In The

Supreme Court of Virginia

RECORD NO. 150522

NAVAR, INC.,

Appellant,

v.

FEDERAL BUSINESS COUNCIL and WORLDWIDE SOLUTIONS, INC.,

Appellees.

REPLY BRIEF OF APPELLANT

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STATUTE

Va. Code § 59.1-336 10

For the following reasons and the reasons stated in the Appellant's Opening Brief, this Court should (1) vacate the judgment of the Fairfax County Circuit Court ("Trial Court"), and (2) either enter final judgment for Navar, Inc. ("Navar") or remand the case for further proceedings.

AUTHORITIES AND ARGUMENT

I. FBC AND WWS DO NOT ADEQUATELY REBUT NAVAR'S CHALLENGES TO THE TRIAL COURT'S JUDGMENT ON COUNTS I AND VII (Navar Assignment of Error 1).

In opposition to Navar's challenges to the Trial Court's judgment on Counts I and VII, Federal Business Council ("FBC") and Worldwide Solutions, Inc. ("WWS") attempt to identify evidence admitted at trial that they believe is legally sufficient to support the jury verdict. For the following reasons, FBC and WWS do not and cannot justify the Trial Court's judgment on Counts I and VII.

A. FBC And WWS Do Not Demonstrate Why This Court Should Not Vacate The Judgment For Count I.

In the Opening Brief of Appellant, Navar advances one legal challenge and three evidentiary challenges to the Trial Court's judgment for Count I. *See* Appellant's Opening Br. at 18-28. Each of these arguments is an independent basis for vacating the Trial Court's judgment on this count. This Court should vacate the judgment on Count I because FBC and WWS cannot adequately resist any of these arguments.

i. FBC And WWS Do Not Persuasively Argue That The "Obligation" Upon Which They Sued In Count I Is Unenforceable As A Matter of Law.

Navar's first challenge to the judgment on Count I is that the NDA provision upon which FBC and WWS base Count I is unenforceable. *See* Appellant's Opening Br. at 18-22. The two arguments pressed by FBC and WWS in opposition are without merit.

First, FBC and WWS wrongly claim that Navar never raised this argument in the Trial Court and therefore waived it. *See* Appellees' Br. at 20-21. FBC and WWS are incorrect. Navar raised this argument in during its motion to strike Count I:

> The NDA … says that the purposes were teaming discussions. And there is certainly a bunch of evidence … there were teaming discussions. They might have not been successful, but there were discussions. *So that doesn't defeat the fact that … the NDA is unenforceable*.

See JA 2262-63 (emphasis provided). Minutes later, the Trial Court took the motion to strike Count I under advisement. *See* JA 2264. Navar did not waive its unenforceability argument.

Second, FBC and WWS argue that the NDA is enforceable because the language that the parties may not use information received in a manner "inconsistent with the intention of the parties"[1] is sufficiently detailed to

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[1] The intention of the parties was to "evaluate whether to enter into and

identify what is not a permitted use. *See* Appellees' Br. at 22. FBC and WWS do not address Navar's argument that the prohibited use provision can be read narrowly or broadly. *See* Appellant's Opening Br. at 20-22.

Any use prohibitions in the NDA are unenforceable because they are too vague. In Virginia, a contract is enforceable if its material terms are reasonably certain; it is not if the material terms are vague. *See Allen v. Aetna Cas. & Sur. Co.*, 222 Va. 361, 363-64 (1981). The terms of the contract must be clear, definite, and explicit. *See Dodge v. Trustees of Randolph-Macon Woman's Coll.*, 276 Va. 1, 5-6 (2008) (citations omitted). A contract must be sufficiently definite to enable a court to give the contract an exact meaning, and it must obligate the contracting parties to matters that are definitely ascertainable. *See id*. A contract is unenforceable if the terms of the contract are not established with reasonable certainty. *See id.*

Here, the NDA's use prohibitions are not reasonably certain. The only relevant use provision provides that the parties may only use the information to "evaluate … and complete" the DTRA procurement. *See* JA 548. There are no specific, enumerated prohibitions in the NDA. What the NDA permits or prohibits is in no way clear on its face. *See* Appellant's Opening Br. 19-22. It is too vague to be enforceable under Virginia law.

