UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BONA FIDE CONGLOMERATE, INC.,

Plaintiff,

v.

SOURCEAMERICA,

Defendant.

Case No.: 3:14-cv-00751-GPC-AGS

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, PARTIAL SUMMARY JUDGMENT

[ECF No. 370.]

Before the Court is Defendant SourceAmerica's ("Defendant's" or "SourceAmerica's") motion for summary judgment or, alternatively, partial summary judgment on Plaintiff Bona Fide Conglomerate, Inc.'s ("Plaintiff's" or "Bona Fide's") remaining breach of contract claim. (Dkt. No. 370.) The motion has been fully briefed. (Dkt. Nos. 456, 459.) The Court deems the motion suitable for disposition without oral argument pursuant to Civil Local Rule 7.1(d)(1). Having considered the applicable law and the parties' arguments, the Court **DENIES** Defendant's motion for summary judgment or alternatively, partial summary judgment. (Dkt. No. 370.)

RELEVANT PROCEDURAL BACKGROUND

On April 1, 2014, Bona Fide filed a Complaint against SourceAmerica and ten

other nonprofit agency defendants. (Dkt. No. 1.) On September 19, 2014, Bona Fide filed an Amended Complaint, asserting eight claims under § 1 of the Sherman Act, one claim under § 9 of the Clayton Act, and one breach of contract claim. (Dkt. No. 128.) On January 6, 2015, the Court dismissed Bona Fide's Sherman Act and Clayton Act claims against all defendants. (Dkt. No. 189.) Bona Fide's breach of contract claim against SourceAmerica, and SourceAmerica's counterclaim against Bona Fide and Ruben Lopez, are the sole remaining claims in the case. (*Id.* at 29; Dkt. No. 321.)

On March 13, 2017, SourceAmerica filed a motion for summary judgment or alternatively, partial summary judgment as to the remaining tenth claim for breach of contract in Bona Fide's Amended Complaint and Supplemental Complaint. (Dkt. No. 361.) On March 20, 2017, SourceAmerica filed a corrected version of the motion to account for a few citation errors. (Dkt. No. 370.)

SourceAmerica's motion for summary judgment solely concerns Bona Fide's lost profits damages. (*See id.*) No other elements of Bona Fide's breach of contract claim are contested in the instant motion. SourceAmerica contends that Bona Fide may not recover lost profits damages as a matter of law, and that even if it could recover lost profits damages, it lacks any evidence of such damages. (*Id.*)

On April 6, 2017, prior to Bona Fide's April 10, 2017 deadline to file its opposition brief, Bona Fide filed an *ex parte* application for a denial or continuance of SourceAmerica's motion for summary judgment. (Dkt. No. 384.) Bona Fide asserted a Federal Rule of Civil Procedure 56(d) request, arguing that it needed discovery to calculate lost profits damages. (*Id.*) After directing supplemental briefing from both parties and conducting a hearing, (Dkt. Nos. 388–91), the Court granted Bona Fide's Rule 56(d) request, directed the parties to meet and confer regarding discovery issues, and suspended the previously ordered briefing schedule, (Dkt. No. 392).

On April 19, 2017, the parties submitted a joint status report to the Court, identifying the results of their meet-and-confer session and proposing timelines for an amended briefing schedule and hearing date. (Dkt. No. 401.) After considering the

parties' joint status report, the Court set an amended discovery and briefing schedule. (Dkt. No. 402.)

On June 27, 2017, Bona Fide opposed SourceAmerica's motion for summary judgment. (Dkt. No. 456.) On June 30, 2017, SourceAmerica replied. (Dkt. No. 459.)

On July 11, 2017, Bona Fide filed an *ex parte* application for leave to file a sur-reply responding to SourceAmerica's evidentiary objections. (Dkt. No. 464.) The Court granted Bona Fide's *ex parte* application on July 12, 2017. (Dkt. No. 468.)

RELEVANT FACTUAL BACKGROUND

Because SourceAmerica's motion for summary judgment solely concerns Bona Fide's lost profits damages, the Court limits its recitation of the facts.

As set forth in prior orders in this case, this action arises out of the AbilityOne Program, a federal government procurement system for goods and services from designated nonprofit agency affiliates that substantially employ blind or severely disabled persons. (Dkt. No. 466-8, Plaintiff's Separate Statement of Undisputed Material Facts ("Pl.'s SSUF") ¶ 3.) Once a service and nonprofit agency are added to the Procurement List maintained by the United States AbilityOne Commission, federal agencies must procure that designated service from the designated nonprofit agency unless the nonprofit agency cannot meet the federal agency's demand. (*Id.*) A nonprofit agency retains its mandatory sourcing designation as long as it desires, or until the procuring agency no longer requires the designated service. (Pl.'s SSUF ¶ 4.) In effect, the addition of a service to the Procurement List makes the designated NPA the exclusive provider of such services to the federal government. (*Id.*)

SourceAmerica is the Central NonProfit Agency ("CNA") for the AbilityOne Program.[1] (Pl.'s SSUF ¶ 5.) SourceAmerica administers the AbilityOne Program on behalf of the AbilityOne Commission. (*Id.*) The federal government has designated

[1] SourceAmerica is a nonprofit organization organized under the laws of the District of Columbia. (Pl.'s SSUF ¶ 21.)

SourceAmerica with authority to, *inter alia*, facilitate federal procurement of products and services from nonprofit agencies participating in the AbilityOne Program by recommending suitable opportunities for such employment and by recommending nonprofit agencies to the AbilityOne Commission to perform those opportunities. *See* 41 C.F.R. § 51-3.2. Under the Nonprofit Agency Recommendation Process, SourceAmerica publishes Opportunity Notices, or Sources Sought Notices ("SSNs"), to the nonprofit agencies for consideration and response. (Dkt. No. 370-10, Wilkie Decl. Ex. A.) Each Opportunity Notice includes a description of the requirement, the estimated dollar value, and any special requirements or preferences of the federal contracting agency that will award the contract. (*Id.*) As a CNA, SourceAmerica has the responsibility to, *inter alia*, "evaluate the qualifications and capabilities of its nonprofit agencies and provide the Committee with pertinent data concerning its nonprofit agencies, their status as qualified nonprofit agencies, their manufacturing or service capabilities, and other information concerning them required by the Commission."[2] 41 C.F.R. § 51-3.2.

Bona Fide, organized in 2004, is a nonprofit agency that performs janitorial services for contracts in the AbilityOne Program. (Pl.'s SSUF ¶¶ 1, 17.) Ruben Lopez is the Chief Executive Officer of Bona Fide. (Pl.'s SSUF ¶ 17.) Bona Fide began providing services to the United States General Services Administration ("GSA") through the AbilityOne Program in 2005. (Pl.'s SSUF ¶ 1.) Bona Fide currently provides services to GSA on five AbilityOne Program contracts in three states. (Pl.'s SSUF ¶ 2.)

Bona Fide and SourceAmerica have a history of disputes over SourceAmerica's recommendations for AbilityOne Program Opportunities. In 2010, Bona Fide challenged the AbilityOne Commission's adoption of SourceAmerica's recommendation in a bid protest action filed against the United States in the Court of Federal Claims. (Pl.'s SSUF

[2] Bona Fide has proffered evidence showing that the AbilityOne Commission has a history of adopting SourceAmerica's recommendations for Opportunities. For example, in 2010, the AbilityOne Commission adopted SourceAmerica's recommendation of another nonprofit agency for an Opportunity based in Las Vegas. (Pl.'s SSUF ¶ 9.)

