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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ARIEL FREANER,

Plaintiff,

vs.

ENRIQUE MARTIN LUTTEROTH VALLE, an individual; HOTELERA CORAL, S.A. de C.V., a stock company of Baja California, Republic of Mexico; and DOES 1 through 10,

Defendants.

CASE NO. 11CV1819 JLS (MDD)

ORDER (1) GRANTING EX PARTE APPLICATION TO CONFIRM ARBITRATION AWARD; (2) AWARDED DAMAGES ON COUNTERCLAIM FOR BREACH OF CONTRACT; AND, (3) SETTING DEADLINE FOR FILING OF JOINT MOTION FOR FINAL JUDGMENT

Presently before the Court is Defendants Enrique Martin Lutteroth Valle and Hotelera Coral, S.A. de C.V.’s (“Hotelera Coral,” and collectively, “Defendants”) unopposed Ex Parte Application to Confirm Final Award and Modification to Final Award. (Mot. to Confirm Arbit. Award, ECF No. 107.) Also before the Court are the parties’ supplemental filings regarding the amount of damages on Hotelera Coral’s pending breach of contract counterclaim against Plaintiff Ariel Freaner (“Plaintiff,” or “Freaner”). (See Pl.’s Suppl. Br. Re: Damages, ECF No. 103-2; Def.’s Suppl. Br. Re: Damages, ECF No. 104.) Having considered the parties’ arguments and the law, the Court **GRANTS** Hotelera Coral’s motion to confirm the arbitration award and **AWARDS** damages of \$14,139.54 on Hotelera Coral’s

1 counterclaim. As this Order disposes of all remaining issues in this litigation, the
2 Court **SETS** a deadline of September 12, 2014 for the parties to file a joint motion
3 for final judgment.

4 **BACKGROUND**

5 This order incorporates by reference the factual and procedural background as
6 set forth in the Court's prior orders. (*See* Order Granting Motion to Compel
7 Arbitration and Denying Motion to Remand, Nov. 17, 2011, ECF No. 23; Order
8 Denying Motion to Compel Arbitration; Granting in Part and Denying in Part
9 Motion for Partial Summary Judgment, and Setting Deadline for Completion of
10 Pending Arbitration Proceedings, Aug. 22, 2013, ECF No. 93.) A summary of the
11 most relevant facts is presented here only to provide context for the issues discussed
12 below.

13 In this breach of contract case, Freaner sued Hotelera Coral, a hotel and resort
14 located in Baja California, Mexico, seeking compensation for graphic design and
15 advertising services that he provided pursuant to a written agreement reached by the
16 parties in June 2008. (Notice of Removal, Ex. A, ECF No. 1-2.) Hotelera Coral
17 removed the action to this Court and subsequently filed a counterclaim, alleging that
18 Freaner breached his own obligation to deliver marketing materials and services
19 pursuant to a subsequent agreement that was in effect between July 2009 and June
20 2010. (Counter Compl., ECF No. 7.)

21 The Court referred Freaner's claims to arbitration, but retained jurisdiction
22 over Hotelera Coral's counterclaim. (Order, Nov. 17, 2011, ECF No. 23; Order,
23 Aug. 22, 2013, ECF No. 93.) In light of Freaner's acknowledgment that he failed to
24 complete performance of the July 2009 contract, the Court entered summary
25 judgment in favor of Hotelera Coral as to liability only. (Order, Aug. 22, 2013, ECF
26 No. 93.) A genuine factual issue remained as to the appropriate amount of damages,
27 however, and the Court ordered the parties to provide supplemental briefing and
28 evidence regarding that issue. Freaner filed his supplemental briefing regarding

1 damages on February 20, 2014. (Pl's Suppl. Br. Re: Damages, ECF No. 103-2.)
2 Hotelera Coral filed its supplemental materials on March 5, 2014. (Def.'s Suppl. Br.
3 Re: Damages, ECF No. 104.)

