STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

DD Dannar, LLC,

Plaintiff/Counterclaim Defendant,

v.

SC LAUNCH!, Inc.,

Defendant/Counterclaim Plaintiff.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2015-CP-23-00142

ORDER GRANTING DEFENDANT/COUNTERCLAIM PLAINTIFF SC LAUNCH!, INC.'S MOTION FOR SUMMARY JUDGMENT

Introduction

This dispute arises from Plaintiff/Counterclaim Defendant DD Dannar, LLC's ("Dannar") participation in the Defendant/Counterclaim Plaintiff SC Launch!, Inc. ("SC Launch") program for start-up businesses located in South Carolina pursuant to which SC Launch provides valuable mentoring and other services, as well as certain funding for selected businesses. Dannar entered into the SC Launch program, the parties executed a Financing Agreement dated as of April 14, 2011 ("the Agreement"), and SC Launch provided Dannar high-risk financing for its start-up business, in the form of a $200,000 loan, in addition to mentoring and other valuable services. DD Dannar executed a Promissory Note in connection with the loan. The Agreement contained a Relocation Provision pursuant to which Dannar promised to pay a Relocation Fee equal to the amount of the loan if it relocated its business to another state within five years from the date of the Agreement. On or about April 30, 2013, Dannar repaid SC Launch the balance due under the Financing Agreement in the amount of $222,634.23. Dannar subsequently relocated its business to Indiana less than five years after executing the Agreement.

In this lawsuit, Dannar asserts a single cause of action for declaratory relief declaring that the Relocation Provision constitutes an unenforceable penalty or that it has no obligation to pay it. SC Launch asserted a single counterclaim for breach of the Relocation Provision and for an award of judgment in the amount of the Relocation Fee and prejudgment interest.

This matter is currently before the Court on SC Launch's Motion for Summary Judgment ("SC Launch Motion"), filed February 23, 2017, and Dannar's Motion for Summary Judgment ("Dannar Motion"), filed on February 28, 2017. The Court heard oral argument on both motions on April 5, 2017. Appearing for SC Launch were Robert Y. Knowlton, Esq. and John G. Tamasitis, Esq. Appearing for Dannar were Natalma M. McKnew, Esq. and Emily I. Bridges, Esq.

Attached to the SC Launch Motion were affidavits from Harry Greg Hillman, executive director for SC Launch, and Mark Housley, Upstate Regional Manager for SC Launch. Prior to the April 5, 2017 hearing, SC Launch submitted a Memorandum in Support of its Motion for Summary Judgment, along with a combined 15 exhibits. Additionally, prior to the April 5, 2017 hearing, Dannar submitted a Memorandum in Support of its Motion for Summary Judgment and a Memorandum in Opposition to SC Launch's Motion for Summary Judgment, along with a combined seven exhibits.

After considering these various submissions and the arguments of counsel, for the reasons more fully discussed below, SC Launch's Motion is GRANTED, and Dannar's Motion is DENIED. The parties to the Agreement are sophisticated commercial entities, represented by counsel, who reached an arm's length agreement. The Agreement is clear and unambiguous, and it articulates and describes the relationship between the parties. Dannar breached the Agreement by relocating to Indiana within the meaning of the Relocation Provision within five years of

executing the Agreement, thereby triggering the obligation to pay the Relocation Fee. Further, the defenses to payment of the Relocation Fee raised by Dannar are unavailing. Pursuant to the clear language of the Agreement, the obligations under the Relocation Provision survive the payment of the subject Promissory Note. In addition, the Relocation Provision does not constitute an unenforceable penalty under the controlling legal principles set forth in *ERIE Ins. Co. v. Winter Const. Co.*, 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011).

Factual Background

The facts presented herein are either undisputed or are construed in the light most favorable to Dannar. *See Summer v. Carpenter*, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997).

I. SC Launch.

In 2006, the SC Launch program was formed by the South Carolina Research Authority ("SCRA") pursuant to S.C. Code Ann. § 13-17-87 and § 13-17-88. SC Launch's statutory mission is to facilitate applied research, product development and commercialization programs, and to strengthen South Carolina's knowledge economy by creating high paying jobs. (Affidavit of Harry Greg Hillman Aff. at ¶ 5).[1] The program operates in partnership with SCRA and the research foundations of the University of South Carolina, the Medical University of South Carolina, and Clemson University to support high-potential companies with services and grant funding. (*Id.* at ¶ 3). SC Launch is an independent nonprofit 501(c)(3) corporation affiliated with SCRA, and the SC Launch program makes seed investments in businesses that anticipate financial returns. (*Id.* at ¶ 4).

To fulfill its charter, SC Launch supports advanced technology and knowledge based businesses with seed capital that fills gaps in funding from individual investors, angel investment

[1] A copy of the Hillman Affidavit is attached as Exhibit 1 to SC Launch's Motion for Summary Judgment.

groups, lenders, private equity firms, and other sources. (*Id.* at ¶ 5). Funding from SC Launch is supplemental; it is not intended to replace funding from other sources. (*Id.*)

Companies that are admitted into the SC Launch program are referred to as "Client Companies." (*Id.* at ¶ 6). These companies receive mentoring and support services from SC Launch staff, as well as access to SC Launch's resource partner network. (*Id.*) SC Launch staff members are salaried employees who dedicate significant amounts of time and energy into developing and mentoring companies admitted into the SC Launch program. (*Id.* at ¶ 7).

