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Jacob D. Williams, an Individual, Plaintiff/Appellant vs. Craig Alan Anderson, an Individual, and Quinn Zite, an Individual, and Anderson Zite, LLC (F/K/a/ Fix a Phone, LLC), a Utah Limited Liability Company, Defendants/Appellees

Utah Court of Appeals

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UTAH COURT OF APPEALS

JACOB D. WILLIAMS, an individual, Plaintiff/Appellant vs. CRAIG ALAN ANDERSON, an individual, QUINN ZITE, an individual, and ANDERSON ZITE, LLC (f/k/a Fix A Phone, LLC), a Utah limited liability company, Defendants/Appellees	**BRIEF OF APPELLANT** Appellate Case No. ~~20160885~~ 20150886

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UTAH APPELLATE COURTS

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IDENTIFICATION OF THE PARTIES

The Appellant is Jacob Williams ("Williams"). Williams is the Plaintiff in the case before the trial court. The Appellees are Craig Alan Anderson, Quinn Zite, and Anderson/Zite, LLC (f/k/a Fix A Phone, LLC). Appellees were the Defendants in the case before the trial court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-4-103(2)(j).

STANDARD OF REVIEW AND ISSUE PRESERVATION

Issue: Did the trial court err in prohibiting Appellant from presenting any evidence of damages in support of his claims for an alleged failure to provide a "computation of any damages" as required by Utah R. Civ. P. 26(a)(1)(C).

Standard of Review: Two standards of review are applicable to this appeal. First, the standard of review is "correctness" in regard to the Trial Court's interpretation of Rule 26. Second, if the Trial Court's interpretation of Rule 26 was correct and Williams failed to comply with Rule 26, did the Trial Court's order result in an abuse of discretion.

As summarized by this Court: "AIM argues the trial court erred in excluding evidence of part of Durbano's billing statements because AIM did not supplement its discovery requests. Trial courts have 'broad discretion in selecting and imposing sanctions for discovery violations . . . .' However, 'the proper interpretation of a rule of procedure is a question of law, and we review the trial court's decision for correctness.'" Am. Interstate Mortg. Corp. v. Edwards, 2002 UT App 16, ¶ 10 (internal quotations and citations omitted); see also Bodell Constr. Co. v. Robbins, 2009 UT 52, ¶ 35 ("In applying the abuse of discretion standard to the district court's imposition of a particular sanction, we give the district court a great deal of latitude in determining the most fair and efficient manner to conduct court business because the district court judge is in the best position to evaluate the status of his [or her] cases, as well as the attitudes, motives, and credibility of the parties. Thus, we will determine that a district court 'has abused its discretion in choosing which sanction to impose only if there is either an erroneous conclusion of law or no evidentiary basis for the [district] court's ruling.").

Preservation of the Issues: Williams opposed Defendants' motion in limine seeking the exclusion of damages-related evidence and presented argument before the Trial Court. (R. 505-522; 912-960). Thus, Williams adequately preserved the issue for appeal. See Normandeau v. Hanson Equip., Inc, 2009 UT 44, ¶ 23 ("An issue is preserved if it is raised in a timely fashion, clearly identified, and adequately briefed.").

STATEMENT OF THE CASE

The lawsuit underlying this interlocutory appeal arises from a business dispute. Williams and Defendants were co-owners in a Utah company known as Fix-A-Phone, LLC ("Fix-A-Phone"). As alleged in Williams' complaint, Defendants engaged in numerous wrongful acts to exclude Williams from Fix-A-Phone, including the issuance of a fraudulent and unnecessary capital call that purportedly resulted in Williams' 30% ownership interest in Fix-A-Phone being "cancelled." Shortly after Defendants secured Williams' ownership interest, Defendants sold Fix-A-Phone's assets to a company known as Tricked Out Accessories, Inc. ("Tricked Out").

