

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas  
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JUN 06 2018  
SC Court of Appeals

The Honorable Robin B. Stilwell, Circuit Court Judge

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Case No. 2015-CP-23-00142  
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DD DANNAR, LLC

Appellant,

vs.

SC LAUNCH!, INC.

Respondent.

\_\_\_\_\_  
FINAL BRIEF OF APPELLANT  
\_\_\_\_\_

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TABLE OF CONTENTS

	<u>Page</u>
Statement of Issues on Appeal.....	1
Statement of the Case.....	1
Facts .....	3
A.    SCL’s Loan to DD Dannar.....	3
B.    DD Dannar Requests Additional Financing.....	4
C.    Relocation Fee Demand .....	5
Argument .....	6
I.    DD Dannar’s repayment of the loan in full extinguished the Note and Financing Agreement.....	6
II.   The relocation fee is an unenforceable penalty.....	7
Conclusion .....	14

TABLE OF AUTHORITIES

	<u>Page</u>
<b>Cases</b>	
<i>Barnacle Broad., Inc. v. Baker Broad., Inc.</i> , 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000).....	7
<i>Benya v. Gamble</i> , 282 S.C. 624, 630, 321 S.E.2d 57, 61 (Ct. App. 1984).....	8
<i>City of Davenport v. Shewry Corp.</i> , 674 N.W.2d 79 (Iowa 2004) .....	9, 10
<i>ERIE Ins. Co. v. Winter Constr. Co.</i> , 393 S.C. 455, 462, 713 S.E.2d 318, 322 (Ct. App. 2011).....	9
<i>Foreign Academic &amp; Cultural Exchange Services, Inc. (FACES) v. Tripon</i> , 394 S.C. 197, 204, 715 S.E.2d 331, 334 (2011) .....	9, 11
<i>Foster v. Roach</i> , 119 S.C. 102, 107, 111 S.E. 897, 899 (1922) .....	9
<i>Lewis v. Premium Inv. Corp.</i> , 351 S.C. 167, 172, 568 S.E.2d 361, 374 (2002) .....	8
<i>Moser v. Gosnell</i> , 334 S.C. 425, 431, 513 S.E.2d 123, 126 (Ct. App. 1999).....	8, 13
<i>Tate v. Lemaster</i> , 231 S.C. 429, 441, 99 S.E.2d 39, 45-46 (1957).....	8

**OTHER AUTHORITIES**

<i>Black's Law Dictionary</i> 10th ed. 2014 .....	7
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### **Statement of Issues on Appeal**

I. Did the lower court err in holding that the financing agreement between the parties was not fully extinguished upon full repayment of the business loan by DD Dannar?

II. Did the lower court err in holding that the alleged “relocation fee” was not an unenforceable penalty?

### **Statement of the Case**

Appellant DD Dannar, LLC (“DD Danner”) and Respondent SC Launch!, Inc. (“SCL”) signed a Financing Agreement on April 14, 2011 (the “Financing Agreement”), securing a Promissory Note (the “Note”) obligating DD Dannar to repay a loan of \$200,000 to SCL. Payment of this loan was due, according to the Note, by April 14, 2014. However, DD Danner prepaid the Note in full, plus interest, on April 30, 2013, nearly a full year ahead of schedule. Prepayment of the Note was specifically permitted “without penalty” by the stated terms of the Note.

The Financing Agreement that secured the Note included an alleged “relocation fee,” which SCL contractually represented to be “a good faith estimate of the amount necessary to compensate [SCL] for its actual costs” in conjunction with relocation by DD Dannar. SCL, however, has never presented any estimate of such actual costs. Internally, SCL referred to the fee as a “penalty” and a “clawback.”

When DD Danner repaid the Note in full, with interest, one year ahead of schedule, no “relocation fee” was due to SCL under the terms of the Financing Agreement. DD Dannar did not relocate its business operations to Indiana within the meaning of the Financing Agreement until April 2015, almost two years after the Note had been repaid in full. After DD Danner

relocated in 2015, despite the absence of any continuing indebtedness, SCL nevertheless demanded payment of a "relocation fee" of \$200,000. Such a payment would more than double SCL's recovery on its loan to DD Dannar.

