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
The Honorable Perry H. Gravely, Circuit Court Judge

Case No. 2015-CP-23-00142
Appellate Case No. 2017-002029

DD Dannar, LLC,.....Appellant,

v.

SC LAUNCH!, Inc.,.....Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court correctly ruled that, pursuant to the unambiguous provisions of the parties' Agreement, Appellant's obligations under the Relocation Provision were independent and survived Appellant's payment of the Promissory Note.

II. Whether the trial court correctly ruled that the Relocation Provision contained in the parties' Agreement was not an unenforceable penalty because, among other things, the damages associated with a premature relocation were difficult, if not impossible, to ascertain when these sophisticated parties negotiated the Agreement with the assistance of counsel, and the amount of the Relocation Fee was reasonable given the context of the subject high-risk, public funding and assistance program, the costs of administering the program, the lost opportunity costs, and the anticipated lost jobs, wages, and tax revenues that would result from a premature relocation from South Carolina.

STATEMENT OF THE CASE

Respondent SC LAUNCH!, Inc. ("SCL") operates a program for start-up enterprises located in South Carolina and provides high-risk, state tax incentivized funding for its selected businesses as well as mentoring and other valuable services from the SCL staff and its contacts and supporters. Businesses selected for the program enter into an agreement with SCL to repay any amounts advanced and, as an independent obligation, agree to pay a relocation fee if they relocate to another state within five years.

Appellant DD Dannar, LLC ("Dannar") applied to and was accepted into the SCL program, and it received funding and SCL's services. The parties entered into a Finance Agreement ("the Agreement") dated as of April 14, 2011. Pursuant to the Agreement, SCL provided certain funding to Dannar, and Dannar agreed to repay that funding pursuant to the

terms of a Promissory Note. In addition, the Agreement provided that Dannar must pay a Relocation Fee if it relocates from South Carolina within five years of the execution of the Agreement, which in this case, would be before April 14, 2016. Dannar relocated to Indiana prior to this date.

Dannar filed its Complaint against SCL in this case on January 7, 2015. The Complaint alleged a single cause of action seeking a Declaratory Judgment declaring that: (a) Dannar did not owe SCL the Relocation Fee because it had repaid the Promissory Note; (b) Dannar was not in violation of the Relocation Provision because it had not relocated within the meaning of the Agreement; and (c) Dannar did not owe SCL the Relocation Fee because it constituted an unenforceable penalty.

On February 11, 2015, SCL filed a Motion to Dismiss the Complaint on the grounds that the case was not ripe and did not present a justiciable controversy based upon Dannar's position that it had not relocated to Indiana within the meaning of the Agreement.

By Supplemental Complaint dated April 27, 2015 ("Supp. Complt."), Dannar alleged that, as of April 1, 2015, it had relocated to Indiana within the meaning of the Relocation Provision. SCL filed its Answer to Dannar's Supplemental Complaint and Counterclaim on June 2, 2015. The pleading responded to Dannar's allegations, raised certain affirmative defenses, and asserted a counterclaim against Dannar for breach of contract for failure to pay the Relocation Fee.

After the deadline for the completion of discovery pursuant to a scheduling order entered in the case, both parties filed motions for summary judgment. At the hearing on the motions, the parties agreed that there were no genuine issues of material fact.

The Honorable Robin B. Stilwell granted SCL's motion, denied Dannar's motion, and awarded SCL judgment in the amount of $200,000 plus prejudgment interest thereon from April 1, 2015, to the date of entry of judgment pursuant to Order Granting Defendant/Counterclaim Plaintiff SC LAUNCH!, Inc.'s Motion for Summary Judgment filed on June 15, 2017 ("Order"). The Order also concluded that SCL was entitled to an award of its attorneys' fees and expenses pursuant to the terms of the Agreement and provided a timeline for the submission of information in support of the award and Dannar's response.

The Honorable Perry H. Gravely granted SCL's motion for an award of its attorneys' fees in the amount of $147,977.00 plus expenses of $2,195.78 pursuant to his Order Granting Defendant/Counterclaim Plaintiff SC LAUNCH!, Inc.'s Motion for Award of its Attorney's Fees and Expenses filed on September 5, 2017.

Judgment was entered on the Order granting SCL's motion for summary judgment on June 15, 2017, and on the order granting it an award of its attorneys' fees and costs on September 5, 2017.

Dannar served its notice of appeal on September 27, 2017.

FACTS

I. The SC Launch! Program.

In 2006, the SCL program was formed by the South Carolina Research Authority ("SCRA") pursuant to S.C. Code Ann. § 13-17-87 and § 13-17-88. SCL'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. (R. p. 90, ¶ 5). 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. (R. p. 89, ¶ 3). SCL is an

independent nonprofit 501(c)(3) corporation affiliated with SCRA, and the SCL program makes seed investments in businesses that anticipate financial returns. (R. p. 90, ¶ 4).

