

STATE OF NORTH CAROLINA
COUNTY OF CATAWBA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
11 CVS 933

WILLIAM A.B. BLYTHE (individually and)
in his capacity as shareholder) and)
DRYMAX SPORTS, LLC,)
)
Plaintiffs,)
v.)
)
ROBERT E. BELL III, VIRGINIA BELL,)
NISSAN JOSEPH, AND HICKORY)
BRANDS, INC.,)
)
Defendants.)

DEFENDANTS' MOTION TO
EXCLUDE TESTIMONY FROM
WILLIAM A. BARBEE

Defendants Robert E. Bell, III, Virginia Bell, Nissan Joseph, and Hickory Brands, Inc. ("Defendants"), through counsel, respectfully submit this Motion to Exclude Testimony from William A. Barbee ("Barbee"). In support of this Motion, Defendants come now and say the following:

1. Plaintiffs retained Barbee, a certified public accountant, to support their theory of damages in this matter. Barbee was the sole expert disclosed by Plaintiffs through their initial expert disclosures.
2. On August 1, 2012, Barbee submitted his Initial Report, in which he set out his opinions and the basis for those opinions.
3. On August 27, 2012, Defendants' counsel took Barbee's initial deposition.
4. On September 4, 2012, Defendants submitted reports from three experts, each of whom questioned the content of Barbee's Initial Report.
5. On September 20, 2012, Barbee submitted a Rebuttal Report, in which he responded to various points raised by Defendants' experts.
6. On October 3, 2012, Defendants' counsel took Barbee's second deposition.

7. Through his Initial Report, Rebuttal Report, and two-part deposition, Barbee has been afforded a complete and fair opportunity to discuss his background, express his opinions, and explain the means by which he arrived at those opinions. On the basis of various assumptions, Barbee expresses his opinion that Drymax Sports LLC has been harmed in several respects, divided by category of alleged damages:

- a. “Historic Lost Profits” alleged to be about \$3.3 million;
- b. “Additional Lost Profits” alleged to be about \$7.4 million;
- c. An “Alternative Calculation” to the “Additional Lost Profits” figure, based on an alleged loss of corporate value, alleged to be about \$7.5 million; and
- d. Losses from “Excess Interest Charged” of about \$131,000.

8. Barbee is not qualified to express the opinions set out in support of his conclusion concerning alleged “Additional Lost Profits.”

9. The methodology that Barbee employs to support his opinions concerning alleged “Additional Lost Profits” is insufficiently reliable to be admissible.

10. Barbee’s opinions and conclusion concerning alleged “Additional Lost Profits” are the products of speculative forecasts and cannot be proven with reasonable certainty.

11. Barbee’s opinions concerning the alleged “Alternative Calculation” damages arise from the estimates and opinions expressed through his “Additional Lost Profits” opinions. These “Alternative Calculation” opinions therefore suffer from all of the same defects as do his “Additional Lost Profits” opinions and are therefore inadmissible.

12. All of Barbee’s opinions are based upon assumptions that are unsupported by any evidence.

13. Barbee has surrendered all objectivity and taken on the role of advocate, such that all of his opinions concerning Drymax Sports's alleged damages should be discarded.

WHEREFORE, for the reasons set forth above and as more fully explained in Defendants' brief filed contemporaneously with this Motion, Defendants Robert E. Bell, III, Virginia Bell, Nissan Joseph, and Hickory Brands, Inc. request that the Court grant this Motion and enter an order excluding testimony from William A. Barbee.

Respectfully submitted, this the 23rd day of October 2012.

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CERTIFICATE OF SERVICE

The undersigned, being an Attorney duly licensed to practice law in the State of North Carolina, does hereby certify that a copy of the foregoing **Defendants' Motion to Exclude Testimony from William A. Barbee** was duly served on the 23 day of October 2012, as follows:

X By electronic mail and by depositing a copy of same in the United States Mail, first class postage prepaid, addressed to them as follows:

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