MULCAHY LLP
James M. Mulcahy (SBN 213547)
jmulcahy@mulcahyllp.com
Kevin A. Adams (SBN 239171)
kadams@mulcahyllp.com
Four Park Plaza, Suite 1230
Irvine, California 92614
Telephone: (949) 252-9377
Facsimile: (949) 252-0090

Attorneys for Plaintiffs and Counter-Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BENNION & DEVILLE FINE HOMES, INC., a California corporation, BENNION & DEVILLE FINE HOMES SOCAL, INC., a California corporation, WINDERMERE SERVICES SOUTHERN CALIFORNIA, INC., a California corporation,

Plaintiffs,

v.

WINDERMERE REAL ESTATE SERVICES COMPANY, a Washington corporation; and DOES 1-10

Defendant.

AND RELATED COUNTERCLAIMS

Case No. 5:15-CV-01921-DFM

Hon. Douglas F. McCormick

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION *IN LIMINE* TO EXCLUDE DAMAGES EVIDENCE

Complaint Filed: September 17, 2015
Counterclaim Filed: October 13, 2015

Plaintiffs and Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion & Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc. (the "Area Representative"), (collectively, "Plaintiffs") and Counter-Defendants Robert L. Bennion and Joseph R. Deville (all collectively referred to as the "B&D Parties") submit this opposition to Windermere Real Estate Services Company's ("WSC") motion *in limine* to exclude evidence of damages.

I. INTRODUCTION

At the end of last month, the Court precluded Plaintiffs' damages expert from testifying as to the fair market valuation of the Area Representative. [Dkt. No. 180.] At the hearing, and again in the Court's ruling, the Court noted that, "subject to other rules of civil procedure and evidence, Plaintiffs may present other evidence of damages [on the valuation of the Area Representative]." Plaintiffs now seek to do just that.

Plaintiffs intend to use Mr. Bennion to identify, in granular detail, the historical performance of the Area Representative and the anticipated future revenue – both gross and net – that this business was expected to generate. This anticipated testimony is predicated entirely upon data and information that was made available to WSC throughout the course of the parties' relationship and again produced and identified (by both sides) during this litigation. In other words, none of this is a surprise to WSC.

The Advisory Committee Notes to FRE 701 make clear that this is the exact type of damages testimony that an owner of a business is routinely allowed to present at trial.[1] *See also Teen–Ed, Inc. v. Kimball Int'l, Inc.,* 620 F.2d 399, 403 (3d

[1] "For example, most courts have permitted the ***owner or officer of a business to testify to the value or projected profits of the business***, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, e.g., Lightning Lube, Inc. v. Witco Corp.* 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to

Cir. 1980); *Pet Food Exp. Ltd. v. Royal Canin USA, Inc*., No. C-09-1483, 2011 WL 6140874, *6-7 (N.D. Cal. Dec. 8, 2011); *Lativafter Liquidating Trust v. Clear Channel Communications, Inc*., 345 Fed. App'x 46, 50 (6th Cir. 2009); *Innovation Ventures, LLC v. NVE, Inc*., No. 08-11867, 2016 WL 266396, *5-6 (E.D. Mich. Jan. 21, 2016); *Securitron Magnalock Corp. v. Schnabolk,* 65 F.3d 256, 265 (2d Cir. 1995) (An executive in a company "has 'personal knowledge of his business . . . sufficient to make . . . him eligible under Rule 701 to testify as to how lost profits could be calculated.'") (internal citations and quotation marks omitted).

Still, WSC seeks to exclude from trial Mr. Bennion's testimony – and seven related demonstrative exhibits – identifying these future lost profits of the Area Representative. WSC's arguments should be rejected for the reasons set forth below.

First, WSC argues that any damage calculation that is inconsistent with the Termination Obligation at § 4.2 of the Area Representation Agreement ("ARA") should be excluded. This argument should be summarily rejected as the Court has already found that "the Termination Obligation is but one measure of Plaintiffs' potential damages. **Plaintiffs have several breach of contract claims based on the ARA; several of these claims involve provisions other than § 4.2; and the Termination Obligation only applies to terminations under § 4.1(b)**." [Minute Order, Dkt. No. 164, p. 5 (emphasis added and internal citation omitted); *see* also p. 5 ("Plaintiffs also alleged other breaches of the ARA and that those breaches caused unspecified damages.").] To the extent that WSC did not comply with the termination requirements of the ARA or breached the ARA in other respects (e.g., failed to register or maintain the registration of the Franchise Disclosure Document), Plaintiffs would not be limited by the Termination Obligation at § 4.2.

damages, as it was based on his knowledge and participation in the day-to-day affairs of the business)." Advisory Committee Notes to FRE 701.