Williams filed suit asserting, among other claims, that he was still a thirty-percent owner in Fix-A-Phone at the time of the sale. Williams' initial disclosures included a computation of damages, pursuant to Utah R. Civ. P. 26(a)(1)(C), stating that "Plaintiff Jacob D. Williams is entitled to 30% of the price Tricked Out Services, Inc. paid for Fix A Phone, LLC, as well as 30% of any equity or ownership interest Defendants may have in Tricked Out Services, Inc." In discovery, Williams learned that Defendants sold Fix-A-Phone's assets for $200,000.00. Williams did not amend his Rule 26 disclosures to

state that he was entitled to "30% of the $200,000.00"; rather, his initial disclosures continued to state that he was "entitled to 30% of the price . . . paid for Fix-A-Phone ...."

A jury trial was set for September 7 – 9, 2015. On August 4, 2015, Defendants filed a motion in limine seeking to prevent Williams "from opining or otherwise presenting damages-related evidence." As grounds for their motion, Defendants argued that Williams had "failed to comply with his obligations under Utah R. Civ. P. 26(a)(1)(C) because he had failed to provided "a *computation* of any damages...." (emphasis in original). Williams filed an opposition arguing that his initial disclosures plainly stated a computation of the damages requested – that is, "30% of the price Tricked Out Services Inc. paid for Fix a Phone LLC" and that it was undisputed that the sales price was $200,000.00, which Defendants knew since they had signed the contract selling Fix A Phone.

On September 3, 2015, Judge Faust held oral argument on Defendants' motion. The next day, Judge Faust issued a memorandum decision granting Defendants' motion thereby prohibiting Williams from presenting any evidence of damages. See Addendum Exhibit A attached hereto. The parties then filed a joint stipulated order striking the trial dates given Judge Faust's ruling on Defendants' motion. On October 13, 2015, Judge Faust entered an order stating that Defendants' motion "is granted. Williams is and shall be prevented from opining on or otherwise presenting damages-related evidence at the trial of this matter." See Addendum Exhibit B attached hereto. On October 26, 2015, Williams filed his petition seeking interlocutory appeal.

STATEMENT OF THE FACTS

A. Williams' Complaint.

1. Williams filed a complaint against Defendants asserting claims for declaratory judgment, fraud, breach of fiduciary duty, and civil conspiracy. (R. 1-14).

2. Williams' complaint alleged that Defendants had engaged in numerous wrongful acts, resulting ultimately in the purported cancellation of Williams' thirty-percent ownership interest in Fix-A-Phone. As Defendants sold the assets of Fix-A-Phone shortly after allegedly cancelling Williams' thirty-percent ownership interest, Williams sought a declaratory judgment stating that:

> a. Williams' thirty percent (30%) ownership in Defendant Fix A Phone was never cancelled. Williams therefore was a thirty percent (30%) owner of Defendant Fix A Phone at the time of the January 2013 sale to Tricked Out Services, Inc., for an unknown amount, and Williams is entitled to recover thirty percent (30%) of the purchase price.
>
> b. Williams is a thirty percent (30%) owner of any equity or ownership interest that Defendant Anderson and/or Defendant Zite possesses in Tricked Out Services, Inc., or in any money owed by Tricked Out Services, Inc., to Defendant Anderson and/or Defendant Zite.

(R. 7-8).

3. Because the sale price was unknown, and Williams reasonably believed Fix-A-Phone was sold for over $1,000,000.00, the case was designated Tier III for discovery purposes. (R. 7).

B. Discovery In This Matter.

4. After Defendants' motion to dismiss was denied (R. 99), Williams provided his Rule 26(a) initial disclosures. (R. 453-459). In regard to damages, Williams stated: "Plaintiff Jacob D. Williams is entitled to 30% of the price Tricked Out Services, Inc.

paid for Fix-A-Phone, LLC as well as 30% of any equity or ownership interest Defendants may have in Tricked Out Services, Inc. . . . ." (R. 485).

5. Williams learned in discovery that Fix-A-Phone's assets were sold to Tricked Out Services, Inc. for $200,000.00. As Defendants had executed the asset purchase agreement on behalf of Fix-A-Phone (as Williams' ownership interest had allegedly been "cancelled"), Defendants knew the purchase price was $200,000.00 and that thirty-percent of the purchase price equaled $60,000.00. (R. 538-554).