4 Freaner's claims were resolved in an arbitral proceeding conducted under the
5 aegis of the American Arbitration Association's International Centre for Dispute
6 Resolution. The arbitrator, Richard W. Page, issued a final award on December 16,
7 2013 absolving Hotelera Coral of liability. (Mot. to Confirm Arbit. Award, Ex. A,
8 ECF No. 107-1.) The arbitrator determined that Freaner failed to prove that he had
9 obtained prior written approval for additional services as required by the terms of the
10 parties' agreement. (*Id.*) The arbitrator subsequently entered a modification of the
11 final award on February 26, 2014, awarding attorney's fees and costs to Hotelera
12 Coral in the amount of \$105,714. (Mot. to Confirm Arbit. Award, Ex. B, ECF No.
13 107-2.)

14 The parties filed a Joint Status Report on March 27, 2014, indicating that they
15 had reached a stipulation as to confirmation of the arbitral award. (Status Report,
16 ECF No. 105.) Subsequently, Freaner declined to sign onto a joint motion
17 requesting confirmation of the award by this Court. Hotelera Coral filed the present
18 ex parte application seeking confirmation of the award on April 16, 2014. (Mot. to
19 Confirm Arbit. Award, ECF No. 107.) Freaner has not filed a response or
20 opposition to Hotelera Coral's ex parte application and there is no indication that he
21 has withdrawn his earlier stipulation to confirmation of the arbitral award.

22 DISCUSSION

23 1. Ex Parte Application to Confirm Arbitration Award

24 The Court referred Freaner's breach of contract claims to arbitration because
25 the June 2008 printed contract between the parties contained a binding and
26 enforceable arbitration clause. (Order, Nov. 17, 2011, ECF No. 23.) As the Court
27 previously indicated, the arbitration clause is governed by the Inter-American
28 Convention on International Commercial Arbitration, also known as the Panama

1 Convention. (Order, Nov. 17, 2011, ECF No. 23; Order, Aug. 22, 2013, ECF No.
2 93.)

3 “Confirmation of an arbitration award under the Panama Convention is a
4 summary proceeding.” *Empresa De Telecomunicaciones De Bogota S.A. E.S.P. v.*
5 *Mercury Telco Grp., Inc.*, 670 F. Supp. 2d 1357, 1361 (S.D. Fla. 2009) (citing
6 *American Life Ins. Co. v. Parra*, 269 F.Supp.2d 519, 524 (D.Del. 2003)). “[A]
7 district court’s role in reviewing an arbitral award [rendered under the Panama
8 Convention] is strictly limited.” *Banco de Seguros del Estado v. Mut. Marine*
9 *Offices, Inc.*, 257 F. Supp. 2d 681, 685–86 (S.D.N.Y. 2003). “The court is required
10 to confirm the award ‘unless it finds one of the grounds for refusal or deferral of
11 recognition or enforcement of the award specified in the [Panama Convention].’”
12 *Id.* at 686 (quoting 9 U.S.C. § 302 (incorporating 9 U.S.C. § 207)).

13 Article 5 of the Panama Convention presents “just five possible grounds for a
14 district court to refuse to recognize and execute [an] arbitral decision.” *Empresa*
15 *Constructora Contex Limitada v. Iseki, Inc.*, 106 F. Supp. 2d 1020, 1025 (S.D. Cal.
16 2000). These grounds are:

17 a. That the parties to the agreement were subject to some
18 incapacity under the applicable law or that the agreement is not valid
19 under the law to which the parties have submitted it, or, if such law is
20 not specified, under the law of the State in which the decision was
21 made; or

22 b. That the party against which the arbitral decision has been made
23 was not duly notified of the appointment of the arbitrator or of the
24 arbitration procedure to be followed, or was unable, for any other
25 reason, to present his defense; or

26 c. That the decision concerns a dispute not envisaged in the
27 agreement between the parties to submit to arbitration; nevertheless, if
28 the provisions of the decision that refer to issues submitted to
arbitration can be separated from those not submitted to arbitration,
the former may be recognized and executed; or

d. That the constitution of the arbitral tribunal or the arbitration
procedure has not been carried out in accordance with the terms of the
agreement signed by the parties or, in the absence of such agreement,
that the constitution of the arbitral tribunal or the arbitration procedure
has not been carried out in accordance with the law of the State where
the arbitration took place; or

e. That the decision is not yet binding on the parties or has been
annulled or suspended by a competent authority of the State in which,
or according to the law of which, the decision has been made.

