STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

FCA US LLC, f/k/a CHRYSLER GROUP, LLC,

Plaintiff,

v.

Case No. 16-155786-CB

Hon. Victoria A. Valentine

RIGHTTHING, LLC, ADP RPO, LLC, APC WORKFORCE SOLUTIONS, LLC d/b/a ZEROCHAOS, COMPUTER AND ENGINEERING SERVICES, INC., KYYBA, INC., AEROTEK, INC., ALLMERICA FINANCIAL BENEFIT INSURANCE COMPANY and ~~ACE AMERICAN INSURANCE COMPANY~~,

Defendants.

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OPINION AND ORDER REGARDING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10) AS TO COUNTS I AND II OF PLAINTIFF'S SECOND AMENDED COMPLAINT

This matter is before the Court on Plaintiff's Motion for Summary Disposition under MCR 2.116(C)(10) as to Counts I and II of Plaintiff's Second Amended Complaint. The Court, having reviewed the parties' submissions and pleadings dispenses with oral argument under MCR 2.119(E)(3).

OPINION

I.

Overview

Plaintiff FCA US, LLC f/k/a Chrysler Group, LLC ("Chrysler") and Defendant RightThing, LLC ("RightThing") entered into a Master Service Agreement ("MSA") dated May 16, 2011 whereby RightThing was to provide "recruitment process outsourcing services" to Chrysler.[1] In order to fulfill its obligations to Chrysler under the MSA, RightThing contracted with Defendant APC Workforce Solutions, LLC d/b/a ZeroChaos ("ZeroChaos"). Under the February 22, 2012 Management Services Agreement between RightThing and ZeroChaos ("ZeroChaos Agreement"), ZeroChaos agreed to provide certain services related to RightThing's temporary workforce program.[2]

In March and April of 2012, ZeroChaos entered into "Staffing Company Agreements" with three Staffing Companies, Defendant Computer Engineering Services ("CES"); Defendant KYYBA, Inc. ("KYYBA"), and Defendant Aerotek, Inc. ("Aerotek"). The Staffing Companies agreed to "recruit, interview, select, hire and assign employees ("Staffing Company Worker"), who, in Staffing Company's judgment, are best qualified to perform the Work requested by ZeroChaos."

Chrysler was named as a defendant in four lawsuits arising out of motor vehicle accidents involving drivers alleged to be employees of the Staffing Companies.

In two Washtenaw County lawsuits, the plaintiffs, Laura Holliday and Gregory Green, alleged injuries arising out of an automobile accident occurring on or about July 19, 2012 and

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[1] Pl's Motion, Exh 2, MSA.
[2] Pl's Motion, Exh 3, ZeroChaos Agreement, p 1.

involving Bradley Erdman ("Erdman"). It was alleged that, at the time of the accident, Erdman, an employee of CES, was driving a vehicle owned by Chrysler.[3] The Holliday and Green suits were settled with Chrysler contributing $456,250 and ZeroChaos' insurer, National Union Fire Insurance Company of Pittsburgh ("National Union"), contributing $456,250.

In a Texas lawsuit, the plaintiff, Dennis Olson, alleged that he suffered serious injuries as a result of a motor vehicle accident occurring on or about June 2014 and involving Adam Martin ("Martin"). It was alleged that at the time of the accident Martin, an employee of KYYBA, was driving a vehicle owned by Chrysler and was "performing work for [Chrysler] such that it is liable for Plaintiff's damages under the doctrine of respondeat superior."[4] The Olson suit settled with Chrysler paying $2,500,000.

On September 28, 2016, the Estate of Ahmad Anique Ashraf filed a complaint in the Connecticut Superior Court, Judicial District of New London, alleging that Ashraf suffered fatal injuries which resulted from a motor vehicle accident involving James Sposito ("Sposito") in December 2015.[5] Sposito was allegedly employed by Defendant Aerotek, Inc. ("Aerotek") to perform services for Chrysler.[6] The Ashraf Complaint against Chrysler was withdrawn on March 22, 2017.[7]

RightThing declined to accept Chrysler's tender of claims relating to the Holliday and Green lawsuits as well as the Olson and Ashraf suits.[8]

Chrysler filed the instant action seeking to recover the amounts it paid to defend and settle the lawsuits. The instant motion relates solely to Chrysler' claims under Count I (Breach of

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[3] Second Amended Complaint, at ¶¶ 11-12, 59; Second Amended Complaint, Exhibits A and B, Holliday and Green Complaints.
[4] Second Amended Complaint, Exhibit C, Olson Petition.
[5] *Id.,* Exh D, Ashraf Complaint.
[6] Second Amended Complaint, ¶ 98.
[7] *Id.*, ¶¶ 14-15.
[8] Pl's Motion, Exhs 6, 12 and 16.

