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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

LOKAN & ASSOCIATES, INC. d/b/a OPTI STAFFING GROUP,

Appellant,

v.

AMERICAN BEEF PROCESSING, LLC

Respondent

REPLY BRIEF OF APPELLANT

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COMES NOW Appellant, LOKAN & ASSOCIATES, INC. d/b/a OPTI STAFFING GROUP, by and through its attorneys of record, SMITH ALLING, P.S. and Kelly DeLaat-Maher, and submits appellant's brief in reply to Respondent's brief on appeal as follows:

I. RESTATEMENT/CLARIFICATION OF THE CASE

Appellant Lokan & Associates, Inc. d/b/a Opti Staffing Group (hereinafter "Opti") substantially relies upon the Statement of Facts contained within its Appellant's Brief. Notwithstanding, some clarification is necessary following Respondent's filing of its Brief on Appeal.

In its introduction, Respondent argues that Opti raises "strained" arguments in order to renege on its own contract and eliminate an "agreed upon contingency." Respondent's Brief, p. 1. Respondent's characterization is contrary to the evidence presented and should be discounted.

Opti is in the private recruiting business, operating in Alaska, Washington, Oregon, and Illinois. CP 32. Opti's work is not done solely on contingency, although it is undisputed that executive recruitment of the sort at issue on the underlying case is typically done on a contingent basis. CP 70. The Service Charge Schedule, which formed the basis of the contract at issue in this case, clearly provides that Opti's fees are

contingent upon hiring a candidate that was referred to the client through Opti's efforts. CP 33; 38. The service charge schedule nowhere provides that payment to Opti is contingent upon the client's ability to pay.

Respondent relies greatly upon Mr. Garwood's self-serving Declaration that Opti agreed to make their receipt of payment contingent upon Respondent's receipt of funds. CP 65, ¶ 6. Mr. Garwood further makes self-serving statements that the company was short of funding. *Id.* at ¶ 5. He states that "until funding was obtained, ABP had no assurance that it could remain open or pay any employees it hired for more than a few months." *Id.* While ABP may have been in financial difficulty, a full review of the actual contract documents and Declaration of Ms. Binder does not support the contention that Opti agreed to supply services and assume a risk that it would **never** be paid for the services that were admittedly provided.

It is undisputed that Opti's point of contact with Mr. Garwood and ABP was employee Caryn Binder. Neither of Ms. Binder's Declarations indicates that the fee owed to her company for the services that she provided was contingent on ABP's financial ability to pay. CP 67-68, 119. Indeed, Mr. Binder crossed off and initialed a portion of her Declaration that had indicated that Mr. Garwood advised her that the future of the company was uncertain due to lack of funding. CP 67, ¶ 2.

She goes on to indicate that he expected to receive a grant, but that it was not available yet. *Id.* When the grant funded, Opti would be paid. *Id.* Ms. Binder was to receive a commission for the fees she generated, pursuant to her employment agreement. CP 119. Thus, it is not a reasonable conclusion that Ms. Binder agreed that she would provide services with the understanding that it was unlikely she would be paid.

Mr. Hansen, the Vice President of Opti, supplied testimony that supports the documents provided by the parties. The parties entered into an agreement, in the form of a Service Charge Schedule, on October 6, 2009. CP 33. Respondent was issued an invoice for placement of Danny Anderson on that same date. CP 33-34, 40. The due date on the invoice was November 23, 2009. CP 40. Again on that same date, Ms. Binder sent Mr. Garwood an e-mail that stated as follows:

So even though the fee agreement says that payment is due 5 days after our services are rendered, any placement we make for you before 11/23/09 will be invoiced with payment due on 11/23/09. **Even if you receive invoices in the month of October, payment will not be due until the end of November** (just don't forget!).

CP 104 (emphasis added). Ms. Binder's e-mail, written contemporaneously with the Service Charge Schedule and the placement of Mr. Anderson, certainly does not reflect an agreement that payment may never be received. Rather, she is quite clear that payment was due in

November. Mr. Garwood acknowledged this understanding in an e-mail also written on October 6, 2009, wherein he states “[i]n accordance with our separate agreement, fees are not due before week commencing November 23, 2009.” CP 105. This language does not mesh with statements in his Declaration that he had an agreement that fees were not due at any point unless and until he received funding.