1 Here, Freaner has not opposed confirmation of the arbitration award and there
2 is no indication that any of the aforementioned grounds for refusing to confirm an
3 award are present. Accordingly, the Court **GRANTS** Hotelera Coral's ex parte
4 application and **CONFIRMS** the final arbitration award rendered on December 16,
5 2013, as well as the modification of the final award issued on February 26, 2014,
6 awarding costs and attorney's fees in favor of Hotelera Coral in the amount of
7 \$105,714.

8 **2. Award of Damages on Hotelera Coral's Counterclaim for Breach of**
9 **Contract**

10 In its August 22, 2013 ruling, the Court declined to enter summary judgment
11 as to damages on Hotelera Coral's counterclaim because a genuine factual dispute
12 existed as to the amount of damages to which Hotelera Coral is entitled for Freaner's
13 breach of the parties' agreement. Based on the briefing and evidence submitted by
14 the parties, the Court must now determine the amount of damages.

15 Hotelera Coral fully performed its end of the bargain by paying Freaner
16 \$4,000 per month for the life of the contract, or \$48,000 in all. Freaner materially
17 and substantially breached the contract by failing to deliver on 17 time-sensitive
18 work orders submitted by Hotelera Coral through an online request system
19 developed by Freaner. Hotelera Coral submitted 47 such work orders over the entire
20 contract term.

21 In its original counter complaint, Hotelera Coral alleged that Freaner failed to
22 deliver, *inter alia*, a dynamic website with 3-D functionality, and therefore sought
23 contract damages, including \$53,000 in lost profits and \$26,150 in costs incurred to
24 hire a new web design team. (Counter Compl. ¶¶ 44–47, ECF No. 7.) Hotelera
25 Coral now insists, however, that it no longer seeks lost profits or other consequential
26 damages flowing from Freaner's breach and has instead "limited its request" to
27 reimbursement for the 17 work orders that Freaner did not fulfill. (Def.'s Suppl. Br.
28 Re: Damages 6, ECF No. 104.) According to Hotelera Coral, the sought-after

1 remedy is “akin to disgorgement or restitution.” (*Id.*)

2 The parties apparently agree that California law governs the dispute. The
3 printed contract drawn up by Freaner in July 2009 contains a choice-of-law clause
4 explicitly stating that the contract “shall be construed and enforced in accordance
5 with the laws of California.” (*See* Notice of Lodgment in Supp. of Opp’n to Summ.
6 J., Ex. 3, 2009 Contract, §19e, ECF No. 68-6.) Hotelera Coral has argued that the
7 printed contract never went into effect and that the parties acted pursuant to an oral
8 agreement, but Hotelera Coral relies exclusively on California law in its briefing and
9 has not invoked the law of any other jurisdiction. (*See* Brief in Supp. of Mot. for
10 Partial Summ. J. 6–8, ECF No. 64-8.)¹ Accordingly, the Court will proceed to apply
11 California law in determining the appropriate amount of damages.

12 In California, “in the case of breach of contract, [a plaintiff] may treat the
13 agreement as alive and effective, suing for damages for breach, or he may assume
14 the contract dead and proceed to obtain restitution.” *Jozovich v. Cent. Cal. Berry*
15 *Growers Ass’n*, 6 Cal. Rptr. 617, 626 (1960); *see also Akin v. Certain Underwriters*
16 *At Lloyd’s London*, 44 Cal. Rptr. 3d 284, 287 (2006) (“[Upon a substantial breach, a
17 plaintiff may] treat [a] contract as rescinded and recover damages resulting from the
18 rescission . . . [or] treat the contract as repudiated by the other party and recover
19 damages to which [it] would have been entitled had the other party not breached the
20 contract or prevented . . . performance.”). “Restitution is defined as restoration of
21 the status quo by the awarding of an amount which would put plaintiff in as good a
22 position as he would have been if no contract had been made and restores to plaintiff
23 [the] value of what he parted with in performing the contract.” *Dunkin v. Boskey*, 98
24 Cal. Rptr. 2d 44, 63 (2000) (internal quotations and citations omitted).