Contract – Contractual Indemnification) and Count II (Breach of Contract – Insurance) against RightThing.

II.

Standard of Review

A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Universal Underwriters Group v Allstate Ins Co,* 246 Mich App 713, 720; 635 NW2d 52 (2001). The court, in reviewing a motion under MCR 2.116(C)(10), "considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion." *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citation omitted). The motion may be granted "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.*

III.

Law Regarding Breach of Contract/Contract Interpretation

"A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). [9]

A court's "goal in contract interpretation is to give effect to the intent of the parties, to be determined first and foremost by the plain and unambiguous language of the contract itself." *Wyandotte Elec Supply Co v Electrical Technology Sys, Inc*, 499 Mich 127, 143-144; 881 NW2d 95 (2016). *See also Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d

[9] The MSA is governed by Michigan law. Pl's Exh 2, MSA Art XIV § 14.5.

491 (2001) ("Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement."); *Kendzierski v Macomb County*, 503 Mich 296, 311-312; 931 NW2d 604 (2019) (emphasis in original) ("A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*" and a court "will not create ambiguity where the terms of the contract are clear.")

"[T]he law presumes that the parties understand the import of a written contract and had the intention manifested by its terms." *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004) (quotation marks and citations omitted.) "[O]ne who signs a contract will not be heard to say, when enforcement is sought, that [he or she] did not read it, or that [he or she] supposed it was different in its terms." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 59; 664 NW2d 776 (2003) quoting *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 567-568; 596 NW2d 915 (1999).

"[I]t has long been the law in this state that courts are not to rewrite the express terms of contracts." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199-200; 747 NW2d 811 (2008). *See also Northline Excavating, Inc v Livingston Co,* 302 Mich App 621, 628; 839 NW2d 693 (2013). (The court "cannot read words into the plain language of a contract.")

Under Michigan law, contracts are subject to the parol evidence rule which prohibits the use of extrinsic evidence to interpret unambiguous language within the contract. *Shay v Aldrich*, 487 Mich 648, 667; 790 NW2d 629 (2010). "However, if a contract is ambiguous, then extrinsic evidence is admissible to determine the actual intent of the parties." *Id.* (quotation marks and citation omitted). The question of whether contract language is ambiguous is a question of law. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

"An ambiguity may be either patent or latent." *Shay*, 487 Mich at 667. A court may not use extrinsic evidence to identify a patent ambiguity "because a patent ambiguity appears from the face of the document." *Id.* "However, extrinsic evidence may be used to show that a latent ambiguity exists."[10] *Id.* A latent ambiguity is one "'that does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed.'" *Id.* at 668 quoting *Grosse Pointe Park v Mich Mun Liability & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005) (opinion by Cavanagh, J.) In other words, "[a] latent ambiguity exists when the language in a contract appears to be clear and intelligible and suggests a single meaning, but other facts create the necessity for interpretation or a choice between two or more possible meanings."[11] *Shay*, 487 Mich at 668. (citation and quotation marks omitted). *See also Kendzierski*, 503 Mich at 317.

The party alleging the existence of a latent ambiguity has the burden to rebut the presumption that the contracting parties' intent is manifested by the actual language used in the contract. *City of Grosse Pointe Park*, 473 Mich at 202 n 11 (Cavanagh, J.) and 219 (Young, J.)[12]

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[10] Chrysler argues that the use of extrinsic evidence to explain the language of the MSA is contrary to the integration clause found in § 14.6. However, this argument was not raised until Chrysler's Reply brief and therefore, is not properly before this Court. *See* MCR 2.116(G)(1)(a)(iii); *Bowman v Walker*, __ Mich App __; __ NW2d __ (Case No. 355561 issued Feb 10, 2022) at slip op 5 n 3. And, in any event, Chrysler has abandoned this argument where it merely states that the integration clause prevents the use of extrinsic evidence and cites *no* legal authority in support of its position. It makes no legal analysis as to how integration clauses operate generally and as to whether the presence of an integration clause in a contract prevents the consideration of extrinsic evidence to determine if a latent ambiguity exists. "If a party fails to adequately brief a position, or support a claim with authority, it is abandoned." *Moses, Inc v Southeast Mich Council of Governments*, 270 Mich App 401, 417; 716 NW2d 278 (2006). Furthermore, Chrysler based its April 26, 2022 Motion in Limine to Exclude Parol Evidence on the existence of the integration clause and such motion was denied by this Court's predecessor in an Order dated June 8, 2022.