6. Williams subsequently amended his initial disclosures as discovery progressed. The language referenced in paragraph 4 above remained the same, with Williams stating his entitlement to "30% of the price Tricked Out Services, Inc. paid for Fix-A-Phone LLC . . . ." (R. 470-476). Williams did not specifically identify "the price Tricked Out Services, Inc. paid for Fix A Phone LLC" as the $200,000.00 set forth in the asset purchase agreement.

7. Notwithstanding the "Tier III" discovery designation, the parties did not engage in an extensive amount of discovery. A couple sets of written discovery were exchanged and three depositions were taken. (R. 163-164, 186-187, 199-200, 230-231, 251-252, 255-256, 318-319, 330-332, 338-339, 376-377, 384-385).

C. Defendants' Motion In Limine And The District Court's Order.

8. As trial approached, Defendants filed a motion in limine requesting that the District Court "issue an order in limine preventing [Williams] from opining on or otherwise presenting damages related evidence." (R. 439-476).

9. Defendants argued that Williams had "failed to comply with his obligations under Rule 26(a)(1)(C) of the Utah Rules of Civil Procedures" by failing to provide "a computation of any damages claims . . . ." (Id.). Defendants argued that "Williams' purported 'calculation' leaves out all inputs – it is no calculation at all, but a mere disclosure that represents no thought, planning, or preparation other than to rely upon Williams' purported 30% interest in Fix-A-Phone and to state that Williams gets 30% of whatever exits." (Id.)

10. Williams filed an opposition, pointing out that there was no dispute that Fix-A-Phone's assets were sold for $200,000.00 and therefore Williams was entitled to thirty-percent of that amount. As part of the opposition, Williams attached an email from Defendants' counsel stating that "my clients' position is that they sold the assets of the Fix A Phone business for $200,000, per the purchase agreement. Any further compensation they receive is in consideration for the services they are required to render per the contract. (In other words, if they don't consult, they don't get paid). Therefore, the most Mr. Williams can recover, even if he succeeds on 100% of his claims, is 30% of $200,000, or $60,000." (R. 505-522).

11. Defendants filed a reply (R. 525-569) in which they argued that at Williams' deposition, he "continued to insist that his damages consisted not only of 30% of $200,000, but also 30% of any compensation Tricked Out Services, Inc. ("Tricked Out") paid Defendants for consulting services rendered." He testified:

Q. Do you know how much the company did sell for?

A. Two hundred, plus a percentage of the stores's profit or revenue.

Q. If Mr. Anderson and Mr. Zite work as consultants; right?

A. I would need to check it.

Q. Okay. And your knowledge of this is just based on receiving the agreement in this litigation from Tricked Out?

A. Right.

Q. Have you actually read that agreement?

A. Yes.

Q. You have; right?

A. Yes.

(R. 528, 566-567).

12. Judge Faust held oral argument on September 2, 2015. (R. 912-960). At oral argument, Defendants' counsel admitted that they had known all along Fix a Phone had sold for $200,000.00:

> **THE COURT:** Hang on for a moment. Did you, in fact, always know from the beginning, even at the time of the filing of the complaint, that the company sold for $200,000 –
>
> **MR. BROUGH:** Yes.
>
> **THE COURT:** -- and not for what was alleged in the complaint?
>
> **MR. BROUGH:** Yes.
>
> **THE COURT:** Okay.
>
> **MR. BROUGH:** That's correct.

(R. 929). Defendants subsequently tried to argue that Williams might be asserting that the $200,000.00 price was "depressed" or otherwise inadequate, but admitted to Judge Faust that no such allegation had ever been raised in the case:

> **THE COURT:** And so as it's disclosed to them, this component's zero, well, that takes care of that one. This is 200,000. That takes care of that one.
> Now, if they had had some documents or some damages on their side that you didn't have in your possession and they failed to give it to you and didn't disclose it to you, then I think it's clear. No question. But I -- I'm struggling to -- to see any financial aspects or components of the actual substantive money issues that we're talking about here that they had or that they knew about except for getting them through you guys.
>
> **MR. BROUGH:** And I -- and I understand and appreciate the Court's question and desire to kind of get the right answer here. Let -- let me explain it this way: Rule 26 makes it mandatory and automatic to exclude what is not disclosed.
> And what wasn't disclosed here?
> I understand that the plaintiff's argument is, okay, we told you 30 percent of X, you guys know what X is. I mean, you got the asset purchase agreement right there, you know nothing else was paid. You know that.
> Well, here's what I don't know. Here's what I don't know: I don't know if you're claiming that there was some sort of collusion between the -- and that the purchase price was depressed. I don't know what you're saying the sales price is.
>
> **THE COURT:** Was that -- was that ever raised?
>
> **MR. BROUGH:** It was -- no, it was never raised.