To fulfill its charter, SCL supports advanced technology and knowledge-based businesses with seed capital that fills gaps in funding from individual investors, angel investment groups, lenders, private equity firms, and other sources. (R. p. 90, ¶ 5). Funding from SCL is supplemental; it is not intended to replace funding from other sources. (R. p. 90, ¶ 5). Returns from SCL investments help fund continuing SCL programs and investments. (R. p. 90, ¶ 5).

Companies that are admitted into the SCL program are referred to as "Client Companies." (R. p. 90, ¶ 6). These companies receive mentoring and support services from SCL staff, as well as access to SCL's resource partner network. (R. p. 90, ¶ 6). SCL staff members are salaried employees who dedicate significant amounts of time and energy into developing and mentoring companies admitted into the SCL program. (R. p. 90, ¶ 7).

Companies are considered for investment by SCL upon recommendation of the SCL staff under the direction of the SCL Executive Director. (R. p. 90, ¶ 8). The staff recommends only companies that are active client companies in the SCL program. (R. p. 90, ¶ 8). They must complete a rigorous due diligence process and demonstrate the ability to execute plans which will result in significant contributions to the South Carolina knowledge economy. (R. p. 90, ¶ 8).

In order to fulfill its mission to enrich the state's innovation economy, SCL 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 SCL program. (R. p. 91, ¶ 9). SCL does not generally require certain significant terms typically required by providers of high risk financing of start-up enterprises – such as substantial equity in the company, seats on the board of directors or participation in management, and corporate governance changes and

controls.[1] However, a key provision in the agreements for SCL's program is an express promise by the funded company that it will not relocate from the state of South Carolina within five years from the date of the agreement. (*See* R. p. 93, ¶ 22; p. 382, lines 6-10). In the event that a company violates this relocation provision, the agreement requires the payment of an agreed upon relocation fee to SCL as a good-faith estimate of the amount necessary to compensate for the loss to SCL (and the State of South Carolina) in connection with a company's relocation. (R. p. 93, ¶ 22; p. 94, ¶ 23; p. 369, line 2 – p. 371, line 10).

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. (R. p. 91, ¶ 10). Since 2006, SCL 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. (R. p. 91, ¶ 10).

The Executive Director recommends the most promising candidate companies to meet with the SCL Board of Directors (the "Board") and request funding. (R. p. 91, ¶ 12). The Chair or designated member of the Board determines which companies are invited to present. (R. p. 91, ¶ 12). A presenting company submits written materials in advance. (R. p. 91, ¶ 12). Principals meet with the Board and staff in executive session during a regularly scheduled meeting. (R. p. 91, ¶ 12). After the presentation and a question and answer session, the Board deliberates and decides by resolution what, if any, funding to offer. (R. p. 91, ¶ 12). Presenting

[1] For example, after SCL provided funding to Dannar in April 2011, Dannar's first follow-on investor, Larry Blackwell, invested $600,000 in the company. In exchange for his investment, Blackwell obtained twenty percent equity in Dannar. (R. p. 501, lines 15-21; p. 515, line 4 – p. 516, line 9).

to the Board does not guarantee funding. (R. p. 91, ¶ 13). The Board, in its sole discretion, selects the best opportunities, and directs available funding for maximum benefit to the state's knowledge economy. (R. p. 91, ¶ 13).

Evaluation of candidate companies and due diligence are performed by the SCL staff under direction of the SCL Executive Director. (R. p. 92, ¶ 14). Successful completion of due diligence is a necessary, but not sufficient, condition for investment. (R. p. 92, ¶ 14). Whenever possible, at least one member of the Board meets face to face with principals of each candidate company before the Board considers investment. (R. p. 92, ¶ 15). The purpose is to augment the staff's analysis and due diligence, assist in determining whether the company is an appropriate candidate at the time, and help the principals prepare for their presentation to the Board. (R. p. 92, ¶ 15). Such an in-person meeting is required, without exception, if an investment decision requiring Board approval is necessary between regularly scheduled Board meetings. (R. p. 92, ¶ 15).

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. (R. p. 92, ¶ 16). The maximum investment is normally $200,000. (R. p. 92, ¶ 16). Lesser amounts are approved in many cases. (R. p. 92, ¶ 16). In select situations, cumulative SCL investments in an individual company may exceed $200,000. (R. p. 92, ¶ 16). Any amounts above $200,000, however, are subject to additional scrutiny. (R. p. 92, ¶ 16).

