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

NASSAR COMPANIES MANAGEMENT, LLC (f/k/a AMSON MANAGEMENT, LLC) a Michigan limited liability company,

Plaintiff/Counter-Defendant,

Case No. 22-197018-CB

Hon. Victoria A. Valentine

v.

TENNECO AUTOMOTIVE OPERATING COMPANY INC., a Delaware corporation,

Defendant/Counter-Plaintiff.

______________________________________/

FINDINGS OF FACT, CONCLUSIONS OF LAW AND VERDICT

At a session of said Court held on
The 26th day of March 2025
in the County of Oakland, State of Michigan
PRESENT: HON. VICTORIA A. VALENTINE

In actions tried without a jury "the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." MCR 2.517(A)(1). "Brief, definite, and pertinent findings and conclusions on the contest matters are sufficient" and may be stated in a written opinion. MCR 2.517(A)(2) and (3).

This matter is before the Court following a bench trial held on July 8 and 9, 2024. On December 16, 2024, both parties filed their Proposed Findings of Fact and Conclusions of Law. Plaintiff filed "Supplemental Findings of Fact as to Damages" on January 14, 2025, and on January

22, 2025, Defendant filed a "Response to Plaintiff/Counter-Defendant's Supplemental Findings of Fact as to Damages."

BACKGROUND

Plaintiff Nassar Companies Management, LLC f/k/a Amson Management, LLC ("Nassar Management") filed the instant action alleging that Defendant Tenneco Automotive Operating Company, Inc. ("Tenneco") breached a Management Agreement between the parties by terminating it in contravention of § 11.2 of the Agreement (Count I) and by not paying certain expenses due and owing (Count II). Tenneco filed a Counterclaim alleging that Nassar Management breached the Management Agreement by failing to perform management services such as HVAC maintenance, misusing Operating Account funds, and failing to provide reports under § 9 of the Management Agreement.

On March 20, 2024, this Court issued an "Opinion and Order Regarding Plaintiff's Motion for Summary Disposition as to Liability in Its favor under Count I Pursuant to MCR 2.116(C)(10) and Defendant/Counter-Plaintiff's Motion for Summary Disposition Pursuant to MCR 2.116(C)(10)." As to Count I of the Complaint, the Court determined that there was a breach of the notice and cure requirements of Section 11.2 of the Management Agreement by Defendant Tenneco. The Court also determined that there were issues of fact regarding alleged "first breaches" by Nassar Management. As to Count II of the Complaint the Court determined that there was a genuine issue of material fact with regard to the claim of non-payment of amounts owed for August 2020. This Court also concluded that genuine issues of material fact remained with regard to Tenneco's Counterclaim.

FINDINGS OF FACT

I. **Witnesses**:

Linda Johnston (Witness presented by Plaintiff):

- Johnston is the Nassar Company Controller employed since April 2018.
- The Management Agreement runs with the lease on the property and has a term of fifteen years.
- The Management Fee is 4% of the monthly rent. No additional costs were associated with the management of the Property. The Management fee is considered to be profit.
- The Maintenance Fee was based on the Maintenance Budget.
- Payment of 1/12 Management Fee and 1/12 of Maintenance Budget was due on or before the first of each month.[1]
- The Maintenance Fee was based upon the estimated budget. At the end of the year there would be a reconciliation between the monthly payments by Tenneco and the amount paid out to vendors. At that time, credits or debits would have been made.
- Tenneco did not make the payment due on March 1, 2020.
- Tenneco did not make the payment due on April 1, 2020; May 1, 2020, or June 1, 2020.
- Nassar was performing management services during the months that payment was not made.
- Non-payment caused problems because there was no funding to pay vendors. During that time payments came, at least in part, from Plaintiff's account. All maintenance vendors were paid.
- Payment for the unpaid periods and the July 1, 2020, payment was made on June 25, 2020. The July 1, 2020, payment was the first payment that was not late.
- August 1, 2020, payment was not made on time.

[1] *See* Trial Exhibit 2, Management Agreement, Section 7.