Companies are considered for investment by SC Launch upon recommendation of the SC Launch staff under direction of the SC Launch Executive Director. (*Id.* at ¶ 8). The staff recommends only companies that are active client companies in the SC Launch program. (*Id.*) They must complete a rigorous due diligence process and demonstrate ability to execute plans which will result in significant contributions to the South Carolina knowledge economy. (*Id.*)

In order to fulfill its mission to enrich the state's innovation economy, SC Launch invests its net revenues and an annual $2,080,000 from the Industry Partnership Fund into qualified South Carolina-based technology companies who have been accepted into the SC Launch program. (*Id.* at ¶ 9).

Contributions to the Industry Partnership Fund come from South Carolina contributors and those contributions are certified by SCRA to the State Department of Revenue and are eligible for a 100% tax credit against South Carolina income taxes, insurance premium taxes, and certain license fees up to a maximum credit of $2 million. (*Id.* at ¶ 10). Since 2006, SC Launch has invested over $25 million of seed capital in over 90 companies and currently has deep relationships with approximately 100 companies at varying stages of development. (*Id.*)

The Executive Director recommends the most promising candidate companies to meet with the SC Launch Board of Directors (the "Board") and request funding. (*Id.* at ¶ 12). The Chair or designated member of the Board determines which companies are invited to present. (*Id.*) A presenting company submits written materials in advance. (*Id.*) Principals meet with the Board and staff in executive session during a regularly scheduled meeting. (*Id.*) After the presentation and a question and answer session, the Board deliberates and decides by resolution what, if any, funding to offer. (*Id.*) Presenting to the Board does not guarantee funding. (*Id.* at ¶ 13). The Board, in its sole discretion, selects the best opportunities and directs available funding for maximum benefit to the state's knowledge economy. (*Id.*)

The Board determines whether to invest and amounts offered are based on availability of funds to invest, potential risk and return, and the relative merit of candidate companies. (*Id.* at ¶ 16). The maximum investment is normally $200,000. (*Id.*)

An average of approximately 12 companies are chosen for an initial round of funding each year. (*Id.* at ¶ 17). Additional follow-on funding may also be available in certain situations. (*Id.*) According to SCRA's 2015 Annual Report on SC Launch, the average salary of the jobs created through the SC Launch program is $69,000 and follow-on capital secured by SC Launch companies is $362,700,000. (*Id.* at ¶ 11, Ex. A, p. 42).

II. Dannar.

Gary Dannar, President of Dannar, holds ownership interest in three companies in addition to DD Dannar, LLC, including Little Industries and two real estate companies. (*See* Transcript of Rule 30(b)(6) Deposition of Dannar ("Dannar Tr.") at 9:3 – 11:22). Prior to 1995, Mr. Dannar spent several years in product development, sales, and marketing for various equipment manufacturers. (*See id.* at 7:14 – 9:2).

DD Dannar, LLC is a start-up enterprise, which focuses on the development and sale of an alternatively powered multi-purpose maintenance vehicle called the Mobile Power Station ("MPS"), primarily for use in the government sector. Dannar was represented by competent counsel during the negotiation of the Agreement with SC Launch, and thereafter.

Simply put, the parties to the Agreement are sophisticated commercial entities represented by counsel who reached an arm's length agreement.

III. The Terms of the Agreement are Clear and Unambiguous.

On April 14, 2011, SC Launch entered into the Agreement with Dannar. Pursuant to the Agreement, SC Launch loaned Dannar $200,000, and Dannar executed a Promissory Note evidencing the debt. Dannar agreed to repay the loan by the maturity date of April 14, 2014. (Agreement at p. 9).[2] Dannar also agreed that if it relocated its business outside the state of South Carolina within a period of five years from the date of the Agreement, before April 14, 2016, a relocation fee would apply. (Agreement at p. 4, § 3.3.A). Dannar accepted the financing from SC Launch and the benefits of the program. These benefits included, but were not limited to, the loan, mentoring with respect to Dannar's business plan, introductions to financial players in the area, and guidance on presenting to the SC Launch board of directors in support of Dannar's attempts to obtain subsequent rounds of funding. (*See* Hillman Aff. at ¶ 19; Affidavit of Mark Housley at ¶ 3; Transcript of Rule 30(b)(6) Deposition of SC Launch ("SC Launch Tr.") at 34:1 – 35:12).

Dannar acknowledged in the Agreement that SC Launch made funds available to it "for the purpose of economic development for the State of South Carolina and particularly for

[2] The Agreement is attached to SC Launch's Motion as Exhibit B to Hillman's Affidavit.

generating professional research and development jobs in South Carolina." (Agreement at p. 4, § 3.3.A).