An average of approximately 12 companies are chosen for an initial round of SCL funding each year. (R. p. 92, ¶ 17). Additional follow-on funding may also be available in certain situations. (R. p. 92, ¶ 17). According to SCRA's 2015 Annual Report on SCL, the average salary of the jobs created through the SCL program is $69,000, and follow-on capital

secured by SCL companies is $362,700,000. (R. p. 91, ¶ 11; p. 140). Indeed, the "bottom line" for the SCL program and the primary reason why it takes the substantial risk of extending financing to certain start-up enterprises is the potential that SCL's investment will lead to a successful enterprise resulting in high-paying knowledge economy jobs for South Carolina citizens. (R. p. 435, lines 15-25).

II. DD Dannar, LLC and the Agreement with SCL

Dannar is a start-up enterprise, owned by Gary Dannar, which is attempting to develop and sell an alternatively powered multi-purpose maintenance vehicle called the Mobile Power Station for use in the government sector.[2] (R. p. 495, line 25 – p. 497, line 16). In April 2011, SCL provided the first major investment in Dannar. (R. p. 502, lines 2-6). Prior to its arrangement with SCL, Dannar was unsuccessful in soliciting private investment for its business enterprise. (R. p. 500, line 1 – p. 502, line 6).

On April 14, 2011, SCL entered into the Agreement with Dannar and, pursuant to the terms of the Agreement, loaned Dannar $200,000. Dannar agreed to repay the loan by the maturity date of April 14, 2014. (R. p. 155). Dannar also agreed not to move or relocate its business outside the state of South Carolina for a period of five years, which five year period would end on April 14, 2016. (R. p. 36, ¶ 6; pp. 42-53; p. 65, ¶ 43; pp. 70-82; p. 149, § 3.3.A). Dannar accepted the financing from SCL and the benefits of the program.[3] (R. pp. 494-495).

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[2] In its Private Placement Memorandum dated March 7, 2013, Dannar represented that Dannar and its operations were subject to a number of risks and uncertainties, including the fact that Dannar was a newly formed enterprise with no operating history upon which a potential investor could evaluate its future performance. (R. pp. 596-604).

[3] Dannar characterizes the Agreement as "just like any commercial loan." (Dannar Initial Brief p. 3). That is simply not the situation. In fact, Dannar, as is typical for a start-up business, despite efforts, was unable to obtain typical financing or investment at the outset. The high-risk financing provided by SCL was its first source of outside funding, and SCL provided mentoring and services that are not part of a normal commercial loan. (R. p. 496, line 19 – p. 502, line 6; p. 508, lines 18-25).

These benefits included, but were not limited to, mentoring with respect to Dannar's business plan, introductions to key financial players in the area, and guidance on presenting to the SCL board of directors in support of obtaining subsequent rounds of funding. (*See* R. p. 93, ¶ 19; p. 159, ¶ 3; p. 369, line 1 – p. 370, line 12). Further, Dannar acknowledged in the Agreement that SCL made funds available to it "for the purpose of economic development for the State of South Carolina and particularly for generating professional research and development jobs in South Carolina." (R. p. 149, § 3.3.A).

The $200,000 loan from SCL to Dannar represented an initial round of funding; however, nothing in the Agreement obligated SCL to provide any further funding. (R. p. 506, line 20 – p. 507, line 3). Under the relocation provision contained within the Agreement, Dannar specifically agreed for a period of five 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, or 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 . . . ."

(the "Relocation Provision"). (R. p. 149, § 3.3.A).

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

> Relocation fee. The "Relocation Fee" will be an amount equal to the aggregate amount of all funds advanced by SC Launch to the Company [Dannar]. 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 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.**

(R. p. 66, ¶ 47; p. 150, § 3.3.B) (emphasis added). The Relocation Provision and Relocation Fee are standard provisions that are contained in every agreement with companies that receive funding from the SCL program. (R. p. 93, ¶ 22; p. 382, lines 6-10).

The longer a company stays in South Carolina, the less likely it is to leave the state. Over time, typically a start-up business will grow (assuming it succeeds and remains in business), and the loss to South Carolina resulting from a growing company's relocation will increase over time. Considering the context and all of the facts and circumstances at the time the Agreement was executed, the amount of the Relocation Fee was fair and reasonable. (R. p. 94, ¶ 23).

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.

(R. p. 153, § 7.10) (emphases added). Thus, the Agreement remains in full force and effect until payment of the Relocation Fee or compliance with the obligations of the Relocation Provision. 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.

(R. p. 153, § 7.13).

III. Dannar's Relocation to Indiana.

At some point during Dannar's relationship with SCL, Mr. Dannar informed Mark Housley, an employee with SCL who was advising Dannar as it pursued a second round of funding, that his wife was unhappy living in Greenville, South Carolina and that she wanted to move back to Indiana. (R. p. 161, ¶ 12). Unbeknownst to SCL, as early as late 2012

(approximately 20 months after receiving funding from SCL), Dannar began investigating and applying for additional economic development funding from other states, namely Indiana. *See* (R. pp. 694-695; *see also* R. p. 170, No. 15; p. 557, line 13 – p. 558, line 9).

