STATE OF MICHIGAN

IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET
414 Washington Ave.
Grand Haven, Michigan 49417
616-846-8320
* * * * *

RAVUN, INC. and **MARK KUYPER,**

Plaintiff/Counter-Defendants,

v

NUVAR, INC.,

Defendant/Counter-Plaintiff.
_____/

OPINION AND ORDER REGARDING COMPETING MOTIONS FOR SUMMARY DISPOSITION, AND DENYING PLAINTIFF'S MOTION TO EXTEND DISCOVERY

Case No. 2021-006713-CB

Hon. Jon A. Van Allsburg

At a session of said Court, held in the Ottawa
County Courthouse in the City of Grand Haven,
Michigan on February 3, 2023.
Present: Hon. Jon Van Allsburg, Circuit Judge

Before the Court are the parties' cross motions for summary disposition and plaintiff's motion to extend discovery. The Court heard argument on defendant's motion on December 5, 2022 but held its decision until it also heard argument on plaintiffs' motions for summary disposition and to extend discovery on December 27, 2022. Defendant's motion is based on accord and satisfaction and is requested pursuant to MCR 2.116 (C)(8) and (C)(10). Plaintiffs' motion for summary disposition is requested pursuant to MCR 2.116 (C)(7) (8) and (10). The Court denies defendant's motion for summary disposition, denies plaintiffs' motion for summary disposition as to Counts I and II, and grants plaintiffs' motion to dismiss Count III. The Court denies plaintiff's motion to extend discovery.

I. Brief Facts/History

Plaintiff Kuyper was the long-time owner of Nuvar Inc., a furniture manufacturer. Amy Sparks owned ALS Acquisitions and on March 28, 2018, entered an Asset Purchase Agreement to purchase Nuvar Inc. from plaintiff Kuyper. The parties closed on the sale on May 31, 2018. The purchase price was $11,000,000.00. Defendant paid $7,000,000 cash and secured the remaining $4,000,000.00 with a 10-year promissory note at 4.65% interest per annum. As a condition of the sale, plaintiff changed its name to Ravun, Inc. and ALS Acquisitions changed its name to Nuvar,

Inc. Amy Sparks remains the owner of Nuvar, Inc. The parties also entered an employment agreement whereby plaintiff Kuyper stayed on as an employee with Nuvar, Inc. to assist with the transition. By all accounts, plaintiff Kuyper and Ms. Sparks worked closely together throughout the transition.

Unfortunately, things have soured due to a dispute regarding the inventory of the business. Defendant's purchase included Nuvar Inc.'s Net Working Capital. Pursuant to 1.05 (a) of the APA, Net Working Capital means the Seller's:

> (i) accounts receivable, Inventory, prepaid expenses listed on Schedule 1.01 (i), and other current assets of Seller (but expressly excluding cash and cash equivalents) minus (ii) accounts payable and other current liabilities of Seller (but expressly excluding indebtedness for borrowed money, accrued liabilities, and Seller's health care liability account), all determined in accordance with Generally Accepted Accounting Principles.

1.01 (g) of the APA defines "Inventory" as "all raw material inventory, finished goods inventory, spare parts, supplies, and other inventory of the Seller, to the extent deemed saleable by the Buyer."[1]

The parties agreed to an $8,607,691.00 Net Working Capital Target in the APA. Within five (5) days before close, pursuant to 1.05 (c), plaintiff was to prepare and deliver to defendant a statement that showed the Estimated Net Working Capital at close. If this was higher than the Target, the sales price would increase, and if lower, the sales price would decrease accordingly.

Within ninety (90) days after the Closing Date, defendant was to prepare and deliver an Actual Net Working Capital Statement to plaintiff that showed the actual Net Working Capital at close. Plaintiff had thirty (30) days to provide an Objection Statement to defendant if plaintiff disagreed with defendant's Actual Net Working Capital Statement.

On June 1, 2018, the day after close, plaintiff Kuyper contacted Amy Sparks and informed her that there was some obsolete inventory included in the sale for Steelcase and Izzy. Plaintiff Kuyper informed Ms. Sparks that he would reimburse defendant for the Steelcase parts after they were counted in early September. Izzy had promised to "make [Nuvar] whole on leftover parts," so the parties agreed to wait on that promise and discuss alternatives when needed.

