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12

13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

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

19 Plaintiffs,

20 v.

21 WINDERMERE REAL ESTATE
22 SERVICES COMPANY, a Washington
corporation; and DOES 1-10
23

24 Defendant.

25 AND RELATED COUNTERCLAIMS
26
27
28

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

Hon. Douglas F. McCormick

**DEFENDANT AND
COUNTERCLAIMANT'S REPLY
IN SUPPORT OF ITS MOTION *IN*
LIMINE TO EXCLUDE NEWLY
DISCLOSED DAMAGES
EVIDENCE**

[FRCP 37, FRE 402, 403]

Complaint Filed: September 17, 2015

1 **I. INTRODUCTION**

2 Plaintiffs’ lost profits analysis, provided to the Court and to WSC on the eve
3 of trial, is the third different damages model they have tried to present in this case.
4 Two of those models (reframing Wrobel’s Termination Obligation Calculation as a
5 “net value” calculation and this new lost profits model) were identified for the first
6 time in the weeks and days leading to trial. Plaintiffs’ newest model was not
7 disclosed in discovery and blindsided WSC just days before trial was to begin.
8 None of the materials submitted in Plaintiffs’ opposition identify or disclose the lost
9 profits damages model Plaintiffs now seek to present to the jury. This is textbook
10 trial by ambush and, respectfully, must be excluded.

11 Further, even had Plaintiffs disclosed that they intended to seek lost profits
12 related to WSSC—they did not—their method of calculating those purported
13 damages is so outrageously speculative it must be rejected on its face.

14 Finally, the primary case Plaintiffs cite in support of admitting this evidence
15 is a patently distinguishable opinion from the Eastern District of Michigan. Plaintiffs
16 found no support for admission of their newly disclosed damages model in the Ninth
17 Circuit because no such support exists.

18 Accordingly, WSC respectfully requests that Plaintiffs be precluded from
19 presenting any evidence, testimony, or argument related to the newly disclosed
20 damages evidence to the jury.

21 **II. LEGAL ARGUMENT**

22 **A. Plaintiffs’ Lost Profits Damages Model Was Not Disclosed in**
23 **Discovery**

24 Plaintiffs admit that their new damages model is not an attempt to calculate
25 the Termination Obligation and is instead an attempt to quantify damages allegedly
26 arising from other breaches of the ARA. (Opp. p. 5.) Specifically, Plaintiffs expect
27 to have Mr. Bennion present to the jury “in granular detail” the historical
28 performance of WSSC and the “anticipated future revenue – both gross and net –

1 that [WSSC] was expected to generate.” Plaintiffs then argue that this new damages
2 model was disclosed in discovery. It was not.

3 In support of this argument, Plaintiffs cite four sources of information: 1)
4 their Rule 26(a) Initial Disclosures; 2) WSSC’s interrogatory responses; 3) financial
5 records produced in discovery; and 4) the deposition testimony of Greg Barton,
6 CPA. None of these sources put WSC on notice that Plaintiffs would seek lost
7 profits for 10 years totaling \$5.2 million.

8 1. Plaintiffs’ Initial Disclosures Do Not Identify Their New Lost Profits
9 Model

10 Plaintiffs Initial Disclosures identified six categories of potential damages,
11 three of which are relevant to the present motion:

- 12 1. “The fair market value of the Area Representative business at the time
13 of termination by WSC;”
- 14 2. “50% of all franchise and license fees, including those resulting from a
15 settlement of said fees, *acquired by WSC and owed to the B&D*
16 *Parties pursuant to the terms of the [ARA];*”
- 17 4. “The depressed value of the franchise and Area Representative business
18 as a result of WSC’s failure to comply with the express and implied
19 terms of the parties’ agreements.” (Doc. 190-1, p. 12) (emphasis
20 added).

