, or substantially all, of the significant things that the contract required plaintiff to do, or plaintiff was excused from having to do those things, (3) defendant unfairly interfered with plaintiff's right to receive the benefits of the contract, and (4) plaintiff was harmed by defendant's conduct. Judicial Council of California Civil Jury Instructions (CACI), Instruction No. 325.

Welk failed to prove elements # 2, # 3 and # 4.

As to element # 2, Welk has failed to pay the assessments on its Aviara intervals, and Welk is not excused from that obligation.

As element #3, the Owners Association did not unfairly interfere with any of Welk's rights. The Owners Association acted in good faith in adopting the rule that is the subject of this lawsuit. The rule itself is reasonable, fair and neutral. It is designed to protect the rights of all Aviara interval owners to have a reasonable opportunity to stay at the Aviara resort during peak demand periods. The rule is designed to prevent an exacerbation of an on-going problem with Aviara owners having difficulty obtaining reservations for high demand periods.

- Welk's eighth cause of action for breach of fiduciary duty

"A fiduciary relationship is any relationship existing between parties to a transaction wherein one of the parties is duty bound to act with the utmost good faith for the benefit of the other party." *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29 (internal quotation marks omitted) In the case of a property owners association in a common interest development, the association must act for the benefit of all of the owners.

The evidence in this case establishes that the Owners Association and its volunteer board of directors fulfilled their duty. They acted with the utmost good faith for the benefit of all of the members of the association.

The evidence does not establish any breach of fiduciary duty by the Owners Association or its volunteer board members.

- Welk's ninth cause of action for fraud by concealment

"[T]he elements of an action for fraud and deceit based on a concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." *Boschma v. Home Loan Center, Inc.* (2011) 18 Cal.App.4th 230, 248.

Welk did not prove any of these elements.

With respect to element # 1, the Court is not persuaded that the Owners Association concealed or suppressed any material facts. Welk asserts that the Owners Association was in the process of formulating the rule while Welk was investigating the possibility of purchasing Aviara intervals, and the Owners Association concealed this fact from Welk. Welk relies heavily on the suspiciousness of the timing of these events – the rule was adopted on July 26, 2016, while Welk completed its first acquisition of Aviara intervals on August 2, 2016. Welk asserts that the Owners Association concealed the fact that the rule had been adopted until December 2016.

These allegations are not supported by the evidence. Welk's own internal emails show that it knew of the substance of the rule "since the beginning" when Welk first began making reservations at the Aviara resort. Trial Ex. 6. *See also* Trial Exs. 5 and 8 (emails from representatives of Aviara Four Seasons to representatives of Welk concerning the procedures for making reservations at the Aviara resort, including the limitation on the number of concurrent reservations) The Four Seasons management company representatives met with Welk representatives in August 2016, and explained the reservations procedures, including the limitation on the number of concurrent reservations.

With respect to element # 2, the Court is not persuaded that the Owners Association had a duty to disclose its consideration of the rule, or the adoption of the rule, to Welk at any time prior to Welk's acquisition of the Aviara intervals. Welk acquired its Aviara intervals on the open market from third parties, not from Aviara. To the extent that the Owners Association provided some information to Welk in meetings and discussions between the two parties before Welk's purchase, there was no intentional nondisclosure of information by the Association, and no deception.

With respect to element # 3, the evidence fails to establish any intentional concealment by the Owners Association or an intent on the part of the Owners Association to defraud Welk.

With respect to element # 4, Welk did not prove that it would have acted differently in the absence of the alleged concealment. On the contrary, after Welk supposedly learned of the alleged concealment, Welk continued to buy Aviara intervals on the open market. Welk even continued to buy Aviara intervals after it filed this lawsuit for concealment.

- Welk's eleventh cause of action for negligent misrepresentation

"The elements of negligent misrepresentation are (1) a misrepresentation of a past or existing material fact, (2) made without reasonable ground for believing it to be true, (3) made with the intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 196.

According to Welk's complaint, the alleged misrepresentation is that "Aviara had no limitation on the number of intervals that could be used at one time." Second Amended Complaint, at paragraph 97.