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." (R. p. 694). Dannar also represented to the state of Indiana that "Dannar's pro forma shows $240 [million in annual] revenue by Year 5." (R. p. 694).[4] Further, Dannar represented in this Incentive Application to Indiana that the effect of Dannar's relocation to that state "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." (R. p. 694). Dannar further anticipated a corporate tax liability by 2016 in the amount of $1,929,343.00 to be realized by Indiana. (R. p. 695).

Without disclosing the fact that it had made this December 2012 application to Indiana, Dannar also sought an additional round of funding from SCL in March 2013. The SCL Board ultimately declined the request. (R. p. 94, ¶ 24; p. 475).[5]

On or about April 29, 2013, in preparation for its move to Indiana, Gary Dannar and Alan Austin, a Dannar employee, met with SCL officer Greg Hillman to discuss repayment of the Promissory Note to SCL. (R. p. 94, ¶ 25). Mr. Dannar stated that he would not have been able to move forward with his business were it not for the support of and investment by SCL. (R. p.

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[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. (R. p. 636).

[5] As stated previously, the Agreement does not obligate SCL to provide any additional funding, and as noted above, the Agreement contains a merger and integration clause. The funding provided by SCL did not preclude Dannar from obtaining additional financing from other sources, and Dannar did in fact obtain other sources of funding from private investors. (*See, e.g.* R. p. 515, line 4 – p. 516, line 9; p. 518, line 9 – p. 519, line 9).

94, ¶ 25). That same day, Mr. Hillman sent Mr. Dannar an email reminding him of Dannar's obligations under the Relocation Provision even if the loan was repaid. (R. p. 94, ¶ 25). The next day, Dannar repaid the balance due under the Promissory Note.[6] (R. p. 94, ¶ 26).

A. Dannar's 2013 Economic Development Agreement with Delaware County, Indiana.

SCL learned in discovery that the Indiana economic incentive program provided by governmental entities in Indiana is similar to that provided by SCL. (*See, e.g.* R. pp. 698-714, 715-747). And effective July 23, 2013, Dannar entered into a Loan Agreement and Redevelopment Agreement with Delaware County, Indiana.[7] (R. pp. 698-714, 715-747). Pursuant to the Loan Agreement, Dannar received a tax incentivized loan from Delaware County in the amount of $150,000. (R. p. 723, § 2.1(b)). Dannar represented that its project "will preserve and create additional jobs and employment opportunities within the boundaries of Delaware County, Indiana." (R. pp. 723-724, § 2.2(c)). Dannar further acknowledged to Delaware County that Dannar, "pursuant to an agreement with SC Launch!, Inc., may be required to pay a Relocation Fee" in the amount of $200,000. (R. p. 747).[8]

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[6] Dannar argues, without citation to record support, that "[s]ignificantly, the parties agreed that, when DD Dannar repaid the Note in April 2013, no relocation fee was due. (Dannar Initial Brief p. 2). As discussed above, SCL at all times took the position that Dannar was subject to the obligations under the Relocation Provision. SCL does not contend that Dannar had actually relocated to Indiana as of April 2013. SCL is unsure when Dannar actually relocated to Indiana within the meaning of the Relocation Provision, and thereby triggering the obligation to pay the Relocation Fee, but Dannar has admitted that it relocated within the meaning of the Agreement by April 1, 2015, which is within five years of the execution of the Agreement. (R. p. 56, ¶¶ 2, 3).

[7] 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, earning an average wage of $27.33 per hour. (R. pp. 173-175).

[8] 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. (R. p. 599).

As part of the Redevelopment Agreement, the Delaware County Redevelopment Commission and Delaware County agreed to provide an additional $500,000 to Dannar for improvements to a facility and/or the purchase of equipment and furniture to be disbursed out of an escrow account. (R. pp. 698-699, ¶ 2). 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. (R. p. 698, ¶ 1; p. 706). Dannar also expected that those jobs would provide an average hourly wage of $27.33. (R. p. 706). As further part of the Redevelopment Agreement, Dannar agreed to certain liquidated damages if it did not meet those job and wage targets. (R. pp. 699-702, ¶ 5). Further, 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 equals 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 six years of the date of the Redevelopment Agreement. (R. p. 703, ¶ 8).