DD Dannar filed this lawsuit on January 7, 2015, seeking a Declaratory Judgment that the alleged "relocation fee" was an unenforceable penalty. On June 2, 2015, SC counterclaimed for breach of contract based on DD Dannar's non-payment of fee.

The parties each filed cross motions for summary judgment. DD Dannar argued that the Financing Agreement (in which the "relocation fee" appeared) secured repayment of the Note; and that the Note and the Security Agreement were extinguished when DD Dannar repaid the loan in full. Significantly, the parties agreed that, when DD Dannar repaid the Note in April 2013, no relocation fee was due. DD Dannar further contended that the "relocation fee" was an unenforceable penalty. SCL asserted that DD Dannar breached the terms of the Financing Agreement and requested that SCL be awarded the full amount of the "relocation fee," in addition to its reasonable attorneys' fees. The parties agreed that there were no genuine issues of material fact that would preclude a decision by the Court on cross-motions for summary judgment. The circuit court heard both motions on April 5, 2017.

By order dated June 15, 2017, the lower court incorrectly held that the "relocation fee" was not an unenforceable penalty and that the Financing Agreement had not been extinguished by DD Dannar's prepayment of the full amount of the loan, including interest. (R. pp. 3-27). The lower court awarded SCL the full amount of the "relocation fee," namely \$200,000, and held that SCL was entitled to recover reasonable attorneys' fees and expenses. By order dated September 5, 2017, the lower court awarded SCL attorneys' fees and costs in the amount of \$150,172.78, the entire amount requested by SCL. (R. pp. 28-34).

DD Dannar filed and served its Notice of Appeal on September 27, 2017.

### **Facts**

#### **A. SCL's Loan to DD Dannar**

DD Dannar is a South Carolina start-up that developed a proprietary "Mobile Power Station" ("MPS"). The MPS is an innovative, multi-purpose vehicle designed for use in the government sector. It relies on clean energy and features a creative, state-of-the-art design. Gary Dannar, founder and President of appellant DD Dannar, has surmounted numerous challenges over many years in his efforts to develop the MPS. In 2011, Mr. Dannar anticipated that, with adequate funding, the MPS could be commercially produced within a few years and submitted a request for loan funding to respondent SCL.

SCL is a publicly-established entity whose mission is to select promising South Carolina companies and assist them by providing venture loan funding. Ideally, the funded company succeeds, creating technical jobs and paying taxes to the state of South Carolina. The funding is not a grant or donation, however; it is a loan, which the funded company is expected to pay back, with interest, just like any commercial loan. Thus, an SCL loan recipient executes a Note and Financing Agreement, as DD Dannar did here. SCL's mission is not to profit from the loans made but rather to recoup its investment and encourage economic development and job creation in South Carolina.

DD Dannar applied for and was approved for a loan of \$200,000 by SCL in March 2011. On April 14, 2011, DD Dannar executed a Note in the principal amount of \$200,000, and the parties signed a Financing Agreement securing repayment of the Note. Repayment of the loan was due, according to the Note, on April 14, 2014. Section 3.3B of the Financing Agreement,

which secured the Note, included the alleged “relocation fee,” which imposed a hefty fee on a debtor that relocates while the Agreement is in effect:

Relocation Fee. The “Relocation Fee” will be an amount equal to the aggregate amount of all funds advanced by SC Launch to the Company. . . . 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.

“Company Relocation” is defined in Section 3.3A as moving or relocating the company’s principal office or principal place of business outside of South Carolina and having 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 develop, employed at locations outside of the State of South Carolina”.

**B. DD Danner Requests Additional Financing**

DD Danner applied to SCL for additional financing early in 2013, but SCL denied the request. SCL officials admit that such a denial was somewhat unusual, as most organizations that received initial loan funding from SCL also received follow-on funding. After SCL’s refusal to provide follow-on loan funding, DD Danner continued trying to raise investment funds in South Carolina, but the denial by SCL hindered its ability to do so. New potential investors were reluctant to invest in DD Danner when SCL had broken its usual practice and refused follow-on loan funding to DD Danner. To overcome this hurdle, DD Danner prepaid the SCL debt in full, including all interest owed, on April 30, 2013, nearly a full year ahead of schedule.

