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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

REPLY BRIEF IN SUPPORT OF DEFENDANT AND COUNTERCLAIMANT'S MOTION *IN LIMINE* TO EXCLUDE OPINION OF PLAINTIFFS' EXPERT PETER WROBEL RE: NET VALUE

[FRE 104, 402, 403, 702, 703]

Date: June 18, 2018
Time: 10:00 a.m.
Courtroom: 6B

Complaint Filed: September 17, 2015

I. INTRODUCTION

Once again, Plaintiffs attempt to recast the facts to support their current narrative. Plaintiffs[1] chose to employ a strained interpretation of paragraph 4.2 of the ARA to include future revenues in order to more than double their damages claim. Plaintiffs' gamble failed when the Court interpreted the plain language of that provision against them and found that their expert did not follow the unambiguous language of the ARA in purporting to calculate the Termination Obligation under paragraph 4.2. As suspected, Plaintiffs now contend that Wrobel's opinion regarding the "Net Value of WSSC as of January 2015" was not only a calculation of the Termination Obligation, but that his net value calculation also conveniently quantified the damages allegedly suffered as a result of WSC's other breaches of the ARA. However, this fictional opinion is completely absent from Wrobel's opinion and deposition testimony. Plaintiffs took their shot and missed. Discovery is closed, expert disclosures have been made, and experts have been deposed. Plaintiffs should not be allowed to reload and shoot again.

Distilled to its essence, Plaintiffs' opposition argues two points: (1) Plaintiffs contend that they have always sought alternative remedies for their imaginary theory of constructive termination[2] – damages under the Termination Obligation or damages representing the loss of WSSC's business; and (2) Wrobel set forth both theories of damages in his report and deposition testimony. The record simply does not support either argument.

While it is true that Plaintiffs alleged a number of purported breaches of the ARA, Wrobel's opinion regarding damages caused by the termination of the ARA

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[1] For convenience, WSC uses the same defined terms herein as set forth in its moving papers.

[2] As set forth in WSC's reply brief filed in support of its recent motion for partial summary judgment, California does not recognize a claim for "constructive termination" outside of the employment context. (*See* Dkt. 162, pp. 5-6.)

was limited to his purported calculation of the Termination Obligation under paragraph 4.2, which he referred to as the Net Value of WSSC as of January 2015. His opinion assumed that the Termination Obligation was triggered regardless of whether the ARA was "constructively terminated" or terminated without cause. Nowhere in his report or his deposition testimony did Wrobel offer an opinion of any other damages resulting from the termination of the ARA.

As a result, Wrobel's opinion regarding the Net Value of WSSC as of January 2015 should be excluded as irrelevant under Federal Rules of Evidence 402 and 702. His opinion is also properly excluded under Rule 403 because its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, and misleading the jury. Finally, Plaintiffs are precluded by Federal Rule of Civil Procedure 37(c)(1) from seeking to expand Wrobel's opinion to the other alleged breaches of the ARA.[3]

II. PLAINTIFFS' ARGUMENTS ARE INCONSISTENT WITH THE HISTORY OF THIS CASE AND WROBEL'S STATED OPINIONS

From the outset, Plaintiffs argued that WSC's purported "constructive termination" of the ARA triggered the Termination Obligation set forth in Section 4.2 of the ARA. As alleged in the First Amended Complaint ("FAC"), "WSC's conduct constituted a constructive termination of the Area Representation Agreement, without cause, subjecting WSC to comply with the buyout provision of Section 4.2." (Dkt. 31, ¶ 33.) This theory of damages is clearly laid out in paragraphs 116-120 of the FAC:

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[3] Contrary to Plaintiffs' assertion in their opposition, WSC does not contend that Plaintiffs are precluded from attempting to present damages allegedly suffered from the other alleged breaches of the ARA. Rather, as clearly stated in the moving papers, WSC is seeking only to exclude Wrobel's opinion regarding the "Net Value of WSSC as of January 2015." In fact, Category 2 in Wrobel's report identifies settlement payment amounts allegedly owed to WSSC under the ARA.