On August 28, 2018, the parties agreed by email to extend the deadline for the Actual Net Working Capital Statement to September 30, 2018. On September 25, 2018, Ms. Sparks sent

[1] The parties have made implied reference to the phrase "to the extent deemed saleable by the Buyer" by referencing "obsolete" inventory or "unsaleable" inventory. The court notes that these summary terms may or may not be an accurate reference to the contract language. The court further notes that Buyer's discretion in determining whether inventory is "saleable" is not absolute but is subject to an objective standard of reasonableness.

plaintiff Kuyper an email entitled True Up Reconciliation in which she stated, "I think we are finally there on the 90-day true up!" She also noted "there are several items in column M highlighted in 'orange' that you and I have agreed we will not know the outcome of for several weeks, possibly months and you and I will 'true up' with one another as they come in." On October 23, 2018, Ms. Sparks emailed plaintiff Kuyper an "Updated True Up."

Finally, on May 20, 2019, Ms. Sparks sent plaintiff Kuyper another email about the true up, which states in pertinent parts:

> I think Shara and I have the final open items on the Post 5/31 transactions sheet, reconciled to the best of our ability so that you can close 'Old Nuvar.' I am forwarding the Updated True Up Email and original 2 attachments from last October. Also Attached are: 1. 'Revised True Up Summary for Mark May 2019' This details the final adjustments that were needed to be made and originally highlighted in 'orange' on the 'Post 5/31 Transactions' excel file as additional open items. It also notes a check that was deposited to Old Nuvar that was really for New Nuvar but that wasn't discovered until November of last year. We decided to hold that until we had the other items figured out. The Net amount due to New Nuvar from Old Nuvar is $476.24. I'm thinking you and Barb can just take Jeff and I to dinner and we'll call it even. 2. An updated Working Capital Calculation for the impact of the applicable reconciling items called "Working Capital Calculation adj for final Outstanding items 5 20 2019. This shows what the Adjustment would have been at October/May if we would have had the correct amounts. The adjusted amount would have been $5,441. In October it equaled $2,927 and we recorded that amount on the final 'true up' sheet. The difference of $2,514 is what I owe you for reconciling items that went to the working capital calculation. So overall- it appears the adjustments were pretty much break even which is great news.

On October 31, 2019, Ms. Sparks emailed plaintiff Kuyper again to inform him that she had found inventory that "should not have been on the balance sheet at closing because it wasn't here or was supposed to have been disposed of by [plaintiff]." She asked plaintiff Kuyper to waive the 18-month claims period outlined in Section 6.01 of the APA as it related to inventory issues. To the Court's knowledge, plaintiff Kuyper did not respond to this request. Instead, on November 6, 2019, plaintiff Kuyper declined to meet with Ms. Sparks until he had a chance to discuss the inventory issues with his attorney. He indicated the same on November 11, 2019. According to a deposition from Ms. Sparks, verbal communications about the inventory continued between the parties.[2]

On November 26, 2019, Jonathan Siebers, attorney for defendant, sent a letter to plaintiff which purported to be "notice of Nuvar's claim for indemnification from Seller Parties under Section 6.02 of the APA, and is based on Seller Parties' breaches of two representations and warranties in the APA." Defendant noted violations of Section 3.05 and 3.09 of the APA and

[2] Deposition of Amy L. Sparks page 88.

$634,177.88 of disputed inventory. Lastly, defendant stated "[w]hile Nuvar is not exercising its setoff rights at this time, Nuvar reserves the right to do so and, if we cannot resolve this manner in a timely fashion, Nuvar will have no option but to exercise such rights."

On October 22, 2021, Ms. Sparks informed plaintiff Kuyper via letter that she planned to refinance the $4,000,000 promissory note and pay off plaintiff Kuyper. She indicated that she intended to setoff losses in the amount of $579,194.39, which consisted of $492,945.40 of obsolete inventory and $82,248.99 of "interest that should not have been paid." She stated that

> Nuvar is preparing to pay off the Seller Note. This letter constitutes notice under Section 6.05 of the APA of Nuvar's intent to exercise its setoff rights and to set off the full Loss Amount against the Employment Agreement and the Seller Note. Given that your insurance benefits are tied to the Employment Agreement, Nuvar would like to give you the option to set off the Loss Amount solely against the Seller Note. If [sic] would like us to do so, please let me know on or before November 1, 2021.

Earlier that same day, Ms. Sparks sent an email to plaintiff Kuyper to give him advanced notice about the letter. In that email she stated

> [i]n paying off your note I need to address the old and obsolete inventory that was included in the original acquisition. The good news is that I was able to get paid for some of the obsolete inventory by the customers. The bad news is that I was not able to get paid for all of it. I did everything I could. We hit a wall prior to Shara leaving and Matt and I have continued these discussions. We are at a point where we've pushed so much on this old inventory that it's starting to impact the customer relationship. We went above and beyond what we needed to do and our efforts over the past two years (roughly), since we originally brought this issue to your attention, resulted in reducing the obsolete inventory by a little more than $140,000.