Under the relocation provision contained within the Agreement, Dannar specifically agreed for a period of five (5) years after the execution of the Agreement:

> not to (a) move or relocate the Company Business or the Company's principal office or principal place of business outside the state of South Carolina and (b) not to have more than one-half, based on payroll expenses, of the Company's total employees, senior management employees, or employees engaged principally in professional research and development, employed at locations outside of the State of South Carolina (any of which shall be deemed a "Company Relocation"), unless the Company has paid SC Launch a Relocation Fee as set forth below.

(the "Relocation Provision"). (Agreement at p. 4, § 3.3.A).[3]

Section 3.3 of the Agreement defines the "Relocation Fee" as follows:

> B. Relocation Fee. The "Relocation Fee" will be an amount equal to the aggregate amount of all funds advanced by SC Launch to [Dannar, LLC]. SC Launch will continue to retain any Securities or other interests it holds in the Company after payment of such fee and this Agreement will continue in full force and effect. The parties acknowledge that the cost to SC Launch, including both tangible and intangible costs, of a Company Relocation is not susceptible to precise measurement. The parties hereby agree that the Relocation Fee is not a penalty, but rather, a good-faith estimate of the amount necessary to compensate SC Launch for its actual costs in connection with a Company Relocation.

(Agreement at p. 5, § 3.3.B). The Relocation Provision also requires Dannar to reimburse SC Launch for its reasonable attorneys' fees and expenses, and court costs incurred in connection with the enforcement of Dannar's obligations under the Relocation Provision. (Agreement at p. 5, § 3.3.C). The Relocation Provision and Relocation Fee are standard provisions contained in

[3] Dannar argues in its Memorandum in Support of its Motion for Summary Judgment that a "Company Relocation" under the terms of the Agreement requires that a supported company satisfy both (a) and (b) of the Relocation Provision. (Pl.'s Mem. in Supp. of Mot. for Summary J., at pp. 3, 8-9). However, as the parenthetical at the end of the provision ("any of which shall be deemed a "Company Relocation") makes clear, Dannar expressly agreed that violating the terms of either (a) or (b), standing alone, would constitute a Company Relocation under the Agreement.

every agreement with companies that receive funding from the SC Launch program. (Aff. of Hillman at ¶ 22; SC Launch Tr. at 47:6-10).

The Agreement's Termination Provision further states as follows:

> 7.10 Termination of Agreement. Except as otherwise specified herein, the provisions hereof, including all covenants, shall continue in full force and effect until the repurchase or redemption by [Dannar] of all securities of [Dannar] held by SC Launch or its successors or assigns, and payment of fees, including the Relocation Fee to the extent applicable, and performance of all other obligations owed SC Launch hereunder.

(Agreement at p. 8, § 7.10) (emphasis added).

The Agreement also contains the following merger clause:

> 7.13 Entire Agreement. This Agreement together with the Financing Documents are intended to supersede all prior agreements, representations and understandings between or among any of the parties hereto relating to the subject matter hereof.

(*Id.* at p. 8, § 7.13).

As discussed further herein, these provisions of the Agreement are clear and unambiguous.

IV. Dannar's Repayment of the Loan and Relocation to Indiana.

Unbeknownst to SC Launch, as early as January 26, 2013 (approximately 21 months after receiving the initial round of funding from SC Launch), Dannar began investigating and applying for additional economic development funding from other states, namely Indiana. (*See* Dannar Tr. at Ex. 9; *see also* Dannar Tr. at 77:13 – 78:9; Dannar Second Supp. Resp. to SC Launch's First Set of Interrogs. at ¶ 15).

In its application to Indiana for additional taxpayer incentivized funding, dated December 15, 2012, Dannar represented that its project's "impact on Indiana will be substantial." (Dannar Tr. at Ex. 9, p. 1) "Dannar's pro forma shows $240 [million in annual] revenue by Year 5."

(*Id.*)[4] Further, Dannar represented that the effect of Dannar's relocation to Indiana "can be measured in job creation of up to 479 direct jobs; additional significant indirect job creation; new tax revenue (state and local); ... capital investment; ... and other areas of impact." (*Id.*) Dannar further anticipated a corporate tax liability by 2016 in the amount of $1,929,343.00 to be realized by Indiana. (*Id.* at p. 2)

Without disclosing the fact that it had made this application to Indiana, Dannar also sought an additional round of funding from SC Launch in March 2013. The SC Launch Board ultimately declined the request. (*See* Hillman Aff. at ¶ 22; SC Launch Tr. at Ex. 12, p. 4).

On or about April 30, 2013, Dannar repaid the SC Launch loan in full, including interest. (Hillman Aff. at ¶ 26). The day prior to repayment, SC Launch reminded Dannar of its obligations under the Relocation Provision even if the loan was repaid. (*Id.* at ¶ 25).