THE COURT: So that's a hypothetical.

MR. BROUGH: It is a hypothetical. I don't know that. But the reason that I don't know that is because I can't look at their pleading to determine it, nor can I look at their disclosures to determine –

THE COURT: But if you asked him -- you asked him in his deposition what he -- what he thought his damages were.

MR. BROUGH: Right.

(R. 953-955).

13. On September 3, 2015, Judge Faust issued a memorandum decision granting Defendants' motion. The Trial Court held: "Plaintiff further argues Defendants always knew of his demand on damages as being thirty percent (30%) of whatever the company sold for and the Defendants had this information in their possession. A claim of a fixed percentage for damages does not comply with the requirement to disclose a calculation of the damages a plaintiff is required to disclosure under Rule 26." See Addendum Exhibit A attached hereto; see also R. 693-698. On October 13, 2015, the Trial Court entered an order granting Defendants' motion in limine. See Addendum Exhibit B; see also R. 801-802.

SUMMARY OF THE ARGUMENT

Utah R. Civ. P. 26(a)(1)(C) requires a party to provide a "computation of any damages claimed . . . ." Williams did exactly that. In his Rule 26 disclosures, Williams stated that, as a thirty-percent owner in Fix A Phone at the time it was sold, he was entitled to thirty percent of the actual sale price of Fix A Phone. And while Williams did

not know Fix A Phone's sale price when he filed his initial disclosures, Defendants certainly did, as Defendants had executed the contract selling Fix A Phone's assets for $200,000.00.

The comments to Rule 26, as well as Federal caselaw interpreting similar language, recognizes that the purpose of the Rule 26 damages disclosures is to facilitate an exchange of information and avoid unfair surprise in regard to "the nature and extent" of a party's damage. Here, Williams' Rule 26 disclosures plainly articulated the nature of his damage (being excluded from the sale) as well as the extent of his damage (thirty-percent of the Fix A Phone sale price). In doing so, Williams complied with both the letter and spirit of Rule 26. Defendants' argument that "30% of the sale price of Fix A Phone" is inadequate and needed instead to read "30% of the $200,000.00 sale price of Fix A Phone" should be rejected.

But even if Williams did not comply with Rule 26 in a technical sense, any failure to supplement Williams' initial disclosures was harmless under Rule 26(d)(5), and the Trial Court's decision to impose the drastic sanction of prohibiting all damages evidence was an abuse of discretion.

ARGUMENT

Utah R. Civ. P. 26(a)(1)(C) states that a party shall serve on the other parties: "a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered." According to Professor Moore, such "initial disclosures may be sufficiently specific if they, coupled with other information made

available to the other parties earlier during the course of the proceedings, provide the other parties with an adequate basis to evaluate the injury the disclosing party has suffered." Moore's Federal Practice 3D, § 26.22[4][c][ii].

Utah appellate courts have not addressed the fundamental purpose of the Rule 26 disclosure requirements or the definition of the phrase "a computation of any damages." Federal courts considering the issue have identified two primary goals for this disclosure requirement. First, as the Advisory Committee's notes to the 1993 amendment state, "a major purpose of the Rule 26(a) initial disclosure requirement is to accelerate the exchange of basic information about the case and to eliminate the paperwork involved in requesting such information." See e.g., Gutierrez-Howerton v. Gonzales, 2014 U.S. Dist. LEXIS 79511, *5 (D. Nev. June 11, 2014); Meneweather v. Powell, 2011 U.S. Dist. LEXIS 143292, *2-3 (N.D. Cal. December 13, 2011) ("The purpose of Rule 26 initial disclosures is to accelerate the exchange of basic information, encourage counsel to evaluate the case, and enhance settlement opportunities."). Second, "the purpose of the initial disclosures provided for in Rule 26 is to prevent a party from being unfairly surprised by the presentation of new evidence." Alza Corp. v. Andrx Pharms., LLC, 2008 U.S. Dist. LEXIS 34435, *5 (D. Del. April 28, 2008) *citing* Astraxeneca AB v. Mutual Pharmaceutical Co., 278 F. Supp. 2d 491, 510 (E.D. Pa. 2003).[1]