- The next payment, on September 2, 2020, was for the September 2020 Management Fee. The August 2020 fee was never paid. The amount outstanding for the August 2020 Management Fee is $5,983.33.[2]
- HVAC maintenance was not performed for 2020. Mistakenly believed that Continuum, the subcontractor which installed the systems, was doing the maintenance.
- Johnston did not prepare monthly statements for Tenneco.
- Johnston believed that she had 60 days from February 15, 2020 (the effective date of the Management Agreement) to provide an annual reconciliation.
- An annual reconciliation was not made before the Management Agreement was cancelled.
- The alleged reporting breaches could have been cured by the close of business on March 8, 2021.

Les Upfall (Witness presented by Plaintiff):

- Owner of HVAC company National Mechanical Services qualified to work on Trane HVAC systems.
- Upfall was at the Property with Mr. Nassar around February 15, 2021. Accessed inside of Property which was unoccupied.
- Submitted a proposal for HVAC maintenance to "inspect all equipt operations change all filters make sure everything in Proper working order."[3]
- Upfall ordered filters on or about a week before March 4, 2020. Filters were delivered on Friday March 5, 2020. On March 5 his company took old filters out and replaced with new filters.
- Upfall was also at Property on Monday March 8, 2020, and may have come back on March 10, 2020.

Therese Roggenkamp (Witness presented by Defendant):

- Roggenkamp was Tenneco Facilities Manager and was responsible for the operation of the Northville Facility.
- The Northville Facility was intended to be the North American Corporate Headquarters for Tenneco.

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[2] *See* Trial Exhibit 60, Summary of payments prepared by Johnston.
[3] *See* Trial Exhibit 70, Proposal.

- Construction on the Facility was substantially complete on February 14, 2020, and that is when the Maintenance relationship with Nassar began.[4]
- Maintenance and Management fees not paid on March 1, 2020; April 1, 2020; or May 1, 2020.
- No money deposited by Tenneco into Nassar Operating Account until June 25, 2020.
- During the initial months of the Management Agreement Tenneco was acquired by another entity, Federal Mogul. The acquisition process caused difficulties in getting the Maintenance and Management Fees paid due to organizational changes and difficulty in categorizing the fees and employing the correct account numbers. Roggenkamp was aware of the outstanding fees.[5]
- Roggenkamp relied exclusively on Nassar Management to ensure HVAC Maintenance was performed as required by the Agreement.
- HVAC maintenance is important to ensure that the unit functions properly and to maintain any warranty with the manufacturer.
- Spring start-up and cooling inspection and fall heating inspection and start-up are important to ensure the systems are prepared for the upcoming season.
- There is no set time for the spring and fall inspections/start-ups. Spring start up is "typically Apri-ish April or May." Fall start-up would occur sometime in August, September, or October.
- Coil cleaning is an annual thing that can happen anytime of the year, typically done late summer, early fall. Coil cleaning is important because the coils are the heat transfer units of the mechanism.
- It is important that four filter changes be performed because when filters are not clean the system works harder to push the air through the system.
- Roggenkamp requested monthly reports under Section 9 of the Management Agreement but did not receive them.
- Roggenkamp was satisfied with the landscaping, snow removal, janitorial and elevator maintenance services provided.
- Subsequent to Tenneco's termination of the Management Agreement with Nassar Management, Roggenkamp took over management of the Property.

II. **Trial Exhibits:**

- <u>Trial Exhibit 1 - Lease</u>

  Section 6 listed required HVAC maintenance and states, in pertinent part:

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[4] *See also* Trial Exhibits 1(Lease) and 2 (Management Agreement). Per Section 3 of the Lease, the Commencement Date of the Lease was the date of "substantial completion." Per Section 11.1 of the Management Agreement the Commencement Date of the Agreement was the same as the Commencement Date of the Lease.

[5] *See also* Trial Exhibits 19-22, April and May 2020 Emails between Fadi Nassar and Roggenkamp.

a. Inspections

Includes but not limited to:

1) One comprehensive annual cooling inspection and seasonal start-up in the spring.
2) One comprehensive annual heating inspection and seasonal start-up in the fall.
3) One annual operating cooling inspection.
4) One annual operating heating inspection.
5) One annual coil cleaning.
6) Four filter changes.

