

The Court has granted the Plaintiff summary judgment on the Defendant's liability for breach of contract and breach of fiduciary duty. The Court has dismissed on summary judgment the Defendant's Counterclaim. The parties, however, have not been able to stipulate to Plaintiff's damages, and have filed reports and briefs on the issues concerning Plaintiff's recovery of damages.

After studying the report and briefing of Counsel, the law, and the record, the Court determines that Phase 2 of this case concerning Plaintiff's recovery of damages shall proceed as follows.

There is a preliminary issue whose resolution is potentially dispositive of the Plaintiff's damages claim. That preliminary issue is whether the measure of damages provided in the parties' contract (hereinafter referred to as "Contract Damages Measure") is enforceable. If it is enforceable, the amount of Plaintiff's recovery of damages is established in the record, and can be awarded forthwith as a matter of law. If the Contract Damages Measure is unenforceable, discovery, summary judgment motions and selecting a trial date will be scheduled to determine the Plaintiff's recovery.

It is therefore ORDERED that by November 27, 2017, Defendant shall file any additional briefing on the enforceability of the Contract Damages Measure; by December 22, 2017, Plaintiff shall file any additional opposition; and by January 12, 2018, Defendant shall file any reply. Following that filing, the Court shall rule on the papers on the enforceability

of the Contract Damages Measure. Also to be included in the additional briefing is any further argument and authorities on the defense that the Contract Damages Measure did not survive amendment of the parties' contract, and, therefore, cannot serve as the measure of the breach of contract damages, "the contract continued to be amended by the amendment of the Bylaws at least through 2011 without any specific reincorporation of the liquidated damages provision" (*Defendant Simpson's Brief on Damages*, filed September 25, 2017 at p. 3 ("*Defendant's Brief*")).

The additional briefing opportunity is provided because in prior briefing Counsel did not have the rulings herein and conclusions of law to present their positions.

It is also ORDERED that unless an objection of Counsel is filed by November 3, 2017, on that date this case is referred to mediation to be completed by December 13, 2017. The Court has referred the case to mediation at this juncture to provide the parties an opportunity to decide and control the outcome of the case. The reasoning on this timing of mediation is that it is the Court's assessment that once the parties have incurred attorneys' fees on additional briefing on liquidated damages and the Court rules, the parties have less control of the outcome of the case.

Other defenses to damages asserted by the Defendant are covered in orders provided below at the conclusion of this Memorandum.

The conclusions of law on which the foregoing orders concerning the Contract Damages Measure are based are as follows.

Analysis of Contract Damages Measure Provision

The parties' contract documents, the Participation Agreement and VMG By-Laws, provided, respectively, the following Contract Damages Measure.

I hereby agree that I shall not engage in any professional activities in the care of patients except in accordance with the standards and conditions set forth in the By-laws of the VMG or as established by the Board of Directors of the VMG. I understand that all fees received for professional services rendered by me or on behalf of patients shall be endorsed over to and shall become the property of Vanderbilt University [emphasis added].

* * *

(c) All fees received for professional services, including all Accounts Receivables ("ARs"), rendered by a Participating Member to patients or on behalf of patient care, whether in-person or by telemedicine or other means. ("Practice Earnings") shall be endorsed over to, and shall become the property of, Vanderbilt University.

Based upon this provision, the Plaintiff asserts that it is entitled to recover the fees received by the Defendant for providing breast pathology consults through her private company which amounted to \$244,146.84 through October 2013 when her employment by Vanderbilt ended. *See Plaintiff Vanderbilt University's Brief on Damages*, September 6, 2017 at p. 3, and *Complaint* at ¶¶ 6, 7, 21, 27.

Among its defenses to Plaintiff's recovery of damages is the Defendant's assertion that the Contract Damages Measure constitutes a liquidated damages provision, and that the Contract Damages Measure is unenforceable as it does not bear a reasonable relationship to the expected damages, and, therefore, discovery and a trial is required to decide Plaintiff's

compensatory damages. *Defendant Simpson's Brief on Damages*, filed September 25, 2017 at pp. 1-3, and Affirmative Defenses ¶¶ 4, 5 of May 3, 2016 *Answer*.

After studying Tennessee law and other authorities on liquidated damages provisions and in particular, based upon *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 96-101 (Tenn. 1999) and *Anesthesia Medical Group, P.C. v. Buras*, 2006 WL 2737829, No. M2004-01599-COA-R3-CV (Tenn. Ct. App. 2006), the Court concludes as a matter of law that, as asserted by the Defendant in its September 25, 2017 briefing, the Contract Damages Measure constitutes a liquidated damages provision.

