

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

COLLIERS INTERNAITONAL DETROIT,  
LLC,

Case No 22-196197-CB  
Hon. Victoria Valentine

Plaintiff,  
vs.

14 MACK LP, and SIGNATURE  
ASSOCIATES,

Defendant

vs.

THE DUFRESNE SPENCER GROUP, LLC,

Third-Party Defendant.

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OPINION AND ORDER REGARDING DEFENDANT/THIRD-PARTY PLAINTIFF, 14 MACK  
LP'S MOTION FOR SUMMARY DISPOSITION AND THIRD-PARTY DEFENDANT, THE  
DUFRESNE SPENCER GROUP LLC'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court held on the  
22th day of April 2024 in the County of  
Oakland, State of Michigan  
PRESENT: HON. VICTORIA A. VALENTINE

The matter before the Court is on Defendant/Third-Party Plaintiff 14 Mack LP's ("14 Mack") Motion for Summary Disposition under MCR 2.116(C) (8) and (10) as to its third-party complaint<sup>1</sup> against The Dufresne Spencer Group, LLC's ("DSG") and on Third-Party Defendant DSG's Motion for Summary Disposition under MCR 2.116(C) (8) and (10) as to the third-party complaints filed against it by 14 Mack and by Defendant/Third Party Plaintiff Signature Associates, Inc ("Signature").

The Court is very familiar with this dispute and relies on its statement of facts set forth in its 21-page Opinion and Order regarding Plaintiff's previous Motion for Summary Disposition.<sup>2</sup> In addition to its Opinions, the Court has also reviewed the Court file, the briefs, responses, exhibits, and heard oral argument on April 10, 2024.

#### FACTS PERTINENT TO THE MOTIONS

Both Third-Party Plaintiffs/Defendants 14 Mack and Signature filed third-party complaints against The Dufresne Spencer Group, LLC (DSG), seeking contractual and common law indemnity. The third-party complaints arise out of Plaintiff Colliers

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<sup>1</sup> 14 Mack's Motion originally sought dismissal of Counts III-IX alleged in Plaintiff's Complaint. Those counts were subsequently dismissed pursuant to this Court's Order dated 2/28/24.

<sup>2</sup> Court's Opinion and Order dated 1/27/2023. The Court also entered an opinion on 4/5/2024, which addressed Plaintiff's and Signature's motions for summary disposition.

International Detroit, LLC’s (“Colliers”) complaint against Signature<sup>3</sup> and 14 Mack for its failure to pay Colliers, a real estate broker, a “cooperating broker” commission under an Exclusive Leasing Agreement<sup>4</sup> between 14 Mack, the owner of the leased property, and Signature, 14 Mack’s leasing agent, to which the Court has previously found Colliers to be a third-party beneficiary.<sup>5</sup>

The property at issue was leased by 14 Mack as landlord to DSG as tenant under a Lease Agreement (“Lease”) dated April 28, 2022.<sup>6</sup> There is no evidence that Colliers and DSG entered into any written contractual agreement for commissions to be paid by DSG to Colliers. Colliers did not sue DSG. Rather, Colliers sued Signature alleging, *inter alia*, counts of breach of contract, third-party beneficiary, and conversion and sued 14 Mack alleging a third-party beneficiary claim.<sup>7</sup> Signature and 14 Mack, in turn, filed third-party complaints against DSG.

14 Mack relies on Section 42 of the Lease to support its contractual indemnity claim.

This Section provides:

42. Broker. The parties acknowledge and agree that neither of them has used the services of a broker or leasing agent or any other person to whom a commission is or may be owed, other than Signature Associates, representing Landlord. Commissions to the referenced brokers are paid pursuant to a separate agreement. Except as otherwise provided in this Section 42, each party agrees to indemnify and hold harmless the other against any claims by a third party for payment of a commission or other fee in connection with this Lease.

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<sup>3</sup> Plaintiff’s complaint also alleged other counts against Defendant Signature. Plaintiff’s counts of breach of contract, statutory conversion, and conversion were addressed in a separate opinion entered by the Court on 4/5/2024. The remaining counts were dismissed pursuant to this Court’s Order dated 2/28/24.

<sup>4</sup> DSG’s MSD Exhibit A.

<sup>5</sup> Court’s Opinion and Order dated 11/27/2023.

<sup>6</sup> DSG MSD Exhibit B.

<sup>7</sup> Plaintiff’s other claims were dismissed by Order dated 2/28/24.