Second, WSC argues that these types of damages should be excluded because they were not disclosed during discovery. This argument ignores and/or grossly mischaracterizes the damages articulated by Plaintiffs during discovery and the evidence that Plaintiffs intend to introduce at trial. As part of Plaintiffs' initial disclosures and again during written discovery, Plaintiffs' identified damages in the form of (1) Plaintiffs' 50% share of monthly franchise fees generated by the Bennion and Deville franchises; and (2) Plaintiffs' 50% share of initial and ongoing franchise fees generated by non-Bennion and Deville franchisees. [Trial Ex. 10, § 10.] Moreover, WSC cannot claim surprise or prejudice as it has been in possession of the underlying data since before the litigation started and has otherwise known of Plaintiffs' pursuit of lost profits through the testimony of CPA Greg Barton and damages expert Peter Wrobel.

Finally, WSC argues that Plaintiffs' evidence of damages is irrelevant and should be excluded due to the parties' ability to terminate the ARA on 180-days' notice pursuant to the termination language in the ARA. This argument, like their first argument, overstates the effect of the termination rights under the ARA. The 180-days' notice provision can only be triggered if the language of the provision is followed. Here, however, WSC materially breached and took away the Area Representative's rights under the ARA without following the notice requirement in the termination provision. Because of this, the termination provision was never triggered and does not limit Plaintiffs' damages under the ARA.

For these reasons, set forth in detail below, WSC's motion *in limine* to exclude from trial Plaintiffs' lost profit damage theory should be denied.

II. WSC'S ATTEMPT TO LIMIT PLAINTIFFS' DAMAGES TO THOSE IDENTIFIED BY THE TERMINATION OBLIGATION SHOULD *AGAIN* BE REJECTED

The first argument raised by WSC has already been fully briefed by the parties and rejected by this Court. [Dkt. No. 164, p. 5.] In its motion for partial

summary judgment, like here, WSC argued that Plaintiffs' damages for breach of the ARA should be limited to those liquidated damages identified by the Termination Obligation at § 4.2 of the ARA. [*See id*.] Rejecting WSC's argument, the Court found that "Plaintiffs have several breach of contract claims based on the ARA [citation]; several of these claims involve provisions other than § 4.2" that "caused unspecified damages." [Dkt. No. 164, at 5.] The Court also found that "the Termination Obligation provision of § 4.2 should apply ***only*** to 'without stated cause' terminations under § 4.1(b)." [*Id*. (emphasis added).] Because the Court has already rejected WSC's contention that the Termination Obligation is WSSC's sole remedy for breach of the ARA, the first argument in WSC's current *in limine* motion should be summarily denied.

At trial, Mr. Bennion intends to identify the revenue that the Area Representative lost as a result of WSC's numerous breaches of the ARA that do not implicate the Termination Obligation at Section 4.2 of the ARA. Because this evidence does not implicate the Termination Obligation, Plaintiff should not be limited by that section of the ARA. Plaintiffs' position is consistent with the Court's prior ruling on summary judgment. Accordingly, the first argument raised in WSC's *in limine* motion should be rejected.

III. PLAINTIFFS' DAMAGES THEORY AND THE UNDERLYING SUBSTANTIATION WAS PREVIOUSLY DISCLOSED TO WSC

The demonstrative exhibits (and anticipated testimony) that gave rise to the instant motion identify the revenue streams available to the Area Representative under the ARA.[2] These revenue streams consist of: (1) Plaintiffs' 50% share of

[2] The seven demonstrative exhibits depict the following information: (1) a summation of the revenue the Bennion and Deville offices were generating at the time the ARA was terminated; (2) the future anticipated revenue to the Area Representative generated by the Bennion and Deville offices; (3) the initial franchise fees that were expected to be generated from new franchisees; (4) the monthly franchise fees that were expected to be generated by non-Bennion and

monthly franchise fees generated by the Bennion and Deville franchises [Trial Ex. 10, Ex. A, ¶ 2]; and (2) Plaintiffs' 50% share of initial and ongoing franchise fees generated by non-Bennion and Deville franchisees. [Trial Ex. 10, § 10.] As set forth in detail below, damage to Plaintiffs for the loss of these two revenue streams was identified during discovery and is based upon information that was produced during the litigation. Moreover, WSC cannot claim surprise or prejudice as it has been in possession of the underlying data since before the litigation started and has otherwise known of Plaintiffs' pursuit of lost profits through the report and testimony of CPA Greg Barton and damages expert Peter Wrobel. Accordingly, WSC's *in limine* motion should be denied.