> 116. After April 20, 2014, Bennion and Deville were deprived of one of their primary benefits under the Area Representation Agreement – i.e., the right to 50% of all franchise fees and subsequent royalties paid by all new Windermere franchisees in the Southern California region. (See Ex. B, §§ 2, 3.) ***WSC's unilateral termination of Bennion and Deville's right and ability to solicit and sell new Windermere franchises resulted in the premature, constructive termination of the Area Representation Agreement***.
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> 117. WSC's termination of the Area Representation Agreement without first providing Bennion and Deville 180 days written notice of the termination breached Section 4 of the Area Representation Agreement.
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> 118. Further, ***WSC's termination of the Area Representation Agreement without cause, obligated WSC to pay Bennion and Deville the fair market value of their interest in the Area Representation Agreement pursuant to Section 4.2 of that agreement***. WSC's failure to pay this amount constitutes a breach of Section 4.2.
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> 119. Bennion and Deville now seek damages in the form of 50% of all lost franchise fees they should have recovered for the period April 20, 2014 to the commencement of this litigation and the fair market value of their rights in the Area Representation Agreement.
>
> 120. Moreover, Bennion and Deville's lost franchise fees – and the ability to aggressively solicit and sell new franchises from April 20, 2014 forward – artificially depressed the value of Bennion and Deville's rights under the Area Representation Agreement. The fair market value to be paid by WSC should reflect these lost sales as well.

(Emphasis added.) Thus, although Plaintiffs alleged various breaches of the ARA, such as the failure to register the FDD, the alleged damages resulting from Plaintiffs' theory of "constructive termination" were ***always*** alleged to be governed by paragraph 4.2 of the ARA.

Wrobel's report and deposition testimony echoed this theory. Specifically, as stated by Wrobel in his report:

> It is my understanding that ***WSC effectuated a constructive termination of the [ARA]*** with [WSSC] by late summer 2014, ***and later provided [WSSC] a formal notice of termination in January 2015***. In either event, it is my further understanding that the termination

> of the [ARA] was without cause. ***This termination triggered a clause in the [ARA] which provided for the terminating party to pay the terminated party "an amount equal to the fair market value of the Terminated Party's interest in the Agreement***.

(Dkt. 168-2, Ex. 2, p. 2 [emphasis added].) Thus, Wrobel's opinion as set forth in his report was limited to the amount he contends was owed by WSC under the Termination Obligation set forth in paragraph 4.2. As the Court noted, Wrobel equated the Termination Obligation to be the net value of WSSC. (Dkt. 164, p. 6.)

Using the amount derived from his attempted calculation of the Termination Obligation, which he also referred to in his deposition as the "fair market value of WSSC," Wrobel then reduced that amount by fees that had been paid to WSSC in 2015 in order to come up with $2,529,526 as WSSC's purported damages under paragraph 4.2. (*Id*., Schedule 2A.) Wrobel's deposition testimony – quoted by Plaintiffs in their opposition – was entirely consistent on this issue:

> Q. You are referring to damages, and I just want to be clear. The damages that you are talking about in this instance are the damages as set forth in the termination obligation in the Area Representation Agreement?
>
> A. Well, again, the termination or the area agreement deals with the fact that you need to calculate the fair market value. In this case, I did it as of January 2015. In terms of damages, there is one further adjustment that needed to be done, which is the fact that after 2015, January 2015, WSSC would have received some additional funds, and so those are being subtracted out to calculate what the damage number would be.
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> Q. So is the number reflected in your report the damages number or the termination obligation number under the Area Representation Agreement?
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> A. I guess both are reflected. In my report it shows what is the fair market value, and then a final adjustment was made to calculate what the damages related to that would be.