- Trial Exhibit 2-Management Agreement effective February14, 2020.

Section 7:

Payment of Management Fees and Permitted Expenditures. *On or before the first day of each month*, Tenant shall deposit 1/12 of the sum of the annual Permitted Expenditure budget and *1/12 of the annual Projected Management Fee* determined from the Approved Budget (the "Monthly Deposits"), into a segregated bank checking account for the Property in a bank reasonably satisfactory to Management Agent . . . . (Emphasis added).

Section 9: Reports, Budgets, and Statements. Management Agent shall furnish Tenant with the following statements concerning the operation of the Property at the time and in the manner specified:

(A) On or about thirty (30) days after the end of each calendar month, a statement setting forth all debits, credits and the balance of the Operating Account for the calendar month then ended.

(B) On or before December 1of each calendar year, a proposed budget of Permitted Expenditures for the upcoming calendar year (the "Proposed Budget"). Tenant shall approve or reject the Proposed Budget within thirty (30) days after receipt; provided, if it rejects the budget, it shall include in its notice of such rejection its proposed modifications and reasons for such rejection. If Tenant fails to approve or reject the Proposed Budget within such thirty (30) day period, it will be deemed to have accepted the Proposed Budget. If a new Proposed Budget is not otherwise in effect as of January 1, Tenant shall pay 103% of the Monthly Deposit previously in effect until the Proposed Budget is approved: i.e. until it becomes an Approved Budget.

(C) Within sixty (60) days after the end of each calendar year, a year-end a [sic] statement setting forth all debits, credits and the balance of the Operating Account for the calendar year then ended.

Management Agent's books and records relating to the Management Services for the Property shall be kept and maintained by Management Agent at is principal offices. Tenant, or its duly authorized agents, shall have the right to examine and

audit such books and records where they are being maintained at any time during normal business hours with reasonable prior notice, at Tenant's sole cost and expense.

Section 10.3:

10.3 Neither party shall be liable to the other for lost profits, loss of opportunity or other consequential damages; provided, Management Agent's lost profits attributable to unpaid but due Management Fees shall be considered actual damages.

Section 11.2:

11.2 In the event of any breach or violation of this Agreement by either Party, this Agreement may be terminated by the non-breaching Party if the breaching party does not cure such breach within thirty (30) days following written notice from the non-breaching Party (the "Section 11.2 Cure Period"). Any notice of breach must include a detailed statement of the nature of the breach. Notwithstanding the foregoing, if the breaching party is Tenant the Section 11.2 Cure Period shall be five (5) days in the case of a failure to pay any Management Fees as and when due. Also notwithstanding the foregoing, if the breaching Party is Management Agent and if the breach cannot reasonably be cured within the Section 11.2 Cure Period, then so long as Management Agent has commenced and is diligently pursuing cure to completion, the Section 11.2 Cure Period shall be extended to allow for such completion.

- Trial Exhibit 4- Bank Statements Nassar Management Operating Account

  On 6/25/20 Tenneco deposited $94,411.55 (This appears to be payment for invoices dated from 2/15/20 to 7/1/20.)

  On 9/2/20 $17,975.76 was deposited by Tenneco.

  On 10/2/20 $17,975.76 was deposited by Tenneco.

  On 10/30/20 $17,975.76 was deposited by Tenneco.

  On 12/2/20 $17,975.76 was deposited by Tenneco.

  On 1/8/20 $18,087.97 was deposited by Tenneco.

  On 2/2/20 $20,848.97 was deposited by Tenneco.

  On 3/2/21 $18,390.97 was deposited by Tenneco.

- Trial Exhibit 6- Nassar Invoices to Tenneco 2/15/20-3/1/21

  Two invoices were issued for each month, one for "Maintenance" and one for "Management Fee."

All invoices except invoice for 8/1/20 have a handwritten “Pd [date]” notation.