A. Damages For The Loss Of Plaintiffs' 50% Share Of Their Own Monthly Franchise Fees Was Disclosed To WSC

The first category of damages to the Area Representative that Plaintiffs' seek to introduce at trial is loss of the 50% of monthly franchise fees generated from the Bennion and Deville franchisees. This category of damages should not be precluded as it was disclosed in discovery and all substantiating documents are in the possession of WSC.

Plaintiffs served WSC with their Rule 26(a) Initial Disclosures on December 14, 2015.[3] In it, Plaintiffs identified several categories of damages resulting from WSC's breaches of the parties' contracts. These damage categories expressly included: (1) the Area Representative's fair market value at the time WSC terminated the ARA; (2) ***50% of all franchise and license fees owed to Plaintiffs under the ARA***, and (3) the depressed value of the Area Representative. [Ex. A, p. 12.] As part of the initial disclosure, Plaintiffs also identified (and produced) their

Deville franchisees; (5) a summary of charts 2 through 4, (6) the future anticipated expenses of the Area Representative; and (7) a summary of charts 2 through 4 and 6.

[3] A true and accurate copy of the B&D Parties December 2015 Rule 26(a) Initial Disclosures is attached hereto as Exhibit A**.**

financial records as documents that would establish the nature and extent of these damages. [*Id*. at 13.]

In March 2016, WSC served the Area Representative with an interrogatory asking it to "[s]tate all facts Relating to [the Area Representative's] 'actual damages' suffered as a result of WSC's breaches of the Area Representation Agreement." [*See* attached Exhibit B.] In response, and among other things, the Area Representative identified the loss of "**the 50% reduction in franchise fees enjoyed by [the B&D Franchisees]**" caused by the termination of the ARA.[4] [*Id*. at 24-25.] This interrogatory response was served on WSC on April 13, 2016. [*See id*.]

During discovery, both parties produced additional financial records that identified this historical revenue stream to the B&D Parties. [*See e.g.*, Trial Exs. 439, 794, 610.] In fact, Trial Exhibit 439 is a recast profit and lost statement produced to WSC during discovery that specifically identifies the 50% revenue flow to the Area Representative from the Bennion and Deville franchisees. [Trial Ex. 439.] WSC cannot claim "surprise" by Plaintiffs' pursuit of this category of damages at trial.

Moreover, WSC's claim of surprise is undermined by its own legal position and claim for damages in the case. WSC claims that it was justified in terminating the ARA for failure of the Area Representative to "collect and remit" the franchise fees owed from the Bennion and Deville franchisees. [*See* Trial Ex. 370.] This is the same revenue stream to the Area Representative that Plaintiffs rely upon in the first category of damages. Because WSC was well aware of this revenue stream at the time it terminated the ARA, it cannot claim surprise by the fact that Plaintiffs now seek damages in the form of that unlawfully terminated revenue stream.

[4] Notably, this category of damages was identified separate apart from WSC's "fail[ure] to pay [the Area Representative] the termination fee" under the ARA. [Ex. B, p. 25.]

In short, WSC was aware that Plaintiffs sought damages for the Area Representative's loss of the 50% of monthly franchise fees generated from the Bennion and Deville franchisees. WSC has long been in the possession of all of the underlying substantiation relied upon by Plaintiffs in advancing this category of damages. In light of this, WSC's motion as to this first category of damages should be denied.

B. Damages For The Loss Of Plaintiffs' 50% Share Of Third-Party Franchise Fees Was Disclosed To WSC

Plaintiffs' theory of damages in the form of third-party franchise fee revenue that was cutoff as a result of WSC's breaches of the ARA was also known to WSC and should not be excluded from trial.

As a preliminary matter, WSC's argument that it had no knowledge of Plaintiffs' pursuit of this theory of damages is disingenuous. During discovery, Plaintiffs produced a report (along with the underlying data) that they had commissioned from CPA Greg Barton. [*See* Trial Ex. 498.] This report specifically identified the value to the Area Representative of this lost third-party franchisee revenue stream. Mr. Barton was deposed by WSC's counsel and discussed this report and category of damages at length. [*See* attached Exhibit C.] During the deposition, Mr. Barton made clear that Plaintiffs had requested the report "to get a value of what the third party – the unrelated franchisees, what the value of those – of those entities were on the future earnings." [Ex. C, p. 77:14-24.] Both Mr. Barton's assessment of this future revenue and Mr. Bennion's assessment of this future revenue are based on the same historical data in WSC's possession prior to the commencement of the litigation.[5] WSC should not be able to exclude this category of damages based on "surprise."