Signature relies on Section 16(i) to support its claim that Signature, as 14 Mack's "Agent," is entitled to be indemnified by DSG:

(i) Irrespective of the adequacy of any insurance required to be maintained by Tenant hereunder, Tenant agrees that it will indemnify, defend and hold harmless Landlord, its successors, assigns, agents, employees, contractors, partners, directors, officers and affiliates (as that term is defined in the Securities Act of 1933) (collectively, the "**Landlord Indemnified Parties**") from and against all fines, suits, losses, costs, expenses, liabilities, claims, demands, actions and judgments (including reasonable attorneys' fees) of every kind or character arising from a claim brought by a third party and (a) arising from any breach, violation or non-performance of any term, provision, covenant, agreement or condition on the part of Tenant hereunder, (b) recovered from or asserted against any of the Landlord Indemnified Parties on account of injury or damage to person or property to the extent that any such damage or injury may be incident to, arise out of, or be caused, either approximately or remotely, wholly or in part, by any act, omission, negligence or misconduct on the part of Tenant or any of its agents, servants, employees, contractors, or invitees or of any other person entering upon the Premises under or with the express or implied invitation or permission of Tenant, (c) arising from or out the occupancy or use by Tenant, its agents, servants, employees, contractors, or invitees of the Premises or any part thereof or arising from or out of any event, circumstance, or occurrence within the Premises, howsoever caused, (d) due directly or indirectly to violations of the laws and regulations of the United States, of the State of where the Premises is located and the ordinances and laws of the City and County where the Premises is located, which are now in force or which may hereafter be in force, by Tenant, its agents, subtenants, or assignees, and/or (e) suffered by, recovered from or asserted against any of the Landlord Indemnified Parties by Tenant's employees, agents, servants, contractors, or invitees. Such indemnification of the Landlord Indemnified Parties by Tenant shall be effective unless such damage results from the gross negligence or willful misconduct of Landlord or any of its duly authorized agents or employees.

14 Mack now files its Motion for Summary Disposition under MCR 2.116(C)(8)<sup>8</sup> and (10) as to its own third-party complaint against DSG. DSG, in turn, files its cross Motion for Summary Disposition under MCR 2.116(C)(8) and (10), seeking to dismiss both third-party complaints filed against it.

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<sup>8</sup> The Court will treat 14 Mack Motion under MCR 2.116(C)(8) as a Motion under MCR 2.116(C)(9).

### Standard of Review

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, not whether the complaint can be factually supported. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160 (2019); *Pawlak v Redox Corp*, 182 Mich App 758, 763 (1990). A motion for summary disposition based on the failure to state a claim upon which relief may be granted is to be decided on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603 (2013); *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357, 360 (1991).

“All well-pleaded factual allegations are accepted as a true and construed in a light most favorable to the nonmovant.” *Maiden v Rozwood*, 461 Mich 109, 119 (1999); *Wade v Dep’t of Corrections*, 439 Mich 158, 162 (1992). Summary disposition is proper when the claim is so clearly unenforceable as a matter of law that no factual development can justify a right to recovery. *Parkhurst Homes*, 187 Mich App at 360; *Spiek v Dep’t of Transportation*, 456 Mich 331, 337 (1998).

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim or defense. See, e.g., MCR 2.116(G)(3)(b); *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996). Accordingly, “[i]n evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion.” *Maiden v Rozwood*, 461 Mich 109, 119-120 (1999); MCR 2.116(C)(10); MCR 2.116(G)(4); *Quinto*, 451 Mich at 358. The moving party

“must specifically identify the issues” as to which it “believes there is no genuine issue” of material fact and support its position as provided in MCR 2.116. MCR 2.116(G)(4).

Under Michigan law, the moving party may satisfy its burden of production under MCR 2.116(C)(10) by demonstrating to the court that the non-moving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim. Quinto, 451 Mich at 361. If the moving party properly supports its motion, the burden “then shifts to the opposing party to establish that a genuine issue of disputed fact exists.” Id. at 362. If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion. MCR 2.116(G)(4); see also Meyer v City of Center Line, 242 Mich App 560, 575 (2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116[C][10]).