B. Dannar's Public Announcement of Relocation to Indiana and Subsequent Denials to SCL.

On June 19, 2013, Dannar, in conjunction with the Muncie-Delaware County, Indiana Economic Development Alliance, issued a public announcement that Dannar was relocating its corporate headquarters and assembly facility to Muncie, Indiana. (R. pp. 689-691). Following initial approval of the incentives package by the Delaware County Council, the *Star Press* in Muncie, Indiana reported on July 23, 2013, that Mr. Dannar was questioned by one of the county council members regarding the SCL Relocation Fee. (R. pp. 692-693). Specifically, the council member inquired into whether Dannar would be prepared to pay the Relocation Fee as set forth in SCL's Agreement. (R. p. 692). Mr. Dannar stated in response, "Yes, we would be prepared to pay that back." (R. p. 692).

In response to these reports, SCL sent a letter to Dannar requesting payment of the Relocation Fee on or about September 19, 2013, and again on November 7, 2013. (R. pp. 94-95, ¶¶ 27, 28). On November 25, 2013, Dannar's counsel responded to these requests and denied that Dannar had relocated under the Agreement. (R. p. 95, ¶ 29). Dannar's counsel maintained this position in a letter dated December 13, 2013, and again by letter dated September 19, 2014. (R. p. 95, ¶ 29).

In response to these reassurances, via letter dated October 7, 2014, SCL agreed not to pursue payment of the Relocation Fee if Dannar would confirm by affidavit that it had in fact not relocated. (R. p. 95, ¶ 30). Rather than sign the affidavit, Dannar elected to bring this suit on January 7, 2015. (*See* R. pp. 35-53). In its Supplemental Complaint dated April 27, 2015, Dannar admitted that it relocated to Indiana as of April 1, 2015. (R. p. 56, ¶¶ 2, 3).

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. "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). The parties agree that there are no material facts in dispute. (R. p. 273, lines 12-13; p. 274, lines 19-24). The construction of a clear and unambiguous contract is a matter of law for the court. *Lee v. Univ. of S.C.*, 407 S.C. 512, 517, 757 S.E.2d 394, 397 (2014).

ARGUMENT

I. Pursuant to the express provisions of the Agreement, the Relocation Provision was an independent obligation, and that obligation survived repayment of the Promissory Note.

The trial court ruled that under the clear language of the Agreement, Dannar's repayment of the Promissory Note did not extinguish its other obligations under the Agreement, including the Relocation Provision. (R. pp. 15-16). Dannar argues that the trial court erred because Dannar "fully met the terms of its obligations under both the Note and Financing Agreement in 2013" by paying the amount due under the Promissory Note. (Dannar Initial Brief p. 7). Dannar's argument fails.

As held by the trial court and also quoted with approval by Dannar, (R. p. 16) (Dannar Initial Brief p. 7), "[t]he 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 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000).

The Agreement's Termination Provision 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."** (R. p. 153, § 7.10) (emphasis added). Under this clear language, Dannar's obligations under the Relocation Provision were not extinguished until after the five year period ran or, in the event it relocated from South Carolina before then, 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, which ran until April 14, 2016. (R. p.

155). Thus, when Dannar entered the Agreement it expressly promised to remain in South Carolina until April 14, 2016, or else pay the Relocation Fee regardless of whether it paid back the loan early or on the agreed upon Maturity Date.

Dannar's argument to the contrary does not hold in the face of the actual contract language. Dannar essentially argues that repayment of a loan amount automatically satisfies *all* provisions of the contractual arrangement providing for the loan. However, the contract language can (and here does) provide that certain contractual obligations survive for longer periods of time than other contractual obligations. *See, e.g. Milliken & Co. v. Morin*, 399 S.C. 23, 38, 731 S.E.2d 288, 296 (2012) (finding that a provision in an "Associate Agreement" that forbid an employee from using or disclosing any confidential information for three years following the termination of the Associate Agreement was enforceable). Indeed, commercial contracts often have independent obligations, some of which survive termination of the contract. A ubiquitous example is the survival of confidentiality obligations after termination of a contract.

Dannar's argument also ignores the plain language of the Relocation Provision of the Agreement wherein Dannar covenanted and

> acknowledge[d] that funds are made available to it under this 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. Accordingly, [Dannar] agrees for the thereafter period of five years from the date of this Agreement*, not to (a) move or relocate the Company Business or the Company's principal office or principal place of business outside of the State of South Carolina, and (b) not to have more than one-half, based on payroll expenses, of the Company's total employees, or 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.

(R. p. 149, § 3.3.A) (emphases added). The obligations of the parties thus extended beyond an agreement to simply repay funds in compliance with repayment terms. The purpose of the

Agreement was not just to provide a loan and to be repaid according to payment terms; instead, an integral and explicit purpose underlying the entire arrangement was to generate professional research and development jobs in South Carolina and to provide economic development for the state.

Just because Dannar's repayment obligations were satisfied by his repayment of the loan amount on or about April 30, 2013, does not automatically mean that all of his other contractual obligations were also satisfied at that time. The trial court correctly found that the Relocation Provision survives the repayment of the financial debt. This ruling should be affirmed.