[5] The difference being that Mr. Barton used a starting figure that averaged the 2014 and 2015 years and Mr. Bennion uses just the 2015 year.

1 Moreover, this category of damages was disclosed during discovery. For
2 instance, Plaintiffs' initial disclosures identified damages in the form of 50% of all
3 franchise and license fees owed to the Area Representative under the ARA. [Ex. A,
4 at 12.] Thereafter, Plaintiffs' discovery responses made clear that WSC's failure to
5 register the FDD "deprived [the Area Representative] of one of its primary benefits
6 under the Area Representation Agreement – *i.e.*, **the right to 50% of all franchise
7 fees and subsequent royalties paid by all new Windermere franchisees in
8 Southern California region**." [Ex. B, pp. 3, 10, 31 (emphasis added).] Likewise,
9 the interrogatory responses stated that WSC's "prohibition and delay in registration
10 [of the FDD] precluded [the Area Representative] from selling franchises and,
11 thereafter, collecting the fees that flowed from those sales." [*Id*., p. 19.]
12 When later asked to identify its "actual damages," the Area Representative
13 identified, among other thing, the "**lost fees and royalties for … those lost sales
14 during WSC's lapse or refusal to register to sell franchises in Southern
15 California**." [Ex. B, p. 25.] As stated above, WSC was also provided with (and
16 already in possession of) the substantiating materials relied upon by Plaintiffs in
17 identify the lost revenue from the non-Bennion and Deville franchisees.
18 Because WSC was aware that Plaintiffs sought damages for the Area
19 Representative's loss of the franchise fees generated from the non-Bennion and
20 Deville franchisees, its motion should be denied.
21 **C. <u>Even If Plaintiffs' Damage Methodology Was Not Expressly</u>
22 <u>Disclosed During Written Discovery, It Should Still Be Allowed</u>**
23 Even if this information was not disclosed as part of Plaintiffs' written
24 discovery (*it was*), WSC is not prejudiced as Plaintiffs' damages expert, Peter
25 Wrobel, identified these forms of damages early on in the case. Although Mr.
26 Wrobel has been precluded from offering these opinions at trial, his report and
27 related testimony put WSC on notice that Plaintiffs' were seeking damages for the
28 lost franchise fees that flowed from the ARA. Because WSC was on notice of this

1 form of damages, they cannot now claim surprise or unfair prejudice by Plaintiffs'
2 pursuit of this category of damages at trial.
3 In September 2016, Plaintiffs served WSC with Mr. Wrobel's expert report.
4 As the Court is aware, Mr. Wrobel's report detailed his fair market valuation of the
5 Area Representative and the factors he considered in arriving at this valuation. Mr.
6 Wrobel's report and subsequent deposition testimony showed that Plaintiffs'
7 damages theory included—and centered on—the Area Representative's lost future
8 profits from the two categories of damages outlined above. Although excluded,
9 Mr. Wrobel's report and testimony show that categories of damages currently at
10 issue have been a part of this litigation for some time. In fact, **WSC's exclusion of
11 Mr. Wrobel's testimony was based in large part on his inclusion of future lost
12 profits to the Area Representative**. [Dkt. No. 103-1, at 8 ("Wrobel wrongfully
13 included future revenues going out to 2020 in calculating purported damages"); p.
14 10 ("Wrobel's valuation wrongfully assumes that [the B&D Franchisees] would
15 have paid the franchise fees they owed to WSSC but for the parties' dispute").]
16 Though excluded, Mr. Wrobel's report and testimony placed WSC on notice
17 that the Area Representative seeks damages in the form of lost franchise fees.
18 These lost franchise fees are based on facts in WSC's possession and subject to
19 cross examination. Because of this, WSC cannot claim any prejudice by Plaintiffs'
20 offer of evidence on these damages.
21 While only instructive, the decision in *Innovation Ventures, LLC v. NVE,
22 Inc*., 90 F. Supp. 3d 703 (E.D. Mich. 2015) ("*Innovation*"), is helpful as the facts of
23 that case are similar to the facts here. In *Innovation*, NVE's damages expert opined
24 that NVE experienced "lost sales" during an eleven-month period from June 2008
25 to April 2009 caused by Innovation's activity. *Id*. NVE's executives apparently
26 disagreed with their expert's calculation of lost sales and sought to present their
27 own calculation of lost sales at trial. *Id*. at 732. Shortly before trial, they advised
28 opposing counsel that NVE would be pursing lost sales damages from June 2008

"***through the present at trial***." *Id*. at 731. These lost sales totaled over $10 million – a figure significantly higher than the $3.4 million disclosed by NVE's expert. *Id*. at 732.