The Indiana economic incentive program provided by governmental entities in Indiana is similar to that provided by SC Launch. (*See e.g.,* Dannar Tr. at Exs. 11 and 12). Specifically, Dannar entered into a Loan Agreement and Redevelopment Agreement with Delaware County, Indiana dated effective July 23, 2013.[5] Pursuant to the Loan Agreement, Dannar received a tax incentivized loan from Delaware County in the amount of $150,000. (Dannar Tr. at Ex. 12, § 2.1(b)). Dannar represented that its project "will preserve and create additional jobs and employment opportunities within the boundaries of Delaware County, Indiana." (*Id.* at § 2.2(c)). Dannar provided Delaware County a copy of its Agreement with SC Launch and acknowledged

[4] In its Private Placement Memorandum, dated March 7, 2013, Dannar represented that it expected annual revenues of $184 million by the end of 2016. (Dannar Tr. at Ex. 3, p. 58).

[5] Dannar also obtained economic incentives from the Indiana Economic Development Corporation. In Dannar's letter agreement with that entity dated March 13, 2013, Dannar represented that it was considering Delaware County as a site for its operations and that Dannar advised that the project involved 288 net new full-time positions for Indiana residents by 2016.

that Dannar, "pursuant to an agreement with SC Launch!, Inc., may be required to pay a Relocation Fee in the amount of $200,000." (*Id.* at Ex. D).[6]

As part of the Redevelopment Agreement, the Delaware County Redevelopment Commission and the county agreed to provide an additional $500,000 for improvements to a facility in which Dannar would locate. (Dannar Tr. at Ex. 11, ¶ 2). Those funds were not distributed directly to Dannar. In exchange, Dannar represented that it reasonably expected to meet or exceed certain job creation and wage rate targets, including 288 jobs by the end of 2017 and 479 jobs by the end of 2018. (*Id.* at pp. 1, 9). Dannar also expected that those jobs would provide an average hourly wage of $27.33. (*Id.*) As further part of the Redevelopment Agreement, Dannar agreed to certain liquidated damages if it did not meet those job and wage targets. (*Id.* at ¶ 5).

In addition to the liquidated damages provisions tied to Dannar's job creation, Dannar also agreed to pay a relocation fee up to $650,000, which represents the total amount of funding provided to Dannar pursuant to the Loan Agreement and Redevelopment Agreement, if Dannar relocated its operations outside of Delaware County within 6 years of the date of the Redevelopment Agreement. (*Id.* at ¶ 8).

On June 19, 2013, Dannar, in conjunction with the Muncie-Delaware County, Indiana Economic Development Alliance, issued a public announcement that Dannar would be relocating its corporate headquarters and assembly facility to Muncie, Indiana. (Dannar Tr. at Ex. 5).

In response to reading the June 19, 2013 announcement, SC Launch sent a letter to Dannar requesting payment of the Relocation Fee on or about September 19, 2013, and again on

[6] Dannar also raised private investment by way of a private placement and informed potential investors in its Private Placement Memorandum that it may have to pay the Relocation Fee and that a portion of the funds raised may be used to pay that fee. (Dannar Tr. at Ex. 3, pp. 21).

November 7, 2013. (Hillman Aff. at ¶¶ 27-28). Dannar's response in both instances was that it had not relocated, as that term is defined in the Agreement. (*Id.* at ¶ 29).

In response to these reassurances, via letter dated October 7, 2014, SC Launch agreed not to pursue payment of the Relocation Fee if Dannar would confirm by affidavit that it had in fact not relocated. (*Id.* at ¶ 30). Dannar elected not to sign the affidavit, and initiated this suit.

Dannar filed its original Complaint on January 7, 2015 seeking a declaratory judgment from this Court that the Relocation Fee was a "penalty." (Compl. at ¶ 10; Agreement at p. 5, § 3.3.B). Dannar also asserted that it did not owe the Relocation Fee because it had repaid the loan SC Launch had made to it.

In its Supplemental Complaint filed on April 27, 2015, Dannar admitted that, as of April 1, 2015, it had moved or relocated its business from South Carolina, or had more than one-half of its total employees engaged principally in professional research and development, outside of the State of South Carolina. (Supp. Compl. at ¶¶ 2-4).

SC Launch answered the Supplemental Complaint and asserted a counterclaim for breach of the Agreement. (SC Launch Answer and Counterclaim at ¶¶ 39-64). Additionally, SC Launch asserted various affirmative defenses to Dannar's claim for declaratory relief. (*Id.* at ¶ 37.)

STANDARD OF REVIEW

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 summary judgment as a matter of law. Rule 56(c), SCRCP. With respect to an issue upon which the non-moving

party bears the burden of proof, the moving party may discharge his initial responsibility by pointing out to the Court the absence of evidence to support the non-moving party's case. *Id.*

After the moving party has met its initial burden, Rule 56(e), SCRCP requires the opposing party to "do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* In response to a properly supported motion for summary judgment, the opposing party "must come forward with specific facts showing there is a genuine issue of material fact." *Id.* Thus, "the non-moving party may not rest on the mere allegations or denial of pleadings, but must set forth or point to specific facts showing there is a genuine issue of material fact." *Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E. 2d 659, 661 (Ct. App. 1994) (quoting *Dickert v. Metropolitan Life Ins. Co.*, 306 S.C.311, 313, 411 S.E.2d 672, 673 (Ct. App. 1993), *rev'd in part on other grounds*, 311 S.C. 218, 428 S.E.2d 700 (1993)); Rule 56(c), SCRCP.

