NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: *Solentus, Inc. v. Henry Lam, et al.*, CL-2016-3462

Dear Counsel:

This case is before the Court after a two day jury trial in January 2017, on Solentus, Inc.'s ("Solentus") complaint for two counts of (I) Breach of Contract, seeking injunctive relief, and (II) Breach of Contract, seeking monetary relief, against both Defendant Henry Lam ("Lam") in his personal capacity and Defendant Gentlerock, LLC ("Gentlerock"). After a two day trial, the jury returned a verdict for Solentus in the amount of $137,575.08. Lam and Gentlerock thereafter moved to set aside the verdict for (I) lack of causation and proof of damages, (II) for an over broad non-solicitation agreement, and (III) against Lam regardless, for lack of evidence of personal liability. In the alternative, Lam and Gentlerock moved to reduce damages to conform with the complaint. A hearing on the post-trial motions was held on February 9, 2017. The motion raises four questions:

A. If an *ad damnum* clause seeks damages "in excess of" some amount, can the defendant properly move post-trial to reduce damages to the number provided?

OPINION LETTER

B. Did Solentus present any credible evidence, such that a rational trier of fact could conclude that Gentlerock was merely the alter ego of Lam, and so hold Lam personally liable?

C. Was the non-solicitation clause, preventing Gentlerock from soliciting or accepting work from a Solentus customer within twelve months of ending work with Solentus, overly broad as a matter of law?

D. Did Solentus present any credible evidence, such that a rational trier of fact could conclude that Gentlerock was performing the same body of work with Concepts Beyond as with Solentus, so that Solentus lost profits it otherwise would have received *but for* Gentlerock's breach?

After considering the pleadings and exhibits, authorities, and oral arguments presented by Counsel, the Court finds that the *ad damnum* clause, seeking damages "in excess of $100,000," is improper, and thus the Court must reduce the jury verdict to $100,000, the only ascertainable amount stated. Additionally, the non-solicitation clause is not overly broad as a matter of law, and there was sufficient evidence for a rational trier of fact to find that Gentlerock was performing similar work through Concepts Beyond as it had through Solentus. Nevertheless, the Court finds that Lam *cannot* be held personally liable, as he was not a party to the agreement and Solentus failed to produce any credible evidence for a rational trier of fact to conclude that Gentlerock was merely Lam's alter ego. As a result, the Motion is granted in part and denied in part, and judgment is entered for $100,000 against Gentlerock.

I. BACKGROUND[1]

A. Factual Background

Solentus is a Virginia corporation who contracts exclusively with the Federal Aviation Administration ("FAA") to provide project management, systems engineering, evaluation, and system enhancement services. Compl. ¶¶ 1, 7-8. Gentlerock is a limited liability company in Virginia which similarly contracts for work with the FAA. Compl. ¶ 3. Lam is the sole member and employee of Gentlerock. Compl. ¶ 2.

Gentlerock contracted with Solentus in 2009 to provide services for Solentus' senior systems engineer. Compl. ¶ 13; Ex. A. A Confidentiality and Non-Compete Agreement was signed as part of the contract, which also contained a non-solicitation provision prohibiting the "Consultant" signing the contract from "directly or indirectly…solicit[ing] or accept[ing] business competitive with the business conducted by the Company…" Compl. Ex. A, § 4. The Agreement defined "Company" as STG Technologies, Inc. (Solentus), "Consultant" as

[1] In forming its opinion, the Court has reviewed all of the admitted evidence. The following recitation of facts is a summary of the pertinent facts. The Court has cited to several exhibits, but relied upon all of the evidence in its decision.

GentleRock Technologies, LLC, and limited the non-solicitation provision to Company customers. Compl. Ex. A.

Pursuant to this agreement, Gentlerock began work supporting Thien Ngo, a Program Manager in a subdivision of the FAA called the Technical Center Office (also known as "ANG-E"). Compl. ¶¶ 10, 15. ANG-E in turn provides technical support for the Advanced Concepts & Technology Office at the FAA (also known as "ANG-C"). Compl. ¶¶ 9, 15.

In April 2014, Gentlerock ceased work with Solentus. Within months, it became apparent that Gentlerock was working with a different contractor, Concepts Beyond, LLC, also providing support for Mr. Ngo. The evidence presented at trial supported the proposition that the job descriptions for each contract were substantially similar. Despite reminding Lam of the agreement, Gentlerock continued its work.

