IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

Case No. 2015-CP-23-00142

DD DANNAR, LLC — Appellant,

vs.

SC LAUNCH!, INC. — Respondent.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

In its Initial Brief, Respondent SC LAUNCH!, Inc. ("SCL") makes two assertions that call for reply: (1) that because DD Dannar, LLC ("DD Dannar") signed the Financing Agreement, the alleged Relocation Fee cannot be an unenforceable penalty; and (2) that the alleged laudable purposes of SCL to DD Dannar are relevant in a determination of the enforceability of the Relocation Fee. Neither has merit.[1]

I. A Signed Contract Does Not Immunize an Unenforceable Penalty from Legal Challenge.

In its brief, Respondent spends several pages contending that Gary Dannar's signature on the Financing Agreement means that the Relocation Fee is not an unenforceable penalty. This is simply not the law in South Carolina. Virtually all cases in which liquidated damage clauses were declared to be unenforceable penalties involved signed contracts.[2]

A sentence in a contract claiming that a fee is not a penalty does not relieve a court of its duty to examine the provision at issue to determine whether it in fact is an illegal penalty. Whether a damages clause 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). South Carolina courts are required to "look at the whole contract, its subject-matter, the ease or

[1] Appellant DD Dannar, LLC ("DD Dannar") incorporates the Statement of Issues on Appeal, the Statement of the Case, and the Facts from its Initial Brief of Appellant.

[2] Indeed, liquidated damages clauses *appear* in contracts.

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)). Further, 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).

Nor does South Carolina law recognize a different standard for the review of an alleged damages clause for a party who is a business novice versus a sophisticated party. The law is clear that it is the provision itself, the rational basis for the fee, and the totality of the circumstances surrounding the agreement that determine whether a liquidated damages provision is an unenforceable penalty.

As discussed in detail in DD Dannar's Brief, SCL admitted it made no attempt to define or determine the types of damages that SCL might suffer should DD Dannar relocate, nor to calculate the Relocation Fee accordingly. (R. p. 243, line 1-p. 245, line 10). SCL has never been able to state the manner in which it calculated the actual costs incurred by SCL when DD Dannar moved. (R. pp. 271-316). In fact, all of SCL's alleged damages were either sunk costs it would have incurred regardless of whether DD Dannar or another company was the subject of these efforts, or they are speculative losses to the state of South Carolina, not SCL. Reflecting the real purpose of the Relocation Fee, SCL employees and board members referred to the alleged relocation fee as both a "clawback" and a "penalty." (*See* R. pp. 250, 255, 259-260).

The alleged Relocation Fee is, in reality, an unenforceable penalty, and this Court should so hold.

II. The Claimed Laudable Purposes of SCL Are Irrelevant to Enforcement of the alleged Relocation Fee, and SCL's Damages are Speculative.

SCL attempts to distract the Court by extolling the laudable purposes of SCL. The reasons SCL *loans* money to start-up companies are entirely irrelevant to the legal determination of whether the alleged Relocation Fee is an unenforceable penalty. Once again, SCL spends numerous pages extolling the virtues of its programs and development of nascent companies. (*See* Respondent's Initial Brief pp. 3-7). While the purposes of SCL's loans may be admirable, there is no exception, special consideration or unique legal status that permits any lender to enforce an unenforceable penalty. SCL still has not cited any precedent demonstrating that, in loans to achieve laudable goals, the enforceability of a liquidated damages clause is not subject to the same legal standard as any other damages provision. Nor has SCL ever cited any precedent that forgives the requirement for a reasonable relationship between the amount of liquidated damages and the actual potential losses based on a lender's supposed goals or intent.

Moreover, the damages claimed by SCL are not "actual costs" as represented in the Agreement, but mere speculation. DD Dannar repaid SCL in full, plus interest, for its loan to the company. SCL claims it suffered "lost jobs and wages for South Carolina citizens and tax revenues." (Respondent's Initial Brief p. 26). But this is an alleged loss to the state, not SCL. In fact, there was no such loss; within five years from the date of the loan documents, DD Dannar had not markedly increased its employees. (R. 519, line 24-p. 520, line 2). SCL also claims "costs associated with administering the SCL program." (Respondent's Initial Brief p. 27). But the SCL program would be ongoing regardless of whether efforts were directed at DD Dannar or another company; these are sunk costs that cannot reasonably be imposed on DD Dannar.

Finally, SCL alleges "lost opportunity costs." First, any alleged lost opportunities are speculative at best and have no reasonable relationship to DD Dannar. Second, SCL is once again claiming costs that, even if suffered, were those of the state of South Carolina, not SCL.

CONCLUSION

For the foregoing 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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