The parties agree that there are no genuine issues as to any material fact in this case. The construction of a clear and unambiguous contract is a matter of law for the court. *See Lee v. Univ. of South Carolina*, 407 S.C. 512, 517, 757 S.E.2d 394, 397 (2014). The deadline for discovery has expired, and this case is ripe for summary judgment.

ANALYSIS

I. Dannar Breached the Terms of the Agreement's Relocation Provision by Relocating from South Carolina within Five Years of Executing the Agreement.

Pursuant to the Agreement, Dannar agreed for a period of five (5) years after execution of the Agreement not to relocate its business and not to have more than one-half of its employees engaged principally in professional research in development employed outside South Carolina, unless Dannar paid SC Launch the Relocation Fee. (Agreement at p. 4, § 3.3.A).

On April 27, 2015, Dannar admitted in its Supplemental Complaint that it (a) had "relocated a majority of its assets and inventory from South Carolina to Indiana . . ." and (b) "hired two employees in Indiana and retained one employee in South Carolina" as of April 1, 2015. (Supp. Compl. at ¶¶ 3). Further, as discussed above, Dannar announced publically in June 2013 that it was moving its corporate headquarters to Delaware County, Indiana (Dannar Tr. at Ex. 5) and had entered into the Loan Agreement and Redevelopment Agreement with Delaware County on July, 23, 2013. (*See* Dannar Tr. at Exs. 11, 12).[7]

There is no genuine issue of material fact that Dannar relocated from the State of South Carolina as of April 1, 2015, which was within five years of the Agreement as defined in the Relocation Provision. Dannar relocated and thereby breached the terms of the Agreement.

II. Per the Express Language of the Agreement, the Relocation Provision Survives Repayment of the Promissory Note.

Dannar argues that its repayment of the Promissory Note to SC Launch extinguished its other obligations under the Agreement, including the Relocation Provision. The Agreement's Termination Provision, however, specifically states that the Agreement "shall continue in full force and effect until the repurchase or redemption by [Dannar] of all securities of [Dannar] held by SC Launch or its successors or assigns, ***and*** **payment of fees, including the Relocation Fee to the extent applicable,** ***and*** **performance of all other obligations owed SC Launch hereunder."** (Agreement p. 8, § 7.10) (emphasis added). Under this clear language, Dannar's obligations under the Relocation Provision were not extinguished until after the five-year period

[7] In addition, as part of the Redevelopment Agreement, on July 23, 2013, Dannar entered into a lease agreement with the Delaware County Redevelopment Commission to lease approximately 25,000 square feet of certain real property referred to as the "Former Twoson Facility" for a period of five years beginning on the date of the lease agreement (the "Lease Agreement"). A copy of the Lease Agreement is attached as Exhibit E to SC Launch's Memorandum in Support of its Motion for Summary Judgment.

ran or, in the event it relocated from South Carolina before then, until it paid the Relocation Fee. This interpretation of the Agreement is further supported by the fact that Dannar agreed to repay the loan, plus applicable interest, by April 14, 2014 (the "Maturity Date"), which was two years earlier than the Relocation Provision's five year period. (*Id.* at Ex. A, p. 9). That is to say, when Dannar entered the Agreement it expressly promised to remain in South Carolina until April 14, 2016 or pay the Relocation Fee regardless of whether it paid back the loan early or on the agreed upon Maturity Date. *See Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000) ("The primary test as to the character of a contract is the intention of the parties, such intention to be gathered from the whole scope and effect of the language used.").

III. The Relocation Fee Does Not Constitute an Unenforceable Penalty.

Dannar further argues that the Relocation Fee constitute an unenforceable penalty. I disagree.

Given the context and the relationship of the parties at issue, SC Launch disputes that the traditional law pertaining to whether a liquidated damages provision constitutes an unenforceable penalty applies to this situation. People or entities providing financing and services to a high risk, start-up business normally insist on receiving substantial equity in the company, seats on the board of directors, involvement in management, and other valuable consideration. SC Launch's request for a commitment to remain in this State for five years or pay a fee in order to obtain state tax incentivized funds and services is modest consideration in this context, and this situation is differs in character from the liquidated damages provisions often seen in construction and other commercial contracts that are analyzed by the courts as to whether they constitute an unenforceable penalty. This context and relationship is important, but I need not reach this issue

because, even applying traditional liquidated damages law in this case, I conclude that the Relocation Provision is valid and enforceable.

"South Carolina law allows parties to prospectively set an amount of damages for breach through the inclusion of a liquidated damages provision." *ERIE Ins. Co. v. Winter Const. Co.*, 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011). "[W]here the sum stipulated is reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reasons of nonperformance, the stipulation is for liquidated damages." *Tate v. LeMaster*, 231 S.C. 429, 441, 99 S.E.2d 39, 45-46 (1957). In addition, "[w]hether such a stipulation is one for liquidated damages or for a penalty is . . . primarily a matter of the intention of the parties." *Id.* at 441, 99 S.E.2d at 45. Accordingly, the analysis must first look to the language of the agreement, and then to the reasonable intention of the parties to determine whether the liquidated damages provision was the predetermined measure of compensation. *ERIE*, 393 S.C. at 461, 713 S.E.2d at 321.