Respondent argues that the agreement to defer payment in perpetuity was an initially agreed upon term rather than any amendment to the Service Charge Schedule, as argued by Opti. First, the dates of the documents at issue simply don’t support that contention, especially when read in conjunction with Ms. Binder’s October 6, 2009 e-mail. Second, the very language of the Addendum indicates that it is something different than that initially agreed upon. Further, the Addendum to the Service Charge Schedule supports the conclusions that Opti was merely agreeing to defer payment once the initial payment terms had not been met, based upon the promise of receipt of anticipated funding. The Addendum provides in pertinent part as follows:

In consideration of American Beef Processing’s **delayed receipt of federal funds**, and services rendered by Opti Staffing Group for the recruitment and identification of Danny Anderson for the Plastic Engineering position with American Beef Processing, **Opti Staffing Group will extend our initially agreed upon payment terms to be payable upon American Beef Processing’s receipt of said**

funds. Services have been rendered and payment is due at the time funding is received regardless of candidates start date and or execution of originally agreed terms pertaining to Opti Staffing Group's "One time replacement guarantee."

It is our understanding that Danny Anderson is to begin employment on December 1st, 2009, and for purposes of the replacement guarantee this will be the effective date. All terms of the originally agreed guarantee terms will apply.

CP 42 (emphasis added). Had the parties intended to subject the payment terms upon ABP's **possibility** of receipt of funds, which might or might not occur, the language would have indicated as such.

The interpretation that the addendum merely reflected an agreed delay is again supported by an e-mail from Caryn Binder written on December 7, 2009 – shortly after the date indicated on the Addendum. In describing the addendum, she writes as follows:

. . .It basically states that we will **extend the payment due date** and allow Danny to work for you before we have been paid for our service with the understanding that we will be paid as soon as you receive your funding.

CP 103 (emphasis added). Again, Ms. Binder's language, written contemporaneously with the documents at issue, reflect merely an extension of the due date rather than an agreement to make receipt of payment for services rendered explicitly contingent upon the possibility, however remote, that ABP would receive funding.

Respondent goes on to essentially argue that factually, having receipt of payment for services rendered contingent upon ABP's receipt of funding makes perfect business sense. Respondent's Brief, p. 5. This statement is ludicrous. Opti's only contractually agreed contingency was that an employee they referred be hired. No business would adopt a business model that allows for a contingency based upon the recipient's ability to actually pay for the services provided.

II. ARGUMENT

A. ABP'S PAYMENT OBLIGATION WAS NOT CONTINGENT ON USDA FUNDING

Respondent argues that the contract at issue is a simple contingent fee agreement based upon two events: 1) the respondent's hiring of an employee through Opti; and 2) ABP's receipt of the hoped for funding. Contrary to Respondent's assertion, classifying the contract as subject to two contingencies is simply inconsistent with the actual contract documents at issue, and the emails exchanged between the parties at the time the documents were entered into. Opti is not attempting to renege and rewrite a contract to eliminate the second contingency, as argued by Respondent, but rather seeking to enforce a payment obligation they only agreed to delay for a reasonable time – an obligation that Opti clearly expected to be met as outlined in the e-mails from Ms. Binder as to the initial delay in payment, and in the subsequent addendum.

ABP states that Opti's entire business model is contingency based, and that this differentiates them from the *Taleghani* case cited in Opti's Appellate Brief. See *O'Brien & Gere Eng'rs. Inc. v. Taleghani*, 540 F. Supp. 1114 (E.D. Pa. 1982), *aff'd*, 707 F.2d 1394 (3d Cir. 1983). First, Opti's business model is not solely based on contingent fees; only its executive recruitment services are contingency-based. Even if it were, there is no difference in facts from that in *Taleghani* – the fact that Opti provides staffing services does not exempt them from the law outlined in *Taleghani*, as nowhere does the case imply that it is applicable solely for services provided by contractors or engineers. Therein, the court determined that an agreement to be paid for engineering services when funds were available did not make the receipt of funds from the Iranian government a condition precedent to payment, the nonoccurrence of which excused performance. *O'Brien & Gere Eng'rs. Inc. v. Taleghani*, 540 F. Supp. 1114 (E.D. Pa. 1982), *aff'd*, 707 F.2d 1394 (3d Cir. 1983).