While SCL refused additional funding to DD Danner, Indiana offered the company financial assistance to renovate a building to house DD Danner corporate operations in Indiana.

No direct governmental funds from Indiana were offered or provided to DD Dannar, however. Sometime after DD Dannar repaid the SCL loan in full, the company took the offer and established some operations in Indiana.

**C. Relocation Fee Demand**

On September 19, 2013, five months after DD Dannar had prepaid the SCL loan in full, but hearing that DD Dannar had accepted Indiana's offer, SCL demanded payment of the alleged "relocation fee." SCL had already received \$200,000 plus interest; it was seeking another \$200,000 in addition. DD Dannar refused, reminding SCL that no relocation fee was due because the loan had been repaid in full and because DD Dannar had not "relocated" within the meaning of the Financing Agreement. Significantly, in minutes of an SCL board meeting on July 17, 2013, an SCL official discussed DD Dannar's obligation to pay "the \$200,000 clawback for relocation outside of SC." (R. p. 250). In a September 11, 2013 SCL board meeting, officials agreed to consider "sending Dannar a demand letter based on the penalty clause." (R. p. 255). The September 19, 2013 demand followed.

By April 2015, DD Dannar had moved sufficient operations to Indiana to constitute a "relocation" as defined in the Financing Agreement, and SCL once again demanded payment of the additional \$200,000. DD Dannar again informed SCL that no relocation fee was due because the loan had been repaid and the Note extinguished nearly two years prior, and that the supposed "relocation fee" was actually an unenforceable penalty.

DD Dannar then initiated this litigation, seeking a declaration that SCL was not entitled to recover any "relocation fee" from DD Dannar, and SCL counterclaimed for breach of the Financing Agreement.

## Argument

### **I. DD Dannar's repayment of the loan in full extinguished the Note and Financing Agreement.**

When DD Dannar repaid the Note in full on April 30, 2013, a year ahead of schedule, it had not relocated its business to Indiana, as defined in the Financing Agreement. Therefore, no "relocation fee" was due. The Note expressly allowed prepayment "without penalty."

Section 7.10 of the Financing Agreement provides as follows:

Termination of Agreement Except as otherwise specifically provided herein, the provisions hereof, including all covenants, shall continue in full force and effect until the . . . payment of fees, including the Relocation Fee *to the extent applicable*, and performance of all other obligations owed to SC Launch hereunder. (emphasis added)

On April 30, 2013, when DD Dannar prepaid the Note in full, the "relocation fee" was not "applicable" to any extent, as DD Dannar had not relocated. Prepayment of the Note thus satisfied "all other obligations owed to [SCL]" under the terms of the Financing Agreement, and fully extinguished the Note and Financing Agreement.

SCL agreed that the Note and Financing Agreement secured the amount of SCL's loan to DD Dannar. (R. p. 242, lines 8-16). Indeed, the language of both the Financing Agreement and the Note reflect this purpose – to secure repayment of the Note. The Financing Agreement includes numerous provisions typical of a standard security arrangement: it recites the loan it secures; a promissory note undergirds the Agreement; SCL has a right to acquire equity in the debtor; the debtor is bound by negative covenants and must notify SCL as creditor of financial matters; and SCL is permitted to take action if it deems itself to be insecure. These provisions reflect the parties' clear intent for the Financing Agreement to secure payment of the Note. "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.” *Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 SC. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000).

As a matter of law, full payment and extinguishment of the Note on April 30, 2013, ended any obligations DD Danner had to SCL. A debtor is no longer obligated to its creditor when a loan is repaid and the underlying monetary obligation is satisfied. Satisfaction is defined as “the fulfillment of an obligation; esp., the payment in full of a debt.” *Black’s Law Dictionary* 10th ed. 2014. SCL accepted the loan repayment by DD Danner as full satisfaction of DD Danner’s debt on or about April 30, 2013. Thereafter, there was no longer any indebtedness that was secured by the Financing Agreement – its purpose had been fulfilled. Any risk of non-payment had ended.

The lower court erred in finding that, notwithstanding prepayment of the loan two years prior, DD Danner remained liable for payment of a “relocation fee” in April 2015. DD Danner fully met the terms of its obligations under both the Note and Financing Agreement in 2013. Once that occurred, the Note and Financing Agreement were extinguished, and neither DD Danner nor SCL owed any further obligations to one another. The lower court erred in its decision that DD Danner’s full repayment of the loan did not extinguish the terms of the Note and Financing Agreement.