In so concluding, the Court has applied the instruction in *Guiliano* that under Tennessee law, “A contractual provision need not explicitly include the term ‘liquidated damages’ to constitute a liquidated damages provision. In cases as here, where a provision entitles one party to a stipulated recovery following an event that constitutes a breach of contract, courts must look to the substance of the provision and the intentions of the parties to determine whether the provision calls for liquidated damages. If the parties agree in the contract on the amount of damages to be recovered for compensation, upon the occurrence of a particular defaulting event, then the damages are liquidated unless the contract states otherwise. *See V.L. Nicholson*, 595 S.W.2d at 484.”

Further instructive are these general principles.

“Liquidated damages” are a set amount of money, or a certain formula, expressly stipulated in a contract as the amount of damages to be paid by a party that breaches the agreement

* * *

Liquidated damages provisions allow private parties to reform the fixed concept of compensatory damages for breach of contract, by providing relief in excess, or in lieu, of compensatory damages. Thus, the provision is used as an economical alternative to time-consuming and costly litigation for the allocation of damages before a breach occurs. The provision may discourage a party from breaching a contract, but it cannot be used as a penalty.

* * *

Liquidated damages clauses do not limit a nondefaulting party’s remedies for a breach of contract but instead provide an agreed upon measure of damages.

* * *

Liquidated damages are the amount a party to a contract agrees to pay for breaking a promise and is legally recoverable if the breach occurs. A liquidated damages clause need not specify a set dollar amount nor necessarily be monetary in nature.

The purpose of a stipulated damages clause is to fix the measure of damages in advance and to constrain the timely performance of the principal obligation. By using a liquidated damages provision, the contracting parties may know with reasonable certainty the extent of liability in the event of breach. A liquidated damages provision helps ease the burden of proving a loss after breach by predetermining the issue of damages in an prior agreement rather than after via expensive and time-consuming judicial proceedings to ascertain actual damages. It is an advance settlement of the anticipated actual damages, estimated by a good-faith effort, arising from a future breach.

22 AM. JUR. 2D *Damages* §§ 504, 506 (August 2017 Update) (footnotes omitted).

Applying these principles to the record, the Court concludes as a matter of law that the text of the Contract Damages Measure in this case, quoted above at page 4, constitutes a liquidated damages provision because the Measure:

- uses a formula to fix the measure of damages in advance
- so that the contracting parties may know with reasonable certainty the extent of liability in the event of breach and
- eases the burden of providing a loss after breach.

This conclusion, however, does not end the analysis.

The law further provides that a term fixing unreasonably large liquidated damages is not just compensation and operates as a penalty. Under these circumstances, the liquidated damages clause is invalid, and the nonbreaching party is not entitled to recover the damages specified in the contract but must prove actual damages.

Liquidated damages are an appropriate means of inducing due performance and discouraging a party from breaching a contract, especially where damages are stipulated for a delay in performance. However, a liquidated damages clause is unenforceable where its sole purpose is to secure performance of a contract and deter a breach. In such a case, it will be treated as a penalty, and only actual damages proven can be recovered.

* * *

When evaluating whether a liquidated damages provision in a contract is an unenforceable “penalty,” the court must 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 also in proportion to the probable consequences of the breach.

* * *

Parties to a contract may effectively provide in advance the damages that are to be payable in the event of breach as long as the provision does not disregard the principle of compensation. The policy of just compensation acts to invalidate agreements that fix damages in advance of breach when such agreements are punitive in nature. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.

* * *

Under circumstances where liquidated damages clauses are found invalid as penalties, the nonbreaching party is entitled to recover actual damages.

22 AM. JUR. 2D *Damages* §§ 506, 507 (August 2017 Update) (footnotes omitted).

The premise of the enforceability of liquidated damages provisions balances the freedom of the parties to bargain for and to agree upon liquidated damages versus the limitations set by public policy.

The fundamental purpose of liquidated damages is to provide a means of compensation in the event of a breach where damages would be indeterminable or otherwise difficult to prove. *V.L. Nicholson*, 595 S.W.2d at 484; 22 AM. JUR. 2D *Damages* § 683 (1988); Restatement (Second) of Contracts § 356 cmt. (1979). By stipulating in the contract to the damages that might reasonably arise from a breach, the parties essentially estimate the amount of potential damages likely to be sustained by the nonbreaching party. “If the [contract] provision is a reasonable estimate of the damages that would occur from a breach, then the provision is normally construed as an enforceable stipulation for liquidated damages.” *V.L. Nicholson*, 595 S.W.2d at 484 (citing *City of Bristol v. Bostwick*, 146 Tenn. 205, 240 S.W. 774 (1922); 22 AM. JUR. *Damages* § 227 (1965)). However, if the stipulated amount is unreasonable in relation to those potential or estimated damages, then it will be treated as a penalty. 22 AM. JUR. 2D *Damages* § 686 (1988); Restatement (Second) of Contracts § 356 (1979).