Instead, the court determined that the agreement between the parties was an unconditional obligation, and the language regarding payment from the Iranian government merely fixed the *time* when that unconditional obligation would be definitively paid. *Id.* at 1117. Thus, the court determined that the defendant was responsible to pay the *full amount* of the contract to the plaintiff *within a reasonable time. Id.*

The case here is substantially similar to that presented in *Taleghani*. Like the contract at issue in *Taleghani*, the Addendum merely sets forth the date upon which an unconditional obligation became immediately due. Contrary to ABP's arguments, it is not a condition that must be fulfilled before ABP is required to pay, the non-occurrence of which excuses performance. Further, it is not evident from any document, with the exception of Mr. Garwood's self-serving Declaration, that the parties knew that ABP would not be able to pay for the services provided. Respondent argues that Opti's interpretation ignore common business sense. It is Respondent's interpretation that ignores common business sense, as it simply does not make business sense for a company to agree to pay for services provided that it cannot afford. It should not be up to the service provider to ensure that the company agreeing to pay for services can afford it. Opti should not be punished due to Respondent's poor business judgment.

B. MODIFICATION OF THE SERVICE CHARGE SCHEDULE WAS NOT SUPPORTED BY CONSIDERATION

ABP argued that the payments under the service charge schedule were not due, pursuant to the addendum signed by Mr. Garwood on behalf of ABP, and Stuart Lee, a branch manager with Opti at the time. CP 42. However, the Addendum was dated and signed well after the October 6,

2009 Service Charge Schedule was signed, and therefore modifies the terms of that contract. The dates of the documents and the e-mails between the parties reflect what happened, without self-serving interpretation well after the fact.

As outlined in the factual portion of the brief, all of the documents at issue bear dates that support Opti's contention that the Addendum was entered into *after* the initial service charge. The Service Charge Schedule is dated October 6, 2009. The invoice for Danny Anderson is also dated October 6, 2009. The Service Charge schedule does not contain any language in small print. Indeed, it states clearly that the only payment contingency is whether any candidates referred by Opti are hired. The last sentence of paragraph 4 of the Schedule defines when services are rendered: "Our service is rendered when you make an offer of employment and our candidate accepts the offer." Finally, paragraph 5 of the Service Charge Schedule provides that the acceptance of referrals by Opti signifies acceptance of the terms, unless a written modification is signed. CP 38.

Furthermore, it is evident in e-mails between the parties provided that the Service Charge Schedule and Addendum were not executed simultaneously, nor was the decision and offer to Danny Anderson for employment executed at the time of the Addendum. In an e-mail dated

September 28, 2009, Caryn writes to Tony: "I gave Danny Anderson a heads up to expect an official letter from you soon." CP 012. Tony responded on the next day: "I will confirm the offer to Danny tomorrow".

Id. In an e-mail exchange on October 6, 2009, the date of the Service Charge Schedule, Caryn wrote to Tony as follows:

So, even though the fee agreement says that payment is due 5 days after our services are rendered, any placements we make for you before 11/23/09 will be invoiced with payment due on 11/23/09. Even if you receive invoices in the month of October, payment will not be due until the end of November (just don't forget!).

CP104. Tony responded:

Please see the attached, executed fee agreement.
In accordance with our separate agreement, fees are not due before week commencing November 23, 2009.

CP 105. Thus, based upon the e-mail exchange, and as supported by the invoice for Danny Anderson dated that same date, the only agreement as to fees as of October 6, 2009 was that they would not be due until November 23, 2009.

When payment was not made on November 23, 2009, the parties ultimately entered into the addendum. In an e-mail dated December 7, 2009, Caryn wrote Tony as follows:

I talked with management about the delay in your payment due to the funding not coming through when first expected. They drafted an addendum to the fee agreement I need for you to please review, sign and return to me. It basically

states that we will extend the payment due date and allow Danny to work for you before we have been paid for our services with the understanding that we will be paid as soon as you receive your funding.

CP 103. Thus, based upon the e-mail exchange between the parties, it is abundantly evident that the Addendum was not executed contemporaneously with the Service Charge Schedule, and reflected a different understanding than that originally agreed to. The Addendum is indeed a modification of the original payment terms under the Service Charge Schedule, no matter how Respondent tries to spin it.