21 Plaintiffs Initial Disclosures go on to state that “a financial expert will be
22 required to conduct a fair market value for the Area Representative business and the
23 depressed value of the B&D Parties’ businesses as a result of WSC’s unlawful
24 conduct.” (Doc. 190-1, p. 13.) The Court already rejected Plaintiffs’ attempt to
25 reframe Wrobel’s Termination Obligation calculation as a fair market value analysis
26 of the Area Representative business, and it is undisputed that no expert opinion was
27 offered relating to the “depressed value of the B&D Parties’ businesses.” Mr.
28 Bennion was not disclosed as an expert witness in this case and cannot be qualified

1 as one. Consequently, two of the three referenced categories are flatly unrelated to
2 the present inquiry.

3 Plaintiffs hang their hat on the second category identified above, selectively
4 highlighting a portion of the language, and arguing that this somehow justifies the
5 presentation of evidence related WSSC's lost revenue from franchise fees owed by
6 the B&D Franchisees. (Opp. pp. 6-7.) The final clause of the disclosure (absent
7 from Plaintiffs' brief and emphasized above) shows that this is not true. Read as a
8 whole, category (2) in Plaintiffs' Initial Disclosures plainly identifies *fees actually*
9 *collected by WSC*, including those collected pursuant to a settlement agreement.
10 No fair reading of this category remotely suggests that Plaintiffs will seek 10 years
11 of lost revenue from their own franchises who left the Windermere system on the
12 same day WSSC was terminated as the Area Representative.

13 As for franchise fees from non-B&D Franchisees, Plaintiffs' Initial
14 Disclosures do not identify lost profits going 10 years into the future. At most,
15 Plaintiffs' disclosure notified WSC they would seek amounts collected by WSC and
16 wrongfully withheld. This is why Plaintiffs specifically identified the example of
17 third party settlement payments, which WSC has already offset against the fees
18 Plaintiffs owe pursuant to the franchise agreements, and which Plaintiffs already
19 raised with Mr. Drayna during his recent testimony. Plaintiffs' initial disclosures *in*
20 *no way* put WSC on notice they would seek 10 years of speculative, future revenue
21 generated by non-B&D Franchisees.

22 2. WSSC's Interrogatory Responses Do Not Identify Lost Profits as a 23 Damages Model

24 Next, Plaintiffs argue their responses to interrogatories adequately disclose
25 that they would seek 10 years of lost profits. WSC discussed Plaintiffs'
26 interrogatory responses in detail. (Doc. No. 186, pp. 4-8.) However, WSC adds that
27 it remains entirely unclear how "the loss of the 50% reduction in franchise fees
28 enjoyed by the [B&D Franchisees]" could possibly put WSC on notice that

1 Plaintiffs would seek 10 years of lost profits for WSSC. As a practical matter, the
2 ARA and the franchise agreements all terminated on September 30, 2015. After that
3 date, Plaintiffs no longer had to pay *any* ongoing franchise fees, let alone the
4 reduced 50% that they now claim. Plaintiffs' last minute lost profits model was not
5 disclosed in response to a discovery request asking WSSC to identify its damages.
6 That should end the inquiry and Plaintiffs should be precluded from presenting or
7 arguing this "evidence" to the jury.

8 3. Plaintiffs' Financial Records and the Testimony of Greg Barton Did
9 Not Notify WSC That Plaintiffs Would Seek 10 Years of Lost Profits