## ANALYSIS

### A. LAW

#### 1. Contractual Indemnity

Indemnity contracts are construed in accordance with general contract interpretation rules. *Triple.E.Produce.Corp.v.Mastronardi.Produce.Ltd*, 209 Mich App 165, 172 (1995). “Contractual indemnity is an area of law guided by well-settled general principles,” and “each case must ultimately be determined by the contract terms to which the parties have agreed.” *Grand Trunk Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 351 (2004) (citations omitted). “Where parties have expressly contracted for indemnification, the extent of the duty must be determined from the language of the

contract.” *Miller\_Davis.Co.v.Ahrens.Constr?Inc*, 495 Mich 161, 174 (2014)(quotation marks and citation omitted). “Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court.” *Meagher v Wayne State Univ*, 222 Mich App 700, 721 (1997).

“The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties; to this rule all others are subordinate.” *Highfield Beach v Sanderson*, 331 Mich App 636, 654 (2020) (quotation marks, alterations, and citation omitted). “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.” *Id.* (quotation marks and citation omitted). Courts must “give effect to every word, phrase, and clause in a contract 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 (2003). “[U]nless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written.” *Rory v Continental Ins Co*, 473 Mich 457, 461 (2005). The legal principle that “unambiguous contracts are not open to judicial construction and must be enforced as written” is “grounded in the rationale that the judiciary ought not interfere with the right of individuals to ‘arrange their affairs via contract.’” *VHS Huron Valley Sinai Hosp v Sentinel Ins Co*, 322 Mich App 707, 716 (2018), quoting *Rory*, 473 Mich at 468.

## 2. Common Law Indemnity

The right to common-law indemnification is based on the equitable theory that where the wrongful act of one party results in another party's being held liable, the latter party is entitled to restitution for any losses.

The right exists independently of statute, and whether or not contractual relations exist between the parties, and whether or not the negligent person owed the other a special or particular legal duty not to be negligent. Common-law indemnity is intended only to make whole again a party held vicariously liable to another through no fault of his own. This has been referred to as ‘passive’ rather than ‘causal’ or ‘active’ negligence. It has long been held in Michigan that the party seeking indemnity must plead and prove freedom from personal fault. This has been frequently interpreted to mean that the party seeking indemnity must be free from active or causal negligence. Therefore, a common-law indemnification action cannot lie where the plaintiff was even .01 percent actively at fault.

Botsford.Continuing.Care.Corpj.v.Intelistaf.Healthcare?Inc., 292 Mich App 51, 61 (2011)  
(internal quotations and citations omitted)

#### 14 Mack and DSG’s Cross-Motions

The Court agrees with 14 Mack that DSG’s motion should be considered only under (C)(10). DSG’s motion fails to address deficiencies in the pleading of contractual and common law indemnity; and goes outside the pleadings by relying on exhibits attached to its motion, including an affidavit and this Court’s previous opinion...MCR 2.116(C)(10) motions are distinct from (C)(8) motions: MCR 2.116(C)(8) motions denounce a claim’s legal sufficiency and require the court to consider evidence only from the pleadings, while (C)(10) motions denounce a claim’s factual sufficiency and allow the court to consider evidence beyond the pleadings. ElKhalil.v.Oakwood.Healthcare?Inc, 504 Mich 152, 159-160 (2019). Courts should be careful to analyze the summary disposition motion under the correct standard. See *id*. Therefore, DSG’s motion is DENIED under MCR 2.116(C)(8) as to both 14 Mack and Signature’s third-party complaints.

As previously set forth above, the contractual indemnity provision in the 14 Mack/DSG lease provides:

42. Broker. The parties acknowledge and agree that neither of them has used the services of a broker or leasing agent or any other person to whom a commission is or may be owed, other than Signature Associates, representing Landlord. Commissions to the referenced brokers are paid pursuant to a separate agreement. Except as otherwise provided in this Section 42, each party agrees to indemnify and hold harmless the other against any claims by a third party for payment of a commission or other fee in connection with this Lease.

By signing this Lease both 14 Mack and DSG “acknowledge[d] and agree[d] that it ha[d] not used the services of a broker or leasing agent or any other person to whom a commission is or may be owed, other than Signature Associates” and “agree[d] to indemnify and hold harmless the other against for any claim by a third party, [i.e. Colliers], for payment of a commission or other fee in connection with the Lease.”<sup>9</sup>

The Court agrees with 14 Mack that according to this clear and unequivocal language of the Lease, DSG represented that it had not used the services of a broker or leasing agent or another person to whom a commission is or may be owed and agreed to indemnify and hold harmless 14 Mack if a third party, such as Colliers, subsequently claimed it was owed a commission in connection with the Lease. The Court previously found that “Signature failed to cooperate in good faith with Colliers, who unquestionably assisted Signature in the procurement of “any” lease. The Court further [found] that 14 Mack is, therefore, responsible for commissions owed to Colliers who was the cooperating broker.”<sup>10</sup> The Court’s previous opinion, detailed numerous pertinent facts evidencing DSG’s use of

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<sup>9</sup> DSG MSD Exhibit B.