[11] If it is determined that a latent ambiguity exists, the extrinsic evidence is examined again to ascertain the meaning of the contract language at issue. *Shay*, 487 Mich at 668.

[12] Justices Cavanagh and Young agreed that the burden of proof was with the party alleging the latent ambiguity but disagreed as to whether a clear and convincing standard applied. *City of Grosse Pointe Park*, 473 Mich at 202 n 11 (Cavanagh, J.) and 473 Mich at 209 (Young, J.).

However, "[p]arol evidence under the guise of a claimed latent ambiguity is not permissible to vary, add to, or contradict the plainly expressed terms of [a] writing, or to substitute a different contract for it, to show an intention or purpose not therein expressed." *Michigan Chandelier Co v Morse*, 297 Mich 41, 48; 297 NW 64 (1941). *See also Grosse Pointe Park*, 473 Mich at 218 (opinion by Young, J.) citing *Wilkie*, 469 Mich at 51 (emphasis in original) (In considering whether a latent ambiguity exists "a court must never cross the point at which the written contract is *altered* under the guise of contract *interpretation*.")

IV.

Count I: Breach of Contract-Contractual Indemnification

"A right to indemnification can arise from an express contract, in which one of the parties has clearly agreed to indemnify the other." *Hubbell, Roth & Clark, Inc v Jay Dee Contractors, Inc*, 249 Mich App 288, 702; 642 NW2d 700 (2001). An indemnity contract is construed in the same fashion as are contracts generally."[13] *Id.*

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[13] RightThing, citing *Pritts v J I Case Co*, 108 Mich App 22, 29; 310 NW2d 261 (1981), argues that the MSA should be strictly construed against Chrysler "who dictated 'roadstopper' terms." However, the rule of contra proferentem is to be applied only where a contract is ambiguous and only if "all conventional means of contract interpretation, including the consideration of relevant extrinsic evidence, have left the jury unable to determine what the parties intended their contract to mean." *Klapp v United Ins Group Agency, Inc.*, 468 Mich 459, 470-471; 663 NW2d 447 (2003). As will be explained, the Court determines that no latent ambiguity exists. Further, even if there were an ambiguity, the rule of contra proferentem is to be used by the finder of fact, not by the court in deciding a motion for summary disposition. Lastly, the parties agreed in § 14.14 of the MSA that:

> The parties have participated jointly in the negotiation and drafting of this Agreement. If an ambiguity or question of intent or interpretation arises, this Agreement must be construed as if drafted jointly by the parties and no presumption or burden of proof may favor or disfavor any party by virtue of authorship of any of the provisions of this Agreement. [Pl's Motion, Exh 2, MSA, p 50, § 14.14.]

Thus, the parties agreed that "no presumption . . . may favor or disfavor any party by virtue of authorship" and such provision is apparently enforceable. *See DaimlerChrysler Corp v G Tech Prof Staffing, Inc*, 260 Mich App 183, 187; 678 NW2d 647 (2003) citing *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 370; 666 NW2d 251 (2003) (Where the court, addressing a similar contractual provision, stated that "the parties may agree to any terms they wish that are not otherwise prohibited by law.")

A. Article XI Section 11.1 of the MSA

In support of its indemnification claim, Chrysler relies on Section 11.1 of the MSA which provides, in pertinent part:

> Supplier agrees to indemnify, defend and hold harmless each of the Authorized Users and their respective officers, directors, employees, agents, successors, and assigns from any and all Losses and threatened Losses due to any claims arising from or in connection with any breach by Supplier of this Agreement, or for injury or death of any person and damage or loss of any property, whether allegedly or actually resulting from in whole or in part, *any act*, omission, or work of Supplier, including its employees, agents, representatives and subcontractors, and from:
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> ***
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> e. Supplier's breach of this Agreement;
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> h. Occurrences that Supplier is required to insure against pursuant to the Agreement;
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> ***
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> m. Supplier's breach of any of its obligations (regarding Approved Subcontractors) under Section 5.14 of this Agreement; and
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> ***
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> s. Any violation by Supplier or its employees or Supplier's vendors of any Applicable Law. [14]

RightThing is the "Supplier" under the MSA and Chrysler is an "Authorized User."[15] "Subcontractor" is defined as "a third-party business entity that provides any of the Services, including any affiliate of Supplier."[16] "Services" includes "any other service provided by Supplier directly or indirectly under this Agreement and all Work Product provided under this Agreement.[17]

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[14] *Id.,* Exh 2, MSA, pp 44-45, § 11.1.
[15] *Id.*, p 1; p 5, § 1.16.
[16] *Id.,* p 13, § 1.82.
[17] *Id.,* p 12, § 1.79(f).