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complete the [teaming discussions for research and development enterprise event and conference support] matter." *See* Appellees' Br. 22.

Navar did not waive its unenforceability argument, and the NDA provision upon which FBC and WWS sued in Count I is unenforceable.

ii. FBC And WWS Do Not Identify Evidence To Show How Navar Used Information In Breach Of The NDA.

Next, Navar challenges the sufficiency of the evidence to establish a breach of the NDA by demonstrating that FBC and WWS admitted that they – and not Navar – voluntarily disclosed their own purported confidential information to the government during the procurement process. *See* Appellant's Opening Br. 22-24. FBC and WWS respond by arguing that the breach was not that Navar used or disclosed the information related to *another* government contract, but rather that Navar used the information to compete for the contract "solely for Navar" instead of for the Navar/FBC/WWS team.[2] *See* Appellees' Br. at 24.

This argument has two fatal flaws. *First*, the only identified use or disclosure of WWS and FBC's information came during the presentation of their information with DTRA. FBC and WWS incorrectly assume that *their* presentation of *their* information to the government can somehow impose liability on Navar for a breach of Navar's obligation under the NDA. Indeed, the Teaming Agreement *obligates* FBC and WWS to support Navar's

[2] FBC and WWS concede that Navar did not use information in pursuit or performance of another contract. *See* Appellees' Br. at 24.

procurement efforts. *See* JA 168-169. FBC and WWS do not identify any disclosure other than the presentation during which they, and not Navar, disclosed their own information to DTRA. This point remains unrebutted.

Second, the evidence FBC and WWS rely on does not support their argument. FBC and WWS attempt to identify evidence to refute Navar's argument that they failed to admit sufficient evidence of a breach of the NDA at trial. This evidence, however, (1) fails to explain Navar's alleged misuse of WWS and FBC's information (*i.e.*, what Navar actually did with the information); (2) simply supports the contention that FBC and WWS gave the information to Navar with a belief that they would be subcontractors; and (3) supports the undisputed contention that Navar did not give FBC or WWS any work after award. There is no evidence whatsoever to explain how Navar used any information with an intent inconsistent with winning the DTRA contract.

iii. FBC And WWS Fail To Identify Any Evidence of Causation.

Navar also challenges the Trial Court's entry of judgment on Count I on the grounds that FBC and WWS did not admit *any* evidence to support the legal conclusion that any information disclosure or use proximately caused any damages. *See* Appellant's Opening Br. 24-25. FBC and WWS could not identify any evidence to support the causation element of their

breach of contract claim on Navar's post-trial motion seeking reconsideration of the Trial Court's motion to strike, at the petition stage in this Court, or now in their opposition papers. *See Haas v. Broyles Excavators, Inc. v. Ramey Bros. Excavating Co.*, 233 Va. 231, 235 (1987) (plaintiff "bears the burden of establishing a causal connection between the defendant's breach and the damages claimed.")

At best, FBC and WWS argue (without referring to anything in the record) that Navar would not have received the DTRA award without their participation. Assuming *arguendo* that FBC and WWS are correct (they are not), the disclosure only helped cause the government to award Navar the contract and revenue stream flowing from it. That is different than arguing that Navar's use of the information caused FBC and WWS any damages.

Instead, it was the fact that Navar and FBC/WWS did not successfully negotiate a subcontract that led to the loss of revenues for FBC and WWS. The NDA does not contain any such requirement to execute a subcontract.[3] In other words, FBC and WWS simply argue that the use of information caused Navar to win the award. They cannot logically argue that the use of their information caused them to suffer damages.

Second, the record does not support the argument that any

[3] The Teaming Agreement, however, does, but the governing provision is unenforceable as a matter of law. *See infra*, at Section III.

information use caused the government to award Navar the contract. Indeed, FBC and WWS do not point to anything in the 3,916-page record to support this argument. The record reflects that the government did not even mention FBC or WWS in its award document, *see* JA 106-111, and instead identifies Navar as the "most capable performer" that will "reduce costs on the contract *since the work will not have to be outsourced*." *See* JA 108 (emphasis provided).