II. The trial court correctly ruled that the Relocation Provision contained in the Agreement was not an unenforceable penalty.

The trial court held that the Relocation Fee did not constitute an unenforceable penalty because, among other things, the damages associated with a premature relocation were difficult, if not impossible, to ascertain when these sophisticated parties negotiated the agreement with the assistance of counsel. The trial court further held that the amount of the Relocation Fee was reasonable given the context of the high-risk, public funding and assistance program, the costs of administering the program, the lost opportunity costs, and the anticipated lost jobs, wages, and tax revenues that would result from a premature relocation from South Carolina. (R. pp. 16-25). On appeal, Dannar challenges this holding. (Dannar Initial Brief pp. 7-14). The trial court was correct.

As noted by the trial court, SCL disputes that the law pertaining to traditional liquidated damages provisions applies to this situation. (*See* R. pp. 16-17). Given the context and the relationship of the parties at issue, that law simply does not fit the situation. Rather than requiring significant equity, seats on the board of directors, and other corporate governance measures normally obtained by the provider of high-risk capital to a startup company, the

consideration obtained by SCL—in the form of a promise to stay in South Carolina for five years or otherwise pay the Relocation Fee—was fair and reasonable. And Dannar had the option at all times of staying or paying the Relocation Fee. The trial court should be affirmed for this additional sustaining ground.

Even if traditional law pertaining to liquidated damages provisions applies to this situation, the trial court correctly held that the Relocation Fee is not an unenforceable penalty. The trial court correctly set forth the standard applicable to traditional liquidated damages provisions. "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 instead of a penalty. *ERIE*, 393 S.C. at 461, 713 S.E.2d at 321.

A. The language of the Agreement is clear and unambiguous.

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)). "Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 183 (2013) (quoting *ERIE*, 393 S.C. at 461, 713 S.E.2d at 318).

At issue in this action is Section 3.3 of the Agreement, which 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] . . . **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.**

(R. p. 150, § 3.3.B) (emphasis added); (*see also* R. pp. 155-156). The language of the Agreement is clear. In the event Dannar relocated from South Carolina under the terms of the Agreement within five years from the date of the Agreement, SCL would be entitled to a Relocation Fee in the amount of $200,000.

Dannar agreed to every provision in the Agreement, as evidenced by Gary Dannar's signature at the end of the Agreement and his deposition testimony. (*See, e.g.* R. p. 153; p. 494, line 25 – p. 495, line 5).[9] Further, Dannar has not alleged that the amount of the Relocation Fee was arrived at by unfair means or was not negotiated as part of an arms' length transaction. Rather, Dannar was represented by counsel during the course of its negotiations of the Agreement with SCL. (*See* R. p. 495, lines 6-19). Moreover, there is no evidence to suggest that

[9] Dannar also admitted that it was aware of the liquidated damages and relocation provisions in its agreements with Delaware County. (R. p. 537, line 3 – p. 538, line 7).

Gary Dannar, Dannar's president, is an unsophisticated party incapable of understanding the terms of the Agreement.[10] And in July 2013 (months after Dannar had repaid the loan to SCL), Mr. Dannar told elected officials in Delaware County, Indiana that Dannar was prepared to pay the Relocation Fee. (R. pp. 692-693). Moreover, the company acknowledged in the 2013 Loan Agreement with Delaware County (again after Dannar had repaid the loan to SCL) that it may be required to pay the Relocation Fee. (R. p. 747).

Accordingly, and under the plain language of the Agreement, the parties agreed and understood that the Relocation Fee did not constitute a penalty and, instead, was "a good faith estimate of the amount necessary to compensate SC Launch for its actual costs in connection" with Dannar's relocation, "including both tangible and intangible costs." (R. p. 150, § 3.3.B). The amount of the Relocation Fee was reasonable under the circumstances existing at the time the Agreement was executed. (R. p. 94, ¶ 23).

B. The Relocation Fee is the predetermined measure of compensation for Dannar's relocation.

After analyzing the language of the contract at issue, the benchmark 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 463, 713 S.E.2d at 322 (quoting *Tate*, 231 S.C. at 441,

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[10] Mr. Dannar is the owner of three companies in addition to Dannar. (*See* R. p. 489, line 3 – p. 491, line 22). Since 1995, Mr. Dannar has owned Little Industries, which develops products that are installed on tractors, trucks, and other types of machinery. (R. p. 489, lines 8-17). Mr. Dannar also owns two real estate development companies. (R. p. 491, lines 4-22). Prior to owning these businesses, Mr. Dannar spent several years in product development, sales, and marketing for various equipment manufacturers. (*See* R. p. 487, line 14 – p. 489, line 2). Mr. Dannar has also filed individual bankruptcy petitions on two separate occasions, (R. p. 492, line 12 – p. 494, line 14), which further illustrates the high risk of the funding supplied to Dannar by SCL.