Guiliano, 995 S.W.2d, 88 at 98.

In determining enforceability, the *Guiliano* Court adopted a prospective approach.

We, therefore, adopt a prospective approach for addressing the recovery of liquidated damages. Under this approach, courts must focus on the intentions of the parties based upon the language in the contract and the circumstances that existed at the time of contract formation. Those circumstances include: whether the liquidated sum was a reasonable estimate of potential damages and whether actual damages were indeterminable or difficult to measure at the time the parties entered into the contract. *See V.L. Nicholson*, 595 S.W.2d at 484. If the provision satisfies those factors and reflects the parties' intentions to compensate in the event of a breach, then the provision will be upheld as a reasonable agreement for liquidated damages. However, if the provision and circumstances indicate that the parties intended merely to penalize for a breach of contract, then the provision is unenforceable as against public policy.

Id. at 100–01.

Finding that the liquidated damages provision was a reasonable way and method to estimate damages at the time the parties entered into the contract, the *Guiliano* Court concluded that the extent of actual damages had no bearing on the recovery under the liquidated damages provision and, to the extent the Court of Appeals based its decision upon a review of actual damages, that decision was overruled. *Id.* at 101. The *Guiliano* Court explained that, “While ‘[t]he bargain may be an unfortunate one for the delinquent party, . . . it is not the duty of courts of common law to relieve parties from the consequences of their own improvidence’ [citations omitted].”

Following *Guiliano*, the Tennessee Court of Appeals in *Anesthesia Medical Group, P.C. v. Buras*, 2006 WL 2737829, No. M2004-01599-COA-R3-CV (Tenn. Ct. App. 2006) reversed the trial court and awarded the plaintiff the liquidated damages specified in the contract. Applying *Guiliano*, the *Anesthesia* Court explained that courts are to presume the

parties intended the agreed upon damages to apply and those damages will be upheld if the method of those damages is reasonable.

The Court recounted the well-established principle, and Tennessee authority like that discussed earlier in this opinion, that recognizes the freedom of parties to agree upon terms that may not appear desirable to outsiders and the duty of the courts to refrain from interfering with the parties' agreement unless to enforce it would violate established public policy. *Id.*

As the Court noted, parties are free to agree to liquidated damages, and courts should presume that when parties have done so, they chose the certainty and efficiency provided by the inclusion of such a term in their agreement over the uncertainty and burden of requiring the non-breaching party to prove actual damages in the event of a default

Guiliano did not change the essential requirements of a valid and enforceable liquidated damages provision. Instead, it clarified the viewpoint from which courts are to analyze those requirements. The law continues to be that a liquidated damages provision will be upheld if the amount of such damages bears a reasonable relationship to the amount of actual damages that would likely be sustained in the event of a breach and if the actual amount of damages would be difficult to determine or prove. Conversely, liquidated damages will not be upheld if they are deemed to constitute a penalty against the breaching party rather than a reasonable way to guarantee compensation for damages to the non-breaching party. *Guiliano*, 995 S.W.2d at 98.

Id. at *6, *7.

Law from other jurisdictions guides this Court that whether a liquidated damage clause is a valid and enforceable one for stipulated damages, or is invalid as a penalty, is a question of law. *See, Comar Marine, Corp. v. Raider Marine Logistics, L.L.C.*, 792 F.3d 564, 2015 A.M.C. 1978 (5th Cir. 2015); *Boone Coleman Constr., Inc. v. Piketon*, 145 Ohio St. 3d 450, 2016-Ohio-628, 50 N.E.3d 502 (2016); *Rumsey v. Gillis*, 329 Ga. App. 488, 765 S.E.2d 665 (2014), *cert. denied*, (Mar. 30, 2015), for the trial court, *Slinski v. Bank of*

America, N.A., 981 F. Supp. 2d 19 (D.D.C. 2013) (applying District of Columbia law), based on the facts of the case. *Southern Elec. Corp. v. Utilities Bd. of City of Foley, Ala.*, 643 F. Supp. 2d 1302 (S.D. Ala. 2009) (applying Alabama law).

On the other hand, it has been noted that the validity of a provision alleged to be an unlawful penalty is not really a classic question of law, but is one of fact that, because of its character, is nevertheless committed to judicial determination. Thus, a trial court decides, in light of all the facts, including the whole instrument, whether the provision in question is an unlawful penalty. *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332, 182 Cal. Rptr. 3d 235 (5th Dist. 2015).