B. Procedural Background

Solentus filed this action in March 2016[2], alleging (I) Breach of Contract, and seeking injunctive relief, and (II) Breach of Contract, seeking monetary damages. The complaint alleged that Gentlerock was the mere alter ego of Lam, though failed to provide any factual assertions supporting such a claim. Compl. ¶ 3. In response, Gentlerock and Lam denied that Gentlerock was a mere alter ego. Ans. ¶ 3. Additionally, the complaint's *ad damnum* clause then sought damages "in excess of $100,000." Compl. ¶ 33. Prior to trial, the non-compete clauses of the Agreement were struck as overly broad; however, the non-solicitation provision remained intact. A two day jury trial was held in January 2017, and a verdict was returned for $137,575.08, holding Lam liable in his personal capacity. Presently, the defendants move to set aside the jury verdict for failure to prove causation of lost profits, and again arguing the over-breadth of the non-solicitation agreement. Gentlerock and Lam further moved to reduce damages to $100,000 if not set aside, and to release Lam from personal liability.

I. STANDARD OF REVIEW

Virginia applies the same test to non-solicitation clauses that it applies to non-competition clauses. *See Foti v. Cook*, 220 Va. 800, 805 (1980). In turn, such restraints are only permissible when "employees are prohibited from competing directly with the former employer, or through employment with a direct competitor" and must be narrowly tailored, and no broader than necessary, to protect a company's legitimate interests. *Omniplex World Services Corp. v. U.S. Investigation Services*, 270 Va. 246, 249-50 (2005).

Nevertheless, a Court may grant a motion for judgment *non obstante veredicto*, setting aside the jury verdict, when "it is contrary to the evidence, or without evidence to support it." Va. Code. § 8.01-430. Virginia Courts have clarified that this requires the verdict to be "plainly wrong or without credible evidence to support it." *Doherty v. Aleck*, 273 Va. 421, 424 (2007)

[2] This action was originally filed on January 5, 2015; however, was nonsuited on January 8, 2016.

(citing *Lane v. Scott*, 220 Va. 578 (1979)). Hence, if the evidence gives rise to multiple and conflicting inferences which the jury resolves in reaching the verdict, it should not be set aside. *Lane*, 220 Va. at 580.

II. ARGUMENTS

A. Defendant's Argument

Gentlerock and Lam first argue that the *ad damnum* clause is improper. Virginia requires that the plaintiff plead a specific amount; because Solentus did not do so, but rather sought an amount "*in excess* of $100,000," it should be bound to the only number it did provide. As a result, the jury verdict should be reduced to conform to $100,000.

Additionally, Lam himself should not be held liable *at all* in his personal capacity. He was not party to the agreement, but only signed in a representative capacity, on behalf of Gentlerock. The parties were clearly defined, as was the term "Consultant" as Gentlerock, above which Lam signed, definitively making the agreement between Solentus and Gentlerock, not Lam. Thus, the plain and unambiguous interpretation is that Lam is not a party. Furthermore, Solentus failed to produce any evidence at trial that Gentlerock was merely the alter ego of Lam. Without any credible evidence, it failed to prove its claim and cannot pierce the corporate veil.

Regardless, the non-solicitation agreement is overly broad as a matter of law. It does not permit Gentlerock to work with any customer of Solentus. Customer is an exceedingly broad term, regardless of any arguments from Solentus that it was understood to be narrow. By its terms, it precludes a vast amount of work, prohibiting any work with the FAA. As a result, by its terms, it is unenforceable.

Furthermore, Solentus also failed to provide any credible evidence as to causation. There was no evidence regarding the work being done by Gentlerock with Solentus, and then with Concepts Beyond; without such evidence, the jury cannot draw a causal connection between the breach, and the lost profits claimed by Solentus. The case law requires that Gentlerock have performed the same work with Concepts Beyond as it was performing with Solentus, in order to show that Solentus would have profited through performance of the work but for Gentlerock's breach of the non-solicitation agreement. However, it presented no evidence of exactly which work was being done in either place, and thus failed to prove causation of damages.

B. Plaintiff's Response

Solentus argues that the *ad damnum* clause appropriately placed Gentlerock and Lam on notice, and that the lack of a specific amount does not render it improper. Nevertheless, in the event the *ad damnum* clause *is improper*, the opportunity to request a bill of particulars, to clarify or demur, or otherwise object to the pleadings, has passed, and was thus waived as a defense. Gentlerock and Lam cannot *now* argue it is improper.

Solentus further argues that (1) Lam, as a signatory to the agreement, was a party to the agreement, not just Gentlerock, (2) to the extent the contract is ambiguous about who is party to the agreement, the jury resolved the question by holding Lam personally liable, and (3) it is furthermore both alleged, and Solentus presented sufficient evidence to show, that Gentlerock is Lam's alter ego. As a result, Lam is personally liable as a signatory to the contract, via resolution of any contractual ambiguity by the jury, and, alternatively, by piercing the corporate veil.