In response, plaintiff's attorney, Ronald VanderVeen, sent a letter to Attorney Siebers that acknowledged receipt of the letter, requested additional information, and disputed the right to setoff. Specifically, Attorney VanderVeen said "[w]hile our client does not agree that Nuvar has the right to set off any amounts, we believe it is appropriate to discuss what she is claiming at this point." In response to plaintiff's request for information, defendant provided an inventory spreadsheet that apparently itemizes inventory that did not sell from 2018-2021. Plaintiff contends that some of its requests for information were unfulfilled.

On November 23, 2021, Ms. Sparks sent another letter to plaintiff Kuyper that was substantially the same as the October 22, 2021 letter, but updated the amount of set off to $741,500.51, which consisted of "$628,646.19 in obsolete inventory and $112,854.33 in interest that should not have been paid." Again, Ms. Sparks stated that

> Nuvar is preparing to pay off the Seller Note. This letter constitutes notice under Section 6.05 of the APA of Nuvar's intent to exercise its setoff rights and to set off

> the full Loss Amount against the Employment Agreement and the Seller Note. Given that your insurance benefits are tied to the Employment Agreement, Nuvar would like to give you the option to set off the Loss Amount solely against the Seller Note. If [sic] would like us to do so, please let me know on or before December 1, 2021.

Attorney Siebers followed up with an email to Attorneys VanderVeen and Jeff Helder that same day in which he explained that defendant increased the setoff because plaintiff's request for information uncovered additional inventory to be set off.

In response, plaintiff filed the instant suit for declaratory judgment. According to Court records, plaintiff filed the suit on December 22, 2021. The Court notes that Attorney VanderVeen signed the complaint on December 6, 2021. In the complaint plaintiffs requested that the Court determine that defendant is not entitled to set off on the grounds that there was no unusable inventory and defendant did not suffer damages even if there was. Plaintiffs also requested that the Court determine the balance defendant owed to plaintiffs under the Employment Agreement and Promissory Note.

Defendant filed a counter-complaint in which it alleged that plaintiffs violated its representations and warranties in the APA, specifically Sections 3.05, 3.06 and 3.09. Defendant seeks indemnification and setoff pursuant to Section 6.01, 6.02, and 6.05 of the APA in excess of $700,000.

II. Standards of Review

For a motion under MCR 2.116 (C)(7), the Court must consider "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidenced then filed in the action or submitted by the parties" in accordance with MCR 2.116 (G)(5). "The contents of the complaint must be accepted as true unless specifically contradicted by the affidavits or other appropriate documentation submitted by the movant." *Sewell v Southfield Pub Sch*, 456 Mich 670, 674; 576 NW2d 153 (1998). If the movant supports the motion with facts, the burden shifts to the non-moving party to show a genuine issue of material fact. *Kincaid v Cardwell*, 300 Mich App 513, 537; 834 NW2d 122 (2013). MCR 2.116 (G)(6) requires that the Court only consider affidavits, depositions, admissions, and documentary evidence to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.

The Court's decision on a motion for summary disposition under MCR 2.116 (C)(8) for failure to state a claim on which relief can be granted is limited to review of the pleadings per MCR 2.116(G)(2). "The term 'pleading' includes only: (1) a complaint, (2) a cross-claim, (3) a counterclaim, (4) a third-party complaint, (5) an answer to a complaint, cross-claim, counterclaim, or third-party complaint, and (6) a reply to an answer." MCR 2.110. The Court may also review

the contract when an action is based on the contract, as is the case here. *Woody v Tamer*, 158 Mich App 764, 770; 405 NW2d 13 (1987).

A motion for summary disposition based on MCR 2.116(C)(10) tests the factual support for a claim and like motions filed under (C)(7), must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Patterson v Kleiman,* 447 Mich 429, 432; 526 NW2d 879 (1994). The moving party must specifically identify the undisputed factual issues and support its position with evidence. MCR 2.116(G)(4); *Maiden v. Rozwood,* 461 Mich 109, 120, 597 NW2d 817 (1999). The trial court must consider the submitted evidence in the light most favorable to the nonmoving party, but may not make findings of fact or weigh credibility in deciding the motion. *Id.*; *Skinner v Square D Co.,* 445 Mich 153, 161; 516 NW2d 475 (1994). If the moving party fulfills its initial burden, the party opposing the motion then must demonstrate with supporting evidence that a genuine and material issue of disputed fact exists. MCR 2.116(G)(4); *Maiden,* 461 Mich at 120–121." *Reed v Reed*, 265 Mich App 131, 140–41, 693 NW2d 825, 833 (2005).