¶¶ 9–10.) As a result of the bid protest action, the AbilityOne Commission vacated the award and reopened the solicitation—SourceAmerica recommended the same nonprofit agency, and the AbilityOne Commission again adopted the recommendation. (Pl.'s SSUF ¶ 11.) In 2012, Bona Fide challenged the AbilityOne Commission's adoption of SourceAmerica's recommendation in a second bid protest action filed against the United States in the Court of Federal Claims. (Pl.'s SSUF ¶ 12.) In this second bid protest action, Bona Fide alleged, *inter alia*, that: (1) SourceAmerica denied it a "fair opportunity to compete" in violation of procurement laws and disregarded bidding specifications on the Las Vegas contract, and that but for SourceAmerica's conduct, Bona Fide would have won the contract; and (2) SourceAmerica and GSA subjected Bona Fide to "discriminatory and retaliatory actions," including the "denial of an award" related to two Program Opportunities. (Pl.'s SSUF ¶ 13.) In Count IV of the second bid protest action, Bona Fide sought money damages and injunctive relief pursuant to the False Claims Act from the United States on the basis of GSA and SourceAmerica's conduct. (*Id.*) Bona Fide incurred more than $100,000 in costs to litigate the first and second bid protest actions. (Pl.'s SSUF ¶ 14.)

On July 27, 2012, Bona Fide and SourceAmerica entered into a settlement agreement to resolve Count IV of Bona Fide's second bid protest action against the United States. (Pl.'s SSUF ¶ 15.) The United States was not a party to the settlement agreement. (Pl.'s SSUF ¶ 22.) The settlement agreement recited the following:

> WHEREAS, Bona Fide alleges that [SourceAmerica] whether in conjunction with other entities or acting alone, violated procurement laws and regulations and/or [SourceAmerica's] internal processes, resulting in allocations of contracts to other nonprofit organizations, rather than to Bona Fide. Bona Fide further alleges that [SourceAmerica] retaliated against Bona Fide . . . for making reports of improper actions and/or utilizing proper methods of redress. Among other claims to be released in this Agreement, Bona Fide made certain allegations against both [SourceAmerica] and the AbilityOne Commission in a Complaint it filed against the AbilityOne Commission in the United States Court of Federal Claims at Case 12-CV-00244-MCW.

(Pl.'s SSUF ¶ 18.)

> The settlement agreement further provides:
>
> [SourceAmerica] will, through its Office of General Counsel, reasonably monitor Bona Fide's participation in the Program for a period of three (3) years from the date a Bona Fide representative signs this Agreement. [SourceAmerica] agrees to use best efforts to provide that Bona Fide is treated objectively, fairly, and equitably in its dealings with [SourceAmerica], with specific attention to contract allocation. Bona Fide will notify the [SourceAmerica] Office of General Counsel when it has responded to any [SourceAmerica] Sources Sought Notice in efforts to obtain an AbilityOne contract. [SourceAmerica] will also use best efforts to provide that Bona Fide is afforded equal access to services provided by [SourceAmerica] including, regulatory assistance; information technology support; engineering; financial and technical assistance; legislative and workforce development assistance; communications and public relations expertise; and an extensive training program.

(Dkt. No. 466-8, Defendant's Separate Statement of Undisputed Material Facts ("Def.'s SSUF") ¶ 1.) The settlement agreement provides that Virginia law governs any dispute arising from it. (Def.'s SSUF ¶ 2.)

Bona Fide's breach of contract claim arises out of SourceAmerica's alleged breaches of the settlement agreement. Since the parties entered into the settlement agreement, Bona Fide has applied for SSNs 1483 (Ft. Hood), 1692 (Lakewood), 1723 (VA HQ), 1741 (DOD-IT), 1944 (St. Elizabeth's), 2075 (NGA II), 2161 (Puerto Rico), 2379 (USDA), 2381 (Capitol), 2410 (JFK), 2693 (WrightPatterson), 2705 (Shaw AFB), 2783 (Chicago), 2808 (Camp Lejeune), and RFI 1953 (NGA I). SourceAmerica has not recommended Bona Fide for any of these Opportunities, and Bona Fide has accordingly not received any of the contract awards. (Pl.'s SSUF ¶ 25.)

A nonprofit agency may appeal to the AbilityOne Commission any adverse recommendation made by SourceAmerica with respect to an AbilityOne Program Opportunity if it contends that SourceAmerica failed to follow its established policies and procedures or did not properly document its decision, or that the selected nonprofit agency did not meet the minimum criteria. (Def.'s SSUF ¶ 6.) A nonprofit agency may

also file a protest action "objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1). Since the parties entered into the settlement agreement, Bona Fide has not appealed to the AbilityOne Commission or filed a protest action with respect to any of the AbilityOne Program Opportunities. (Def.'s SSUF ¶ 8.)

LEGAL STANDARD

Federal Rule of Civil Procedure 56 empowers the Court to enter summary judgment on factually unsupported claims or defenses, and thereby "secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 327 (1986). Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material when it affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex*, 477 U.S. at 323. The moving party can satisfy this burden by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element of his or her claim on which that party will bear the burden of proof at trial. *Id.* at 322–23. If the moving party fails to bear the initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

Once the moving party has satisfied this burden, the nonmoving party cannot rest on the mere allegations or denials of his pleading, but must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*,

477 U.S. at 324. If the non-moving party fails to make a sufficient showing of an element of its case, the moving party is entitled to judgment as a matter of law. *Id.* at 325. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968)). In making this determination, the court must "view[] the evidence in the light most favorable to the nonmoving party." *Fontana v. Haskin*, 262 F.3d 871, 876 (9th Cir. 2001). The Court does not engage in credibility determinations, weighing of evidence, or drawing of legitimate inferences from the facts; these functions are for the trier of fact. *Anderson*, 477 U.S. at 255.

DISCUSSION

The following elements are required for a plaintiff to recover lost profits under Virginia law.

> (1) The damages must be established with reasonable certainty. If remote, speculative, contingent or uncertain, they are not recoverable.
> (2) The breach of contract must be the direct and proximate cause of the damage, which must be naturally and directly traceable to the act of the wrongdoer.
> (3) The consequences of the wrongful act must have been reasonably foreseeable by the parties at the time of the execution of the contract.

E. I. Du Pont De Nemours & Co. v. Universal Moulded Prod. Corp., 62 S.E.2d 233, 255 (Va. 1950). Put differently, a plaintiff carries the burden of proof on two required "primary factors" with respect to damages. *Saks Fifth Ave., Inc. v. James, Ltd.*, 630 S.E.2d 304, 311 (Va. 2006). "First, a plaintiff must show a causal connection between the defendant's wrongful conduct and the damages asserted. Second, a plaintiff must prove the amount of those damages by using a proper method and factual foundation for calculating damages." *Id.*

Here, SourceAmerica does not move for summary judgment on the elements of breach or causation. (*See* Dkt. No. 389 at 11 (clarifying that SourceAmerica's motion "assume[s] *arguendo* SourceAmerica's alleged breach of contract caused *some*

theoretical harm to Bona Fide"); *see also* Dkt. No. 389 at 11 n.4 (stating that SourceAmerica's arguments "assume[] *arguendo* that SourceAmerica's alleged breach proximately caused Bona Fide's alleged lost profits").) Rather, SourceAmerica contends that Bona Fide lacks evidence of lost profits, that Bona Fide's lost profits damages are unforeseeable and speculative as a matter of law, and that Bona Fide failed to mitigate damages. None of these arguments warrants granting SourceAmerica's motion for summary judgment.