The non-solicitation clause is reasonably narrow. The word "customer," as used in the agreement, was referring to the specific program manager for whom the parties performed services—it was referencing the *specific subdivisions* at issue, not even the FAA generally, as evidenced by the definition of "Company customers" in the Agreement. Furthermore, there was sufficient testimony presented to evince that this understanding of "customer" was *shared* by both parties.

Finally, in regard to the causation of lost profits, Solentus argues it presented sufficient evidence, comparable to that presented in parallel cases. Namely, Solentus presented testimonial and documentary evidence of performing the work in question, evidence that funding stopped when Gentlerock left for a competitor, timesheets of defendants performing the work in question, and testimony that it had a business expectancy of performing the same work.

III. ANALYSIS

A. The *Ad Damnum* Clause Was Improper, And the Verdict Should Be Reduced

The *ad damnum* clause was improper. The Rules of the Virginia Supreme Court clearly state that the plaintiff must provide "the *amount* of damages requested." Va. Sup. Ct. Rule 3:2(c)(ii) (emphasis added). Not only does Merriam Webster define 'amount' as "the total number or quantity," MERRIAM WEBSTER DICTIONARY, February 14, 2017, *available at* https://www.merriam-webster.com/dictionary/amount, but Virginia Circuit Courts have previously held the same. *EER Sys. Corp. v. Armfield, Harrison & Thomas, Inc.*, 51 Va. Cir. 84, 99 (Va. Cir. 1999) ("In Virginia, contrary to Federal practice, the motion for judgment must contain an *ad damnum* that quantifies the monetary damages sought. This is because the *ad damnum* sets a cap on the amount recoverable by the plaintiff."). Stating "in excess of" does not state an *amount*, it does not provide a total number or quantity, nor even a specific *range*, but rather a *floor*.

In Virginia, the pleadings remain critical throughout the entirety of a case. The "issues in a case are made by the pleadings, and not by the testimony of witnesses or other evidence." *Dabney v. Augusta Mut. Ins. Co* , 282 Va. 78, 86 (2011). In fact, no judgment can be entered on "a right not pleaded and claimed," nor under a theory of liability not articulated in the pleadings. *Sloan v. Thornton*, 249 Va. 492, 500 (1995). This binding effect of the pleadings includes the *ad damnum* clause. Thus, a demurrer may be sustained when the *ad damnum* clause is improper, *Ramos v. Wells Fargo Bank, NA*, 289 Va. 321, 322 (2015), and a plaintiff cannot ask the jury to

award an amount in excess of that requested in the complaint. *Smith v. McLaughlin*, 289 Va. 241, 270 (2015).

As a result, a demurrer to an improper *ad damnum* clause, if brought, should be sustained. *See e.g.*, *EER Sys. Corp.*, 51 Va. Cir. at 99 ("The Court sustains the demurrer to the Amended Motion for Judgment for failure to mention a specific amount sought in the *ad damnum*."). Furthermore, even when an *ad damnum* is properly pled, a remittitur is warranted when the plaintiff receives more than the *amount* requested in the pleadings. *Powell v. Sears, Roebuck & Co.*, 231 Va. 464, 470 (1986). Nevertheless, none of these circumstances are before the Court. Presently, Gentlerock and Lam do not seek to set aside the entire verdict on *these* grounds. The question raised is whether a jury verdict, in the event of an improper *ad damnum* clause that fails to state an "amount," but to which there was no objection before a verdict was rendered, may be *reduced* to *a* number stated in the clause. In this case, the only number stated was $100,000.

Although a unique set of circumstances, the same logic follows. The *ad damnum* clause was improperly pled, and the Court cannot award damages beyond the only ascertainable "amount" proffered in the pleadings. The verdict must be reduced to $100,000.

B. Solentus Failed to Provide Any Evidence at Trial Justifying Piercing the Corporate Veil

The non-solicitation agreement is unambiguous, and Lam is plainly not a party to the contract. The agreement was between Solentus and Gentlerock, and Lam signed on behalf of Gentlerock. This much is clear from a plain reading of the agreement. The opening paragraph defines the parties: "This Agreement…is made and entered…by and between GentleRock Technologies, LLC (hereinafter referred to as the "Consultant") and STG Technologies, Inc…." Compl. Ex. A. The word Consultant appears throughout, and is repeated, even with a capital "C," at the signature block. Lam signed his name above that signature block. There can be no other reading of the agreement. A corporation never signs "Corporation." An individual will sign his or her name on behalf of the company. In this case, Lam signed his name. The fact that he is signing on behalf of Gentlerock is made clear by both (1) his exclusion from the agreement's naming of the parties, and (2) the definition of "Consultant" as Gentlerock. As a result, the only method of holding Lam personally liable is piercing of the corporate veil.