"When properly challenged, plaintiff must establish that he has a case on the law and that there are some evidentiary proofs to support his allegations as to any material fact." *Durant v Stahlin,* 375 Mich 628, 638; 135 NW2d 392 (1965). Under MCR 2.116(G)(4), a party opposing a motion for summary disposition is required to respond with affidavits or other evidentiary materials to show the existence of a factual dispute, rather than relying on the allegations or denials in the pleadings. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284, 287 (1991). Generally, the nonmoving party may not rest on mere allegations or denials, but must proffer evidence of specific facts. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163, 645 NW2d 643 (2000). "The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." *Maiden*, 461 Mich 109. A genuine issue of material fact exists "when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

III. Defendant's Motion for Summary Disposition Based on Accord and Satisfaction

As stated in *Nationwide Mut Ins Co. v Quality Builders, Inc*, 192 Mich App 643, 646; 482 NW2d 474 (1992) (citing *Fuller v Integrated Metal Technology, Inc*, 154 Mich App 601, 607; 397 NW2d 846 (1986)):

> An 'accord' is an agreement between parties to give and accept, in settlement of a claim or previous agreement, something other than that which is claimed to be due, and 'satisfaction' is the performance or execution of the new agreement... An accord and satisfaction may be effected by payment of less than the amount which

> is claimed to be due if the payment is tendered by the debtor in full settlement and satisfaction of the claim. In order to effect an accord and satisfaction under such circumstances, the tender must be accompanied by an explicit and clear condition indicating that, if the money is accepted, it is accepted in discharge of the whole claim.

To satisfy a claim for accord and satisfaction, defendant must show

> (1) its good faith dispute of (2) an unliquidated claim of plaintiff, (3) its tender of money in satisfaction of the claim, and (4) plaintiff's acceptance of the tender. Defendant must also show that plaintiff was fully informed of the condition. This does not mean that the defendant must show plaintiff's express acceptance of the condition; rather, the law of accord and satisfaction is that where a creditor accepts a conditional tender, the creditor also assents to the condition. The law will deem a creditor to have been fully informed where the tender of money in full payment of a disputed claim is made in unequivocal terms. "The law requires that in order to accomplish an accord and satisfaction the statement that is so intended must be clear, full, and explicit."

Id. at 647, citing *Durkin v Everhot Heater Co,* 266 Mich 508, 513; 254 NW 187 (1934).

In *Fritz v Marantette*, 404 Mich 329, 273 NW2d 425 (1978), defendant sent plaintiff a check for less than the full amount owed on the parties' purchase contract. A printed statement on the check read "'[b]y endorsement this check when paid is accepted in full payment of the following account.'" Beneath the printed statement, defendant added a handwritten note that read "[c]orn contract paid in full." Plaintiff attempted to resolve the monetary dispute with defendant to no avail before he crossed out the handwritten note, deposited the check, and filed an action in district court for the balance of the contract price. Defendant filed a motion for summary disposition based on accord and satisfaction, which the court denied. A jury found in favor of plaintiff and defendant appealed.

The Supreme Court upheld the district court's decision and reasoned that it would have been reasonable for a jury to find that the debt was liquidated and undisputed or that the amount defendant paid represented the undisputed portion of the contract. The Court stated that "whether a particular set of facts amounts to an accord and satisfaction is generally a question of fact for the fact finder. One of the key elements, which the trier of fact must find to reach the conclusion that an accord and satisfaction exists, is a 'meeting of the minds."

In *Nationwide,* 192 Mich App at 649, citing *Durkin*, 266 Mich at 513, the Court of Appeals expanded on this and explained that

> The tender of a sum less than the contract price, in settlement of a disputed claim, must be accompanied with a statement, not which *may* be understood by the creditor as intended to be in full settlement and satisfaction of the claim, but which

> *must* be so understood by him. That is, the statement must be so clear, full, and explicit that it is not susceptible of any other interpretation.

In that case, plaintiff insurance agency sued defendant for insurance payments. Defendant had three policies with plaintiff that defendant believed it had overpaid for. It sent a "notice of cancellation" with "a check for $2,210 marked 'Paid in Full' and an accompanying letter that explained how defendant had arrived at this figure." *Nationwide* at 644. The Court of Appeals found that the notations on the check and letter "were insufficient, as a matter of law, to effect an accord and satisfaction upon negotiation of the check by plaintiff." *Id.* at 648-649.