I. Evidence of Lost Profits

SourceAmerica initially argued that Bona Fide lacks evidence of lost profits damages. (Dkt. No. 376-15 at 23–26.) However, Bona Fide subsequently filed a Federal Rule of Civil Procedure 56(d) request, arguing that it needed discovery to calculate lost profits damages. (Dkt. No. 384.) After directing supplemental briefing from both parties and conducting a hearing, (Dkt. Nos. 388–91), the Court granted Bona Fide's Rule 56(d) request, (Dkt. No. 392), considered the parties' joint status report, (Dkt. No. 401), and set forth a schedule for discovery and briefing, (Dkt. No. 402).

Since then, Bona Fide has filed its opposition to SourceAmerica's motion for summary judgment with evidence supporting its lost profits damages calculation. (*See* Dkt. No. 455 at 23–24; Pl.'s SSUF ¶¶ 42–72.) Bona Fide also represents that it has designated Brian P. Brinig to provide expert damages testimony on its behalf. (*Id.* at 23 n.6.) The deadline for expert reports is forthcoming at the end of August 2017. Discovery is ongoing,[3] and more pretrial motions are likely to be filed.

SourceAmerica asserts evidentiary and procedural objections to Bona Fide's damages evidence. Most of the parties' voluminous evidentiary objections and responses are immaterial. (*See*, *e.g.*, Dkt. Nos. 455-1, 459-1, 459-2, 459-3, 466-8, 464-1.) The Court will address only the salient objections regarding Bona Fide's damages evidence.

[3] A cursory review of the docket indicates that the parties have been engaged in ongoing, protracted discovery disputes. Over one hundred docket entries have been entered since SourceAmerica filed the instant motion for summary judgment on March 13, 2017.

A. Second Supplemental Responses to SourceAmerica's Interrogatories (Set Two) (Exhibit A to the Ergastolo Declaration)

SourceAmerica asserts a litany of objections to ¶ 2 of the Deckaration of Joseph T. Ergastolo. (Dkt. No. 459-3 at 3–8.) These objections are unavailing. SourceAmerica first contends that Ergastolo "makes no attempt to establish that he has personal knowledge of any of the alleged facts contained in the attached exhibit A." (*Id.* at 3–4.) Federal Rule of Civil Procedure 56(c)(4) provides, "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). In ¶ 2, Ergastolo declared: "On June 23, 2017, I caused to be served Bona Fide's second supplemental responses to defendant and counterclaimant SourceAmerica's Interrogatory Nos. 15 and 16 (Set Two), true and correct copies of which are attached hereto as Exhibit A." (Dkt. No. 456-9, Ergastolo Decl. ¶ 2.) SourceAmerica has not cast any doubt on Ergastolo's authentication of Bona Fide's interrogatory responses or Ergastolo's knowledge of the facts declared in ¶ 2—that Ergastolo caused the interrogatory responses to be served, and that Exhibit A contains a true and correct copy of the responses.

SourceAmerica objects that Bona Fide's evidence of lost profits in its Second Supplemental Responses to SourceAmerica's Interrogatories (Set Two), (Dkt. No. 455-8, Ergastolo Decl. Ex. A), is verified only upon information and belief, (Dkt. No. 466-1 at 4). This objection is unavailing. First, Federal Rule of Civil Procedure 56(c)(1)(A) provides that Bona Fide may cite to interrogatory answers or other materials, such as affidavits or declarations, to support its assertion that a fact is genuinely disputed.

> A party asserting that a fact . . . is genuinely disputed must support the assertion by citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, *interrogatory answers*, or other materials[.]

Fed. R. Civ. P. 56(c)(1)(A). In addition, Federal Rule of Civil Procedure 33, which

governs interrogatories, provides that if the responding party "is a public or private corporation, a partnership, an association, or a governmental agency," the interrogatory must be answered by "by *any officer or agent*, who must furnish the *information* available to the party." Fed. R. Civ. P. 33(b)(1)(B). "[A]n individual party is treated differently than a party that is a business entity; the former must answer interrogatories based on personal knowledge, whereas the latter may answer interrogatories based on available information." *U.S. ex rel. O'Connell v. Chapman Univ.*, 245 F.R.D. 646, 650 (C.D. Cal. 2007) (citing *Shepherd v. Am. Broad. Companies, Inc.*, 62 F.3d 1469, 1482 (D.C. Cir. 1995)). That is precisely what Lopez, in his capacity as an officer of Bona Fide, did.

In any event, Lopez's verification of the interrogatories cannot fairly be characterized as verified solely upon information and belief. (*See* Dkt. No. 455-8 at 8.)

> I am the Chief Executive Officer of Plaintiff/Counterdefendant Bona Fide Conglomerate, Inc. and am authorized to make this verification on its behalf. I have read the foregoing Plaintiff/Counterdefendant Bona Fide Conglomerate, Inc.'s Second Supplemental Responses to Defendant/Counterclaimant SourceAmerica's Special Interrogatories (Set Two) and *know* the contents thereof. I am informed and believe that the matters stated therein are true and on that ground *declare under penalty of perjury that the foregoing is true and correct*.

(Dkt. No. 455-8 at 8.) To start, the "informed and believe" language appears to be a formality. None of the actual answers to the interrogatories are stated on information and belief, and all of interrogatory answers were verified by Lopez under penalty of perjury to be true and correct. *Cf. Estate of Gustafson ex rel. Reginella v. Target Corp.*, 819 F.3d 673, 677 n.4 (2d Cir. 2016) (observing that the verified answer itself was stated only upon information and belief, rather than on the basis of personal knowledge, and so could not be considered in opposition to summary judgment); *Harrison v. Culliver*, 746 F.3d 1288, 1300 n.16 (11th Cir. 2014) ("*In his statement*, Harrison claims that 'To the best of [his] belief and knowledge,' there were 20 assaults in the back hallway in 2005, 15 in 2006, 30 in 2007, and five in 2008 . . . We do not credit this statement as creating a

genuine issue of fact because the statement itself evinces that Harrison did not rely on his personal knowledge of the incidents that occurred on the back hallway." (emphasis added)). Lopez's verification is distinguishable from the "wholly insufficient" deficient interrogatory answers in *S & S Logging Co. v. Barker*, 366 F.2d 617, 624 n.7 (9th Cir. 1966). In *S & S Logging*, the Ninth Circuit observed that "[i]n the first place these answers are in substance no more than a bill of particulars of the allegations of the complaint." 366 F.2d at 624 n.7. The Ninth Circuit further observed that "[t]he answers here in question were sworn to but are wholly insufficient because there is a complete failure to show that the person answering had personal knowledge or was competent to testify to any of the matters stated." *Id.* To illustrate, one of the interrogatories asked the responding party to "[s]tate with whom, when and how the defendants . . . participated in the conspiracy." *Id.* The answer itself was stated upon belief: "It is *believed* that [defendants] were doing the bidding of" other companies pursuant to the conspiracy. *Id.* (emphasis added). Here, the interrogatory responses at issue here do not present the same deficiencies.

SourceAmerica objects that Ergastolo is not a designated expert in this action and thus cannot offer an expert opinion as to Bona Fide's lost profits. (Dkt. No. 459-3 at 4–5.) It is plain that Ergastolo is not purporting to be an expert in this action. Paragraph 2 of his declaration merely serves to authenticate Bona Fide's interrogatory responses. And while SourceAmerica faults Bona Fide for failing to include a declaration from its designated damages expert, (*id.* at 5), the deadline for expert reports has not even passed, and discovery is clearly ongoing.