The cardinal rule of contract construction and interpretation is that when the language of the contract is clear, explicit, and unambiguous, the language of the contract dictates the contract's force and effect, and the court must construe the contract according to its plain and ordinary meaning. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). Further, "[w]here an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *Id.* (citing *Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001)).

At issue in this action is Section 3.3 of the Agreement. Section 3.3 provides in pertinent part:

> B. Relocation Fee. The "Relocation Fee" will be an amount equal to the aggregate amount of all funds advanced by SC Launch to [Dannar, LLC] . . . The parties acknowledge that the costs to SC Launch, including both tangible and intangible costs, of a Company Relocation are not susceptible to precise measurement. **The parties hereby agree that the Relocation Fee is not a penalty, but rather, a good-faith estimate of the amount necessary to compensate SC Launch for its actual costs in connection with a Company Relocation.**

(Agreement at p. 4, § 3.3.B) (emphasis added). As noted above, the language of the Agreement is clear and unambiguous. In the event Dannar relocated from South Carolina under the terms of the Agreement within five years from the date of the Agreement, SC Launch would be entitled to a Relocation Fee in the amount of $200,000.

After analyzing the language of the contract at issue, the key question in determining "whether the sum stipulated in the [Agreement] is a liquidated damage or an unenforceable penalty is whether the amount is 'reasonably intended by the parties as the predetermined measure of compensation for actual damages that **might be sustained** by reasons of nonperformance.'" *ERIE*, 393 S.C. at 462, 713 S.E.2d at 322 (quoting *Tate v. Le Master*, 231 S.C. at 441, 99 S.E.2d at 46) (emphasis in original). The stipulation will be deemed a penalty only if it is so large that it "is **plainly disproportionate to any probable damage** resulting from breach of contract . . . ." *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 172, 568 S.E.2d 361, 363 (2002) (emphasis added). In making this determination

> it is necessary to look at the whole contract, its subject-matter, the ease or difficulty in measuring the breach in damages and the magnitude of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probably consequences of the breach.

Foster v. Roach, 119 S.C. 102, 107, 111 S.E. 897, 899 (1922) (quotation omitted).

"To the extent that there is uncertainty as to the harm, the estimate of the court or jury may not accord with the principle of compensation any more than does the advance estimate of

the parties." Restatement (Second) of Contracts § 365 cmt. b (quoted by *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 27, 738 S.E.2d 480, 494 (Ct. App. 2013) and cited by *ERIE*, 393 S.C. at 462, 713 S.E.2d at 322). Indeed, "[t]he greater the difficulty either of proving that loss has occurred or of establishing its amount with the requisite certainty, the easier it is to show that the amount fixed is reasonable." *Id.* "If the difficulty of proof of loss is great, considerable latitude is allowed in the approximation of anticipated or actual harm." *Id.*

Dannar acknowledged in the Agreement "that the costs to SC Launch, including both **tangible** and **intangible costs**, of a Company Relocation are not susceptible to precise measurement." (*Id.*) (emphasis added). Moreover, this sophisticated entity expressly agreed in Section 3.3 that **"the Relocation Fee is not a penalty."**[8]

Undeniably, these types of economic development financing arrangements and the SC Launch program do not entail standard business contracts. The parties are not bargaining for the construction of a building or the delivery of goods. Rather, SC Launch provides tax incentivized funding and other valuable resources with the hope that the supported company will be successful and, as a result, enhance the economic status of the community and its citizenry. (*See* Hillman Aff. at ¶¶ 3, 5). This is why SC Launch does not merely provide funding to its supported companies, but also has staff that mentor, develop, and steer its companies towards a path of success. (*See* Aff. of Hillman at ¶¶ 6, 7, 19; Aff. of Housley at ¶¶ 3, 8; *see* SC Launch Tr. at 100:15-25 ("[T]he bottom line to our program is to try and create wages and salaries that are higher than average in South Carolina. So the opportunity to bring tens to potentially hundreds

[8] Dannar argues that SC Launch personnel and Board members referred to the Relocation Fee as a "clawback" or "penalty" on several occasions. However, such informal language does not alter the clear language of the Agreement to which Dannar is a party or the conclusions discussed herein.

of employees employed in South Carolina . . . revenues that ultimately were produced, tax revenue back to South Carolina . . . that's what we're trying to accomplish with this program.").