The 2011 Utah Advisory Committee notes shed further light on the purpose of Rule 26's damage disclosure requirement, stating that "[t]he amendments also require

[1] "Interpretations of the Federal Rules of Civil Procedure are persuasive where the Utah Rules of Civil Procedure are 'substantially similar' to the federal rules." Tucker v. State Farm Mut. Auto. Ins. Co., 2002 UT 54, ¶ 7 n.2 *citing* Lund v. Brown, 2000 UT 75, ¶ 26.

parties to provide more information about damages early in the case. Too often, the subject of damages is deferred until late in the case." The 2011 Advisory Notes then state "the subject of damages should not simply be deferred until expert discovery. Parties should make a good faith attempt to compute damages to the extent it is possible to do so and must in any event provide all discoverable information on the subject, including materials related to the nature and extent of the damages." The consequence of failing to disclose is also discussed: "To make the disclosure meaningful, and to discourage sandbagging, parties must know that if they fail to disclose important information that is helpful to their case, they will not be able to use that information at trial. The courts will be expected to enforce them unless the failure is harmless or the party shows good cause for the failure."

The question here is what "important information," if any, did Williams "fail to disclose?" In Williams' complaint, and then consistently throughout discovery, Williams maintained that he was "entitled to 30% of the price Tricked Out Services, Inc. paid for Fix-A-Phone, LLC . . . ." Williams did not identified his damages in a vague or conclusory way; rather, he stated his specific belief that he was entitled to 30% of the actual amount paid for Fix-A-Phone by the purchaser. In doing so, he identify the "nature" of his damage (which was being excluded from the sale of Fix-A-Phone to Tricked Out) as well as the extent of his damages (which was thirty percent of Fix-A-Phone's actual sale price). Williams did not "sandbag;" to the contrary, he was explicit and forthright.

Defendants argued repeatedly to the Trial Court that they suffered prejudice because Williams never identified what he believed to be Fix A Phone's sale price. (R. 448 – "The formula Williams provided is insufficient, based upon a single question: 30% of what? What does Williams claim is the sale price of Fix A Phone?"; R. 526 – "Williams have never disclosed --- the figure he considers to be the sale price of Fix A Phone . . . ."). But Defendants knew the actual sale amount at all times, as they executed the asset purchase agreement on Fix-A-Phone's behalf. Williams therefore could not "fail to disclose" to Defendants something that Defendants already knew. And Williams' initial disclosures were clear that he was seeking thirty percent of the "price [Tricked Out] paid for Fix A Phone, LLC . . . ."

Williams never once argued that he was seeking anything more than his rightful percentage of the actual "price paid," which Defendants knew was $200,000.00. Indeed, during oral argument, Defendants admitted that Williams had never advocated that the sale price was too low or that Williams was entitled to more than thirty-percent of the price actually paid. See Statement of Fact No. 12 above. If Williams had made such an argument for damages, perhaps Defendants would have a point. But this "hypothetical" (as Judge Faust called it) never occurred because Williams never sought to recover more than thirty-percent of the price actually paid, as set forth in his initial disclosures.