The amounts invoiced for September 2020 through March 2021 match the amounts deposited by Tenneco into the operating account during the same period.

8/1/20 invoice amount is $12,082.43 for Maintenance and $5,893.33 for Management Fee the evidence supports the finding that the August 2020 invoice was not paid.

- Trial Exhibit 7-2020 Maintenance Budget.
- Trial Exhibit 8- 2021 Maintenance Budget.
- Trial Exhibits 19, 20, 21,23, 27- Emails between Nassar and Roggenkamp regarding unpaid Tenneco invoices for Feb 14-29 (prorated) and March 1, April 1, and May, 1 2020.
- Trial Exhibit 36- February 4, 2021, Tenneco letter to Nassar Management stating in part:

> During a recent visit to the Property, Tenant discovered that no HVAC maintenance has been performed on the HVAC unit servicing the Property despite the fact that [Tenneco] pays for such maintenance under the terms of invoices submitted by [Nassar Management] to [Tenneco]. In addition, an inspection of the invoices recently submitted to [Tenneco] has resulted in [Tenneco] discovering that there are discrepancies between the third-party invoices submitted to [Nassar Management] and charges made to [Tenneco]. Finally, [Nassar Management] has failed to deliver on a timely basis any of the reports required to be delivered by [Nassar Management] under the terms of Section 9 of the Agreement.

- Trial Exhibit 39- February 17, 2021, email chain. Nasser Management indicating that Continuum refuses to do HVAC maintenance work and that Nasser was at Property two days before with a qualified contractor. Also indicated that filters had been ordered.
- Trial Exhibit 41- March 2, 2021, Landlord email approving HVAC maintenance contractor National Mechanical Service Corporation.
- Trial Exhibits 48-49- Emails regarding filter replacement on March 5, 2021.
- Trial Exhibit 50- March 5, 2021, Termination letter from Tenneco.
- Trial Exhibit 51- March 5, 2021, Email from counsel for Nassar Management indicating that work was performed on all but 4 of the approximately 150 filters. The remaining 4 filters were backordered and would be available by Monday.
- Trial Exhibit 52- March 11, 2021, correspondence from counsel for Tenneco informing Plaintiff “again that the Management Agreement has been terminated in accordance with its terms, and all further obligations of [Tenneco] under the Management Agreement have ceased.”
- Trial Exhibit 54- March 23, 2021, email from Nassar to Roggenkamp stating, “It’s very important that I stress to you that I had no knowledge of Continuums failure to perform the HVAC maintenance until recently as such I believe that it is appropriate that we credit the 2020 HVAC maintenance costs in that amount.”

- Trial Exhibit 59- 9/19/23 Deposition of Fadi Nassar (excerpts read into record by counsel for Defendant).

  Page 30- Nassar did not realize until the receipt of the 2/21/21 Tenneco letter that Continuum was not performing HVAC maintenance.

  Page 49 Nassar agreed that Continuum did not charge Nassar Management for maintenance services.

III. Summary

First, this Court takes judicial notice that from March 2020 until at least early June of 2020 COVID-19 mandates were in effect. This Court may take judicial notice of executive orders issued in response to COVID-19 as undisputed facts within the public record.[6] *See Warren v Flint*, __ Mich App __; __ NW3d __ (2024) (Docket No. 366226), p 1, n 1. Evidence supports a finding that the Property remained unoccupied as of early 2021.

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[6] A summary of Executive Orders issued by the Governor is provided in *In re Certified Questions From United States District Court, Western District of Michigan*, 506 Mich 332,338-339; 958 NW2d 1 (2020):