At least one court construing these types of economic development financing arrangements has agreed that the actual loss sustained by a public entity from a borrower's breach of the agreement is difficult, if not impossible, to ascertain. *See City of Davenport v. Shewry Corp.*, 674 N.W. 2d 79, 86 (Iowa 2004). In *Davenport*, the borrowing company entered into an economic development agreement with the City of Davenport, which contemplated that the company would build a new welding and fabrication facility on property acquired by the company. *Id.* at 81. In exchange, the city agreed to provide up to $200,000 of economic development grant money to the company in three phases coinciding with the company's construction of taxable improvements to its property. *Id.* In addition, the company was required to create 60 new full-time positions within 36 months of the date of the agreement, retain 186 existing jobs, and maintain at least 246 full-time positions from month 36 through month 120 from the date of the agreement. *Id.*[9] The economic development agreement provided that a material breach of the agreement (which included failure to meet the employment requirements) would require repayment of all monies that have been granted to the company. *Id.*

The city ultimately advanced $150,000 in economic incentivized funds between 1996 and 1997. *Id.* However, the company did not meet the employment requirements of the contract and the city was forced to file an action seeking to recoup the $150,000 dispersed. *Id.* at 82. Much like Dannar in this case, the company claimed that the repayment requirement was an unconscionable penalty. *Id.* The lower court held that it was not a penalty and entered judgment against the company for $150,000. *Id.*

[9] Unlike the economic development agreement in *Davenport* and Dannar's agreement in Delaware County, SC Launch did not require Dannar to satisfy job creation requirements.

The Supreme Court of Iowa, applying the Restatement (Second) of Contracts § 356, affirmed and found that the city would have great difficulty in establishing with any degree of certainty the loss sustained from the company's breach of the economic development agreement and, therefore, held that the repayment provision was not an unenforceable penalty. *Id.* at 85-86.

The court explained that the company's arguments rested on the "erroneous assumption that the City's only loss [was] the grant money paid to the company." *Id.* at 85. According to the Iowa Supreme Court, the company's assumption ignored the fact that the economic development agreement expressly recognized two anticipated benefits to the city under the agreement: (1) an increased tax base and (2) job creation. *Id.* The court concluded that the city's loss from the company's failure to create jobs was "difficult, if not impossible, to measure." *Id.* Ultimately, the court held that the repayment provision was clearly not an unreasonably large sum so as to constitute a penalty in view of the anticipated or actual harm because, "[w]hile the City will recover the cash outlays made to the company, this repayment does not cover the costs to the City in issuing bonds required to obtain grant funds, nor does it encompass the damages resulting from loss of the anticipated jobs." *Id.* at 86.

South Carolina courts are in accord with the Iowa Supreme Court's reasoning in *Davenport*. *See, e.g., Baugh*, 402 S.C. at 23-27, 738 S.E.2d at 492-94 (upholding a stipulated damages provision contained in a covenant not to compete and a separate forfeiture provision in shareholder-physician employment agreements where both provisions contained an acknowledgement that the stipulated amounts reflected a portion of the damages the employer would suffer from breach and the damages to be expected by competition were highly difficult to predict at the time the agreements were entered into by sophisticated parties through arm's length negotiation); *ERIE*, 393 S.C. at 460-65, 713 S.E.2d at 320-23 (upholding an administrative

burden provision in a subcontract as a liquidated damage where the language of the subcontract was clear that the parties agreed the stipulated sum was one for liquidated damages and the damages that the contractor might reasonably anticipate were difficult to ascertain because of the nature of the work being performed such that the sum stipulated was reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reasons of nonperformance).

Lost Jobs and Wages for South Carolina Citizens and Tax Revenue.

Here, Dannar expressly acknowledges that tax incentivized funds were made available to it under the Agreement "in whole or in part for the purpose of economic development for the State of South Carolina **and particularly for generating professional research and development jobs in South Carolina.**" (Agreement at p. 4, § 3.3.A) (emphasis added). The parties stipulated in the Agreement that the costs to SC Launch, both tangible and intangible, of Dannar's relocation "are not susceptible to precise measurement." (*Id.* at p. 5, § 3.3B). Indeed, determining the intangible cost associated with the loss of jobs in South Carolina as a result of Dannar's relocation is nearly impossible to ascertain. (SC Launch Tr. at 44:7-18).[10]

Costs Associated with Administering SC Launch Program.

Further, there are additional costs associated with the development of a company funded by SC Launch. SC Launch does not only provide funding to the companies within its program, it also provides mentoring and guidance to the companies regarding board presentations, consultation services, and a wealth of business and relationship experience. (*See* SC Launch Tr.

[10] However, it is relevant that, as part of its application to Delaware County, Indiana, Dannar anticipated the creation of 288 jobs in Indiana by the year 2016 with an hourly average wage for those employees of $27.33. (Dannar Tr. at Ex. 9, p. 2). In addition, Dannar expected Indiana Corporate Tax Liability from adjusted gross income by 2016 in the amount of $1,929,343.00. (*Id.*) These are the types of costs contemplated by the Relocation Provision and Relocation Fee. (*See* SC Launch Tr. at 100:15-25).

at 33:21 – 35:12; Housley Tr. at 29:6-21; 31:13 – 32:21; Aff. of Hillman at ¶¶ 6, 7, 18; Aff. of Housley at 3, 8). These services require a large number of man hours and expenditure of goodwill in the community from SC Launch's salaried employees operating on behalf of the State of South Carolina and her citizens that cannot be computed into a single identifiable cost. (*See* Aff. of Hillman at ¶ 7; SC Launch Tr. at 33:21 – 35:12).