Chrysler asserts that under Article XI Section 11.1 of the MSA "RightThing agreed to defend and indemnify Chrysler for any and all claims arising out of any act of a staffing company worker providing services to Chrysler."[18]

RightThing does not dispute Chrysler's assertion that the plain language of the indemnification provision in the MSA is broad enough to require indemnification for the underlying claims. Rather, RightThing argues that this motion should be denied because the MSA is ambiguous as to its indemnity and insurance requirements. RightThing asserts that there is a latent ambiguity in the provisions of the MSA because "[t]here was never any intention of the parties to the [MSA] to have RightThing insure and indemnify Chrysler for accidents involving Chrysler-owned vehicles at all. It was clearly not the intention for such insurance and indemnification when the workers were not acting within the scope and course of their employment."[19] RightThing relies on extrinsic evidence, including deposition testimony of parties allegedly involved with negotiating the MSA, to demonstrate that the parties' intent was contrary to the plain language of the MSA and therefore, a latent ambiguity exists.

In support of its argument RightThing cites Shay *v Aldrich*, 487 Mich 648, 667; 790 NW2d 629 (2010) for the general rule regarding latent ambiguities. However, RightThing does not discuss the specific language of § 11.1 which it claims to be latently ambiguous.

It appears from the arguments made in RightThing's response brief that it is arguing that the portion of § 11.1 requiring indemnification for "any and all Losses and threatened Losses due to any claims arising from or in connection with any breach by Supplier of this Agreement, or for injury or death of any person . . . whether allegedly or actually resulting from in whole or in part, *any act* . . ." means "any act" of a supplemental worker *except* those acts occurring while driving

[18] Pl's Motion, p 15.
[19] Def's Response, p 14.

a Chrysler owned vehicle and/or while the worker is not acting in the scope and course of his or her employment.[20]

However, reading Section 11.1 in the way RightThing presumably asserts it should be read, would require the Court to alter the MSA by varying the terms of § 11.1. RightThing is not seeking to use extrinsic evidence to explain the meaning of the terms or a term in the indemnification provision but is seeking to use extrinsic evidence to contradict the provision's plain language. Effectively, RightThing is attempting to demonstrate the existence of a different contract than that executed by the parties. However, as was previously discussed, extrinsic evidence "under the guise of a claimed latent ambiguity is not permissible to vary, add to, or contradict the plainly expressed terms of [a] writing, or to substitute a different contract for it, to show an intention or purpose not therein expressed." *Michigan Chandelier Co*, 297 Mich at 48. *See also Grosse Pointe Park*, 473 Mich at 218; and *McDonald*, 480 Mich at 199-200 ("[I]t has long been the law in this state that courts are not to rewrite the express terms of contracts.")

Additionally, the Court agrees with Chrysler that the extrinsic evidence proffered by RightThing does not create the necessity for interpretation or a choice between two or more possible meanings. *See Shay*, 487 Mich at 668. (citation and quotation marks omitted) (extrinsic evidence presented to establish the existence of a latent ambiguity must support the argument "that

[20] *See e.g.* Def's Response, pp 11,13. This Court should not be in the position where it has to surmise how RightThing alleges the indemnification provision should be interpreted and RightThing' failure to even discuss the language of the MSA is essentially an abandonment of the latent ambiguity argument. *See Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008) (It is well-settled that "[t]rial courts are not the research assistants of the litigants" and that "the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute."); *Mitcham v Detroit,* 355 Mich 182, 203; 94 NW2d 388 (1959) (It is not enough for a party to "simply announce a position or assert an error and leave it up to this Court to discover and rationalize the basis for [its] claims . . . ."); *Moses, Inc v Southeast Mich Council of Governments*, 270 Mich App 401, 417; 716 NW2d 278 (2006) ("If a party fails to adequately brief a position, or support a claim with authority, it is abandoned.")

the contract language at issue, under the circumstances of its formation, is susceptible to more than one interpretation.")