Moreover, Defendants and the Trial Court's memorandum decision refer to the requirement for a "calculation" – a term not used in Rule 26 – rather than a "computation," which is the term used in Rule 26. But even assuming "calculation" and "computation" can be used interchangeably, Defendants and the Trial Court's definition

of "computation" is unduly narrow. Merriam-Webster defines "computation" as "1a: the act or action of computing: Calculation; b: the use or operation of a computer; 2: a system of reckoning; and 3: an amount computed." See Merriam-Webster.com (September 21, 2015). Likewise, Courts have recognized (in different settings) that "computation" is defined as "the act or process to determine an amount or number." Costello v. Patterson Dental Supply, Inc., 2007 U.S. Dist. LEXIS 25636, *14 (W.D. Mich. April 5, 2007) quoting the American Heritage Dictionary, 3d Ed. 1996. Here, Williams plainly provided the "act or process" or the "calculation" or the "system or reckoning" by which the damages claimed were identified.

For these reasons, the provisions of Utah R. Civ. P 26(d) governing the consequences of failing "to supplement timely a disclosure" cannot be applied to this situation. Specifically, Rule 26(d)(4) states that a party "may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure." Here, there is no undisclosed "witness, document, or material" as Defendants were in possession of the actual price paid for Fix-A-Phone's assets at all times.

But even if there was a failure to supplement, it was necessarily harmless. Williams has not located any Utah law detailing the factors to consider if late supplementation is "harmless." The Tenth Circuit has identified four factors in making this determination: "(1) the prejudice or surprise to the opposing party; (2) the ability of the party to cure the prejudice; (3) the extent to which the evidence would disrupt the trial; and (4) the moving party's bad faith or willfulness." Jacobsen v. Deseret Book Co.,

287 F.3d 936, 954 (10th Cir. 2002). Here, each factor leads to the conclusion that any alleged failure to supplement did not harm Defendants in any way.

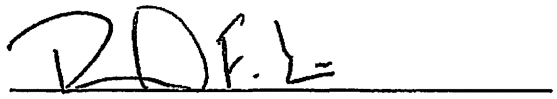
First, the fact that Williams was seeking thirty-percent of $200,000.00 could not have surprised Defendants as they knew all along that was the sales price. There was no "new" or "surprise" evidence. Second, there is no prejudice to cure. The price Tricked Out paid for Fix A Phone is undisputed and well-known to Defendants. Williams' failure to include the number $200,000.00 in his initial disclosures in no way limited the Defendants' discovery efforts into the price paid for Fix A Phone or Williams' damages. Indeed, Defendants knew the entire time what price was paid and, in fact, asked Williams what he thought the price was during discovery. Nothing was left to discover on this issue. Third, allowing the jury to hear the evidence of the actual price paid would not have disrupted the trial in any way. Finally, Williams diligently fulfilled his discovery obligations in this case, including updating his initial disclosures on one occasion to provide Defendants with additional information. No evidence of bad faith or willfulness exists.

CONCLUSION

Williams' initial disclosure properly set forth a "computation" of his requested damages. As a result, the Trial Court's ruling that a "claim of a fixed percentage of damages does not comply with the requirement to disclose a calculation of damages . . ." is erroneous and should be overturned by this Court. For the reasons set forth above, Williams respectfully requests that the Trial Court's order, dated October 13, 2015, be reversed.

DATED this 4th day of March 2016.

MICHAEL BEST & FRIEDRICH, LLP



Richard F. Ensor
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that in accordance with Rule 24(f)(1)(A) of the Utah Rules of Appellate Procedure, this Brief is in compliance with the Type-Volume Limitations set by the Court. Specifically, this Brief contains 4,002 words including all headings, footnotes, and quotations, and 379 lines of text.

DATED this 4th day of March 2016.

Richard F. Ensor
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed with the Court on this 4th day of March 2016, and a copy was delivered via first class mail to:

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Tab A

EXHIBIT A TO ADDENDUM

FILED DISTRICT COURT
Third Judicial District

SEP 03 2015

SALT LAKE COUNTY
By: _____
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JACOB D. WILLIAMS, an individual, **Plaintiff/Counterclaim Defendant,** **vs.** **CRAIG ALAN ANDERSON, an individual, QUINN ZITE, an individual, and ANDERSON ZITE, LLC, f/k/a FIX A PHONE, LLC, a Utah limited liability company,** **Defendants/Counterclaimants.**	**MEMORANDUM DECISION** **CASE NO. 130901891** **Judge Robert P. Faust**

The above-entitled matter came before the Court on September 2, 2015 pursuant to Defendants/Counterclaimants' Motion in Limine. Following the hearing, the matter was taken under advisement. The Court having considered the motion, memoranda, exhibits attached thereto, as well as the arguments of counsel, hereby enters the following ruling.