Lost Opportunity Costs.

In addition, there are significant opportunity costs associated with providing funding to a company that will eventually leave the State of South Carolina. SC Launch's annual direct investment budget is $2,080,000 each year. (*Id.* at 98:9 – 99:6; Aff. of Hillman at ¶ 9). SC Launch has provided funding to over 90 companies since it began the program and, at any given time, there are approximately 100 additional companies that are involved at some level in the program. (Hillman Aff. at ¶ 10; SC Launch Tr. at 37:10-20). Thus, when SC Launch makes a decision to invest and expend its resources in one company that eventually leaves South Carolina without creating knowledge economy jobs, the State of South Carolina necessarily loses the potential gain from the other companies not chosen who may have been able to generate valuable jobs for South Carolina citizens. (SC Launch Tr. at 100:7 – 101:5 ("When we have [a] company that spent . . . considerable team resource[s] and – and we lose that company, either they go out of business or they make a decision to go to another state. South Carolina loses that opportunity."). Naturally, this type of cost is difficult, if not impossible, to quantify and is another reason why the parties entered into the stipulated Relocation Fee in the event Dannar decide to leave the State of South Carolina before the 5 year deadline.

Furthermore, it logically follows that the longer a supported company remains in South Carolina, the more likely South Carolina and its citizens will benefit from the growth and

development of that company. (*See* Hillman Aff. at ¶ 23). The Relocation Provision attempts to foster that development and, in addition, guards against companies that intend to take tax incentivized funds from the State of South Carolina and, in the next breath, leave the state to seek additional opportunities elsewhere, thereby depriving the South Carolina of the benefit of its bargain. Hence, SC Launch, as a steward of South Carolina tax incentivized funds, has determined that the Relocation Provision and Relocation Fee are critical to the success of its program and, as a result, has included a virtually identical Relocation Provision and Relocation Fee in each of its financing agreements. (Aff. of Hillman at ¶ 22; SC Launch Tr. at 47:6-10).

Based on the foregoing, SC Launch is entitled to summary judgment. The damages associated with a premature relocation that SC Launch and Dannar might reasonably anticipate when they entered into the Agreement were undoubtedly difficult, if not impossible, to ascertain because of the very nature of these types of public funding arrangements. As set forth above, the costs associated with administering the program, the opportunity costs in choosing one company over another, and the lost jobs, wages, and tax revenue were simply not susceptible to precise measurement in the event of default because the future costs were unknown at the time of the Agreement.

Due to the virtual impossibility of determining the actual and consequential damages stemming from Dannar's relocation, the parties included the Relocation Provision and Relocation Fee, which was reasonably intended by the parties as the predetermined measure of compensation for damages that might have been sustained by SC Launch in connection with Dannar's relocation from South Carolina in breach of the Agreement. It is clear from the express language of the Agreement that these sophisticated commercial entities agreed that "the Relocation Fee is not a penalty, but rather, a good-faith estimate of the amount necessary to

compensate SC Launch for its actual costs in connection with a Company Relocation." The South Carolina Court of Appeals' decision in *ERIE Insurance Company v. Winter Construction Company*, 393 S.C. 455, 713 S.E.2d 318 (Ct. App. 2011) is controlling in this case and there are no genuine issues of material fact. Thus, summary judgment is appropriate in favor of SC Launch on its counterclaim for breach of the Agreement and as to Dannar's claim for declaratory judgment.

It is therefore ORDERED:

1. SC Launch is granted summary judgment in its favor on Dannar's declaratory judgment action, and Dannar's claims against SC Launch are hereby dismissed with prejudice; and

2. SC Launch is granted summary judgment in its favor on its counterclaim asserted against Dannar for breach of the Financing Agreement, and a judgment in the principal amount of $200,000.00 is hereby rendered in SC Launch's favor and against Dannar. In addition, SC Launch is hereby awarded prejudgment interest thereon at the rate of 8.75% pursuant to S.C. Code Ann. § 34-31-20(a), from April 1, 2015 (the date Dannar admitted that it had relocated from South Carolina) to the date of entry of judgment.

3. SC Launch is also entitled to an award of its attorneys' fees and expenses, and court costs incurred in connection with its enforcement of Dannar's obligations under the Relocation Provision pursuant to the terms of the Financing Agreement in an amount to be determined by the Court. Within 10 business days after entry of this Order, SC Launch shall submit an affidavit relating its attorneys' fees, after which Dannar shall have 10 days to reply thereto.

It is so ordered.

The Honorable Robin B. Stilwell
Judge, Thirteenth Judicial Circuit

Dated: _____, 2017
Greenville, South Carolina

Greenville Common Pleas

Case Caption: DD Dannar LLC vs. SC LAUNCH Inc

Case Number: 2015CP2300142

Type: Order/Summary Judgment

So Ordered

s/ Robin B. Stilwell 2158