The deposition testimony of the parties allegedly involved in negotiating the MSA for Chrysler and RightThing does not support the argument that a latent ambiguity exists. The most that can be gleaned from the deposition testimony cited by RightThing is that there was no discussion during negotiations about the requirements of indemnification and insurance for the use of Chrysler owned vehicles by supplemental workers. [21] However, RightThing does not explain how the *lack* of discussion on the issue is evidence of intent contrary to the plain language of the indemnification and insurance provisions of the MSA.

Additionally, although RightThing asserts that at the time the MSA was negotiated the focus of the parties was upon talent acquisition for permanent workers for Chrysler not for supplemental workers, the MSA itself contemplates the recruitment of supplemental workers.[22]

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[21] RightThing asserts that John Hancock was the person primarily negotiating the MSA on its behalf. Def's Response, p 2. In support of its argument, RightThing cites deposition testimony of Hancock in which he stated that he never discussed the use of Chrysler owned vehicles with anyone from Chrysler prior to signing the MSA. Def's Response, Exh D, Hancock Dep, pp74-76. While Hancock signed the MSA, he stated at his deposition that "his responsibility for negotiations [was] commercial" and "anything to do with the indemnity, insurance, the legal aspects, [he] was not responsible for." *Id.* p 59. RightThing also references deposition testimony of Matthew Meyers, CFO of RightThing, but he stated that he did not negotiate the indemnification or the insurance clauses. Def's Response, Exh G, Meyers Dep, pp 43,45. Additionally, RightThing cites the testimony of Terry Terhark, the owner of RightThing, who agreed in his deposition that it wasn't RightThing's intention to provide indemnity or insurance coverage for accidents involving supplemental workers driving Chrysler owned vehicles. Def's Response, Exh A, Terhark Dep, pp 93-94. But Terhark did not participate in the day-to-day negotiations of the MSA and did not recall reading the indemnification provision before the MSA was signed. He also did not recall discussing the insurance provision with anyone at RightThing or Chrysler. Def's Response, Exh A, pp 51-53.

RightThing states that Shellie Medici and Joseph Delikat represented Chrysler in the negotiations. Def's Response, p 2. However, in the testimony cited by RightThing Delikat stated that he did not recall participating in discussions about indemnification or insurance. Def's Response, Exh B, Delikat Dep, p 27. Medici agreed in her deposition testimony that there was no discussion during negotiations that Chrysler expected RightThing to provide insurance and indemnification for damages caused by supplemental workers' use of vehicles assigned to them by Chrysler. Def's Response, Exh C, Medici Dep, pp 31-32.

[22] Exhibit 1 to the MSA entitled "Statement of Work to the Master Service Agreement for Recruitment Process Outsourcing Services by and between Chrysler and Supplier (RightThing)" states under a section entitled "Supplier Responsibilities" that:

> Supplier shall provide and perform:

Based upon the foregoing, summary disposition is granted in favor of Chrysler on the issue of liability only with regard to any breach of contract claim based upon Article XI Section 11.1 of the MSA.[23]

B. Article V Section 5.14 of the MSA- Subcontractor Obligations

Article V ("Additional Supplier Obligations and Responsibilities") of the MSA states, in pertinent part:

> **5.14 Approved Subcontractors.** Supplier may subcontract its obligations to perform the Services under this Agreement to an Approved Subcontractor, if in each instance:
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> b. Supplier enters into a subcontract with that Subcontractor *with terms that are no less protective of Chrysler's rights than the terms of this Agreement*, including but not limited to, provisions regarding intellectual property, confidentiality, competitor restrictions, warranties and indemnities . . . .[24]

Chrysler argues that RightThing, as Supplier, breached Section 5.14(b) of the MSA by failing to secure indemnity for Chrysler from ZeroChaos, as Subcontractor.[25] The Management Services Agreement between RightThing and ZeroChaos contains the following provision:

> **10 INDEMNIFICATION.**
>
> **10.1** *SUPPLIER'S INDEMNIFICATION OF CUSTOMER.* SUPPLIER SHALL DEFEND, INDEMNIFY AND HOLD HARMLESS CUSTOMER FROM

- Recruiting tasks and activities related to salaried personnel;
- Recruiting tasks and activities related to hourly personnel; and
- *Recruiting tasks and activities related to supplemental contract workers*. [Pl's Motion. Exh 2, MSA Exh 1, p 1. Emphasis added.]

Hancock agreed in his deposition that the Statement of Work was part of the MSA in May of 2011. [Def's Response, Exh D, Hancock Dep, pp 46-47.]