## **II. The relocation fee is an unenforceable penalty.**

The lower court further erred by holding that the alleged “relocation fee” was an enforceable liquidated damages clause and not than an unenforceable penalty. Under South Carolina law, “[p]arties to a contract may stipulate as to the amount of liquidated damages owed in the event of nonperformance. Where, however, the sum stipulated is plainly disproportionate to any probable damage resulting from breach of contract, the stipulation is an unenforceable

penalty.” *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 172, 568 S.E.2d 361, 374 (2002) (internal citations omitted).

Simply because there is a representation in the contract that a fee is not a penalty does not relieve the court of its duty to determine whether that fee is in fact a penalty. Whether a damages clause or fee is in fact and law an unenforceable penalty, “does not depend solely upon the language used in the contract. Rather, it depends on the nature of the contract in light of the circumstances, and the attitude and intentions of the parties.” *Moser v. Gosnell*, 334 S.C. 425, 431, 513 S.E.2d 123, 126 (Ct. App. 1999). “Irrespective of its terminology, a stipulation will be held to constitute a penalty where the sum stipulated is so large that it is plainly disproportionate to any probable damage resulting from [a] breach of the contract.” *Benya v. Gamble*, 282 S.C. 624, 630, 321 S.E.2d 57, 61 (Ct. App. 1984) (internal quotation marks and citations omitted).

The test for determining whether a contract provision is an unenforceable penalty is explained in *Tate v. Lemaster*, 231 S.C. 429, 441, 99 S.E.2d 39, 45-46 (1957):

Implicit in the meaning of ‘liquidated damages’ is the idea of compensation; in that of ‘penalty’, the idea of punishment. Thus, where the sum stipulated is reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reason of nonperformance, the stipulation is for liquidated damages; and where the stipulation is not based upon actual damages in the contemplation of the parties, but is intended to provide punishment for breach of contract, the sum stipulated is a penalty.

In order for a contractual provision to be considered an enforceable liquidated damages clause rather than an impermissible and unenforceable penalty, there must be some basis on which the amount stated is determined. Basically, the figure cannot be a number unconnected and unrelated to the amount of actual damages potentially suffered by a party.

While the language of the Financing Agreement asserts the alleged “relocation fee” is not a penalty, a court is not required to so find based solely on the language of the provision in isolation. In fact, quite the opposite. Under South Carolina law, a court is required 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 probable consequences of the breach.” *ERIE Ins. Co. v. Winter Constr. Co.*, 393 S.C. 455, 462, 713 S.E.2d 318, 322 (Ct. App. 2011) (quoting *Foster v. Roach*, 119 S.C. 102, 107, 111 S.E. 897, 899 (1922)). A court must look beyond the amount stated in a contract to determine whether this number is “plainly disproportionate to any probable damage. . . .” *Foreign Academic & Cultural Exchange Services, Inc. (FACES) v. Tripon*, 394 S.C. 197, 204, 715 S.E.2d 331, 334 (2011).

SCL witnesses admitted that there was no attempt to calculate the amount of the alleged “relocation fee” or even to define the type of damages that SCL would suffer as a result of a debtor company’s relocation. SCL cannot give any estimate of the type of actual costs it would incur when DD Dannar, or any other company, relocated.<sup>1</sup> (R. p. 242, line 1-p. 245, line 10). SCL admitted it has no formula, has identified no factors, and has no defined basis on which any alleged relocation fee is calculated. (R. p. 266; R. p. 246, line 1-p. 247, line 9). At no point during the hearing was SCL able to state the manner in which it calculated the actual costs incurred by SCL when DD Dannar moved. (R. pp. 271-316).

The lower court erroneously relied on a decision from Iowa, *City of Davenport v. Shewry Corp.*, 674 N.W.2d 79 (Iowa 2004), to support its rationale. In *Davenport*, a company received a *grant* from the City of Davenport as part of an economic development agreement. *Davenport*,

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<sup>1</sup> SCL’s representative Hillman admitted, in fact, that SCL generally uses the amount of the loan as the amount of the fee. (R. p. 382, lines 6-10).