10 Finally, Plaintiffs argue that because they produced financial records and had
11 their CPA testify about a valuation of WSSC he performed in September 2015,
12 WSC was on notice that Plaintiffs would seek 10 years of lost profits. Even a
13 cursory analysis exposes the weakness of this argument. WSC does not dispute that
14 it received audited financial statements for WSSC throughout the parties'
15 relationship. These audited financial statements showed WSSC lost money nearly
16 every year of its existence. WSC also does not dispute that during discovery,
17 Plaintiffs produced both audited and unaudited financial statements. Finally, WSC
18 concedes that on the last day of discovery in this case, Plaintiffs suddenly produced
19 "re-cast" financial statements for WSSC that reclassified the franchise fees it did not
20 collect from the B&D Franchisees as revenue in a flagrant attempt to improperly
21 inflate the value of WSSC. Disclosure of these financial statements, however, *did*
22 *not* provide WSC with notice that Plaintiffs would seek \$5.2 million in lost profits
23 over 10 years. If Plaintiffs argument is accepted, a party that produces its financial
24 statements can seek any damages it wishes, and can further modify that damages
25 request up to the very eve of trial. This would turn the whole discovery process on
26 its head.

27 Moreover, Plaintiffs' argument that Barton's deposition, re-cast financial
28 statements, and "potential WSSC Franchise Fee Valuation" provided WSC with

1 notice Plaintiffs would seek \$5.2 million for 10 years of lost profits is belied by the
2 facts. On August 29, 2016, the discovery cut-off, Plaintiffs produced the “re-cast”
3 financials they identified as Trial Exhibit 439. WSC served Barton with a subpoena
4 for business records and deposition testimony to understand how and why he
5 abruptly “re-cast” the financial statements of WSSC years after the fact. Pursuant to
6 that subpoena, Barton produced what Plaintiffs subsequently identified as Trial
7 Exhibit 489. Thus, importantly, this document was produced in response to a third-
8 party subpoena after the discovery cutoff. It was not produced by Plaintiffs in
9 discovery.

10 Importantly, Barton was not identified as an expert and the “potential WSSC
11 Franchise Fee Valuation” was not created pursuant to this litigation – it was
12 provided by Barton to Plaintiffs in September 2015 (before they filed their
13 Complaint in this action) as part of a “negotiation” related to the potential sale of
14 WSSC. (*See* Trial Exhibit 498, p. 1.) Further, in his deposition, Barton
15 acknowledged that he was not certified to perform company valuations, only
16 included non-B&D Franchisees in his valuation, and improperly did not disclose
17 that an accrual, rather than cash, basis was used for the valuation. (Ex. 1,
18 Deposition of Barton, pp. 70-74.) Finally, Plaintiffs seek to introduce this evidence
19 through Mr. Bennion, not Barton, which precludes WSC from cross-examining
20 Barton on those re-cast financials, the “potential WSSC Franchise Fee Valuation,”
21 and the methodology used to create them.¹ By no measure did the two-page
22 document identified as Trial Exhibit 498, nor the deposition testimony of Barton,
23 put WSC on notice that Plaintiffs would seek 10 years of lost profits for from both
24 non-B&D Franchisees who had paid their fees and the B&D Franchisees that had
25 not paid their fees for more than a year at the time their agreements with WSC
26 terminated.

27 _____
28 ¹ WSC will also object to any attempt by Barton to testify regarding the valuation of
WSSC as improper expert witness testimony.

1 Modern trial practice should not be a guessing game. The point of discovery
2 is to avoid this exact type of surprise. At no point during discovery did Plaintiffs
3 state they would seek lost profits for WSSC. WSC should not be required to piece
4 together cryptic disclosures, financial statements, and third-party testimony (all of
5 which is directly contravened by Plaintiffs' damages expert) to speculate that
6 Plaintiffs will pursue a 10-year lost profits model. This trial by ambush cannot be
7 suborned and the Court should exclude this damages model in its entirety.