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 probable consequences of the breach.

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

"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.*

As mentioned previously, it is beyond dispute that Dannar agreed to every provision in the Agreement to include the Relocation Provision and Relocation Fee. (*See, e.g.* R. p. 494, line 25 – p. 495, line 5). Further, 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." (R. p. 150, § 3.3.B) (emphasis added).

The type of taxpayer-supported economic development financing arrangement represented by the Agreement and the SCL program overall does not involve conventional standard private business contracts. The parties are not bargaining for the construction of a

building or the delivery of goods. Rather, SCL 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* R. pp. 89-90, ¶¶ 3, 5). This is why SCL does not merely provide funding to its supported companies, but also has staff that mentor, develop, and steer its companies toward a path of success. (*See* R. pp. 90, ¶¶ 6, 7; p. 93, ¶ 19; p. 159, ¶ 3; p. 161, ¶ 8; *see also* R. p. 435, lines 17-25 ("[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 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.*[11] 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 had been granted to the company. *Id.*

Davenport 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 it had disbursed. *Id.* at 82. Much like Dannar in this case, the company sought to avoid its contractual obligations and 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.*

The Supreme Court of Iowa, applying the Restatement (Second) of Contracts § 365, 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 main 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

[11] Unlike the economic development agreement in *Davenport* and Dannar's agreement in Indiana, SCL did not require Dannar to satisfy job creation requirements.

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.[12]

Dannar argues that the trial court's reliance on *Davenport* was misplaced because it involved a grant and because the measure of damages in that case involved repayment of grant money that would otherwise not be owed. (Dannar Initial Brief p. 10). Those facts are distinctions without a difference because the key facts relied upon in *Davenport* were that the damages to the City were difficult, if not impossible, to measure at the time the contract was formed, and the trial court failed to consider the potential damages to the City, including lost anticipated jobs and taxes. Whether funds went to the company in the form of a loan or of a grant is immaterial to the liquidated damages analysis.

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 arms' length negotiation); *ERIE*, 393 S.C. at 460-65, 713 S.E.2d at 320-23 (upholding an administrative

[12] Dannar makes a similar argument on the grounds that it repaid the loan amount on or about April 30, 2013. (Dannar Initial Brief p. 5). However, as was the case in *Davenport*, the loss contemplated by the parties in the Relocation Fee was not the loss of money paid to Dannar, but was rather the damages incurred as a result of relocation and the loss of the benefits anticipated by the Agreement. (*See* R. p. 149, § 3.3.A) (stating that the tax incentivized funds were made available to Dannar 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").

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).

Dannar also argues that it was improper for the court to consider costs of administering Dannar's participation in the SCL program because those expenses are "sunk costs," relying on the case of *Foreign Academic & Cultural Exchange Services, Inc. (FACES) v. Tripon,* 394 S.C. 197, 204, 715 S.E.2d 331, 334 (2011). (Dannar Initial Brief pp. 8-9). Dannar's argument is misplaced, and the trial court should be affirmed. Here, and unlike in *FACES*, SCL devotes considerable resources in assisting client companies to achieve success. Had Dannar not been accepted into the program, those resources would have been devoted to another company, and SCL and South Carolina thus lost the opportunity to invest those resources into a company that would remain in the state, hire South Carolina citizens, grow the tax base, and contribute to the economic development of the state. These are not "sunk costs" as that term is understood in the jurisprudence because a sunk cost is confined to money that would have been spent regardless of

the breach. *FACES*, 394 S.C. at 204, 715 S.E.2d at 334.[13] As explained below, the damages to SCL and, by extension and statutory directive, to South Carolina, go far beyond mere sunk costs that SCL would have paid regardless of Dannar's relocation and are also exceedingly difficult, if not impossible, to accurately measure.

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

Dannar expressly acknowledged 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**." (R. p. 149, § 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." (R. p. 150, § 3.3.B). 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. (R. p. 379, lines 7-18). *See Davenport*, 674 N.W.2d at 86 ("[T]he City's loss from the company's failure to create the jobs required by the EDA is