Some courts simply find that determining whether a liquidated damages provision is enforceable is a question of law for the court, which necessarily, *JR Real Estate Development, LLC v. Cheeley Investment, L.P.*, 309 Ga. App. 250, 709 S.E.2d 577 (2011), or sometimes, *Magill v. Watson*, 409 S.W.3d 673 (Tex. App. Houston 1st Dist. 2013), requires the resolution of questions of fact. *Magill v. Watson*, 409 S.W.3d 673 (Tex. App. Houston 1st Dist. 2013); *JR Real Estate Development, LLC v. Cheeley Investment, L.P.*, 309 Ga. App. 250, 709 S.E.2d 577 (2011).

The party asserting that a liquidated damages clause is an unenforceable penalty bears both the burden of production and the burden of persuasion. *Schroeder v. Partin*, 151 Idaho 471, 259 P.3d 617 (2011). The burden of proving an unenforceable penalty is not an easy one to sustain, *Peterson v. McAndrew*, 160 Conn. App. 180, 125 A.3d 241 (2015), and it has

been described as a heavy burden, *Commercial Real Estate Inv., L.C. v. Comcast of Utah II, Inc.*, 2012 UT 49, 285 P.3d 1193 (Utah 2012), and a steep climb. *K-Con Bldg. Systems, Inc. v. U.S.*, 778 F.3d 1000 (Fed. Cir. 2015). At least one court has described the standard of proof as one requiring clear and convincing evidence. *Commercial Real Estate Inv., L.C. v. Comcast of Utah II, Inc.*, 2012 UT 49, 285 P.3d 1193 (Utah 2012).

It is from the foregoing law and authorities that the Court has concluded that the Contract Damages Measure in this case constitutes a liquidated damages provision and that the Defendant's defense that the Contract Damages Measure is not enforceable (*see* pages 1-3 of *Defendant's Brief* and paragraphs 4 and 5 of its Affirmative Defenses stated in the *Answer* filed May 3, 2016) is a matter of law to be determined by the Court. Accordingly, the opportunity for supplemental briefing has been provided in the above orders as well as mediation.

Other Defenses to Damages

As to the defense that Vanderbilt contributed to the breach (*see* page 4 of *Defendant's Brief*), that defense was part of the Part 1 liability phase of the case, and it is ORDERED that the defense has been dismissed based upon the Plaintiff prevailing on summary judgment.

With respect to the Defendant's remaining defenses to Plaintiff's recovery of damages, the Court has derived the following list of remaining defenses from the September 25, 2017 *Defendant Simpson's Brief on Damages* and the *Answer* and Affirmative Defenses filed May 3, 2016.

1. "Plaintiff Vanderbilt failed to make reasonable efforts to mitigate or minimize its alleged damages. Instead of making any effort to advertise the availability of its breast consult services, Vanderbilt, instead, let the quality of its services deteriorate including losing incoming tissue samples and allowing incompetent pathologists to render opinions upon them."—p. 4 of *Brief* and Affirmative Defenses ¶ 8.
2. "Plaintiff Vanderbilt could have mitigated its damages by seeking injunctive relief"—p. 11 of *Brief* and Affirmative Defenses ¶ 8.
3. "Vanderbilt generally waives any claim for the return of fees earned in violation of the VMG Participation Agreement when it is aware a physician will be leaving Vanderbilt."—p. 9 of *Brief* and Affirmative Defenses ¶ 9.
4. "Vanderbilt concedes that an employee who breaches a fiduciary duty of loyalty may be required to disgorge any profit or benefit he/she received as a result of the disloyal activities. (Vanderbilt Brief, p. 3-4). There is a substantial difference between profit and benefit. Dr. Simpson is entitled to a jury to determine to which measure of damages Vanderbilt is entitled. The benefit received by Dr. Simpson was not \$244,146.84 as claimed by Vanderbilt. As the evidence will show, Dr. Simpson incurred substantial costs so that the benefit received was a figure substantially less and a jury is required to determine what this alleged benefit amount was."—p. 11 of *Brief* and paragraphs 22, 23, 27 of the *Answer*.

As to these, it is ORDERED that their disposition is held in abeyance until the enforceability of the Contract Damages Measure is decided. The reason is that if the Contract Damages Measure is held to be enforceable, the damages are decided, and the

remaining defenses pertaining to compensatory damages and damages for breach of fiduciary duty are unnecessary to litigate. If, however, the Contract Damages Measure is unenforceable, discovery will have to be opened on the damages issues for summary judgment and/or trial. Because these costs may not be necessary if the Contract Damages Measure is enforceable, that expense is held in abeyance, and it is ORDERED that discovery on these issues is stayed.

Lastly, it is ORDERED that the seal on the May 26, 2017 Memorandum and Order is removed; no objection to removal of the seal was filed.

/s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

cc by U.S. Mail, email, or efile as applicable to:

William N. Ozier
Paige Mills
Mary Leigh Pirtle
John Callison
Richard J. Braun
Mary Leech