8 **B. Plaintiffs' Lost Profits Model is Not Supported by California Law**

9 Plaintiffs' new damages model should also be excluded because it does not
10 comport with well-established California law on the calculation of lost profits.
11 Plaintiffs only remaining claims are breach of contract claims and breach of the
12 implied covenant of good faith and fair dealing claims. Plaintiffs new damages
13 model can only be related to its breach of contract claims. *See Ragland v. U.S. Bank*
14 *Nat'l Ass'n*, 209 Cal.App.4th 182, 206 (2012) (tort damages inappropriate for
15 breach of implied covenant of good faith and fair dealing claim outside of insurer-
16 insured context). To recover lost profits for breach of a contract, a party must
17 present evidence as to the fact and extent of the allegedly lost profits. *Sargon*
18 *Enterprises Inc. v. University of Southern Cal.* 55 Cal. 4th 747, 774 (2012)
19 (excluding evidence of lost profits because it was too speculative). Such damages
20 must "be proven to be certain both as to their occurrence and their extent, albeit not
21 with 'mathematical precision.'" *Id.* at 775. The rule that lost profits must be
22 reasonably certain is a specific application of a more general statutory rule. "No
23 damages can be recovered for a breach of contract which are not clearly
24 ascertainable in both their nature and origin." Cal. Civ. Code, § 3301; *see also*
25 *Greenwich S.F., LLC v. Wong*, 190 Cal.App.4th 739, 760 (2010).

26 Plaintiffs do not present evidence that these lost profits are certain to occur,
27 nor do they present evidence that they would occur for 10 years. Plaintiffs seek 10
28 years of franchise fees from the B&D Franchisees – entities that historically did not

1 pay their fees and had not paid their fees for more than a year prior to leaving the
2 Windermere system. Next, Plaintiffs speculate, without support, that they would
3 register 1.7 new franchisees per year, when WSSC had *only registered one new*
4 *franchisee since 2011*. Then, Plaintiffs predict, again without any support, that
5 franchise fees from non-B&D Franchisees would increase at approximately 5% per
6 year. Further, Plaintiffs' model does not address WSC's *absolute right to terminate*
7 *the ARA with 180 days' written notice*, nor does it reduce the 10 years of lost
8 profits to a present value. Finally, Plaintiffs ignore their own financial statements
9 that show WSSC lost over \$80,000 in 2015, the last year of its existence.

10 Plaintiffs' new lost profits model is, respectfully, absurd. It is unsupported by
11 neither the evidence in this case nor applicable law. These purported damages are
12 neither certain to have occurred nor are they certain in their extent. Therefore, this
13 purported evidence should be excluded.

14 **C. Plaintiffs Reliance on an ED Mich. Case is Misplaced**

15 Plaintiffs cite *Innovation Ventures, LLC v. NVE, Inc.*, 90 F. Supp. 3d 703
16 (E.D. Mich. 2015), a Sixth Circuit case, as the primary support for their argument
17 that Mr. Bennion should be allowed to present a previously undisclosed damages
18 model to the jury. *Innovation Ventures* is easily distinguishable. The counter-
19 claimant in *Innovation Ventures*, a competitor of Five Hour Energy, was seeking
20 damages related to lost sales of its product. *Id.* at 709. During discovery, the
21 counter-claimant disclosed it would seek lost market share through the date of trial
22 and identified an expert who testified as to the amount of market share lost. *Id.* at
23 731-32. Shortly before trial, the counter-claimant sought to present a larger number
24 than previously disclosed by its damages expert.² *Id.* at 732. The court allowed the
25 counter-claimant to present its new, larger damages number at trial because,

26
27 ² The reality is the plaintiff's damages number was significantly higher and the plaintiff was
28 concerned its number paled in comparison.

1 although it differed in amount, the model of damages (lost market share) was
2 disclosed during discovery. *Id.* at 732-33.

3 Here, and unlike the plaintiff in *Innovation Ventures*, Plaintiffs' new damages
4 model differs not only in amount, but in kind. Plaintiffs never identified "lost
5 profits" as a measure of damages for WSSC. Until WSC recently sought to exclude
6 Plaintiffs' expert from testifying regarding his erroneous calculations of the
7 Termination Obligation, Plaintiffs' damages model was limited to the Termination
8 Obligation and the other categories identified in Wrobel's report (none of which are
9 lost profits). Plaintiffs' new damages model more than doubles any previously
10 identified damages related to WSSC, and radically shifts the damages model from a
11 contractual Termination Obligation to a wildly unsupported lost profits analysis.
12 WSC conducted discovery and prepared for trial in good faith based on the damages
13 analysis and amounts Plaintiffs disclosed during discovery. Such a significant
14 change on the eve of trial is unquestionably prejudicial and should be excluded.