[13] *FACES* involved a contractual dispute between a Romanian citizen and FACES, a company that "recruits teachers from outside the United States and places them with schools within the state ... ." *FACES*, 394 S.C. at 200-01, 715 S.E.2d at 332. FACES alleged that the Romanian teacher breached her contract with FACES by not returning to Romania after the contract period and claimed that it was entitled to $36,000 in damages for this alleged breach pursuant to a liquidated damages clause. *Id.* at 201, 204, 715 S.E.2d at 333, 334. The Court found that the $36,000 was "plainly disproportionate to any probable damage resulting from [the teacher's] failure to return home." *Id.* at 204, 715 S.E.2d at 334. Under her contract with FACES, the teacher had taught in South Carolina for over two years and was paid a salary for her work. *Id.* at 201, 715 S.E.2d at 333. FACES tried to claim that the teacher "diverted the funds provided for her own personal use"—presumably, her salary—and that these "diverted" funds represented the majority of the liquidated damages claim. *Id.* at 204, 715 S.E.2d at 334. The *FACES* Court disagreed and held that FACES would have paid the teacher regardless of whether or not the teacher breached the contract by not returning to Romania. *Id.* The Romanian teacher was paid for her teaching work. In contrast, here, SCL invested money, time, and resources in Dannar with the contractual expectation that Dannar would stay in South Carolina for a sufficient time to potentially reap the job creation and economic development rewards that SCL's seed money and mentorship were designed to foster. *FACES* is thus inapplicable to the facts of this case.

difficult, if not impossible, to measure. New workers earn payroll dollars that are spent in the community, generating income for other residents who then spend their earnings, and so on. We conclude the City would have great difficulty in establishing with any degree of certainty the loss it has sustained from the company's breach of the EDA.").

It is also 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 (and, for 2015, an anticipated 115 jobs at an average hourly wage of $24.15). (R. p. 695). In addition, Dannar expected Indiana corporate tax liability from adjusted gross income in 2015 in the amount of $1,233,414.00, and by 2016 in the amount of $1,929,343.00. (R. p. 695). These are the types of costs contemplated by the Relocation Provision and Relocation Fee. (*See* R. p. 435, lines 15-25). Dannar's relocation to Indiana in 2015 deprived South Carolina of the possibility of those significant, bargained-for benefits in 2015 and 2016 while the Relocation Provision was in effect.

2. Costs Associated with Administering the SCL Program.

There are also additional costs associated with the development of a company funded by SCL. SCL 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. (R. p. 90, ¶¶ 6-8; p. 92, ¶ 15; p. 159, ¶ 3; p. 161, ¶ 8; p. 197, lines 6-21; p. 199, line 13 – p. 200, line 15; p. 368, line 21 – p. 370, line 12). These services require a large number of man hours and expenditure of goodwill in the community from SCL's salaried employees operating on behalf of the state of South Carolina and her citizens that cannot be computed into a single identifiable cost. (R. p. 90, ¶ 7; p. 368, line 21 – p. 370, line 12).

3. Lost Opportunity Costs.

In addition, there are significant opportunity costs associated with providing funding to a company that will eventually leave South Carolina. SCL's annual direct investment budget is $2,080,000. (R. p. 91, ¶ 9; p. 433, line 9 – p. 434, line 6). Moreover, SCL 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. (R. p. 91, ¶ 10; p. 372, lines 10-20). Thus, when SCL 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. (R. p. 435, line 7 – p. 436, line 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.")).[14] 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 decided to leave the State of South Carolina before the five 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. (R. p. 94, ¶ 23). The Relocation Provision attempts to foster that

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[14] Dannar appears to acknowledge the lost opportunity costs associated with providing to a company that chooses to relocate from South Carolina. (Dannar Initial Brief p. 12 ("SCL would have incurred its staff and administrative costs regardless of whether DD Dannar *or another company* was the focus of its efforts.") (emphasis added)). What Dannar fails to appreciate is that the costs spent on Dannar could have resulted in the bargained-for benefit to the citizens of South Carolina if those funds had been expended on a company that chose to honor its agreement and remain in South Carolina – these are the opportunity costs protected by the Agreement.

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 South Carolina of the benefit of the bargain for the possibility of job creation, economic development, and an expanded tax base. Hence, SCL, 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. (R. p. 93, ¶ 22; p. 382, lines 6-10).

CONCLUSION

The Agreement is clear and unambiguous. The Relocation Provision survives the repayment obligations of the Agreement. The Relocation Fee is not an unenforceable penalty. The traditional analysis of liquidated damages provisions does not apply in this situation, but, even if it did, the Relocation Fee is valid and enforceable given the difficulty, if not impossibility, of calculating at the time the Agreement was executed the actual damages that SCL would incur upon Dannar's relocation from South Carolina in violation of its contractual obligations, including lost future jobs and tax revenues. For the reasons discussed above, the trial court's orders granting SCL summary judgment and awarding SCL attorneys' fees and costs[15] should be affirmed in all respects.

[15] Dannar makes no argument in its Initial Brief that there is any ground to challenge the order of September 5, 2017, awarding SCL attorneys' fees and costs except for its argument that SCL should not have been granted summary judgment on the merits.

Respectfully submitted,

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