[23] For ease of reference, when referring to summary disposition as to "liability only" the Court is referring to summary disposition on the elements of the existence of a contract and the breach of that contract. *See Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). This does not include a determination of the existence of or the amount of damages resulting from the breach.

[24] Pl's Motion, Exh 2, MSA, p 30, § 5.14(b) (emphasis added).

[25] As was noted above, under § 11.1(e) and (m) of the MSA, RightThing agreed to indemnify Chrysler for RightThing's breach of the § 15.14 of the MSA.

> ANY AND ALL ACTUAL OR THREATENED CLAIMS, DAMAGES, LOSSES, SUITS, JUDGMENTS, FINES, SETTLEMENTS, PENALTIES, INTEREST, COSTS AND EXPENSES . . . OR LIABILITIES OF ANY KIND, INCLUDING . . . INJURIES TO PERSONS (EXCEPT FOR CUSTOMER VEHICLES DRIVEN WITH CUSTOMER CONSENT) (COLLECTIVELY, "LOSSES") ARISING FROM OR RELATED TO (i) THE BREACH OF THIS AGREEMENT AND/OR THE ACTIONS, ERRORS, OR OMISSIONS OF SUPPLIER OR SUPPLIER'S AGENTS OR EMPLOYEES OR ANY STAFFING COMPANY OR ITS AGENTS OR EMPLOYEES . . . .[26]

Under the RightThing/ZeroChaos Agreement, ZeroChaos is defined as "Supplier," RightThing is defined as "Customer," and Chrysler is defined as "End Client."[27]

Chrysler argues, and RightThing does not dispute, that Section 10.1 of the agreement between RightThing and ZeroChaos provides for indemnity by ZeroChaos (Supplier) to RightThing (Customer) but does not provide for indemnification by ZeroChaos (Supplier) to Chrysler (End Client). RightThing also does not dispute that the failure to include such provision in the RightThing/ZeroChaos agreement is contrary to the requirement of Section 5.14 of the MSA between Chrysler and RightThing.[28] As was noted, § 5.14 of the MSA requires that RightThing's agreements with subcontractors include indemnity provisions *"that are no less protective of Chrysler's rights than the terms of this Agreement*."

Based upon the foregoing, there is no genuine issue of material fact that RightThing breached Section 5.14(b) of the MSA where there is no dispute that the agreement between RightThing and ZeroChaos had *no* language providing for indemnity from ZeroChaos to Chrysler. Accordingly, summary disposition is granted in favor of Chrysler as to liability only on its breach of contract claim based upon Section 5.14(b) of the MSA.

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[26] Pl's Motion, Exh 3, ZeroChaos Agreement, pp 13-14, § 10.1.
[27] *Id.* at p 1, Opening Paragraphs (emphasis in original).
[28] RightThing does not even discuss the provisions of § 5.14 of the MSA and does not assert that any other provision of the RightThing/ZeroChaos Agreement provides indemnification to Chrysler.

Chrysler also argues that RightThing breached the last paragraph of Section 5.14 of the MSA which states that:

> Supplier is responsible for any failure by any subcontractor or subcontractor personnel *to perform in accordance with this Agreement* or *to comply with any duties or obligations imposed on Supplier under this Agreement* to the same extent as if such failure to perform or comply was committed by Supplier or Supplier employees. Without limiting the foregoing, if a Subcontractor fails *to perform an obligation under this Agreement*, Supplier must perform this obligation.[29]

Again, under the MSA, RightThing is the "Supplier" and "Subcontractor" is defined as "a third-party business entity that provides any of the Services, including any affiliate of Supplier."

According to Chrysler, RightThing is responsible for breach of the above-noted provision because ZeroChaos, a subcontractor, allowed defendants CES and Aerotek to amend the template staffing company agreements with regard to insurance (CES) and indemnity (Aerotek) requirements. Chrysler argues that the agreement between RightThing and ZeroChaos required that any agreement between ZeroChaos and staffing companies such as CES and Aerotek are in "substantially the form [template]" as was attached to the ZeroChaos/RightThing Agreement.[30]

Chrysler argues that "to the extent that ZeroChaos breached the [Agreement between ZeroChaos and RightThing] by allowing CES and Aerotek to amend [the staffing company agreements] to the detriment of Chrysler, RightThing breached the MSA . . . ." However, it provides no explanation of why this is so. Section 5.14 of the MSA makes the Supplier (RightThing) responsible for a subcontractor's failure "in accordance with *this Agreement*" or to perform or comply with the duties or obligations imposed upon RightThing "in accordance with *this Agreement*." However, Chrysler cites no provision in the MSA which requires the use of