15 **III. CONCLUSION**

16 For all these reasons, WSC respectfully requests that the Court enter an Order
17 excluding all evidence of Plaintiffs' newly disclosed damages model.

18
19 DATED: July 15, 2018

PEREZ VAUGHN & FEASBY INC.

20
21 By: /s/ Jeffrey A. Feasby

22 Jeffrey A. Feasby

23 Attorneys for

24 Windermere Real Estate Services Company
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EXHIBIT 1

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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,

vs.

No.
5:15 -CV -01921
R (KKx)

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

Defendants.

AND RELATED COUNTERCLAIMS.

VIDEOTAPED DEPOSITION OF GREG BARGON
Irvine, California
Wednesday, October 19, 2016

Reported by:
CARA JACOBSEN
CSR No. 13053
File No. 2468166
Pages 1 - 123

1 A I do.

2 Q Do you know whether or not any of these
3 amounts were paid by any of these franchisees?

4 A No.

5 Q Is there a way for you to make that 10:26AM
6 determination?

7 A Not from the document I have.

8 Q You would have to look at other financial
9 records that have been provided to you?

10 A Correct. 10:26AM

11 MR. FEASBY: Mark this as Exhibit 9.

12 (Defendant's Exhibit 9 was marked
13 for identification.)

14 BY MR. FEASBY:

15 Q Do you recognize this? 10:27AM

16 A I do.

17 Q And what is this document?

18 A It's a valuation we did -- we were asked to
19 do.

20 Q Who asked you to do this? 10:27AM

21 A Patrick Robinson at Windermere Services
22 Southern California.

23 Q And when did he ask you to prepare this?

24 A Approximately in the September 2015 time
25 frame.

10:27AM

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1 Q And what -- what documents did you use to
2 prepare this?

3 A I can't recall, but I think we used prior
4 P&L's and income related to franchisees, both
5 unrelated and related. 10:27AM

6 Q And do you believe you're qualified to
7 perform a valuation like this?

8 A Define "qualified."

9 Q Well, what would you consider qualified to
10 prepare a valuation? 10:28AM

11 A Can we do them? Absolutely.

12 Are we doing certified? No.

13 Q What's the difference between this here and
14 the certified?

15 A Usually, a certified valuation, the person 10:28AM
16 has a CVA behind their name.

17 Q CVA?

18 A I think it's certified valuation analyst or
19 something like that.

20 Q And are there certain standards that are 10:28AM
21 employed by certified valuation analyst -- let's --

22 let's just use the acronym CVA.

23 Are there certain standards that CVA's use
24 in order to prepare their --

25 A I -- 10:28AM

1 Q -- certified financial --

2 A I believe so.

3 Q You don't know what they are?

4 A I don't.

5 Q Are you familiar with the AICPA's 10:28AM

6 requirements for CPA's to perform valuations?

7 A I remember reading it at one point in time.

8 Q How long ago?

9 A Couple of years, two or three years ago,

10 maybe more. 10:29AM

11 Q Did you employ those requirements when you

12 prepared this?

13 A I can't answer that. I don't recall.

14 Q So you don't know whether or not those

15 requirements were met for purposes of preparation of 10:29AM

16 this?

17 A Correct.

18 Q And if you look at -- on page 2 -- page 1

19 of 1, there's a cover sheet, and then the valuation

20 is on the next page here. 10:29AM

21 A Yes.

22 Q "WSC average" -- excuse me.

23 "WSSC average annual net revenue, 2014 and

24 2015 through July."