Welk did not prove any of the elements of this cause of action.

As to element # 1, the Court is not persuaded that the Owners Association ever represented that Aviara had no limitation on the number of intervals that could be used at one time.

As to element # 4, there was no reliance by Welk on any purported misrepresentations made by the

Owners Association concerning limitations (or lack thereof) on the use of intervals, as evidenced by the fact that Welk continued to buy Aviara intervals on the open market after Welk was indisputably aware of the limitation, and even after Welk filed this lawsuit.

- Welk's twelfth cause of action for violation of California's unfair competition law

Citing *That v. Alders Maintenance Assn.* (2012) 206 Cal.App.4th 1419, 1426 – 1427, the Association asserts that the unfair competition statute does not apply to it because it is not a "business." The Court need not decide this issue because even if the unfair competition statute applies to the Association, Welk has failed to prove its entitlement to any relief under that statute.

Welk has failed to prove that it is "a person who has suffered injury in fact and has lost money or property as a result of the [alleged] unfair competition." Business & Professions Code section 17204. Welk has never attempted to use all of its Aviara intervals, so it has not suffered injury in fact or lost any money or property.

Assuming hypothetically that the Owners Association engaged in conduct that violates the unfair competition law and Welk has suffered an injury in fact, the Court would nevertheless not issue an injunction against the Association because any alleged violations are *de minimis* in nature and do not warrant an injunction, particularly considering the overall balance of the equities in this case.

Assuming hypothetically that the Owners Association engaged in conduct that violates the unfair competition law and Welk has suffered an injury in fact, the Association did not obtain any profit from its conduct. The Court would not order disgorgement of profits because there are no profits to disgorge.

Similarly, assuming hypothetically that the Owners Association engaged in conduct that violates the unfair competition law, the Court would find that no restitution is warranted under the facts of this case.

ADJUDICATION OF THE OWNERS ASSOCIATION'S CROSS-COMPLAINT FOR DECLARATORY RELIEF

The Owners Association's cross-complaint seeks a judicial determination that (1) "the [Association's] adoption of the Rule [limiting the number of concurrent reservations to six per week] was in accordance with [the Association's] obligations under the Vacation Ownership and Time Share Act of 2004"; and (2) "the Rule, as adopted on July 26, 2016 is valid and enforceable as against [Welk]."

Based on the analysis set forth above, the Court grants the Owner Association's request for declaratory relief as to the second item. The rule limiting the number of concurrent reservations is valid and enforceable as against Welk. This declaratory relief is appropriate in light of the fact that all of Welk's causes of action challenging the rule have been found to be without merit. The relief is also appropriate in light of Welk's written, voluntary consent to the rule.

Having granted the Owners Association's request for declaratory relief as to the second item, there is no need for any further declaratory relief. "The court may refuse to exercise the power [of granting declaratory relief] where its declaration or determination is not necessary or proper at the time under all the circumstances." Code of Civil Procedure section 1061.

Here, the Court's adjudication of all of Welk's causes of action and the Court's declaration of the validity and enforceability of the rule as against Welk resolves the entirety of the dispute between Welk and the Association. The Court is not required to give advisory opinions on issues that are not otherwise determinative of the actual dispute between the parties.

CONCLUSION

The Court will enter a judgment containing the following terms:

- Plaintiff Welk Resort Group, Inc. shall take nothing on its complaint against defendant Aviara Residence Club Owners Association;
- The Court denies all of the relief requested by plaintiff Welk Resort Group, Inc. in plaintiff's Second Amended Complaint;
- The Court finds and declares that the Aviara Residence Owners Association's rule limiting the number of so-called "concurrent reservations" to six per week unless otherwise approved by the Association's board of directors is valid and enforceable against Welk Resort Group, Inc.;
- Defendant Aviara Residence Club Owners Association is the prevailing party in this case;
- Defendant Aviara Residence Club Owners Association shall recover its costs of suit from plaintiff Welk Resort Group, Inc.; and
- Any request for attorneys fees shall be made by noticed motion.

IT IS SO ORDERED.

Robert P. Dahlquist

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Judge Robert P Dahlquist