SourceAmerica objects to the methodology and bases underlying Bona Fide's calculation of damages. (*Id.* at 5–7.) SourceAmerica contends that the damages estimates should have been presented by a damages expert, that the timeframe (2012 through 2017) selected for estimating Bona Fide's calculations is improper, and that the calculations are unreliable and unsupported by factual bases. (*Id.*) As a starting matter, the expert report deadline has not passed. After the expert reports are exchanged, it is

likely that the parties will file *Daubert* motions to challenge the methodology used by the parties' designated damages experts. Further, Bona Fide's estimates are based upon inputs from documents SourceAmerica produced in discovery. In any event, "'[u]nder Rule 702 and Daubert, the proper analysis is not whether some of the inputs can be questioned, but whether [the expert's] testimony is relevant and reliable, and whether the methods and principles upon which [he] has relied in forming [his] opinion have a sound basis in science.'" *People v. Kinder Morgan Energy Partners, L.P.*, 159 F. Supp. 3d 1182, 1190 (S.D. Cal. 2016) (quoting *Abarca v. Franklin Cty. Water Dist.*, 761 F. Supp. 2d 1007, 1033 (E.D. Cal. 2011)). Finally, the factfinder will be able to resolve which expert's methodology is the proper one to use to determine Bona Fide's damages.

Finally, SourceAmerica objects that the interrogatory responses are hearsay. (Dkt. No. 459-3 at 8.) However, "at summary judgment a district court may consider hearsay evidence submitted in an inadmissible form, so long as the underlying evidence could be provided in an admissible form at trial, such as by live testimony." *JL Beverage Co., LLC v. Jim Beam Brands Co.*, 828 F.3d 1098, 1110 (9th Cir. 2016) (citing *Fraser v. Goodale*, 342 F.3d 1032, 1036–37 (9th Cir. 2003)). Bona Fide has shown that the lost profits damages calculations can be presented in a form admissible at trial by way of an expert lost profits opinion rendered by Brian P. Brinig, an expert in forensic accounting and business valuation. (Dkt. No. 464-1 at 28–29.)

The Court overrules SourceAmerica's objections to Bona Fide's Second Supplemental Responses to SourceAmerica's Interrogatories (Set Two). SourceAmerica may renew its objections at an appropriate juncture.

B. Ergastolo Declaration and Specific Exhibits Thereto

The other relevant evidence underlying the damages calculations consists in part of Exhibits E, F, G, I, K, L, N, P, Q, S, T, V, X to the Ergastolo Declaration. (*See* Plaintiff's Separate Statement of Undisputed Material facts ("Pl.'s SSUF") ¶¶ 42–72.) SourceAmerica objects that the evidence is not based on personal knowledge, lacks authentication, and constitutes hearsay. (Dkt. No. 459-3 at 14–27.) None of these

objections are availing.

The personal knowledge objections fail, because Ergastolo establishes that he has personal knowledge of the fact that SourceAmerica produced the documents attached to the Declaration. (*See* Dkt. No. 456-9, Ergastolo Decl.) The authentication objections also fail. To start, it is odd for SourceAmerica to argue that Bona Fide has failed to "produce evidence sufficient to support a finding that the item is what the proponent claims it is," Fed. R. Evid. 901(a), given that SourceAmerica produced—and does not deny producing—the very documents to Bona Fide, *see Hussein v. Univ. & Cmty. Coll. Sys. of Nevada*, No. 304-CV-0455 JCM RAM, 2007 WL 4592225, at *2 (D. Nev. Dec. 28, 2007) ("To authenticate their exhibits, defendants' attorneys should have submitted affidavits testifying that plaintiff produced the documents contained therein during discovery. Absent plaintiff's denial of production, such an affidavit would suffice to authenticate the documents."). The hearsay objections similarly fail. "Documents produced in response to discovery requests are admissible on a motion for summary judgment since they are self-authenticating and constitute the admissions of a party opponent." *Anand v. BP W. Coast Prod. LLC*, 484 F. Supp. 2d 1086, 1092 (C.D. Cal. 2007) (citing cases).

The Court overrules SourceAmerica's objections to Exhibits E, F, G, I, K, L, N, P, Q, S, T, V, X to the Ergastolo Declaration. SourceAmerica may renew its objections at an appropriate juncture.

C. Lopez Declaration ¶ 44

SourceAmerica objects to ¶ 44 of Lopez's Declaration. (Dkt. No. 459-2 at 26–36.) Paragraph 44 of Lopez's Declaration sets forth Lopez's calculation of Bona Fide's average profit margin across all Program contracts between January 1, 2012 and March 31, 2017. (Dkt. No. 455-2 at 8–9.)

SourceAmerica asserts that Bona Fide failed to disclose the information under Federal Rule of Civil Procedure 26, and that Bona Fide's failure to disclose triggers mandatory exclusion under Federal Rule of Civil Procedure 37. (*Id.* at 27–28.)

Specifically, SourceAmerica asserts that Lopez's Declaration

> proffers information from Bona Fide's 'profit and loss statements' for 2012-2017, but SourceAmerica is not in receipt of any documents produced by Bona Fide or Counterdefendant Ruben Lopez entitled 'profit and loss statement,' or any other documents or information, reflecting Bona Fide's alleged income, revenues, losses, profits, and the like, for 2017.

(*Id.*) SourceAmerica also faults Bona Fide for failing to supplement its Rule 26 disclosures from 2015. (*Id.*)

Federal Rule of Civil Procedure 37(c)(1) provides, in pertinent part:

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

Fed. R. Civ. P. 37(c)(1). Here, Bona Fide argues that it has produced statements for the years 2012 through 2016 as native spreadsheets to SourceAmerica. (Dkt. No. 464-1 at 22.) It acknowledges that it has not yet produced a similar spreadsheet for 2017, but notes that Bona Fide's Second Supplemental Responses to SourceAmerica's Interrogatories (Set Two) set forth its profit margin for 2012 through 2017. (*Id.*)

While the Court expresses concern with Bona Fide's delay in completing third-party discovery, (*see* Dkt. No. 466-1 at 5 n.2), and what appears to be a pattern of uncooperative discovery between the parties, Bona Fide's failure to timely produce information is ultimately harmless. SourceAmerica's motion for summary judgment contends that Bona Fide cannot recover lost profits as a matter of law, *see infra* Parts II–IV, and that Bona Fide lacks evidence of lost profits damages. The motion did not contest the amount of damages Bona Fide has suffered—indeed, a dispute as to the amount of damages would preclude summary judgment. Moreover, as is plainly evident, discovery is ongoing, and the deadline to exchange expert reports has not passed.

SourceAmerica also asserts that Lopez lacks personal knowledge. (Dkt. No. 459-2 at 28–30.) "A witness may testify to a matter only if evidence is introduced sufficient to

support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony." Fed. R. Evid. 602. Federal Rule of Evidence 602's "personal knowledge requirement . . . applies at two levels: first, the witness who testifies must have personal knowledge of the making of the out-of-court statement, and second, the person who made the out-of-court statement must have had personal knowledge of the events on which he based his statement." *United States v. Owens-El*, 889 F.2d 913, 915 (9th Cir. 1989). Here, Lopez meets the first level of the personal knowledge requirement—Lopez clearly has personal knowledge of the making of the Declaration. Lopez also meets the second level of the requirement—Lopez's own testimony proves that he has personal knowledge of the subject matter of his statement. Lopez testifies that he is the CEO of Bona Fide and declares that the facts contained in his declaration "are true of [his] own knowledge and are such that [he] could, and would if called upon to do so, competently testify thereto." (Dkt. No. 455-2 at 1, Lopez Decl. ¶ 1.)