ARGUMENT

With this motion, Defendants/Counterclaimants ("Defendants") argue Plaintiff/Counterclaimant, Jacob D. Williams ("Williams"), has failed to comply with his obligations under Rule 26(a)(1)(C) of the Utah Rules of Civil Procedure which requires all parties to a suit to provide "a computation of any damages claimed and a copy of all discoverable

documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered." *Id.* According to Defendants, Williams has *never* provided a computation of his damages and as a result, an order in limine should issue preventing Williams from opining on or otherwise presenting damages-related evidence.

Williams opposes the motion arguing over a year ago, Defendants' counsel stated that:

> [r]egarding mediation, my clients' position is that they sold the assets of the Fix-A-Phone business for $200,000, per the purchase agreement. Any further compensation they receive is in consideration for the services they are required to render per the contract. Therefore, the most Mr. Williams can recover, even if he succeeds on 100% of his claims, is 30% of $200,000, or $60,000.

It is Williams' position Defendants thus know (and have known since the beginning of the case) the amount that Williams is claiming for the sale of Williams' 30% interest in Fix-A-Phone "per the asset agreement" with Tricked Out Services, Inc.

RULING

Rule 26(a)(1)(C) requires all parties to a suit to provide "a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered."

The Advisory Committee further stated:

> The amendments also require parties to provide more information about damages early in the case. Too often, the subject of damages is deferred until late in the case. Early disclosure of damages information is important. Among other things, it is a critical factor in determining proportionality. The committee recognizes that damages often require additional discovery, and typically are the

> subject of expert testimony. The Rule is not intended to require expert disclosures at the outset of a case. At the same time, the subject of damages should not simply be deferred until expert discovery. Parties should make a good faith attempt to compute damages to the extent it is possible to do so and must in any event provide all discoverable information on the subject, including materials related to the nature and extent of the damages.
>
> The penalty for failing to make timely disclosures is that the evidence may not be used in the party's case-in-chief. To make the disclosure requirement meaningful, and to discourage sandbagging, parties must know that if they fail to disclose important information that is helpful to their case, they will not be able to use that information at trial. The courts will be expected to enforce them unless the failure is harmless or the party shows good cause for the failure.

Id. Adv. Comm. n. (2011).

Applied to the facts of this case, the record indicates that Williams has not in fact agreed with Defendants that Fix-A-Phone sold for $200,000 and has contended that the purchase price includes the 50% net profit calculation described in Section 2.02 of the Asset Purchase Agreement.

Additionally, in Williams' deposition, convened on June 5, 2014, he continued to insist that his damages consisted not only of 30% of $200,000, but also 30% of any compensation Tricked Out Services, Inc. ("Tricked Out") paid Defendants for consulting services rendered. Specifically, Williams stated:

> Q. Do you know how much the company did sell for?

> A. *Two hundred, plus a percentage of the stores's profit or revenue.*
>
> . . .
>
> Q. Okay. And your knowledge of this is just based on receiving the agreement in this litigation from Tricked Out?
>
> A. *Right.*
>
> Q. Have you actually read that agreement?
>
> A. *Yes.*

See Dep. Tr. Jacob D. Williams

Accordingly, even after the February 14, 2014 email upon which Williams depends, he continued to insist that Fix-A-Phone sold its assets not just for $200,000, but for an additional percentage of Tricked Out's profits arising from the sold assets.

Furthermore, Williams' own amended initial disclosures disclose, as an uncalculated category of damages, "any money owed by Tricked Out Services, Inc." to Defendants. That would include any profit payments owing pursuant to Section 2.02 of the Asset Purchase Agreement. In other words, Williams apparently seeks a share of the funds Tricked Out should pay to Defendants for their independent consulting work.