> In response to COVID-19, on March 10, 2020, one day before it was declared a pandemic by the World Health Organization, the Governor issued Executive Order (EO) No. 2020-04, declaring a "state of emergency" under the EPGA and the EMA. On March 20, 2020, the Governor issued EO 2020-17, which prohibited medical providers from performing nonessential procedures. On March 23, 2020, she issued EO 2020-21, which ordered all residents to stay at home with limited exceptions. On April 1, 2020, she issued EO 2020-33, which declared a "state of emergency" under the EPGA and a "state of emergency" and "state of disaster" under the EMA. She then requested that the Legislature extend the state of emergency and state of disaster by 70 days, and a resolution was adopted, extending the state of emergency and state of disaster, but only through April 30, 2020. Senate Concurrent Resolution No. 2020-24.
>
> On April 30, 2020, the Governor issued EO 2020-66, which terminated the declaration of a state of emergency and state of disaster under the EMA. But, immediately thereafter, she issued EO 2020-67, which provided that a state of emergency remained declared under the EPGA. At the same time, she issued EO 2020-68, which redeclared a state of emergency and state of disaster under the EMA.

The Orders were in effect at least until early June 2020. "On June 3, 2020, Governor Whitmer began rescinding her COVID-19 related executive orders." *Carter v DTN Management Co*, __ Mich __; __ NW3d __ (2024) (Docket No. 165425) at slip op at 3.

Under the Management Agreement payment of 1/12 Management Fee and 1/12 of Maintenance Budget was due on or before the first of each month. The Management Fee was 4% of the monthly rent. The Maintenance Fee was based on the Maintenance Budget. The Maintenance Budget was based upon estimates from subcontractors. The Maintenance Budget for 2020 was not signed.

Although invoiced monthly from February 15, 2020, Tenneco did not make payment until June 25, 2020. The June 25, 2020, payment included the outstanding invoices and the payment for July 1, 2020. Tenneco was aware that the invoices were outstanding, but due to circumstances involving corporate reorganization and COVID staffing, had difficulty implementing the payment process.

The August 1, 2020, invoices were not paid. The outstanding amount is $12,082.43 for Maintenance and $5,893.33 for Management Fee.

The 2020 Maintenance Budget listed Nassar Management as the HVAC maintenance provider. However, this was a placeholder and Nassar believed that the contractor who installed the HVAC system, Continuum, would be/was performing HVAC maintenance. Continuum was on site for outstanding installation issues but did not perform HVAC maintenance. Nassar was never billed by Continuum.

Nassar responded to the February 4, 2021, letter from Tenneco by contacting a licensed HVAC contractor (National) to replace the filters. A substantial majority of the filters were replaced on March 5, 2021, and other filters were on backorder. National was also on site on March 8, 2021, and maybe March 10, 2021.

CONCLUSIONS OF LAW

Law Regarding Breach of Contract

Under Michigan law "[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). "[T]he damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 414-415; 295 NW2d 50 (1980); *Wright v Genesee Cnty*, 504 Mich 410, 419; 934 NW2d 805 (2019).

Under Michigan law, "'one who first breaches a contract cannot maintain an action against the other contracting party for [its] subsequent breach or failure to perform.'" *Skaates v Kayser*, 333 Mich App 61, 80; 959 NW2d 33 (2020) quoting *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). "This general rule is qualified however, by the requirement that the initial breach is *substantial*." *Skaates*, 333 Mich App at 80 (quotation marks and citation omitted) (emphasis in original). "One consideration in determining whether a breach is material is whether the nonbreaching party obtained the benefit which [it] reasonably expected to receive." *Id.* (quotation marks and citation omitted).

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). "[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).

I. Count I – Breach of Contract-Wrongful Termination of the Agreement

Under Count I Plaintiff asserts that Tenneco breached Section 11.2, the notice and cure provision of the Management Agreement, and seeks to recover "expectancy damages" that is, future monthly Management Fees for the period from April 1, 2021, to February 28, 2035 (the remaining term of the Lease/Management Agreement.) As was stated, in its prior Opinion and Order, this Court determined that Defendant did breach the provisions of Section 11.2, but that question of fact remained as to Defendant's argument that Nassar Management was the party that first committed a material breach of the Management Agreement and therefore, cannot recover under Count I.

A. The "first breach" of the Management Agreement was by Tenneco

The evidence supports the conclusion that, under the Management Agreement Management Fees and Maintenance Fees were due "on or before the first day of each month."