According to DTRA, Navar won the contract because of its own capabilities and experience. WWS and FBC's argument that any disclosure of their information caused them to suffer economic harm is not supported by any evidence and refuted by their own Exhibit. In sum, FBC and WWS have not identified any evidence that any violation *of the NDA* proximately caused them the damages the jury awarded them at trial.

iv. FBC And WWS Demonstrate That The Jury Speculated In Calculating Damages.

Navar challenges the amount of the jury verdicts in this case because none of the evidence, no matter how viewed, supports the award figures. *See* Appellant's Opening Br. at 25-28. In response, FBC and WWS identify evidence that would be sufficient to support a damages figure – but not the ones awarded by the jury. *See* Appellees' Br. at 27-32.

While a plaintiff does not need to prove a precise amount of

damages, a jury verdict must relate to the evidence. *See Hale v. Fawcett*, 214 Va. 583, 585 (1974). "There can be no recovery where speculation or conjecture must be resorted to in order to determine what caused the damage complained of." *Id.* The Trial Court in this case correctly read this controlling law to the jury: "You must not base your verdict in any way upon . . . guesswork or speculation. Your verdict must be based solely upon the evidence and instructions from the court." *See* JA 1988, 2481. FBC and WWS establish in their opposition that the jury violated this instruction when it rendered its $750,000 and $500,000 verdicts.

The parties agree that there are four relevant factors in determining the amount of damages in this case: (1) revenues under the prime contract; (2) profit percentage for FBC and WWS; (3) workshare split between Navar and FBC/WWS; and (4) workshare split between FBC and WWS. *See* Appellant's Opening Br. at 25-28; Appellees' Br. at 30. WWS and FBC's arguments establish that the jury speculated in arriving at its verdicts.

FBC and WWS admitted evidence of the first two factors at trial.[4] *See* Appellees' Br. at 30. The calculation transforms to speculation

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[4] FBC and WWS admitted wildly conflicting evidence that they would be entitled to $2 million in revenues, *see* JA 425, 427, and something over $9 million revenues. *See* Appellees' Br. at 36. They also admitted evidence that FBC had a general profit margin of 17-25% and that WWS had a profit margin of at least 10%. *See* Appellees' Br. at 30.

because of the absence of the third and fourth factors. For the third factor, the jury heard FBC and WWS argue that the Teaming Agreement required Navar to offer 49% of the work to FBC and WWS. *See* J. 1233. But after the jury rendered its verdict, the Trial Court correctly concluded that the "up to 49%" workshare split was too vague to be enforceable. *See* Appellees' Br. at 30. For the fourth factor, FBC and WWS do not identify any evidence of a workshare split between them. Instead, they identify foreign legal authority (also not before the jury) that a workshare split is presumed to be even. *See* Appellees' Br. at 31. Based on these factors, FBC and WWS calculate that their damages should have been $1.54 million and $911,000, respectively. *See id*. These figures bear no resemblance to the $750,000 and $500,000 jury verdicts. To render the verdicts it did, the jury necessarily (1) relied on an unenforceable 49% workshare split between Navar and FBC/WWS; and (2) guessed as to the workshare split between FBC and WWS.[5] The jury's improper speculation of necessary components of its damages calculation is reversible error.

B. <u>FBC And WWS Do Not Demonstrate Why This Court Should Not Vacate The Judgment For Count VII.</u>

In the Opening Brief of Appellant, Navar advances three challenges

[5] That speculation would not have resulted in an even split because their profit margins are different. The differences in profit margin demand a different proportion of workshare to result in the same damages award.

to the Trial Court's judgment for Count VII. *See* Appellant's Opening Br. at 28-34. FBC and WWS do not effectively rebut any of them.

First, FBC fails to adequately respond to the argument that it did not identify what the trade secrets actually were at trial. *See* Appellees' Br. at 32-34. FBC argues that it presented direct evidence of independent value of its information. *See* Appellees' Br. at 32. The cited testimony, however, does not identify or describe with any particularity what the confidential information with independent economic value was; what the actual, or even estimated, value of the trade secret was; or why it was so proprietary. *See* JA 2123-25, 2132-33. There is no evidence to support a legal conclusion that FBC had a protectable trade secret under Virginia Code § 59.1-336.