It is well established in Washington that a modification of an existing contract must be supported by new consideration. In *Boardman v. Dorsett*, 38 Wn.App. 338, 685 P.2d 615 (1984), the court clearly and unequivocally stated that "...a subsequent agreement modifying an existing contract must be supported by new consideration independent of the consideration involved in the original agreement." *Id.* at 341. There is no consideration when "one party is to perform some additional obligation while the other party is simply to perform that which he promised in the original contract." *Rosellini v. Banchemo*, 83 Wn.2d 268, 273, 517 P.2d 955 (1974). Respondent argues that the consideration for the Addendum was simply the reiteration of its promise to pay the fee if the financing

contingency was met. Respondent's Brief, p. 9. Reiteration of a promise is not new consideration.

As a modification of an existing contract, the Addendum must be supported by additional consideration to be enforceable. In deposition, Mr. Garwood testified that he did not offer Opti any additional monies or interest in order to induce Opti to sign the Addendum, and that they were not to receive any additional consideration. See *Dep. of Anthony and Julie Garwood* 56:24-25; 57:1-11, CP 52. Because there is no independent consideration to support the Addendum, it is not valid.

C. OPTI'S FORFEITURE ARGUMENT IS CORRECT

Respondent argues that the Addendum does not create an inequitable forfeiture, but rather is merely another contingency. Respondent's Brief, p. 12. However, for that very reason, it operates as an inequitable forfeiture, since whether or not ABP can obtain funding or even continue to pursue funding is not within Opti's control. Where doubt exists, as in this case, the preferred interpretation is that the event of financing from an outside party was not a condition to payment to Opti. See *Jones Assocs., Inc. v. Eastside Props., Inc.*, 41 Wn. App. 462, 464, 468, 704 P.2d 681 (1985). Further, when reviewing Ms. Binder's emails written contemporaneously with the contract documents at issue, along with her Declaration wherein she struck the suggestion that she knew ABP

was financially unstable, it is certainly not evident that Opti “knowingly assumed the risk” of doing business with a company that was not capable of paying for services provided it. If that was the case, any company agreeing to do business with an unstable company could not collect their fees.

D. THE ADDENDUM DOES NOT APPLY TO KEVIN BAILEY

ABP relies upon Caryn Binder’s Declaration that the Addendum was meant to apply not only to Danny Anderson, but also to any future possible employees. CP 119. Again, Ms. Binder’s Declarations cannot change the language and documents written contemporaneously with the actions giving rise to this matter. The Addendum specifically discusses Danny Anderson. It does not refer to any other possible employees. A plain reading of the Addendum supports Opti’s contention that it only applied to Danny Anderson. Had it been meant to apply to future employees, ABP could have interlineated language to that effect. It did not.

Further, Caryn’s December 7 e-mail to Tony discussing the Addendum further only refers to Danny. CP 103. She goes on to indicate that she is providing additional resumes for various candidates for review for another position. She does not indicate anywhere in that e-mail that in the event those candidates are hired, the payment terms for them would be

subject to the addendum. In short, the addendum is only meant to apply to Danny Anderson.

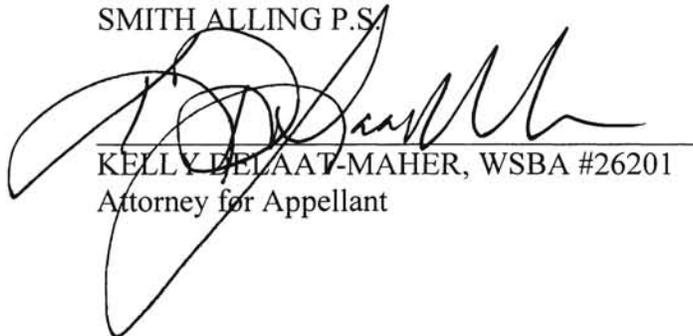
III. CONCLUSION

The trial court committed errors of law when it awarded Summary Judgment in Respondent's favor rather than for Opti. It improperly determined that Opti's payment for services provided was contingent upon Respondent's receipt of funding from an outside source.

As outlined in its Appellant's Brief, Opti requests that the court reverse Summary Judgment in Respondent's favor, and either remand for entry of Summary Judgment in Opti's favor to include prejudgment interest, or remand for trial.

RESPECTFULLY SUBMITTED this 28 day of February, 2012.

SMITH ALLING P.S.



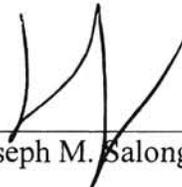
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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February, 2013, I caused to be served a true and correct copy of [this] Reply Brief of Appellant upon counsel of record, via the methods noted below, properly addressed as follows:

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Joseph M. Salonga