674 N.W.2d at 81. As part of the development agreement, the company was required to meet certain job creation requirements by a particular date. When the company was unable to satisfy this condition, the city filed suit seeking to recoup the full amount of its grant. *Davenport*, 674 N.W.2d at 82. The distinctions between *Davenport* and this case, however, are sharp and meaningful. Significantly, *Davenport* involved a *grant*, not an interest-bearing loan that was required to be repaid. There was no promissory note and no loan documents in *Davenport*. The company in *Davenport* had no obligation to repay the grant funds if it met the conditions of the grant. By contrast, DD Dannar was obligated to repay SCL's loan, with interest, according to the terms of a Note that was secured by a Financing Agreement. In addition, the company in *Davenport* was only required to repay the amount of the grant, not any additional amount. Even if one erroneously equates the grant in *Davenport* with the loan in this case, DD Dannar actually did the equivalent – it paid back the full amount that SCL provided, plus interest. Finally, the “relocation fee” that SCL imposed actually doubles its recovery on the loan, unlike the recoupment that was collected by the city of Davenport. DD Dannar was always required to pay back SCL's loan, plus interest, which it did nearly a year before it was due and nearly two years before DD Dannar relocated to Indiana. The lower court erroneously relied on the *Davenport* case. (R. pp. 20-22).

The lower court additionally erred when it accepted ill-defined and speculative impacts of DD Dannar's relocation as a basis for the fee. SCL suggested, for instance, that staff hours working with companies, its work on the loan documents, the cost of employees, and other administrative costs validated the fee.<sup>2</sup> If an enforcing party would still have incurred the asserted costs, regardless of any alleged breach, and these costs are not directly related to the

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<sup>2</sup> R. p. 368, line 18-p. 371, line 10.

alleged breach, they cannot support an enforceable liquidated damages clause. *See FACES*, 394 S.C. 197, 715 S.E.2d 331. Costs of this sort are considered “sunk costs” that would have been incurred regardless of whether there was an alleged violation of the agreement. Under South Carolina law, a liquidated damages provision cannot be predicated on sunk costs. *Id.* In addition, the relocation fee by its terms does not reimburse sunk costs that SCL incurs by simply fulfilling its corporate purposes. Instead, the provision identifies the fee as an “estimate of the amount necessary to compensate SC Launch for its actual costs in connection with a [relocation].” Costs based on the work of SCL’s staff assisting DD Dannar would have been expended by SCL regardless of whether the efforts were directed at DD Dannar or another South Carolina company, and SCL would have incurred these operational costs regardless of whether DD Dannar moved to Indiana. *See FACES*, 394 S.C. at 204-05, 715 S.E.2d at 334-35 (discussing that “sunk costs” cannot be included in the determination of whether a party has suffered actual damages when that party is seeking enforcement of an alleged liquidated damages clause). SCL cannot point to any specific costs incurred by it, or anything resembling actual costs suffered by it, that were caused by DD Dannar’s relocation to Indiana nearly two years after fully prepaying the loan from SCL. SCL contractually represented that \$200,000 was “a good faith estimate of the amount necessary to compensate [SCL] for its actual costs,” and Dannar could have had no way of knowing otherwise. (R. p. 236, lines 9-10). In fact, SCL never formulated any estimate, let alone a good faith estimate, of any actual costs that SCL would incur because of DD Dannar’s relocation.

The lower court further erred in its consideration of the laudable purposes of SCL. (R. pp. 22-24). The loan from SCL is no different than any other business loan a company could get from another lending agency. While SCL may make loans that other lenders might consider risky

or less attractive, and while its purpose may be to promote economic development in South Carolina, SCL makes loans, not grants, and requires the borrowing companies to execute typical loan documents, including an interest-bearing Note and a Financing Agreement to secure repayment.

The stated purpose of a lender, no matter how praiseworthy, has no impact on whether a liquidated damages clause is an unenforceable penalty. SCL cannot and has not cited any precedent that forgives the requirement for a reasonable relationship between liquidated damages and actual potential losses based on a lender's laudable intent. Indeed, the Financing Agreement does not cite laudable purposes as the reason for the relocation fee, but instead an alleged (but non-existent) "good faith estimate of the amount necessary to compensate [SCL] for its actual costs."