25 The remedy of restitution is usually not available to one who has fully

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27 ¹ Hotelera Coral cited California case law in its brief supporting its original
28 motion for partial summary judgment on the breach of contract counterclaim. There are
no cases, statutes, regulations, or other legal authorities discussed in Hotelera Coral’s
most recent briefing regarding the proper amount of damages. (*See* Def.’s Suppl. Br.
Re: Damages, ECF No. 104.)

1 performed his part of a contract. *Oliver v. Campbell*, 273 P.2d 15, 20 (1954).

2 Nonetheless, “full performance does not make restitution unavailable if any part of
3 the consideration due from the defendant in return is something other than a
4 liquidated debt,” such as the rendering of personal services. *Id.* (internal quotations
5 omitted).

6 “A party seeking restitution must generally return any benefit that it has
7 received.” *Dunkin*, 98 Cal Rptr. 2d at 63 (citing *California Federal Bank v.*
8 *Matreyek*, 10 Cal.Rptr.2d 58, 63 (1992)). Where restoration of benefits derived
9 from a defendant’s partial performance of a contract is impossible, restitution is
10 typically still available if the value of the defendant’s performance can be
11 determined and credited against the plaintiff’s recovery. *See, e.g., Landmark Land*
12 *Co., Inc. v. F.D.I.C.*, 256 F.3d 1365, 1373 (Fed. Cir. 2001) (“Because the purpose of
13 restitution is to restore the plaintiff to its status quo ante, the award to the plaintiff
14 must be reduced by the value of any benefits that it received from the defendant
15 under the contract, so that only the actual, or net, loss is compensated.” (citation
16 omitted)); *Am. Sav. Bank, F.A. v. United States*, 62 Fed. Cl. 6, 18 (Fed. Cl. 2004)
17 (“When a contract is breached, restitution requires the parties to return the benefit
18 each received from the other during performance of the contract to prevent an unjust
19 enrichment to one of the parties. . . . The Court must . . . determine the value of the
20 benefit received by [plaintiff from defendant’s partial performance of the
21 contract].”); *David M. Somers & Assocs., P.C. v. Busch*, 927 A.2d 832, 841 (2007)
22 (“The proper measure of damages to apply when a party breaches a contract, and
23 later seeks restitution for partial performance prior to the breach, is the value of the
24 benefit resulting from the partial performance.” (citation omitted)).

25 Here, the remedy that Hotelera Coral is seeking calls for the return of \$48,000
26 paid to Frenner over the life of the contract, reduced to reflect the value of Frenner’s
27 partial performance. Hotelera Coral argues that the value of Frenner’s partial
28 performance must be determined by uniformly apportioning the total contract price

1 to all work orders placed during the contract term. (Def.'s Suppl. Br. Re: Damages
2 5–6, ECF no. 104.) Because Hotelera Coral placed 47 work orders and Freaner
3 completed 30 of them, Hotelera Coral's methodology results in a credit of
4 \$30,638.30 for Freaner's partial performance and a net restitution of \$17,361.70.²

5 Freaner contends, however, that the services that he rendered cannot be valued
6 by evenly apportioning the contract price to the work orders submitted by Hotelera
7 Coral. (Pl.'s Suppl. Br. Re: Damages 2–3, ECF No. 103-2.) Rather, Freaner argues
8 that his performance should be valued by evenly apportioning the contract price to
9 each of Hotelera Coral's "individual requests for work." (*Id.* at 1–2.) Freaner insists
10 that Hotelera Coral ignored his instructions regarding use of the online request
11 system and actually submitted multiple requests for work within each work order.
12 (*Id.* at 2.) Thus, he maintains that it would be unjust to assign an equal portion of
13 the contract price to each work order, as some work orders were substantially more
14 demanding than others. (*Id.* at 2–3.) Freaner's method, properly implemented,
15 indicates that Hotelera Coral submitted 129 individual requests for work and Freaner
16 completed 91 of them, resulting in a credit of \$33,860.46 for Freaner's partial
17 performance and net restitution to Hotelera Coral of \$14,139.54.³

18 The Court agrees with Freaner that it may be unjust to apportion the contract
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20 ² In its briefing, Hotelera Coral requests 17,280 in damages, which appears to be
21 an approximation. (Def.'s Suppl. Br. Re: Damages 6, ECF No. 104.)