> Payment of Management Fees and Permitted Expenditures. *On or before the first day of each month*, *Tenant shall deposit 1/12 of the sum of the annual Permitted Expenditure budget and 1/12 of the annual Projected Management Fee* determined from the Approved Budget (the "Monthly Deposits"), into a segregated bank checking account for the Property in a bank reasonably satisfactory to Management Agent . . ..[7]

Further, the evidence supports and there appears to be no dispute that the fees were not timely paid for March 1, 2020; April 1, 2020; May 1, 2020; and June 1, 2020. Accordingly, Tenneco was in breach of Section 7 of the Management Agreement as early as March 1, 2020. The evidence supports the finding that this was the first substantial/material breach of the Management Agreement as the Plaintiff did not receive the payment it expected in return for its services. To the

[7] Trial Exhibit 2, Management Agreement, § 7 (emphasis added.) *See also* Johnston testimony; Roggenkamp testimony.

extent that Nassar did not ensure that HVAC maintenance services were performed in 2020, the evidence does not support a finding that such breach occurred before Tenneco's breach. There were no "set" dates for the annual inspections and coil cleaning. And no set date for filter changes. The earliest requirement in 2020 for HVAC maintenance appears to be the "one comprehensive annual cooling inspection and seasonal start-up in the spring." However, Roggenkamp testified that there was no exact date for the spring start-up, but it should begin before air conditioning is needed and was typically done "April-ish, April, May." Tenneco's breach had already occurred by April or May 2020.[8] Additionally, to the extent that Tenneco asserts that Nassar breached Section 9 of the Management Agreement by not providing statements "[o]n or about thirty (30) days after the end of each calendar month." Such monthly statement would not have been required prior to March 1, 2020. Additionally, the Court is not convinced that the failure to provide a monthly statement, especially before any payments were made by Tenneco, constitutes a material breach of the Management Agreement.

B. Alleged Breaches of the Management Agreement by Plaintiff could have been cured during the Section 11.2 cure period

Tenneco argues that Plaintiff did not establish that "but-for" Tenneco's breach of the Section 11.2 provisions, Plaintiff would have continued to be entitled to management fees. Tenneco's asserts that "the evidence shows that the Management Agreement would have still been terminated because there is no dispute that Nassar continued but failed to cure by March 8." The

[8] It is not clear that inspections could have occurred in April and May 2020. As was noted previously Executive COVID-19 Mandates were in effect at this time.

Court concludes that the evidence demonstrates that even if breaches were not cured by March 8, Plaintiff "[had] commenced and [was] diligently pursuing cure to completion" under Section 11.2.

C. Under Section 10.3 of the Management Agreement Plaintiff is precluded from recovering future monthly Management Fees for the remaining term of the Lease/Management Agreement from April 1, 2021 to February 28, 2035.

As was previously stated, "the damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Kewin*, 409 Mich at 414-415; 295 NW2d 50 (1980). At the time the Management Agreement was made, the parties contemplated the following with respect to lost profits:

> 10.3 Neither party shall be liable to the other for lost profits, loss of opportunity or other consequential damages; provided, Management Agent's lost profits attributable to unpaid but due Management Fees shall be considered actual damages.[9]

The Court agrees with Tenneco's analysis on pages 13-16 of its Post-Trial Brief that the future management fees are not recoverable under Section 10.3. Trial testimony establishes that management fees were considered "pure profit." Contrary to Plaintiff's assertion, the future management fees are not actual damages under Section 10.3.[10] Under the "carve out" in that section "*unpaid but due* Management Fees shall be considered actual damages." However, as was discussed previously, under Section 7 of the Management Agreement management fees are due *"[o]n or before the first day of each month*."[11] Thus, while the management fees for April 2021-

[9] Trial Exhibit 2, Management Agreement, § 10.3

[10] In its Proposed Findings of Fact and Conclusions of Law Nassar Management merely states "[p]ursuant to paragraph 10.3 of the Agreement, Nassar's unpaid management fees constitute actual damages." However, it provides no analysis of the relevant Management Agreement provisions.