Finally, in his Complaint, Williams alleged that Fix-A-Phone was worth $1.5 million. Based on that allegation, and absent any further disclosure, Williams obtained Tier 3 discovery in both quantity and time, and Defendants assert they defended this lawsuit as if it were a $450,000 case. As a result, a three-day jury trial has been set in this matter which would have

likely been handled much differently. While Williams argues that Defendants never complained about the lack of a disclosure, such is irrelevant as it is Williams' obligation to disclose a damages calculation, not Defendants' obligation to demand one. *See* Utah R. Civ. P.26(a)(1) (requiring disclosure of a damages calculation "without waiting for a discovery request").

Plaintiff further argues Defendants always knew of his demand on damages as being thirty percent (30%) of whatever the company sold for and the Defendants had this information in their possession. A claim of a fixed percentage for damages does not comply with the requirement to disclose a calculation of the damages a plaintiff is required to disclosure under Rule 26.

Based upon the foregoing, Defendants/Counterclaimants' Motion in Limine is GRANTED.

DATED this 3rd day of September, 2015.

BY THE COURT:

STATE OF UTAH THIRD DISTRICT COURT SALT LAKE CITY

ROBERT P. FAUST
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I emailed/mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 3rd day of September, 2015:

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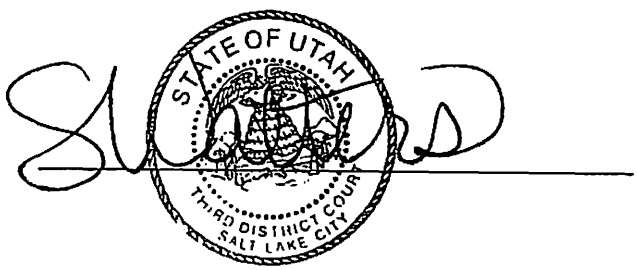

Tab B

EXHIBIT B TO ADDENDUM

The Order of Court is stated below:
Dated: October 13, 2015 11:51:05 AM
/s/ ROBERT FAUST
District Court Judge

Order Prepared By:
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Attorneys for Defendants/Counterclaimants

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY STATE OF UTAH

* * * * * * *

JACOB D. WILLIAMS, an individual, Plaintiff/Counterclaim Defendant, v. CRAIG ALAN ANDERSON, an individual, QUINN ZITE, an individual, and ANDERSON ZITE, LLC, f/k/a FIX A PHONE, LLC, a Utah limited liability company, Defendants/Counterclaimants.	**ORDER GRANTING MOTION IN LIMINE** Case No. 130901891 Judge Robert P. Faust

* * * * * * *

This matter came before the Court on the Motion in Limine (the "Motion") filed by Defendants and Counterclaimants Craig Alan Anderson, Quinn Zite, and Anderson Zite, LLC, f/k/a Fix A Phone, LLC (collectively, "Defendants") on August 4, 2015. The Court has reviewed the Motion and all documents and briefing associated with it, including the Opposition to Defendants' Motion in Limine filed by Plaintiff and Counterclaim Defendant Jacob D. Williams ("Williams") on August 19, 2015, and all documents associated with it. Furthermore,

on September 2, 2015, the Court heard oral argument on the Motion. At that oral argument, Richard F. Ensor appeared and argued on Williams' behalf, and Daniel K. Brough appeared and argued on Defendants' behalf. On September 3, 2015, the Court entered a Memorandum Decision (the "Memorandum Decision") granting the Motion and preventing Williams from opining on or otherwise presenting damages-related evidence at trial.

Now, for all of the reasons stated in the Memorandum Decision, the Court hereby ORDERS as follows:

The Motion is GRANTED. Williams is and shall be prevented from opining on or otherwise presenting damages-related evidence at the trial of this matter.

HEREBY ENTERED BY THE COURT

EFFECTIVE ON THE DATE WHEN THE COURT STAMP IS AFFIXED
TO THE FIRST PAGE OF THIS DOCUMENT

APPROVED AS TO FORM:

MICHAEL BEST & FRIEDRICH, LLP

/s/ Richard F. Ensor
Richard F. Ensor
Melinda A. Morgan

Attorneys for Plaintiff/Counterclaim Defendant

(electronically signed by Daniel K. Brough with written authorization from Richard F. Ensor)

/s/ Daniel K. Brough