Second, FBC does not successfully respond to Navar's argument that any disclosure was with FBC's express consent because FBC expressly authorized its use in the DTRA procurement. *See* Appellant's Opening Br. at 31. Without any authority, FBC simply argues that "Navar's actions are quintessential trade secret misappropriation." *See* Appellees' Br. at 33. FBC simply cannot avoid its own evidence that it gave Navar consent to use its information in the procurement, thereby disproving the "without consent" element of "misappropriation." *See* Va. Code § 59.1-336.

Third, FBC argues that it can claim unjust enrichment damages by

calculating the profit Navar gained from its use of FBC's information. *See* Appellees' Br. at 34. There is no Virginia law to support this theory. Even if there were, the jury should have then yielded a verdict of an additional $990,000 ($18 million in Navar revenues multiplied by a 5.5% profit margin). This figure is unrelated to the jury's additional award of $250,000.

FBC did not admit any evidence of what its trade secrets were, nor has it argued why its express consent to use its information should be disregarded here. Moreover, the additional $250,000 is without any basis in the evidence. This Court should vacate the judgment on Count VII.

II. THE TRIAL COURT ERRED WHEN IT DID NOT REMIT THE DAMAGES AWARD (Navar Assignment of Error 2).

In the alternative to vacating the judgments, Navar asks this Court to reduce the jury verdicts from $750,000 (for FBC) and $500,000 (for WWS) to $318,000 (for FBC) and $100,000 (for WWS). *See* Appellant's Opening Br. at 34-37. FBC and WWS oppose the request by arguing that the jury could have awarded substantially more. *See* Appellees' Br. at 35-36. Navar stands on its opening argument and calculations for remittitur.

III. FBC AND WWS FAIL TO PERSUASIVELY ARGUE THAT THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR NAVAR NOTWITHSTANDING THE VERDICT FOR COUNT II (Appellees' Assignment of Cross-Error).

The Trial Court's decision in entering judgment notwithstanding the

verdict on Count II is correct because the Teaming Agreement provisions upon which that claim is based are unenforceable as a matter of law. *See* Appellant's Opening Br. at 34-49. FBC and WWS advance two grounds to resist the argument. *See* Appellees' Br. at 38-50. Neither has merit.

First, FBC and WWS argue that the Trial Court erred by bootstrapping the unenforceable Teaming Agreement provision onto the provision they sought to enforce. *See* Appellees' Br. at 38-39, 41-43. They specifically argue that the obligation to offer a subcontract is severable from the unenforceable obligation to negotiate a subcontract in good faith. *See id*. This argument makes no logical sense.

The two Teaming Agreement provisions, read together, simply provide that Navar would negotiate and offer FBC and WWS a subcontract if the government awarded it the prime contract. *See* JA 2895, 2902. The Teaming Agreement contains no material terms of the future subcontract other than those in its attachment, Exhibit A. *See* JA 2894-2907. Exhibit A does not contain a reasonably certain scope of work.[6] *See* JA 2899, 2906. Its workshare provision provides that Navar will receive "at a minimum, 51%" (thus implicitly up to 100%) of the labor revenues under the prime

[6] FBC and WWS contend that simply identifying the procurement title is sufficient to describe the multi-million dollar scope of work and place of performance. *See* Appellees' Br. at 45, JA 2894, 2901. It is not.

contract – also not reasonably certain. *See* JA 2899, 2906. The subcontract is contingent upon a successful future negotiation of competitive pricing from FBC and WWS. *See* JA 2899, 2906. The subcontract is also contingent on whether the government would permit the subcontract. *See* J.A. 2899, 2906. In short, the parties agreed to negotiate the scope of work, workshare, and pricing, and be subjected to the government subcontracting rules, *after* prime contract award.

The obligation to offer a subcontract to FBC and WWS is necessarily contingent upon a successful negotiation of the subcontract. Absent a successful negotiation, Navar would have no subcontract to offer. The two obligations are inextricably tied. As the Trial Court concluded, the Teaming Agreement provision to negotiate a subcontract in good faith is unenforceable under *W.J. Schafer Associates, Inc. v. Cordant, Inc.*, 254 Va. 514 (1997).[7] So, too, must be the obligation to offer "a subcontract" because that obligation is nothing more than to offer a subcontract with no reasonably certain terms at the time the parties executed the Teaming Agreement. The Trial Court correctly concluded that the Teaming Agreement was an unenforceable agreement to agree under Virginia law.