[11] As Tenneco argues, other provisions in the Management Agreement reference management fees becoming "due" on or before the first day of every month. For example, Section 7 further provides, with regard to late fees, "Tenant

February 2025, the period after cancellation to the end of the lease term, may remain unpaid, such fees are not actual damages under Section 7 because they never became due. The Court agrees with Tenneco that interpreting the contract to allow for recovery of management fees due at some future time would be contrary to the plain language of Section 10.3 of the Management Agreement.

Because damages are an essential element of a breach of contract claim and because the damages sought by Plaintiff under Count I are not recoverable under the plain language of the Management Agreement, the Court finds no cause of action as to Count I of the Complaint.

II. Count II-Breach of Contract-Failure to reimburse/pay certain expenses prior to termination of the Management Agreement

Plaintiff alleges that Tenneco breached the Management Agreement because it failed to pay the August 2020 invoices. Plaintiff argues that it is entitled to $18,065.76 (the total of the two invoices) plus prejudgment interest. The evidence presented at trial supports the conclusion that Tenneco breached the Management Agreement by failing to pay the August 2020 invoices. A comparison of the invoiced amounts and Tenneco's deposits in the Operating Account demonstrate that invoices for August were not paid.

Tenneco does not appear to argue that the August 2020 invoices were paid. And to the extent that Tenneco argues that Section 10.3 of the Management precludes recovery of damages, this Court disagrees. There is no dispute that the August 2020 invoices were due "on or before August 1, 2020" and therefore, are unpaid but due fees.

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shall deposit to the Operating Account sufficient funds for the payment of all Permitted Expenditures and Management Fees, before the same are due and payable. If any Monthly Deposit is not made as and when due, Tenant shall deposit a late fee equal to five percent (5%) of the Monthly Deposit which late fee shall be added to the Management Fee (and forfeited to Management Agent) for that month. Trial Exhibit 2, Management Agreement, Section 7, p 75.

Accordingly, the Court finds in favor of Plaintiff on Count II and awards damages in the amount of $19,310.01. Damages as calculated as follows: $5,893.33 (unpaid management fee) + 11, 260.51 (unpaid maintenance fee of $12,082.43 - $821.092 HVAC Maintenance Plan Fee[12])= $17,153.84 total past due amount. The interest amount through March 31, 2025, calculated using the same method as used in Plaintiff's Supplemental Brief Exhibit B but based on the revised past due amount, is $2,156.17. Total damages including interest equal $19,310.01 ($17,153.84+2,156.17).

III. Tenneco's Counterclaim-Breach of Contract

Tenneco argues that it is entitled to $111,546.18 in damages because the amount charged by Nassar Management for services was in excess of what Nassar actually paid. The Court finds no cause of action on the Counterclaim. As was discussed previously, Tenneco was the first party to substantially breach the Management Agreement through its non-payment of invoices. As Tenneco itself has asserted, under Michigan law, "'one who first breaches a contract cannot maintain an action against the other contracting party for [its] subsequent breach or failure to perform.'" *Skaates,* 333 Mich App at 80. Additionally, courts have recognized that where a contract expressly includes a notice and cure provision, a party failing to provide such is precluded from then subsequently suing the other party for breach of the agreement. *See e.g. Convergent Group Corp v County of Kent,* 266 F Supp2d 647, 657-59 (WD Mich, 2003) (holding that where the plaintiff did not give notice and an opportunity to cure under the contract, it was prevented from suing for breach.).

[12] It is undisputed that Plaintiff was not charged for HVAC maintenance fees. Thus, Plaintiff did not incur damages as a result of Tenneco's failure to pay this portion of the maintenance fee.

<u>**VERDICT**</u>

Based upon the above-stated findings of fact and conclusions of law the Court hereby renders its verdict:

Count I of Complaint: No cause of action.

Count II of Complaint: Judgment in favor of Plaintiff in the amount of **$19,310.01**

Counterclaim: No cause of action.

IT IS SO ORDERED.

This is a final order and closes the case.

/s/Victoria A. Valentine

HON. VICTORIA A. VALENTINE
BUSINESS COURT JUDGE

Dated: 3/26/25