Solentus failed to present any credible evidence to support the argument that Gentlerock is merely Lam's alter ego. "[A] decision whether to disregard the corporate structure to impose personal liability is a fact-specific determination, and each case requires a close examination of the factual circumstances surrounding the corporation and the questioned acts." *O'Hazza v. Exec. Credit Corp.*, 246 Va. 111, 115 (1993). It is an "extraordinary" measure. *Cheatle v. Rudd's Swimming Pool Supply Co., Inc.*, 234 Va. 207, 212 (1987). Although pled in the complaint that Gentlerock is an alter ego, there were no factual assertions supporting the same; regardless, it was clearly objected to by the defendants, and must still be proven at trial. Nevertheless, there was no evidence of commingling funds, or use of the corporate structure to perpetrate a fraud, to

"use the corporate structure "to mask wrongs" or to facilitate the commission of illegal acts." *Bogese, Inc. v. State Highway and Transp. Comm'r*, 250 Va. 226, 231 (1995). Absent any credible evidence, the jury had no basis upon which to conclude that Gentlerock was a *mere* alter ego, and Lam should not be held personally liable.

C. The Non-Solicitation Provision Is Not Overly Broad

Virginia applies the same test to non-solicitation clauses that it applies to non-competition clauses. *See Assurance Data, Inc. v. Malveyac*, 286 Va. 137, 143 (2013) (grouping non-compete and non-solicitation agreements together for purposes of the court's analysis of restraints on trade); *Foti v. Cook*, 220 Va. 800, 805 (1980) (applying the same standards to a non-solicitation as to a non-compete). The employer bears the "burden to show that the restraint is no greater than necessary to protect a legitimate business interest, is not unduly harsh or oppressive in curtailing an employee's ability to earn a livelihood, and is reasonable in light of sound public policy." *Modern Environments, Inc. v. Stinnet*, 263 Va. 491, 493 (2002).

Solentus successfully proved that the non-solicitation agreement was not overly broad. Unlike the non-compete provisions in the contract, the non-solicitation's prohibitions were tempered by language limiting the restraint to the customers with whom Gentelrock was working while under contract for Solentus. Compl. Ex. A, § 4. The non-competition provision, which was overbroad, stated that Gentlerock could not engage "in any activity or business which directly or indirectly is related to or similar to the business conducted by [Solentus]." *Id* at § 5(a). Conversely, the non-solicitation agreement prevented Gentlerock from accepting business "competitive with the business conducted by [Solentus] from *any of the Company's customers*." *Id.* at § 4 (emphasis added). The "Company's customers" in turn were defined as "any entity (a) to whom [Gentlerock] was introduced as a result of...employment with [Solentus], or (b) with respect to whom [Gentlerock], directly or indirectly, alone or with others, provided services or prepared a bid or proposal to provide services on behalf of [Solentus]." *Id.* at § 6.

In short, Gentlerock could not accept work from those with or for whom they were working when employed by Solentus. It could not "directly compete" with Solentus, which meant very specific subdivisions of the FAA, and is thus a reasonable restraint. *Omniplex*, 270 Va. at 249-50. It was then left to the jury to decide if that restraint was violated. They did so, equipped with more than credible evidence that Gentlerock was performing substantially the same work as it had been with Solentus, for the exact same program manager within the FAA's ANG-C subdivision.

D. Solentus Presented Sufficient Evidence to Show Gentlerock Was Performing the Same Body of Work

In order to prove lost profits due to breach of a non-compete or non-solicitation agreement, a plaintiff must show that the breaching defendant billed for the work or related work, that the plaintiff *would have* billed, and *how much* they would have billed. *See Preferred Sys. Solutions, Inc. v. GP Consulting, LLC*, 284 Va. 382, 398 (2012). In *Preferred Systems*, the

plaintiff provided evidence of its own purchase orders for work supporting a systems solution project, and bills from the breaching party for work on the same project, and "of a similar nature, with similar billing titles." *Id.* at 399. Notably, the Court stated that there need not have been any "guarantee" that the plaintiff would have been given the work. *Id.* at 398. Rather, it was sufficient to show that *it had been billing*, and that the defendant, in violation of a valid restrictive covenant, *began billing* for similar work on the same project.

Solentus likewise presented evidence conveying the similar nature of the work performed, and the profits it would have obtained had it billed for the work instead of Concepts Beyond. Solentus showed the similar job descriptions—it was for the same subdivision of the FAA, and even for the same project manager. This is more than sufficient credible evidence to sustain a jury finding of causation and lost profits.

IV. CONCLUSION

For the foregoing reasons, the Court finds in favor of Lam and Gentlerock on the Motion to Strike and set aside the jury verdict as to Lam's personal liability, and as to a reduction of the whole award to $100,000, but otherwise denies the Motion. Judgment is entered against Gentlerock only in the amount of $100,000.

Sincerely,

[redacted]

Daniel E. Ortiz
Circuit Court Judge

OPINION LETTER