[29] Pl's Motion, Exh 2, MSA, § 5.14 (Emphasis added).
[30] *See* Pl's Motion, Exh 3, Agreement between RightThing and ZeroChaos, § 2.1.

template staffing company agreements. Rather, the provision it claims was breached by ZeroChaos is Section 2.1 of the Agreement between RightThing and ZeroChaos.[31]

The above-quoted provision of Section 5.14 of the MSA refers only to obligations under the MSA. Chrysler's statement that RightThing is responsible for a breach by ZeroChaos of Section 2.1 of the agreement between RightThing and ZeroChaos is not supported by the language of Section 5.14. Accordingly, Chrysler's motion for summary disposition as to any breach of contract claim that relies on the last paragraph of Section 5.14 of the MSA is denied.

V.

Count II: Breach of Contract-Insurance

A. Article XII - Insurance and Risk of Loss

Under Article XII of the MSA, RightThing "agrees to keep in full force and effect and maintain at its sole cost and expense during the term of the Agreement occurrence based policies of insurance as described in Sections 12.1 through 12.6 . . . ."[32] Under Sections 12.2 and 12.3 the required policies are:

> **12.2 Commercial General Liability Insurance** (including contractual liability, products and completed operations, independent contractors and personal and advertising injury insurance) providing coverage for bodily injury and property damage with a combined single limit of not less than . . . per occurrence, and an annual aggregate of at least . . . ."
>
> **12.3 Commercial Business Automobile Liability Insurance** including contractual liability coverage *for all owned, non-owned, leased, and hired vehicles* providing coverage for bodily injury and property damage liability with a combined single limit of not less than . . . per accident.

[31] There are no allegations in the Second Amended Company that ZeroChaos breached Section 2.1 of the agreement with RightThing and in an Order dated November 27, 2019, this Court's predecessor denied Chrysler's Motion for Leave to File a Third Amended Complaint adding an allegation against ZeroChaos for breach of Section 2.1.
[32] Pl's Motion, Exh 2, MSA, Art XII.

> **12.6** Suppliers insurance policies as required under Sections 12.2 and 12.3 *must name Chrysler and all of its subsidiaries, affiliates, officers, directors, agents, servants and employees as additional insured's.* [33]

RightThing does not dispute that it failed to "keep in full force and effect" the insurance required under the language of Article XII of the MSA.[34] Rather, RightThing argues that the MSA is latently ambiguous as to whether RightThing was "obligated to provide motor vehicle insurance for temporary, supplemental workers driving Chrysler owned vehicles both on and off the clock."[35]

In support of its argument, RightThing again relies on *Shay,* asserting that there is a latent ambiguity. RightThing asserts that it did not intend to be "obligated to provide motor vehicle insurance for supplemental workers driving Chrysler owned vehicles both on and off the clock."[36] In support of this assertion, RightThing relies on the extrinsic evidence previously discussed, including deposition testimony of parties allegedly involved with negotiating the MSA, as evidence of its intent.

As was noted, "[a] latent ambiguity exists when the language in a contract appears to be clear and intelligible and suggests a single meaning, but other facts create the necessity for interpretation or a choice between two or more possible meanings." *Shay*, 487 Mich at 668. RightThing, in its response to Chrysler's motion, does not discuss any of the MSA language

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[33] Pl's Motion, Exh 2, MSA Article XII, §§ 12.2 -12.3 and 12.6 (emphasis added).
[34] In addition to the requirements of §§ 12.2, 12.3, and 12.6, the MSA in § 12.7 stated that:

> Such insurance afforded to Chrysler under Article XII of this Agreement must be: (a) written insurance companies that maintain a Best Rating of A-:VII or greater and (b) primary insurance and any other similar insurance existing for Chrysler's benefit must be non-contributing and excess of such primary insurance. Supplier must take such actions with regard to its policy or policies of insurance as are necessary to cause the policy or policies to comply with the requirements of this Agreement. . . . *Supplier will cause and require any Subcontractors or engaged third parties providing Services pursuant to this Agreement to maintain insurance that is the same, or greater to insurance pursuant to this Article XII.* [Emphasis added.]