22 ³ Although Freaner claims that apportionment of the total contract price should
23 account for 66 items that Hotelera Coral did not request through the online work order
24 system, the Court declines to consider these items in calculating damages. (Pl.'s Suppl.
25 Br. Re: Damages 3–4, ECF No. 103-2; Freaner Decl. ¶ 11, ECF No. 103.) Freaner
26 previously characterized those items as additional services beyond the contract's scope
27 and unsuccessfully attempted to obtain compensation with respect to those services in
28 the arbitral proceeding. (Def.'s Suppl. Br. Re: Damages 7–9, ECF No. 104.)

Moreover, Freaner's calculation of damages contains a clear error. He distributes
the total contract price across all individual requests for work, but then values his partial
performance by reference to the number of work orders completed. (Pl.'s Suppl. Br.
Re: Damages 4, ECF No. 103-2.) His damages calculation therefore reflects non-
delivery of 17 individual requests for work; Freaner completed only 91 individual
requests for work within the contract's scope, however, and failed to deliver on the
remaining 38. (*See* Notice of Lodgment in Supp. of Pl.'s Suppl. Br. Re: Damages, Ex.
Z, ECF No. 104-4.)

1 price evenly with respect to each work order—the contract is likely not divisible on
2 this basis. Freaner’s briefing indicates, however, that the contract price may be
3 evenly apportioned with respect to individual requests for work and the Court sees
4 no reason to reject Freaner’s method of valuing his own services.⁴ Accordingly, the
5 Court will adopt the aforementioned calculation of damages, which results in an
6 award of \$14,139.54, slightly lower than the amount requested by Hotelera Coral.

7 **3. Deadline for Filing for Joint Motion for Final Judgment**

8 In a Joint Status Report filed March 27, 2014, the parties represented that
9 confirmation of the arbitral award and determination of the amount of damages on
10 Hotelera Coral’s counterclaim were the only matters remaining in this litigation and
11 the parties indicated that they would file a joint motion for entry of final judgment
12 upon the Court’s resolution of these issues. Accordingly, the Court **HEREBY**
13 **SETS** a deadline of September 12, 2014 for the parties to file a joint motion for
14 entry of final judgment in this action.

15 **CONCLUSION**

16 For the reasons stated above, the Court **GRANTS** Hotelera Coral’s unopposed
17 ex parte application for confirmation of the final arbitral award and

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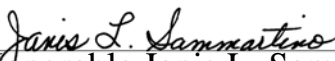
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25 ⁴ Freaner’s calculation of damages, although flawed, assumes the divisibility of
26 the contract price based on individual requests for work, and the Court’s damages
27 calculation employs this method as well. (*See* Pl.’s Suppl. Br. Re: Damages 1, ECF No.
28 103-2 (“[Mr. Freaner] performed approximately 195 tasks of varying degrees of
complexity for Hotelera Coral. . . . As the Court determined, Mr. Freaner did not
perform 17 of Hotelera’s requests for work. Mr. Freaner was paid a total of \$48,000.
Therefore, assuming all of the 195 tasks had an equal value, the value of the work that
he did not perform is approximately \$4,180.80 (17/195 x \$48,000).”))

1 modification of the final arbitral award, **AWARDS** damages to Hotelera Coral in the
2 amount of \$14,139.54, and **SETS** a deadline of September 12, 2014 for the parties to
3 file a joint motion for entry of final judgment.

4 **IT IS SO ORDERED.**

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6 DATED: August 22, 2014

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8 Honorable Janis L. Sammartino
9 United States District Judge
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