(Dkt. 169-2, Ex. A, p. 81:13-82:6.)

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In granting WSC's motion for partial summary judgment, the Court also found that Wrobel's opinion regarding the alleged damages resulting from Plaintiffs' theory of "constructive termination" were always alleged to be governed by paragraph 4.2 of the ARA. In so doing, the Court was careful to separate Plaintiff's theory of "constructive termination," to which Plaintiffs alleged and Wrobel opined the Termination Obligation applied, and Plaintiffs' other alleged breaches of the ARA: "The First Amended Complaint did, at times, link the Termination Obligation to Plaintiffs' theory of 'constructive' termination. But Plaintiffs also alleged other breaches of the ARA and that those breaches caused unspecified damages. See Dkt. 31 ¶¶ 163(a), (e), (f), (g), (h), and (j), 164." (Dkt. 164, p. 5.)

But Plaintiffs' new theory identified for the first time in their opposition ignores this distinction, lumps together these other breaches, and argues that they resulted in the "constructive termination" of the ARA. (Dkt. 169, p. 15, ll. 8-15.) Plaintiffs contend that this is one of their theories of the termination of the ARA. The other theory is that WSC terminated the ARA without cause. (*Id*. at p. 15, ll. 15-21.) Plaintiffs then make an unsupported leap in logic and conclude that "[u]nder both of these alternative termination theories, Wrobel's damages calculations reflect the total loss of WSSC's business – *i.e.*, the fair market value of WSSC." (*Id*. at p. 15, ll. 22-25.) Not true.

Plaintiffs identify seven breaches of the ARA: failure to pay the Termination Obligation pursuant to paragraph 4, and six other various breaches. Based on their current damages theory, the damages WSSC allegedly suffered from the other six breaches conveniently add up precisely to the damage suffered from the alleged breach of paragraph 4. This new and convenient theory does not appear in Wrobel's report or deposition and arrived for the first time only after the Court found that Wrobel's calculation of the Termination Obligation was not supported by the plain language of the ARA.

As is clearly set forth in Wrobel's report and deposition testimony, and as this Court found, Wrobel was attempting to calculate the Termination Obligation, not the loss of WSSC's business. Importantly, nowhere in his report or his deposition testimony did Wrobel state that he was attempting to calculate the total loss of WSSC's business as Plaintiffs now claim.[4] Rather, Wrobel simply calculated the amount he contended was the Termination Obligation under paragraph 4.2, subtracted amounts already received by WSSC, and came up with $2,529,526 as WSSC's purported damages. Thus, any attempts by Plaintiffs to expand Wrobel's opinion to anything other than damages resulting from the Termination Obligation is precluded by Federal Rule of Civil Procedure 37(c)(1) for the reasons set forth in the moving papers.

Wrobel did not, as Plaintiffs now suggest for the first time, offer two alternative forms of damages that coincidentally ended up being the same $2.5 million figure. Rather, Wrobel simply calculated the amount he contended was the Termination Obligation under paragraph 4.2 damages. The Court found that Wrobel calculated the Termination Obligation improperly. Therefore, for the reasons set forth in the moving papers, Wrobel's opinion on this issue is irrelevant and its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, and misleading the jury.

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[4] When questioned whether he anticipated testifying at trial to any opinions other than those in his report, Wrobel responded that he did not, but that he may be asked to opine on the rebuttal report of WSC's expert. (Dkt. 169-2, Ex. A, p. 171, ll. 8-16.) He did not say anything about offering an opinion regarding damages allegedly suffered because of the loss of WSSC's business.

III. CONCLUSION

For all these reasons, and for the reasons set forth in WSC's moving papers, WSC's motion to exclude Wrobel's opinion regarding the Net Value of WSSC as of January 2017 should be granted in its entirety.

DATED: May 16, 2018 PEREZ VAUGHN & FEASBY INC.

By: /s/ Jeffrey A. Feasby
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