SourceAmerica argues that Lopez provides both improper expert and lay opinion testimony on Bona Fide's lost profits damages. (Dkt. No. 459-2 at 30–34.) SourceAmerica's objection runs into an obvious obstacle—Lopez does not opine on lost profits, but rather offers evidence as to Bona Fide's profit margins from 2012 through March 2017. (*See* Dkt. No. 455-2 at 8–9, Lopez Decl. ¶ 44.) SourceAmerica's own cited authorities acknowledge that an owner or officer of a business may testify to the value or projected profits of the business. (Dkt. No. 459-2 at 31 (citing *FiTeq INC v. Venture Corp.*, No. 13-CV-01946-BLF, 2016 WL 693256, at *3 (N.D. Cal. Feb. 22, 2016)). Indeed, the Advisory Committee Note to the 2010 Amendments to Federal Rule of Evidence 701 observes,

> 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

> damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis.

Fed. R. Evid. 701 advisory committee's note. Here, Lopez testifies as to Bona Fide's past profit margins—not lost profits—as permitted by Federal Rule of Evidence 701. And SourceAmerica's objections to Lopez's methodology go to the weight, not the admissibility, of the evidence. (Dkt. No. 459-2 at 33–34.)

SourceAmerica asserts that the evidence is inadmissible double hearsay. (Dkt. No. 459-2 at 35–36.) However, Lopez may provide live testimony as to his personal knowledge and calculation of Bona Fide's past profit margins at trial, and Bona Fide may produce its underlying financial records as business records under Federal Rule of Evidence 803(6).

Finally, SourceAmerica asserts that the evidence does not meet the best evidence rule. (Dkt. No. 459-2 at 36.) However, Bona Fide is not establishing the content of its profit and loss records, but its average profit margin, a number derived from the records. As the Advisory Committee's Note to Federal Rule of Evidence 1002 states,

> [A]n event may be proved by nondocumentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies. For example, payment may be proved without producing the written receipt which was given. Earnings may be proved without producing books of account in which they are entered.

Fed. R. Evid. 1002 advisory committee's note.

The Court overrules SourceAmerica's objections to ¶ 44 of Lopez's Declaration. SourceAmerica may renew its objections at an appropriate juncture.

II. Foreseeability

In Virginia, "loss of profits may be recovered in a breach of contract action only if they are such that can be fairly supposed were within the contemplation of the parties when the contract was made. Damages within the contemplation of the parties are those

actually foreseen or reasonably foreseeable." *Duggin v. Williams*, 353 S.E.2d 721, 723–24 (Va. 1987) (internal citations omitted). Put simply, the damages "must be such as might naturally be expected to follow [the contract's] violation." *E. I. Du Pont De Nemours & Co. v. Universal Moulded Prod. Corp.*, 62 S.E.2d 233, 255 (Va. 1950).

SourceAmerica argues that Bona Fide cannot recover lost profits because they were not foreseeable at the time the parties entered into the settlement agreement.[4] (Dkt. No. 376-15 at 16–20.) SourceAmerica does not put forth any evidence showing that such damages were not foreseeable; rather, it argues that Bona Fide cannot recover lost profits as a matter of law. SourceAmerica offers three contentions. First, SourceAmerica asserts that federal law precludes claimants in procurement protests from recovering lost profits. Second, SourceAmerica argues that it has the power only to recommend a nonprofit agency to the AbilityOne Commission and lacks the power to award a federal contract to any nonprofit agency. Third, SourceAmerica maintains that the identities, nature, and value of the Opportunities that Bona Fide chose to apply for were unknown at the time the parties entered into the settlement agreement. None of these contentions entitle SourceAmerica to summary judgment.

First, federal law does not preclude Bona Fide from recovering lost profits in its breach of contract claim against SourceAmerica. Citing *Lion Raisins, Inc. v. United States*, 52 Fed. Cl. 115 (2002), SourceAmerica argues that 28 U.S.C. § 1491(b) prohibits the recovery of lost profits in procurement protest actions filed against the federal government, and that this prohibition renders Bona Fide's alleged lost profits unforeseeable.[5] However, unlike *Lion Raisins*, the instant breach of contract claim is not

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[4] SourceAmerica cites *Chesapeake Paper Prod. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229 (4th Cir. 1995), for the proposition that "Virginia law applies an objective test for foreseeability." (Dkt. No. 466-1 at 9.) *Chesapeake Paper* does not address the foreseeability of damages, however. Rather, the issue in the case centered on determining which one of two documents constituted the "operative contract." 51 F.3d at 1238, 1233–34.

[5] 28 U.S.C. § 1491(b)(1) provides:

> Both the Unites States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation

a bid protest action. Nor is the United States or any federal agency a defendant or party to this case. The Tucker Act's prohibition on lost profits awards in bid protest actions does not render Bona Fide's lost profits unforeseeable as a matter of law.

SourceAmerica's second argument is also unavailing. SourceAmerica neglects to account for its ability to not recommend Bona Fide to the AbilityOne Commission. As a result, SourceAmerica accordingly possessed the power to prevent Bona Fide from being awarded the federal contract at issue. Assuming *arguendo* that SourceAmerica breached the contract, and that such a breach proximately caused Bona Fide not to receive SourceAmerica's recommendation, Bona Fide's lost profits would plainly be the type of damages "such as might naturally be expected to follow" SourceAmerica's alleged breach. *E. I. Du Pont De Nemours*, 62 S.E.2d at 255. That the alleged lost profits are of the type of damages reasonably foreseen to flow from a breach does not eviscerate or lessen Bona Fide's burden to prove that its damages were proximately caused by SourceAmerica's alleged wrongful conduct—Bona Fide will have to shoulder this burden at trial.

Finally, the fact that the exact nature and value of the Opportunities that Bona Fide chose to apply for were unknown at the time the parties entered into the settlement agreement does not render Bona Fide's lost profits unforeseeable as a matter of law. Although neither party makes clear what type of damages Bona Fide's lost profits would constitute—direct or consequential—even for consequential damages, which are more attenuated than direct damages, the Supreme Court of Virginia has observed that the

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> by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

28 U.S.C. § 1491(b)(2) provides:

> To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

salient question is whether "a reasonably prudent person in the position of [the contracting parties] at the time of contracting would have considered this *type* of damages to be the natural consequence of their breach."[6] *Virginia Polytechnic Inst. & State Univ. v. Interactive Return Serv., Inc.*, 595 S.E.2d 1, 8 (Va. 2004) (emphasis added). In fact, it is not necessary for the "exact consequential damages claimed by [the injured party] to be in fact foreseen or reasonably foreseeable by the parties." *Id.* (citing *Sabraw v. Kaplan*, 211 Cal. App. 2d 224, 228 (Cal. Ct. App. 1962) ("[I]t is not necessary that the exact manner by which damages occur by reason of breach of contract be foreseeable."); *Stern & Stern Assocs. v. Timmons*, 423 S.E.2d 124, 125 (S.C. 1992) ("[T]he defendant need not foresee the exact dollar amount of the injury, the defendant [need only] know or have reason to know the special circumstances.")).

Viewing the evidence in the light most favorable to Bona Fide, the Court concludes that SourceAmerica has not satisfied its burden on summary judgment to show that Bona Fide's alleged lost profits damages are unforeseeable as a matter of law.

III. Reasonable Certainty

Under Virginia law, "[i]t is well settled that damages are recoverable for loss of profits prevented by a breach of contract only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty."[7] *Boggs*

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[6] SourceAmerica has not meaningfully articulated whether the lost profits damages Bona Fide seeks are direct or consequential damages under Virginia law. The Court does not resolve the issue, as it has not been squarely presented.

