

2023 WL 4872906

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United States District Court, W.D. Texas, Waco Division.

The GROUND GUYS SPV, LLC, Plaintiff,  
v.  
SHADOW ENVIRONMENT, LLC, and [Andrew Choi](#), Defendants.

CIV NO. 6:23-cv-00018

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Signed July 11, 2023

#### Attorneys and Law Firms

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[Jason E. Wright](#), Wright Commercial Litigation, McKinney, TX, for Defendant [Andrew Choi](#).

#### **REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE**

[JEFFREY C. MANSKE](#), UNITED STATES MAGISTRATE JUDGE

**\*1**

**TO: THE HONORABLE ALAN D. ALBRIGHT,  
UNITED STATES DISTRICT JUDGE**

This Report and Recommendation is submitted to the Court pursuant to [28 U.S.C. § 636\(b\)\(1\)\(C\)](#), [Fed. R. Civ. P. 72\(b\)](#), and [Rules 1\(f\)](#) and [4\(b\)](#) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges. Before the Court are Defendants Shadow Environment, LLC and Andrew Choi's Joint Notice of Removal (ECF No. 1) and Plaintiff The Ground Guys SPV, LLC's Motion to Remand (ECF No. 8). For the reasons discussed below, the undersigned **RECOMMENDS** that Plaintiff's Motion to Remand under [28 U.S.C. § 1447\(c\)](#) be **GRANTED**.

#### **I. BACKGROUND**

The Ground Guys is a franchisor of lawncare, landscaping, and related maintenance services. Pl.'s Mot. to Remand at 1. Plaintiff is a resident of Texas, and its principal place of business is in Waco, Texas. Defs.' Joint Notice of Removal at ¶ 6. Shadow Environment, LLC, a California corporation, and Andrew Choi, a California resident, entered a Franchise Agreement with Plaintiff on November 16, 2021. Pl.'s Mot. to Remand at 1; Defs.' Joint Notice of Removal at ¶ 8. The Franchise Agreement was assigned to Shadow Environment, LLC with Andrew Choi as the personal guarantor. Pl.'s Mot. to Remand at 1. The Franchise Agreement includes a forum selection clause wherein Defendants waived their right of removal. *Id.* at 3 (citing Ex. A, Franchise Agreement, § 14.H). Specifically, both parties "waive[d] the right to remove any action brought in the state court of McLennan County, Texas to a federal district court." *Id.* at Ex. A, Franchise Agreement, § 14.H. The Franchise Agreement contains an addendum signed by Defendant Andrew Choi on November 16, 2021, and by Plaintiff on November 18, 2021. *Id.* at Ex. A,

Franchise Agreement, Schedule J. The Addendum only discusses rights concerning termination, transfer, and non-renewal of the franchise. *Id.* It indicates that California law applies when a conflict between the Franchise Agreement and California law exists in these areas. *Id.*

Plaintiff sued Defendants on November 15, 2022, in the 414<sup>th</sup> Judicial District Court of McLennan County, Texas. Defs.’ Joint Notice of Removal at ¶ 1. Plaintiff alleges that Defendants breached the Franchise Agreement causing Plaintiff to suffer monetary damages. *Id.* at ¶ 2. Defendants were served on December 13, 2022. *Id.* at ¶ 3.

Defendants removed this case to federal court on January 11, 2023. *See generally* Defs.’ Joint Notice of Removal. Defendants allege this Court has subject matter jurisdiction because there is complete diversity of citizenship among the parties and the amount in controversy is met pursuant to 28 U.S.C. § 1332. *Id.* at ¶ 6. Defendants also allege they did not waive the right to remove this action to federal court. *Id.* at ¶ 14.

## II. LEGAL STANDARD

Plaintiffs may file a motion to remand under 28 U.S.C. § 1447(c) if they believe that removal to federal court was improper. Plaintiffs can seek remand for lack of subject matter jurisdiction, a procedural defect in removal, or both. *See Baris v. Sulpico Lines, Inc.*, 932 F.2d 1540, 1543 (5th Cir. 1991). Plaintiffs can move to remand for lack of subject matter jurisdiction at any time. *See id.* at 1543–44.