Finally, even if SCL's purposes were worthy of consideration, the value of uncreated jobs in South Carolina is speculative at best and is a loss to the state of South Carolina, not to SCL.<sup>3</sup> The lower court even acknowledged this, stating that when companies relocate, the state of South Carolina loses out on potential gains, not that SCL itself suffers any form of loss. (R. pp. 23-25). SCL loaned \$200,000 specifically to DD Dannar, and this amount was paid back in full plus interest. SCL would have incurred its staff and administrative costs regardless of whether DD Dannar or another company was the focus of its efforts. Further, SCL would not have been the beneficiary of any additional tax revenues or profits created due to additional jobs that may have been created by a recipient of an SCL loan. SCL cannot claim these as losses because it would

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<sup>3</sup> In fact, within five years from the date it signed the SCL loan documents, DD Dannar had not markedly increased the number of its employees in South Carolina *or* in Indiana. (R. p. 519, line 24-p. 520, line 2).

never have enjoyed these benefits. Thus, SCL cannot reply on these alleged losses as justification for the alleged “relocation fee.”

Finally, when considering a provision such as the “relocation fee,” a court must consider not only the language of the provision itself, but the totality of circumstances surrounding the agreement. Consistent with the absence of any rational basis for the fee, SCL employees and board members referred to the alleged relocation fee as a “clawback” and a “penalty.” Mr. Hillman freely admitted that such language was used, even stating that he had personally referred to the fee as both a “penalty” and “clawback.” (R. p. 377, line 17-p. 378, line 7).

The minutes of an SCL board meeting, held on July 17, 2013, question whether DD Dannar “is required to pay the \$200,000 clawback for relocation outside of SC.” (R. p. 250). Additionally, the minutes of the September 11, 2013, SCL board meeting state that the staff of SCL “may consider sending [DD] Dannar a demand letter based on the penalty clause in the [Agreement].” (R. p. 255). In an email to Greig Hillman, an SCL board member also referred to the relocation fee as a “claw back.” (R. pp. 259-260). In a response to this communication, Mr. Hillman stated that SCL “still have the potential for penalty through early 2016”. (R. pp. 259-260).

These unguarded internal descriptions clearly demonstrate SCL’s intention when including this provision in the Financing Agreement: the fee was to punish companies that left the state. Because a court is required to look beyond the simple language of the contract to ascertain the intention of the parties, such statements by representatives of SCL cannot be ignored. *See Moser v. Gosnell*, 334 S.C. 425, 431, 513 S.E.2d 123, 126 (Ct. App. 1999) (“The determination does not necessarily depend upon the language used in the contract. . . . Rather, the determination depends upon the nature of the contract in light of the circumstances, and the

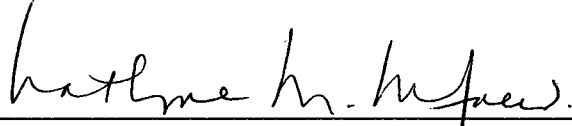
attitude and intentions of the parties.”). The lower court erroneously failed to consider the admissions by representatives of SCL that the alleged “relocation fee” is actually designed to punish companies – that is, an unenforceable penalty.

South Carolina law clearly prohibits an unenforceable penalty. The alleged “relocation fee” in the Financing Agreement is not a liquidated damages clause but rather a severe, unreasonable, and unenforceable penalty without any rational basis. The amount of the relocation fee is not a reasonable estimate of any alleged actual costs incurred by SCL; SCL has no basis for the amount of the relocation fee or any information about any actual costs suffered by SCL due to DD Dannar’s move to Indiana; and SCL employees and board members consistently and explicitly referred to the relocation fee as a penalty and a clawback. The relocation fee is an unenforceable penalty.

#### **Conclusion**

DD Dannar’s repayment of the SCL loan in full, with interest, extinguished the Note and Financing Agreement. No relocation fee was due at the time of repayment. In addition, the asserted “relocation fee” is an unenforceable penalty.

For these reasons, DD Dannar respectfully requests this Court reverse the decision of the circuit court granting SCL's motion for summary judgment and SCL's motion for attorneys' fees and costs.



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