> Direct damages are those which arise "naturally" or "ordinarily" from a breach of contract; they are damages which, in the ordinary course of human experience, can be expected to result from a breach. Consequential damages are those which arise from the intervention of "special circumstances" not ordinarily predictable. If damages are determined to be direct, they are compensable. If damages are determined to be consequential, they are compensable only if it is determined that the special circumstances were within the "contemplation" of both contracting parties. Whether damages are direct or consequential is a question of law. Whether special circumstances were within the contemplation of the parties is a question of fact.

Roanoke Hosp. Ass'n v. Doyle & Russell, Inc., 214 S.E.2d 155, 160 (Va. 1975).

[7] The parties spend considerable effort debating over how to characterize the Supreme Court of Virginia's rules regarding proof of lost profits damages. The dispute primarily centers on a law journal article's division of Virginia lost profits law into the "reasonable certainty," "wrongdoer," and "fact and

v. Duncan, 121 S.E.2d 359, 363 (Va. 1961) (internal citation and quotation marks omitted); *see also Preferred Sys. Sols., Inc. v. GP Consulting, LLC*, 732 S.E.2d 676, 685 (Va. 2012) (citing *ADC Fairways Corp. v. Johnmark Constr., Inc.*, 343 S.E.2d 90, 93 (Va. 1986)). "The standard of review for a damages calculation has been framed as whether there were 'sufficient facts' to support the award." *Preferred Sys. Sols.*, 732 S.E.2d at 685 (quoting *Nichols Constr. Corp. v. Virginia Machine Tool Co.*, 661 S.E.2d 467, 472 (Va. 2008)). While damages must not be "'contingent, speculative, or uncertain,'" *id.* (quoting *Sunrise Continuing Care, LLC v. Wright*, 671 S.E.2d 132, 135 (Va. 2009)), the Supreme Court of Virginia has clarified nonetheless that "'[d]amages are not rendered uncertain because they cannot be calculated with absolute exactness,'" *id.* (quoting *Washington Golf & Country Club, Inc. v. Briggs & Brennan Developers, Inc.*, 95 S.E.2d 233, 238 (Va. 1956)). Rather, "'[i]t is sufficient if a reasonable basis of computation is afforded.'" *Id.* (quoting *Washington Golf & Country Club*, 95 S.E.2d at 238).

SourceAmerica argues that Bona Fide cannot provide a sufficient basis for calculating its damages with a reasonable certainty.[8] (Dkt. No. 376-15 at 20–23.) The

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amount" categories. *See* Robert M. Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, 12 Transactions: Tenn. J. Bus. L. 11, 44–47 (2010). This dispute is immaterial. To start, the article is not binding substantive law. The article ultimately observes that Virginia courts in reality "appear to choose which standard to articulate in their opinions based on the outcome of the case," and that the courts "may well be using the indeterminacy of the existing rules to justify what are very reasonable outcomes." *Id.* at 46–47.

[8] *Hop-In Food Stores, Inc. v. Serv-N-Save, Inc.*, 440 S.E.2d 606 (Va. 1994), does not avail SourceAmerica's argument that Bona Fide's damages cannot be reasonably ascertained. First, while *Hop-In Food Stores* recited the well-established rule that lost profits must be "capable of reasonable ascertainment," and cannot be "uncertain, speculative, or remote," the Supreme Court of Virginia expressly stated, "We do not reach the question whether lost profits were established with reasonable certainty because we hold that [defendant's] trespass did not proximately cause any loss of future profits that [plaintiff] may have suffered." *Id.* at 608–09. The language SourceAmerica quotes from *Commercial Bus. Sys., Inc. v. Halifax Corp.*, 484 S.E.2d 892 (Va. 1997), is similarly inapposite, as the text explains that the first and third elements of a tortious interference with prospective business or economic advantage claim must be measured by an objective test. 484 S.E.2d at 896. Finally, *NCLN20, Inc. v. United States*, 99 Fed. Cl. 734 (2011), *aff'd*, 495 F. App'x 94 (Fed. Cir. 2012), too, is not factually on point. The fact that the procuring agencies, have the ability to terminate contracts for convenience without being liable for lost profits, absent bad faith or clear abuse of discretion, does not

key decision SourceAmerica relies upon, *ADC Fairways Corp. v. Johnmark Const., Inc.*, 343 S.E.2d 90 (Va. 1986), is distinguishable from the instant case.

In *ADC Fairways*, Johnmark Construction, a construction contractor, sued ADC Fairways, a real estate developer, for breach of a contract wherein Johnmark had agreed to rehabilitate and convert the Ivymount apartment complex for ADC. *Id.* at 90–91. The case was tried to a court without a jury. *Id.* at 92–93. The Supreme Court of Virginia reversed the trial court's award of lost profits to Johnmark. *Id.* at 93.

On direct-examination, Johnmark's president "described how lost profits were calculated on the work it did not complete because of the dispute with ADC." *Id.* at 92. Specifically, he testified that he figured in a profit margin of 15% per unit.

> [T]he units were to be rehabilitated for a price of $2,562.50 per unit, a figure which he had bid to secure the contract with ADC. He testified further that in his bid he computed "[a]pproximately 15 percent" of the $2,562.50 as profit. He went on to say that the contract called for the completion of 171 units. Thus, profits were calculated by taking 15% of $2,562.50 and multiplying that number by 171.

Id. at 92–93. Upon questioning by the court, Johnmark's counsel acknowledged that the contract did not carry the 15% profit provision, but that Johnmark "anticipated he would make" 15% profit for his work. *Id.* This anticipated 15% profit margin did not bear out on cross-examination. On cross-examination, Johnmark's president "admitted that on a previous rehabilitation job for ADC he had calculated profits of 7.5% but made little or no profit 'on the basic contract.'" *Id.* at 93. He also admitted that he used "estimated expenses" in making his per unit bid, but that "he could not recall his estimates and had no documents or records to indicate his per unit expenses at Ivymount." *Id.* Further, he "admitted that the receipts and disbursements concerning the Ivymount job were not kept separate from other jobs on which Johnmark was working," and that "the cost of materials increased during the contract period." *Id.* Despite all of the above, the trial

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affect the sufficiency of Bona Fide's damages calculation, which is premised upon the amounts billed by the nonprofit agencies that were actually awarded the Opportunities at issue. And again, neither the United States nor any procuring agency is a party to this case.

court held that Johnmark was entitled to recover lost profits at a 15% profit margin in its bench ruling. *Id.* The Supreme Court of Virginia reversed the trial court, holding that the lost profits damages "were completely speculative," and that the evidence did not afford a sufficient basis for estimating the amount of lost profits with reasonable certainty. *Id.*

> The $47,781.13 figure was nothing more than the profit Johnmark hoped to make at the time of the bid. There was no evidence to establish that this is the profit that would have been made had Johnmark completed the project. Indeed, there was evidence from Johnmark's president that on a similar rehabilitation project for the same developer no profit had been made whatever.

Id.