25 A Yes. 10:29AM

1 Q Do you see that?

2 How do you define for -- or how did you
3 define, for purposes of this, average annual net
4 revenue?

5 A We took the -- between the '14 and '15 10:29AM
6 periods for the nonrelated franchisees, added them
7 up and came up with a device -- or come up with an
8 average annual revenue of 137-. And then we
9 factored in growth rate as well.

10 Q Okay. And so, if you look back at Exhibit 10:30AM
11 3 -- excuse me, Exhibit 8.

12 A Yes.

13 Q Is this where you got those numbers for the
14 non-B&D entities?

15 A It could have been a combination of this 10:30AM
16 plus their books.

17 Q And why did you exclude B&D-related
18 entities from the average annual net revenue?

19 A Because we were asked just to provide our
20 estimate of what we thought the value of the 10:30AM
21 unrelated franchisees were.

22 Q So it was specifically done for valuing it,
23 not including the Bennion & Deville franchisees?

24 A Correct.

25 Q If you were to have done a valuation 10:30AM

1 including those entities, what additional
2 information would you have included in terms of
3 getting to the average annual net revenue number?

4 A Am I including the Bennion &
5 Deville-related entities?

10:31AM

6 Q Yes.

7 A I would have had to go back and pull the
8 same numbers that we -- were used there for the same
9 period of time to add them in.

10 Q And for purposes of the analysis that you 10:31AM
11 did do, do you -- was that -- the average annual net
12 revenue, is that on a cash basis or accrual basis?

13 A I think it was on the -- I'm not -- I can't
14 answer that. I can't remember if it's accrual or
15 cash at that point. 10:31AM

16 Q In preparing valuations, is there one
17 that's used -- can you -- strike that.

18 For purposes of preparing valuations like
19 this, can you use either of those?

20 A I'm not certain. I know what we do. 10:31AM

21 Q Do you know whether it's accepted practice
22 to prepare a valuation of -- such as this using --
23 strike that.

24 Is it acceptable under the AICPA's
25 requirements to prepare a valuation like this using 10:32AM

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1 an accrual basis?

2 A I believe it is.

3 Q And does that need to be disclosed

4 somewhere in the valuation whether it's done on a

5 cash or accrual basis?

10:32AM

6 A It should be.

7 Q And if you look on here, do you see it

8 disclosed anywhere in here?

9 A I don't believe we disclosed it.

10 Q And then you look at the historical --

10:32AM

11 strike that.

12 So -- and I think you -- you answered this
13 question already, but let me just ask to make sure.

14 So, for purposes of this valuation, you
15 don't know whether or not it was done on a cash or
16 accrual basis?

10:32AM

17 A I'm thinking we did it on the accrual, but
18 I couldn't be certain without going back and
19 looking.

20 Q Okay. The -- was there any literature or
21 guidelines or any other writing that you referenced
22 in your preparation of these documents in terms of
23 how to go about preparing a valuation?

10:33AM

24 A No.

25 Q Just based on your experience?

10:33AM

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1 I, the undersigned, a Certified Shorthand
2 Reporter of the State of California, do hereby
3 certify:

4 That the foregoing proceedings were taken
5 before me at the time and place herein set forth;
6 that any witnesses in the foregoing proceedings,
7 prior to testifying, were duly sworn; that a record
8 of the proceedings was made by me using machine
9 shorthand which was thereafter transcribed under my
10 direction; that the foregoing transcript is a true
11 record of the testimony given.

12 Further, that if the foregoing pertains to
13 the original transcript of a deposition in a Federal
14 Case, before completion of the proceedings, review
15 of the transcript [] was [] was not requested.
16 I further certify I am neither financially
17 interested in the action nor a relative or employee
18 of any attorney or party to this action.

19 IN WITNESS WHEREOF, I have this date
20 subscribed my name.

21 Dated: 11/3/2016

22

23



24

Cara Jacobsen

CSR No. 13053

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