Innovation moved to exclude this "new" damages theory on the grounds of late disclosure and surprise. *Id*. at 731. The court denied the motion to excluded finding that, although the executives of NVE would present a calculation that was far above the expert's opinion, the underlying theory had been disclosed—*i.e*. that NVE would seek damages for its lost future sales. *Id*. at 733 ("[NVE's] theory of damages put [Innovations] on notice throughout this litigation that [NVE] was seeking to recover its own lost profits."). The court then found that the executives could testify to these damages as lay opinion testimony under Rule 701. *Id*. at 733-34 (citing *Lativafter Liquidating Trust*, 345 Fed. App'x 46). The court later affirmed its decision on motion for reconsideration. *Innovation Ventures, LLC v. NVE, Inc*., No. 08-11867, 2016 WL 266396, *10 (Jan. 21, 2016 E.D. Mich.).

As explained in *Innovation*, the fact that Mr. Bennion's lost profit valuation differs from that of Mr. Wrobel's opinion should not preclude the evidence so long as WSC was on notice of the theory of damages. As explained above, WSC was on notice that Plaintiffs' sought damages for the Area Representative's lost franchisee revenue. This is reflected in the pleadings, discovery and in Mr. Wrobel's opinions. As such, it is perfectly acceptable for Mr. Bennion to testify to this theory of damages now.

IV. BENNION'S TESTIMONY CONCERNING WSSC'S LOST PROFITS IS HIGHLY RELEVANT

Finally, WSC argues that the anticipated evidence on damages should be excluded as irrelevant under FRE 401 and prejudicial under FRE 403. These arguments – devoid of any legal authority or citation – should be rejected on each of the following grounds:

First, as explained above, Plaintiffs' future lost profit calculation is highly relevant WSC's numerous breaches of the ARA that do not implicate the Termination Obligation at § 4.2. Plaintiffs intend to prove that WSC's unlawful conduct breached the ARA and unlawfully stripped Plaintiffs of the rights under the ARA. Again, WSC's attempt to limit Plaintiffs' damages to the Termination Obligation misses the point.

Second, WSC ability to terminate the ARA without cause on 180-days' notice does not render Plaintiffs' lost profit calculation irrelevant. The 180-days' notice provision is only triggered if the conditions precedent and conditions subsequent are satisfied. Plaintiffs intend to show that they were not. For example, WSC failed to register its FDD after April 2014, thereby stripping Plaintiffs of their right to be an Area Representative long before any notice of termination was provided. WSC cannot avoid compliance with the termination provisions of the ARA and then seek shelter under those same provisions. Because the Termination Obligation was not triggered, Plaintiffs' lost profit calculation is highly relevant to damages.

Finally, Mr. Bennion's anticipated testimony is simple, straightforward, and in-line with the financials and contracts at issue in the case. Nonetheless, WSC seeks to exclude Mr. Bennion's testimony as irrelevant because is "contrary to the evidence." This argument is a nonstarter. Even if Mr. Bennion's testimony was contrary to other evidence in the case, the testimony can be challenged on cross-examination. Exclusion on relevance grounds is not the appropriate relief.

Because none of WSC's arguments support exclusion on FRE 401/403 grounds, WSC's motion should be denied.

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V. <u>CONCLUSION</u>

In sum, WSC has been on notice that WSSC would seek damages that included its lost future profits for the franchise fees from the B&D franchisees and non-B&D franchisees. Mr. Bennion – as a long-time owner of the company – is properly position to testify to these lost future profits. Accordingly, Plaintiffs respectfully ask that this Court deny WSC's motion to exclude evidence of Plaintiffs' lost profit theory of damages.

Dated: July 14, 2018

MULCAHY LLP

By: /s/ Kevin A. Adams
Kevin A. Adams
Attorneys for Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion & Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc., and Counter-Defendants Robert L. Bennion and Joseph R. Deville