[35] Def's Response, p 10.
[36] RightThing's Response, p 10.

regarding insurance coverage, but simply argues that there is a latent ambiguity regarding what coverage was required. RightThing's argument could be that Section 12.3 which requires contractual liability coverage "for all owned, non-owned, leased, and hired vehicles . . . ," should be read to require coverage only "for all owned, leased, and hired vehicles . . ." thereby excluding coverage for Chrysler owned vehicles. It could also be that the alleged latent ambiguity is in § 12.6 of the MSA which requires Chrysler to be named as an additional insured. Or it could be both.[37]

Reading Section 12.3 in the way RightThing presumably asserts it was intended, would require the Court to alter the MSA by removing the term "non-owned" from the contract language. With regard to Section 12.6, in order to read the MSA without the "additional insured" requirement, it would be necessary to delete the entire section. Again, RightThing is not seeking to use extrinsic evidence to explain a contract term but is seeking to use it to contradict or vary the plain language of the MSA. However, as was previously discussed, extrinsic evidence cannot be used in this manner. *Michigan Chandelier Co v Morse*, 297 Mich at 48; *Grosse Pointe Park*, 473 Mich at 218. *See also McDonald*, 480 Mich at 199-200.

Additionally, as was explained above, the Court agrees with Chrysler that the extrinsic evidence proffered by RightThing does not create the necessity for interpretation or a choice between two or more possible meanings. [38]*Shay*, 487 Mich at 668.

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[37] Again, this Court should not have to guess and RightThing essentially abandons the latent ambiguity argument by not even addressing the language of the MSA. *See Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008) (It is well-settled that "[t]rial courts are not the research assistants of the litigants" and that "the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute.") *See also Mitcham v Detroit,* 355 Mich 182, 203; 94 NW2d 388 (1959) (It is not enough for a party to "simply announce a position or assert an error and leave it up to this Court to discover and rationalize the basis for [its] claims . . . ."); and *Moses, Inc v Southeast Mich Council of Governments*, 270 Mich App 401, 417; 716 NW2d 278 (2006) ("If a party fails to adequately brief a position, or support a claim with authority, it is abandoned.")

[38] *See* pp 10-11, *supra*.

For the above-stated reasons, Chrysler's motion for summary disposition on Count II (Breach of Contract-Insurance) is granted as to liability only.

VI.

"Failure to Tender" Argument

RightThing argues that "Chrysler cannot benefit from failing to tender the underlying claims to the other defendants or to follow through with their insurers." RightThing argues that it cannot be in breach of the indemnification and insurance provisions of the MSA because Chrysler had "the resources it requested available to it and chose to ignore them" However, RightThing cites nothing in the MSA which excuses RightThing from liability if claims are not tendered to other entities such as the other defendants in this case or if Chrysler fails to "follow through" with the insurers of the other defendants. Additionally, RightThing cites no legal authority for its position.

Thus, there is no support for RightThing's argument any breach of the MSA is excused. Any failure by Chrysler to properly tender claims or to cooperate with insurers would go to the issue of what damages, if any, are attributable to RightThing's breach of the MSA. *See Miller-Davis,* 495 Mich at 178. According, the Court rejects RightThing's argument that summary disposition on the issue of liability cannot be granted because of Chrysler's alleged failure to use other resources available with regard to the underlying claims.

ORDER

Based upon the foregoing Opinion **IT IS HEREBY ORDERED** that:

As to Count I of the Second Amended Complaint:

(1) Summary disposition under MCR 2.116(C)(10) based upon breach of Article XI Section 11.1 of the MSA is **GRANTED** in favor of Plaintiff as to liability only[39];

(2) Summary disposition under MCR 2.116(C)(10) based upon breach of Article V Section 5.14(b) is **GRANTED** in favor of Plaintiff as to liability only;

(3) Summary disposition under MCR 2.116(C)(10) is **DENIED** any breach of contract claim that relies on the last paragraph of Article V Section 5.14.

IT IS FURTHER ORDERED that:

As to Count II of the Second Amended Complaint:

Summary disposition under MCR 2.116(C)(10) based upon breach of Article XII of the MSA is **GRANTED** in favor of Plaintiff as to liability only.

IT IS SO ORDERED.

This Order does NOT resolve the last pending matter and does NOT close the case.

/s/ Victoria A. Valentine
March 10, 2023
HON. VICTORIA A. VALENTINE
CIRCUIT COURT JUDGE

[39] Again, for ease of reference, when referring to summary disposition as to "liability only" the Court is referring to summary disposition as to elements of the existence of a contract and the breach of that contract. *See Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). This does not include a determination of the existence of or the amount of damages resulting from the breach.