In our case, defendant argues that the letters and emails that it sent plaintiffs through Ms. Sparks and its attorneys provided clear, full, and explicit statements of intent to satisfy its debt to plaintiff in full. The Court disagrees. The correspondence does not contain a statement that indicates that plaintiff's acceptance of the payment resolves the ongoing dispute between the parties about the setoff and fully settles and satisfies the claim. In *Nationwide*, a letter that accompanied the check was insufficient to overcome doubt that plaintiff understood payment to be in full satisfaction of the debt. In our case, the letter did not even accompany the payment, but was sent nearly a month in advance. Defendant argues that plaintiff's admissions at his deposition overcome this.

At deposition, plaintiff Kuyper admitted that he understood that defendant intended to set off against the note. He also admitted that once he received the payments he connected them to the November 23, 2021 letter. But defendant never asked and plaintiff Kuyper never admitted that he understood the payment to resolve the remaining balance due on the promissory note. Similarly to plaintiff in *Fritz,* plaintiff filed suit after attempts to discuss the matter with defendant soured. In fact, plaintiff filed suit for declaratory judgment *on the same day* that he received payment by wire transfer. The evidence in this case does not establish that plaintiff knew that the wire transfer had taken place at the time he filed suit for declaratory judgment, nor does it establish that plaintiff had the option of rejecting the wire transfer. Unlike the receipt of a check with a "paid in full" notation, no action was required of plaintiff to endorse or negotiate the wire transfer. Like the Court in *Nationwide*, this Court finds that the November 23, 2021 letter, coupled with the fact that the payment was made by wire transfer, is "insufficient as a matter of law to effect an accord and satisfaction." There was no meeting of the minds between the parties and defendant's motion is denied.

Because an accord and satisfaction does not exist as a matter of law, plaintiff was not required to tender back payment to file its suit.

IV. Plaintiff's Motion for Summary Disposition of Count I and II of Defendant's Counter-Complaint pursuant to MCR 2.116 (C)(10) and (C) (8)

Plaintiff listed three grounds for summary disposition in its motion and did not specify to which count those theories apply. Based on review of the pleadings, it appears plaintiff moves to

dismiss Count I under MCR 2.116 (C)(8) and (10) and Count II under MCR 2.116 (C)(7)(8) and (10). First the Court considers the motions under (C)(8) and (10) to both counts.

These issues are matters of contract interpretation. Plaintiff contends that defendant's claims under Section 3.05 and 3.09 of the Complaint are barred because plaintiff submitted a "final" Net Working Capital Statement that was final, binding, and non-appealable by defendant and because defendant's methodology to value inventory was incorrect. The Court disagrees with plaintiff's interpretation of the Contract and finds that defendant stated a claim upon which relief can be granted and that a genuine issue of material fact exists as to whether plaintiff breached Section 3.05 and 3.09 of the APA.

To interpret the APA, the Court must determine the parties' intent at the time they entered the contract. *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362; 666 NW2d 251 (2003). "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory v Continental Ins Co,* 473 Mich 457, 464; 703 NW2d 23 (2005). "A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation." *Gortney v Norfolk Western Ry Co*, 216 Mich App 535, 540-541; 549 NW2d 612 (1996). A dispute between the parties about the language does not in itself create an ambiguity and "[i]f the terms of the release are unambiguous, contradictory inferences become 'subjective and irrelevant,' and the legal effect of the language is a question of law to be resolved summarily." *Id.* Ultimately, the Court cannot create an ambiguity where none exists and the Court should avoid consideration of extrinsic evidence except as required to clarify ambiguities in the contract. *Smith v Physicians Health Plan*, 444 Mich 743, 514 NW2d 150 (1994).

To aid in its interpretation, the Court is to consider the contract as a whole and "avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc,* 468 Mich 459, 468; 663 NW2d 447 (2003). The Court must also avoid interpretation that "would impose an absurd or impossible condition on one of the parties." *Wembelton Development Co v Travelers Ins Co,* 45 Mich App 168, 172; 206 NW2d 222 (1973).

In Section 3.05 of the APA, plaintiffs jointly and severally warrant, among other things, that the Financial Statements were

> Prepared in accordance with usual and customary accounting principles, are in accordance with the books and records of Seller, and such books and records of Seller are true, complete, and accurate in all respects. To the extent Seller's usual and customary accounting principles differ from Generally Accepted Accounting Principles, such differences have been described in footnotes to the reviewed Financial Statements, or shall be described on Schedule 3.05.