\*2 The party seeking removal bears the burden of proving that removal was proper. *Tex. Brine Co. v. Am. Arb. Ass’n*, 955 F.3d 482, 485 (5th Cir. 2020). Defendants can generally remove any state court civil action for which the federal district courts have original jurisdiction. 28 U.S.C. § 1441. To remove a state court civil action, defendants must file a notice of removal in the federal district and division where the state court action is proceeding. 28 U.S.C. § 1446. The notice of removal must include a short and plain statement of the grounds for removal along with copies of all processes, pleadings, and orders served upon the defendants. *Id.*

Defendants generally must remove state court civil actions within thirty days of receipt of service of the initial pleading. *Id.* If the face of the initial pleading does not indicate that defendants can remove the case—but a subsequently amended petition, motion, order, or other paper allows defendants to ascertain that the case is removable—defendants can remove within thirty days from service of that amended petition, motion, order, or other paper. *Id.* In any event, all properly joined and served defendants must join or consent to removal. *Id.*

Several procedural removal requirements are unique for diversity of citizenship cases. For diversity of citizenship cases, the plaintiff’s good faith demand controls the amount in controversy. *Id.* Defendants may not remove a state court action solely based on diversity of citizenship more than one year after the plaintiff has commenced the state court action unless the district court finds that the plaintiff acted in bad faith to prevent removal. *Id.* If diversity of citizenship is the defendants’ sole basis for removing a state court action, the defendants may not properly remove the action if any properly joined and served defendant is a citizen of the forum state. 28 U.S.C. § 1441.

## III. ANALYSIS

Plaintiff filed this Motion to Remand, arguing that Defendants waived their right of removal in the Franchise Agreement. Pl.’s Mot. to Remand at 3. Plaintiff contends that the Franchise Agreement signed by both parties contains a forum selection clause and that remand is proper and consistent with this Court’s prior interpretations of similar provisions. *Id.* at 3, 6.

Defendants argue that this Court has subject matter jurisdiction as there is diversity of citizenship and the amount in controversy is met. Defs.’ Joint Notice of Removal at ¶ 6. Further, Defendants argue the Addendum to the Franchise Agreement invalidates the forum selection provision. Defs.’ Resp. to Pl.’s Mot. to Remand (ECF No. 10) at 2–3. Defendants reference a section of the Addendum referring to the California Franchise Relations Act that provides rights to the franchisee relating to the termination, transfer, or non-renewal of a franchise. *Id.* at 3. The Addendum further states that California law will control if a franchise agreement provision is inconsistent with California law. *Id.* Defendants claim the forum selection clause in the Franchise Agreement is inconsistent with California law. *Id.* Therefore, Defendants argue, California law controls, voiding the forum selection clause. *Id.*

#### **A. California law does not apply because there is no conflict of law.**

The Fifth Circuit recently held that in a diversity case, the enforceability of a forum selection clause is governed by federal law and the clause's interpretation is governed by the law of the forum state. *Dynamic CRM Recruiting Sols., L.L.C. v. UMA Educ., Inc.*, 31 F.4th 914, 917–18 (5th Cir. 2022). The forum state in *Dynamic CRM Recruiting Sols.* was Texas. Under Texas law, courts interpreting contracts are to determine the parties’ intent as expressed. *Id.* at 918. All parts of the contract are read together and, in some instances, surrounding facts and circumstances are used to aid interpretation but cannot be used to alter or contradict the terms. *Id.*

\*3 Like *Dynamic*, the forum state in this case is Texas. Therefore, Texas contract law applies. Under Texas law, courts may not rewrite contractual provisions by removing terms or adding terms the parties did not originally consent to but instead must ascertain the parties’ intent as expressed. *Schneider v. YouTube, LLC*, No. 20-CV-04423-JD, 2023 WL 114226, at \*6 (N.D. Cal. Jan 5, 2023) (internal citation omitted); *URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 757 (Tex. 2018). The Addendum does not apply here because there was no issue regarding the franchise's termination, transfer, or non-renewal. Further, even if the Addendum applied, there is no actual conflict between Texas and California law.