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[7] *Agostini v. Consolvo*, 154 Va. 203 (1930), a case upon which FBC and WWS rely, is distinguishable because the Court found that the teaming agreement contained reasonably certain subcontract terms.

Second, FBC and WWS argue that "the law in Virginia … does not create a hard and fast rule that an obligation to negotiate in good faith is unenforceable as a matter of law." *See* Appellees' Br. at 40-41, 43-50. FBC and WWS, however, *do not cite to a single Virginia authority* for the proposition that any type of obligation to negotiate in good faith is unenforceable. *See* Appellees' Br. at 44-45.

Virginia law does indeed have a hard and fast rule that agreements to negotiate agreements in the future are unenforceable. *See*, *e.g.*, *Schafer*, 254 Va. 514; *Cyberlock Consulting, Inc. v. Info. Experts, Inc.*, 939 F. Supp. 2d 572 (E.D. Va. 2013), *aff'd*, 549 F. App'x 211 (4th Cir. 2014); *Weldon v. Innovative Mgmt. Concepts, Inc.*, Civil Action No. 03-363-A (E.D. Va. Dec. 19, 2003), *aff'd*, 113 F. App'x 517 (4th Cir. 2004).[8] FBC and WWS do not advance any argument that this Court should repeal the longstanding rule that teaming agreements containing an agreement to negotiate material terms of a subcontract are unenforceable.[9] *See* Appellees' Br. at 44-50.

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[8] Contrary to WWS and FBC's argument, *Schafer* did not overrule *Agostini*. *See* Appellees' Br. at 48-49. In *Agostini*, the Court concluded that the letter agreements contained reasonably certain terms. In *Schafer*, the Court concluded that the proposed subcontract terms were not reasonably certain. *Schafer* and *Agostini* apply the same rule but reach different conclusions on the facts of their respective cases.

[9] If anything, this Court should further articulate a test that guides whether a future subcontract contemplated under a teaming agreement contains reasonably certain terms. That test should require the teaming

FBC and WWS are incorrect that the provision upon which they sued in Count II is unenforceable. They are also incorrect that Virginia law does not hold that agreements to agree to indefinite subcontracts in the future are unenforceable as a matter of law. The Trial Court correctly entered judgment for Navar on Count II notwithstanding the verdict.

CONCLUSION

Appellant Navar, Inc. requests that this Court (1) vacate the judgment on Counts I and VII, and either (a) enter final judgment on Counts I and VII for Navar, Inc., ***or***, (b) remand the case for a new trial for those counts, ***or***, in the alternative, (2) reduce the judgment to reflect a judgment for FBC for $318,000, and $100,000 for WWS. In addition, Navar requests that this Court affirm the Trial Court's entry of judgment for Navar notwithstanding the verdict on Count II.

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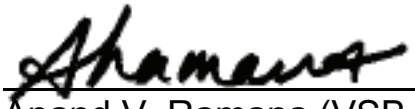
agreement to contain a scope of work in which discreet categories of tasks are identified; prices (or a pricing framework) of the goods or services to be rendered under the subcontract; and a workshare split figure. All of these categories can be subject to government requirements and rules. A more detailed test of enforceability would reduce the business risks for both prime contractors and proposed subcontractors alike.

Dated: January 19, 2016

Respectfully submitted,

NAVAR, INC.



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CERTIFICATE

The undersigned hereby certifies that the foregoing Reply Brief of Appellant complies with Rule 5:26(h) and Rule 5:29, and further certifies as follows:

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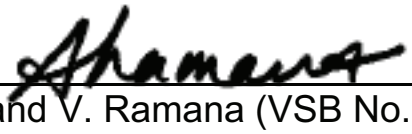
(5) On this 19th day of January, 2016:

a) An electronic copy of the foregoing Reply Brief of Appellant was filed electronically with the Virginia Appellate Courts eBriefs Systems (VACES) pursuant to Rule 5:26(e).

b) Ten copies of the foregoing Reply Brief of Appellant will be filed with the Clerk's Office of the Supreme Court of Virginia pursuant to Rule 5:26(e) and Rule 5:32(a)(3).

c) An electronic copy of the foregoing Reply Brief of Appellant were sent via electronic mail to Counsel for the Appellee.



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