First, the procedural posture of *ADC Fairways* differs from that here. The Supreme Court of Virginia reviewed a lower court's bench trial decision. *Id.* at 92–93. Second, it became clear throughout the course of trial—particularly on cross-examination—that Johnmark provided no empirical basis at all for its lost profits, *see id.*, much less "a sufficient basis for estimating their amount in money with reasonable certainty," *Boggs*, 121 S.E.2d at 363. Here, Bona Fide may well face an uphill battle at trial with respect to the particulars of its damages calculations. As in *ADC Fairways*, it may become evident at trial that Bona Fide's damages calculations lack a sufficient basis to meet the reasonable certainty standard. *Cf. Preferred Sys. Sols.*, 732 S.E.2d at 680, 685–86 (reviewing whether there were sufficient facts to support the lower court's award of lost profits after trial); *Commercial Bus. Sys.*, 453 S.E.2d at 269 (reversing trial court's grant of summary judgment in favor of defendant and holding that damages estimates were not speculative, but "based upon and supported by underlying revenue and cost records of similar business undertakings," and "would have afforded a jury a sufficient basis for estimating the damages with reasonable certainty"). However, the fact of the matter is that SourceAmerica has not carried its burden with respect to the instant motion for summary judgment.

SourceAmerica's argument that "profits derived from other businesses" cannot form the basis for estimating damages is far too broad. (Dkt. No. 376-15 at 25–26.)

Under Virginia law, "calculation of lost profits based on the track records of profits in established companies has long been an accepted method of estimating damages awards." *Id.* at 685–86 (citing *Commercial Bus. Sys., Inc. v. Bellsouth Servs., Inc.*, 453 S.E.2d 261, 268 (Va. 1995) ("When an established business, with an established earning capacity, is interrupted and there is no other practical way to estimate the damages thereby caused, evidence of the prior and subsequent record of the business has been held admissible to permit an intelligent and probable estimate of damages.")). To illustrate, the Supreme Court of Virginia has approved, "in the context of a noncompete clause," a calculation of lost profits using "subsequent profits from the benefiting competitors as evidence in damages calculations for breach of covenants not to compete, provided that the profits can be sufficiently tied to the injured party." *Id.* at 686. Specifically, the injured party "used not the exact profits of [the benefiting competitor], but rather the time billed to [the benefiting competitor] combined with its own established profit margin to calculate damages." *Id.*

While the instant case does not involve the breach of a noncompete clause, Bona Fide employs a similar damages calculation. Bona Fide's current lost profits damages estimate is as follows:

> The estimate is based on taking the actual amounts billed to GSA as to each contract at issue in the case (SSNs 1483, 1741, 1944, 2075, 2161, 2381, 2410, 2693, 2705, 2783, 2808) or the estimated billings for cancelled opportunities at issue in the case (SSNs 1692, 1723, 1953, 2379) through March, 31 2017, reducing those figures to account for subcontracting arrangements where appropriate (SSN 1741, 1953, and 2075), and then multiplying the lost revenues by Bona Fide's own profit margin . . . on Program contracts since it entered into the Agreement, to yield a lost profits estimate.

(Dkt. No. 455 at 23.) Bona Fide uses the actual amounts billed for eleven contracts, in conjunction with its own average profit margin. While SourceAmerica disputes the formula Bona Fide employed to calculate its average profit margin, that dispute may be resolved by a fact finder and is ultimately premature, as expert discovery is still ongoing in this case. And while SourceAmerica takes issue with Bona Fide's calculation of

damages with respect to the cancelled Opportunities, Bona Fide's calculations are tethered to the estimated contract values found in the evidence SourceAmerica produced to Bona Fide.

Finally, SourceAmerica cursorily argues in less than two pages that Bona Fide's lost profits stem from fifteen Opportunities "involving services it has little to no experience providing, in areas where it has never done business, requiring in some instances Top Secret security clearances it does not possess, and at contract sizes that are multiples larger in scale."[9] (Dkt. No. 376-15 at 22–23.) SourceAmerica does not address Bona Fide's qualifications, or lack thereof, for at least four of the fifteen Opportunities at issue in this case. (*See* Dkt. No. 376-15 at 22–23 (omitting mention of SSNs 1723, 1741, 2705, and 2808).) As Bona Fide correctly observes, SourceAmerica's arguments bear on the element of proximate cause, an issue which is not squarely raised in the instant motion. *Cf. Saks Fifth Ave., Inc. v. James, Ltd.*, 630 S.E.2d 304, 311–13 (Va. 2006) (distinguishing between causation and calculation of damages and finding that plaintiff failed to connect its lost profits to defendant's breach). Calling into question Bona Fide's qualifications and suitability for the Opportunities at issue does not establish that Bona Fide's damages elude reasonable ascertainment as a matter of law. The evidence SourceAmerica provides may well make it difficult for Bona Fide to establish proximate cause, but that is a hurdle which Bona Fide must contend with at trial.

In any event, SourceAmerica's cases involving lost profits for new businesses are not on point. (Dkt. No. 466-1 at 12 n.11.) To start, SourceAmerica's description of Virginia's "new business" rule is overbroad. (*Id.* at 12 ("Virginia courts have disallowed claims of lost profits that were not reasonably certain when the future profit would have come from a different location.").) Under Virginia law,

> When an established business, with a proven earning capacity is involved, evidence of the prior and subsequent record of the business is relevant to permit an intelligent and probable estimate of damages. But when . . . a new business is

[9] SourceAmerica cursorily reasserts its argument at the end of its reply brief. (Dkt. No. 466-1 at 11–12.)

> involved, the rule is not applicable because such a business is a speculative venture, the successful operation of which depends upon future bargains, the status of the market, and too many other contingencies to furnish a safeguard in fixing the measure of damages.

ITT Hartford Grp., Inc. v. Virginia Fin. Assocs., Inc., 520 S.E.2d 355, 360 (Va. 1999). Here, SourceAmerica has not meaningfully argued that Bona Fide qualifies as a "new business" under Virginia law.[10] The cases are distinguishable from Bona Fide's situation. While Bona Fide attempted to bid for new contracts in locations outside of the states in which it has performed services, Bona Fide's situation is not exactly analogous to that of a new business, particularly to the extent Bona Fide's business necessarily relies upon continuously bidding for new contracts, and such contracts are available in new locations. *See Mullen v. Brantley*, 195 S.E.2d 696, 699–700 (Va. 1973) (reversing judgment for lost profits based on the operational history of other pizza parlor franchises in other locations and the national profits average of the chain, where the record showed that competition from nearby pizza parlors would have adversely affected the plaintiff's business, and "it was impossible to determine the profit, if any, [plaintiff] would have derived from the operation of a Shakey's Pizza Parlor if he had established it on or near [a certain] site"); *ITT Hartford Grp.*, 520 S.E.2d at 359–60 (holding that an insurance joint venture with only two and a half years of history of premium income was not an established business, and that the record did not permit a reasonably certain estimate of an insurance agent's loss of future commissions from sales of the venture's product); *Sinclair Ref. Co. v. Hamilton & Dotson*, 178 S.E. 777, 781–82 (Va. 1935) (concluding that plaintiffs, who rented a garage from defendant to operate a general automobile and service station business, could not recover lost profits from defendant's failure to construct a paint shop addition to the garage, because plaintiffs' prospective painting business was a "new and untried venture," and plaintiffs had merely been promised a number of paint jobs by

[10] The argument, while briefly alluded to in the motion for summary judgment, (Dkt. No. 376-15 at 25–26), appears to have been clearly articulated for the first time in reply, (Dkt. No. 466-1 at 1).

automobile owners without striking any actual bargain terms); *see also Pennsylvania State Shopping Plazas, Inc. v. Olive*, 120 S.E.2d 372, 377–78 (Va. 1961) (reversing judgment for damages where the evidence was based on profits projected from the operation of a gasoline station which never opened for business). Moreover, by SourceAmerica's own admission, there are estimated contract values assigned to each Opportunity. (*See* Dkt. No. 376-15 at 22–23 (describing the values of contracts).) While these values are admittedly estimates, they are tethered to a factual basis and provide, at minimum, a certain baseline for calculating damages.