California does not allow for the rewriting of a contract. Just as in Texas, a California court may not rewrite a contract by interpreting away clauses the parties agreed to. *Hinckley v. Bechtel Corp.*, 41 Cal. App 3d 206, 211 (Ct. App. 1974). Further, Defendants have not pointed to case law or a California statute indicating that Defendants cannot waive the right to remove. In case law the Court found, a California court granted a motion to transfer a case out of California after finding that a forum selection clause was valid. *Rowen v. Soundview Commc'ns, Inc.*, No. 14-CV-05530-WHO, 2015 WL 899294, at \*7 (N.D. Cal. Mar. 2, 2015). Accordingly, the forum selection clause is enforceable.

#### **B. Defendants’ Notice of Removal is improper.**

Parties to a contract can waive a right to remove so long as the contract clearly states that the other party has the “right to choose the forum” in which a dispute will be heard. *Waters v. Browning-Ferris Indus., Inc.*, 252 F.3d 796, 797 (5th Cir. 2001) (citing *City of Rose City v. Nutmeg Insurance Co.*, 931 F.2d 13, 16 (5th Cir. 1991)). The defendant in *Waters* argued the forum selection clause was ambiguous and only provided the plaintiff the initial choice of where to file suit. *Id.* at 798. However, the court affirmed that the forum selection clause gave the plaintiff the right to choose the forum because a waiver of the right to removal need not be explicit. *Id.* at 797. The *Waters* court concluded that the parties had negotiated the right to forum selection, and a successful removal would revoke the plaintiff's choice of forum. *Id.* at 798.

The forum selection clause in the Franchise Agreement between Plaintiff and Defendants expressly waives both parties’ right of removal. Pl.’s Mot. to Remand at Ex. A, Franchise Agreement, § 14.H (“The parties specifically waive the right to remove any action brought in the state court of McLennan County, Texas to a federal district court.”). The forum selection clause allows the filing party to select the forum and precludes removal.

Defendants argue that the Addendum modified the Franchise Agreement, and that Plaintiff did not mention the Addendum in the opening brief because they knew it was an issue for jurisdiction, venue, and removal. Defs.’ Opposed Mot. for Leave to File Surreply in Opposition to Pl.’s Mot. to Remand (ECF No.14) at 2. Defendants are correct that Plaintiff omitted the Addendum

from its opening brief; however, the omission of the Addendum does not change the forum selection clause. The Addendum is limited to termination, transfer, or non-renewal of the franchise agreement; none are at issue here. Pl.'s Mot. to Remand at Ex. A, Franchise Agreement, Schedule J; Pl.'s Reply in Support of Mot. to Dismiss (ECF No. 13) at 3. The Court must interpret the contract as written; therefore, Defendants removal is improper, and this case should be remanded to the 414<sup>th</sup> District Court in McLennan County, Texas.

#### IV. CONCLUSION

\*4 After thoroughly reviewing the record, the undersigned **RECOMMENDS** that The Ground Guys SPV, LLC's Motion to Remand (ECF No. 8) be **GRANTED**. Therefore, the undersigned **RECOMMENDS** that this cause be **REMANDED** to the 414<sup>th</sup> Judicial District Court in McLennan County, Texas.

#### V. OBJECTIONS

The parties may wish to file objections to this Report and Recommendation. Parties filing objections must specifically identify those findings or recommendations to which they object. The District Court need not consider frivolous, conclusive, or general objections. See *Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report. See 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc). Except upon grounds of plain error, failing to object shall further bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. See 28 U.S.C. § 636(b)(1)(C); *Thomas*, 474 U.S. at 150-53; *Douglass*, 79 F.3d at 1415.

#### All Citations

Not Reported in Fed. Supp., 2023 WL 4872906