Financial Statements include:

> (a) the balance sheets and related statements of income and cash flows of the Business for the fiscal years ended December 31, 2015, December 31, 2016, and December 31, 2017, and (b) the internally prepared balance sheet and related statements for each full calendar month in 2018 that has ended prior to the Closing Date.

Defendant alleges plaintiffs violated this because they improperly valued inventory that it sold to defendant, did not disclose the valuation methods that they used, which differed from GAAP, failed to write-off obsolete or slow-moving inventory, and failed to provide true, accurate, and complete financial statements. Plaintiffs do not provide the court with evidence to dispute these allegations and instead argue that defendant cannot raise these issues now because defendants submitted a final net working capital statement.

The Court finds that a genuine issue of material fact exists about whether Ms. Sparks' May 20, 2019 was the final Actual Net Working Capital Statement. On the one hand, there was no formal extension after September 30, 2018. Parts of Ms. Sparks May 20, 2019 appear to suggest finality in the calculation. She states "[t]his details the final adjustments that were needed to be made … the Net amount due to New Nuvar from Old Nuvar is $476.24. I'm thinking you and Barb can just take Jeff and I to dinner and we'll call it even," and "[s]o overall it appears the adjustments were pretty much breakeven which is great news." Whether the May 20, 2019 Actual Net Working Capital Statement is final and binding on the parties presents a genuine issue of material fact.

On the other hand, Ms. Sparks testified at her deposition that the parties communicated frequently outside of these emails and understood that this true-up was simply to update plaintiff Kuyper so that he could close his business, which the parties referred to as "Old Nuvar." She indicated that plaintiff Kuyper knew these would not be complete, but that he could amend his taxes later if needed to reflect additional changes. She also states that the parties sent checks back and forth to one another as the numbers fluctuated with each new "true up." Whether the parties by their words and actions agreed to continue negotiations with respect to a final Actual Net Working Capital Statement presents a genuine issue of material fact.

The Court also finds that these are separate issues under the contract. Even if there is a final Actual Net Working Capital Statement, it does not preclude warranty claims.

Section 1.05 of the APA addresses Net Working Capital and its calculation. Section 3.05 of the APA addresses plaintiff's warranty of the Financial Statements. Importantly, the time to bring claims under each is different pursuant to Section 6.01 of the APA. According to Section 6.01 of the APA, warranties under Section 3.05 of the APA survive for "30 days after the expiration of the applicable statute of limitations period, or sixty months after the Closing Date, whichever is

later." Section 6.01 also states that claims for violations of representations under Section 3.09 must be asserted within eighteen (18) months after the Closing Date.

Completion of an Actual Net Working Capital Statement is to be done in ninety (90) days pursuant to Section 1.05 of the APA. If claims were barred for warranties in Article III as soon as the Actual Net Working Capital was completed at the ninety-day deadline, there would be no reason for Section 6.01, which provides timelines to make claims under the warranties, to exist. All claims would be barred at ninety (90) days. This would render Section 6.01 "surplusage or nugatory." The Court finds that the parties intended the warranties to survive past the Actual Net Working Capital Statement deadline to account for issues that may not be apparent within the first ninety (90) days.

In addition, the Court does not find any evidence that refutes defendant's claims that plaintiff failed to comply with GAAP, failed to write off obsolete inventory, and failed to provide true, accurate, and complete inventory statements. Instead, plaintiff takes the Court through a cumbersome analysis for the reasons why defendant's valuation methods for the Actual Net Working Capital Statement are incorrect. Again, the Court finds that valuation of the Actual Net Working Capital is a distinct issue from any warranty claims.

While the value in the Actual Net Working Capital statement may be relevant to the defendant's alleged damages for breaches under Section 3.05 and 3.09 of the APA, whether the Actual Net Working Capital Statement was completed does not resolve the allegation that plaintiff violated these provisions. To find otherwise would negate the warranties and representations all together. Plaintiff fails to proffer evidence that supports its conclusion that no material facts exist as to the warranties and representations. The warranties are distinct and contemplate that plaintiff could violate the warranties and representations in Article III separately from the Net Working Capital valuation in Article I. For these reasons, plaintiff's motion for summary disposition of Counts I and II pursuant to MCR 2.116 (C) (8) and (10) are denied.

V. Plaintiff's Motion for Summary Disposition of Count II of Defendant's Counter-Complaint

Plaintiff makes an additional motion to dismiss count II under MCR 2.116 (C)(7) on grounds that the claim is barred by Section 6.01 of the APA. Essentially, plaintiff asks the Court to find that the act of asserting a claim is so narrow as to require a lawsuit. If the word "claim" requires a lawsuit, Count II of defendant's countercomplaint is time-barred by Section 6.01 of the APA. As discussed in Section IV, this is a matter of contract interpretation.