Viewing the evidence in the light most favorable to Bona Fide, the Court concludes that SourceAmerica has not satisfied its burden on summary judgment to show that Bona Fide's alleged lost profits are impermissibly speculative as a matter of law.

IV. Failure to Mitigate Damages

SourceAmerica contends that Bona Fide failed to mitigate its alleged damages. (Dkt. No. 376-15 at 26–28; Dkt. No. 466-1 at 6–7.) However, SourceAmerica's argument does not entitle it to summary judgment.

Virginia courts have "long recognized the obligation of an injured party to mitigate damages." *Forbes v. Rapp*, 611 S.E.2d 592, 595 (Va. 2005). Virginia law recognizes the "general requirement" that:

> One who is injured by the wrongful or negligent acts of another, whether as the result of a tort or of a breach of contract, is bound to exercise reasonable care and diligence to avoid loss or to minimize or lessen the resulting damage, and to the extent that his damages are the result of his active and unreasonable enhancement thereof or are due to his failure to exercise such care and diligence, he cannot recover.

Monahan v. Obici Med. Mgmt. Servs., Inc., 628 S.E.2d 330, 339 (Va. 2006) (quoting *Lawrence v. Wirth*, 309 S.E.2d 315, 317 (Va. 1983)). "'It is only incumbent upon him, however, to use reasonable exertion and reasonable expense, and the question in such cases is always whether the act was a reasonable one, having regard to all the circumstances of the particular case.'" *Haywood v. Massie*, 49 S.E.2d 281, 284 (Va.

1948) (quoting *Stonega Coke & Coal Co. v. Addington*, 73 S.E. 257, 258–59 (Va. 1911)). "[T]o the extent that the [injured party] fails to do so, he may not recover the additional damages incurred." *Forbes*, 611 S.E.2d at 595.

However, "[a]n assertion that an injured party has failed to mitigate damages is an affirmative defense." *Forbes*, 611 S.E.2d at 596. While SourceAmerica raises Bona Fide's alleged failure to mitigate damages as a basis for granting summary judgment in SourceAmerica's favor, the burden to prove that Bona Fide failed to mitigate damages ultimately rests upon SourceAmerica. *See id.* Whether Bona Fide failed to mitigate damages is not an element essential to its breach of contract case, and it does not bear the burden of proof on the issue. *Cf. Celotex*, 477 U.S. at 322 (holding that "Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). Moreover, at bottom, the affirmative defense that a party has failed to mitigate damages is a fact-bound inquiry. "Whether [SourceAmerica] has satisfied its burden of showing that [Bona Fide] failed to mitigate its damages is a factual determination based on the evidence produced." *R.K. Chevrolet, Inc. v. Bank of Commonwealth*, 501 S.E.2d 769, 771 (Va. 1998).

SourceAmerica observes that since the parties executed the settlement agreement, Bona Fide has not appealed any of SourceAmerica's recommendations to the AbilityOne Commission or filed any protest actions in the Court of Federal Claims. (Dkt. No. 376-15 at 26–28; Dkt. No. 466-1 at 6–7.) Bona Fide has availed itself of both avenues to challenge SourceAmerica's recommendations in the past. (*Id.*) While this may be true, SourceAmerica has not shown that it is entitled to summary judgment on its affirmative defense.

First, Bona Fide asserts that it has mitigated its damages by continuing to bid on contract Opportunities. (Def.'s SSUF ¶ 7.) SourceAmerica has not provided any authority establishing that Bona Fide's continued efforts to bid on contract Opportunities evinces an unreasonable failure to mitigate damages. Viewed in the light most favorable

to Bona Fide, Bona Fide's ongoing bidding shows that it has not merely "sat idly by and d[one] nothing," as SourceAmerica claims. (Dkt. No. 376-15 at 28). The instant case is dissimilar to *Cancun Adventure Tours, Inc. v. Underwater Designer Co.*, 862 F.2d 1044 (4th Cir. 1988). In *Cancun Adventure Tours*, the Fourth Circuit affirmed the magistrate judge's rejection of plaintiff's lost profits claim at trial, where plaintiff alleged that defendant's "breach of warranty in the sale of the air compressor deprived [plaintiff] of profits that it could have earned with that equipment," yet provided "little evidence . . . as to why [plaintiff] did not attempt to mitigate its losses, e.g., by buying or leasing another air compressor." 862 F.2d at 1049. The alleged breaches of contract in the instant case do not involve fungible goods. Rather, whether Bona Fide's choice to continue bidding on contract Opportunities, rather than challenge SourceAmerica's recommendations via appeals or lawsuits, satisfies its duty to use "reasonable exertion and reasonable expense" is a fact-bound inquiry that depends upon "the circumstances of the particular case." *Haywood*, 49 S.E.2d at 284 (internal citation and quotation marks omitted).

Second, the Supreme Court of Virginia's decision in *Lockheed Info. Mgmt. Sys. Co. v. Maximus, Inc.*, S.E.2d 420 (Va. 2000), is instructive on the reasonableness of Bona Fide's actions or failure to act. Lockheed, the bidder that was ultimately awarded the government contract at issue, sought to introduce evidence of the failure of Maximus, the bidder that would have been awarded the government contract absent Lockheed's actions, to mitigate its damages. *See* S.E.2d at 430–31.

> Specifically, Lockheed wanted placed before the jury the following evidence: the second request for proposals and award to Lockheed; Maximus' protest of the second award; reversal of that award by the appeals procurement board; a third request for proposals issued by [the Virginia Department of Social Services]; the award of the contract to Lockheed pursuant to the third request; and Maximus' failure to file a protest to that award. Lockheed asserts that this evidence was relevant because, even though Maximus prevailed in having the second award set aside, by failing to pursue a protest and appeal of the third award, Maximus made "no attempt in the third procurement to undo the award to Lockheed in order that it might recapture what was lost in its contract expectancy."

Id. The Supreme Court of Virginia upheld the trial court's holding that Lockheed's evidence was inadmissible to show that Maximus failed to mitigate its damages, in part because "whether Maximus would not only have prevailed in its protest of the third award but also ultimately would have become the recipient of the contract award is entirely speculative." *Id.*

While the admissibility of evidence is a question of federal procedural law, the Supreme Court of Virginia's reasoning for upholding the trial court's exclusion of the evidence sheds light on whether Bona Fide's obligation to "exercise reasonable care and diligence to avoid loss or to minimize or lessen the resulting damage" required Bona Fide to challenge SourceAmerica's recommendations. *Monahan*, 628 S.E.2d at 339 (internal citation and quotation marks omitted). Here, like Lockheed, SourceAmerica seeks to introduce evidence of Bona Fide's failure to appeal to the AbilityOne Commission or file a protest lawsuit in the Court of Federal Claims. Despite the fact that Bona Fide previously utilized these two methods to challenge SourceAmerica's recommendations, it is unclear whether Bona Fide would have prevailed in any subsequent challenge. It is also unclear to what extent any additional damages incurred by Bona Fide are attributable to Bona Fide's failure to mitigate. At best, it is a task for the factfinder to assess the reasonableness of Bona Fide's post-settlement actions.

In light of the above, the Court concludes that SourceAmerica has not carried its burden to show that it is entitled to summary judgment on its affirmative defense.

CONCLUSION

For the foregoing reasons, the Court **DENIES** SourceAmerica's motion for summary judgment or, alternatively, partial summary judgment. (Dkt. No. 370.)

IT IS SO ORDERED.

Dated: July 24, 2017

Hon. Gonzalo P. Curiel
United States District Judge