Section 6.01 of the APA provides, in pertinent part, that

> All representations and warranties of the parties contained in this Agreement shall survive the Closing Date until the date that is eighteen (18) months after the Closing Date; provided, however, (i) representations or warranties which are the basis for claims asserted under the Agreements prior to the expiration of such time period shall survive until final resolution of those claims…

Defendant argues that this language is a survival clause that explains that the representations and warranties do not merge into the agreement and survive closing for the referenced time periods. Defendant asserts that when it sent a letter to plaintiff on November 26, 2019 that outlined its claim to indemnification under the contract and reserved its right to the same, it met the 18-month time period, which triggered survival of plaintiff's representations and warranties. Defendant argues it maintained the right to file suit at any time thereafter to satisfy its claims. Plaintiff argues that the survival clause outlines a contractual statute of limitations. The Court disagrees.

Section 9.03 of the APA entitled "Notices" states that

> All notices, requests, consents, **claims**, demands, waivers and other communications hereunder shall be in writing and shall be deemed to have been given (a) when delivered by hand (with written confirmation of receipt); (b) when received by the addressee if sent by a nationally recognized overnight courier (receipt requested); (c) on the date sent by facsimile or e-mail of a PDF document (with confirmation of transmission) if sent during normal business hours of the recipient, and on the next business day if sent after normal business hours of recipient; or (d) on the third day after the date mailed, by certified or registered mail, return receipt requested, postage prepaid. Such communications must be sent to the respective parties at the following addresses (or at such other address for a party as shall be specified in a notice given in accordance with this Section). (emphasis added).

The parties do not dispute that they closed on the agreement on May 31, 2018. On November 26, 2019, defendant sent the claim letter to plaintiff Kuyper and Attorney Helder at Cunningham Dalman, P.C., by Federal Express Overnight, and by email. While neither party provided the Court with a return receipt for the letter or a time stamp that indicates at what time defendant emailed the letter to plaintiff, there is no dispute that plaintiff received the letter. According to the terms of Section 9.03, the latest it was received was by email on November 27, 2019, two days before the contractual deadline to assert a claim. Because defendant asserted a claim in accordance with Section 9.03 within the 18 months required by Section 6.01, the Court finds that plaintiff's representations and warranties survived until resolved. While the Court acknowledges that this leaves plaintiff vulnerable to litigation for an undefined time period, the Court cannot render Section 9.03 nugatory or create an ambiguity where none exists.

The Court's position is supported by *Pinckney Community Schools v Continental Cas Co,* 213 Mich App 521; 540 NW2d 748 (1995) wherein the Court of Appeals defined the term "claim" broadly and determined that to narrowly interpret the term "claim" is "simply inaccurate." *Id.* at 530. In *Pinckney Schools*, *Pinckney* provided defendant insurance company with notice that *Pinckney* was the defendant in a discrimination lawsuit. After several years, a judgment was entered against *Pinckney. Pinckney,* which no longer had an insurance policy with Continental, made an indemnification claim, which Continental denied. Similarly to this case, Continental argued that Pinckney had not made a valid claim when it provided written notice of the discrimination lawsuit and that instead it needed to have sought the indemnification within the timeframe provided by the policy. The policy language "provided coverage only for claims made 'during the policy period.'" *Id.* at 525. The Court of Appeals found that the term "claim" had multiple meanings and should not be construed narrowly by the Courts.[3]

While the APA does not specifically define a claim, it does offer guidance about how such claim must be delivered and makes clear that the claim must be written. The Court will not narrow the definition beyond that intended and agreed upon by the parties at the time of contract. Plaintiff's Motion to Dismiss Count II of Defendant's Counter-Complaint based on MCR 2.116 (C)(7) is denied.

VI. Plaintiff's Motion for Summary Disposition of Count III Under MCR 2.116 (C)(8) and (C)(10)

Next, the plaintiff asks the Court to dismiss defendant's breach of warranty claim under Section 3.06 of the APA. An express warranty is "no different than any other term of the contract." *Heritage Res, Inc v Caterpillar Fin Servs Corp*, 284 Mich App 617, 635; 774 NW2d 332 (2009). Thus, to succeed in a breach of warranty claim, defendant must prove that it suffered damages due to plaintiff's breach. The Court finds that there is no genuine issue of material fact about whether defendant has suffered damages.

Plaintiffs deposed Kurt Laansma, the Director of Manufacturing Engineering for Nuvar, Inc. At his deposition, Mr. Laansma testified that both thermoforming machines function as intended and that he does not have ongoing concerns about fires with the machines. Plaintiff provides testimony that the machines function normally and defendant fails to refute that. Instead, defendant provides an inconclusive insurance report about the fire. Defendant also makes a blanket

[3] Specifically, the Court found that claim is properly defined as "To demand as one's own or as one's right; to assert; to urge; to insist. A cause of action. Means by or through which claimant obtains possession or enjoyment of privilege or a thing. Demand for money or property as of right , e.g., insurance claim." (citing Black's Law Dictionary (6th ed), p. 247. "A demand for something as due; as assertion of a right or an alleged right...an assertion of something as a fact...a right to claim or demand; a just title to something...a request or demand for payment in accordance with an insurance policy, a workers' compensation law, etc." (citing Random House Webster's College Dictionary, p. 249). "A demand of a right or alleged right; a calling on another for something due or asserted to be due" (citing Central Wholesale Co v Chesapeake & O.R. Co, 366 Mich 138, 149; 114 NW2d 221 (1962).

assertion of over $700,000 in damages to purchase new machines when, according to financial statements, the depreciated value of the machinery at sale was only $171,894.94.

For these reasons, the Court finds that defendant has not stated a claim upon which relief can be granted and dismisses Count III pursuant to MCR 2.116 (C)(8).

VII. Plaintiff's Motion to Extend Discovery

Finally, the Court considers plaintiff's motion to extend discovery. Plaintiffs request that discovery be extended 45 days to afford time to serve and receive responses to subpoenas for information from Steelcase and Miller Knoll. Plaintiffs assert that the information they will request is relevant to whether the inventory defendant wishes to setoff was usable or saleable.

Plaintiff opines that a critical issue to the calculation of inventory are the definitions of "usable" and "saleable." Section 3.09 of the APA provides that "[a]ll of the inventory of the Business... consists of a quality and quantity usable and, with respect to finished goods saleable, in the ordinary course of business." It is plaintiff's position that defendant's definition of usable and saleable is too narrow given its past practice and experience with customers. Defendant contends that inventory that sits for longer than nine (9) months is not usable or saleable in the ordinary course of business. While some inventory may sit for some time, it is not rendered unusable by time because as long as product lines exist, there may be a need for the inventory. Plaintiff seeks to have internal reactions from customers Steelcase and Miller Knoll to support the position that the inventory was still, in fact, usable and saleable.

Defendant objects to the request for several reasons. The Court's initial discovery deadline was September 2, 2022. The parties agreed to extend the deadline until October 17, 2022. On September 30, 2022, plaintiff objected to certain discovery requests. In response the parties agreed to a final extension until November 18, 2022. In an email, the parties agreed that, except for specific issues and their ongoing duty to supplement existing discovery, "discovery was set." Defendant does not believe that the discovery will provide evidence that the plaintiffs do not already have and will only prejudice defendant's customers against them and hurt business. Further, defendant offered to provide their communications to plaintiff, but plaintiff declined.

In *Nuriel v Young Women's Christian Ass'n of Metro Detroit*, 186 Mich App 141, 146; 463 NW2d 206 (1990), the Court of Appeals directs the court to

> Consider whether the granting of discovery will facilitate or hamper the litigation. Factors such as timeliness of the request, the duration of the litigation and the possible prejudice to the parties should also be considered.

Plaintiffs filed this motion on the final day of discovery after a ten-month discovery period. This period included several extensions as well as confirmation between the parties that discovery would conclude on November 18, 2022. The Court finds that this will only serve to hamper and further delay litigation of this case. The requests that plaintiff seeks are not critical to the determination of whether an item is "saleable" or "usable" given the extent of discovery that they have already completed on the same subject. The Court also finds that any benefit of the discovery request is outweighed by the prejudice that defendant would likely experience from its customers. Plaintiff's motion to extend discovery is denied.

VIII. Conclusion

Defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and (10) is denied. Plaintiff's Motion for Summary Disposition of Counts I and II pursuant to MCR 2.116 (C) (7) (8) and (10) is denied. Plaintiff's Motion for Summary Disposition of Count III pursuant to MCR 2.116 (C) (8) and (10) is granted.

Pursuant to MCR 2.116(I)(5) the parties may amend their pleadings within fourteen (14) days of this Order in accordance with MCR 2.118.

IT IS SO ORDERED.

Dated: February 3, 2023

Hon. Jon A. Van Allsburg, Circuit Judge