<sup>10</sup> Opinion and Order dated 11/27/2023, p 16.

Colliers' services relating to the "alternative" lease.<sup>11</sup> Yet, despite this evidence establishing DSG's use of Colliers in connection with the "alternative lease," DSG executed the Lease with 14 Mack, which included its acknowledgment and agreement that "it ha[d] not used the services of a broker or leasing agent or any other person to whom a commission is or may be owed, other than Signature Associates."

Based on the above, the Court finds that there is not a question of material fact that DSG breached ¶42 of the Lease by representing that it had not used the services of a broker or leasing agent to whom a commission is owed. There is also not a question of material fact that under the plain language of Section 42 of the Lease, DSG "agree[d] to indemnify and hold harmless the other [14 Mack] against for any claim by a third party, [i.e. Colliers], for payment of a commission or other fee in connection with the Lease."

However, ¶16(i) of the Lease between 14 Mack and DSG must also be considered. In this indemnification paragraph, DSG, the tenant, specifically agreed to indemnify 14 Mack, the landlord, "from and against all fines, suits, losses, costs, expenses, liabilities, claims, demands, actions and judgments (including reasonable attorney fees) of every kind or character arising from a claim brought by a third party," i.e. Collier, and "arising from any breach, violation or non-performance of any term, provision, covenant, agreement or condition on the part of Tenant hereunder..."<sup>12</sup>

Importantly, 14 Mack's right to be indemnified by DSG is conditioned on damages not resulting from 14 Mack or its duly authorized agent's gross negligence or willful misconduct.

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<sup>11</sup> Opinion and Order dated 11/27/2023, pp 17-19.

<sup>12</sup> DSG MSD Exhibit B, section 16(i)(a).

“Such indemnification of the Landlord Indemnified Parties [Landlord, its successors assigns, agents, employees, contractors, partners, directors, officers and affiliates (as that term is defined in the Securities Act of 1933) (collectively “Landlord Indemnified Parties”)] by Tenant shall be effective unless such damage results from the gross negligence or willful misconduct of Landlord or any of its duly authorized agents or employees.”<sup>13</sup>

“Willful misconduct generally means a knowing violation of a reasonable and uniformly enforced rule or policy. It means intentionally doing that which should not be done or intentionally failing to do that which should be done, knowing that injury to a person will probably result or recklessly disregarding the possibility that injury to a person may result.”

See <https://definitions.uslegal.com/w/willful-misconduct/>.

Under Michigan law, gross negligence is limited to “conduct so reckless as to demonstrate a substantial lack of concern about whether an injury results.” Xu.v.Gay?257 Mich App 263, 269 (2003).<sup>14</sup>

As noted above, the Court found that DSG breached ¶ 42 of the Lease. And in the Court’s Opinion dated November 27, 2023, it found that Signature (14 Mack’s agent) failed to cooperate in good faith with Colliers and found that 14 Mack is “responsible for commissions owed to Colliers who was the cooperating broker.”<sup>15</sup> The Court’s previous

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<sup>13</sup> DSG MSD Exhibit B, section 16(i)(a). (Emphasis added)

<sup>14</sup> In Xu.v.Gay?the Court of Appeals applied the definition of “gross negligence” set forth in MCL 691.1407(8)(a) of the Governmental Tort Liability Act (GTLA), MCL 691.1401 et. seq; to a contractual waiver of liability. The GTLA defines gross negligence as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(8)(a).

<sup>15</sup> Opinion and Order dated 11/27/2023, p 16.

opinion also detailed numerous pertinent facts evidencing 14 Mack's awareness of Colliers' possible involvement relating Colliers' to the "alternative" lease.<sup>16</sup>

As a result, the Court finds that there is a question of fact as to whether 14 Mack is free from gross negligence or willful misconduct for purposes of the contractual indemnity provision under ¶16(i) of the Lease. There is also a question of fact as to whether 14 Mack is free from active or causal negligence for purposes of common law indemnity. Consequently, 14 Mack's Motion for Summary Disposition under MCR 2.116(C)(10) is DENIED as to both breach of contractual indemnity and common law indemnity and DSG's Motion under both (C)(8) and (C)(10) is DENIED.

#### DSG's Motion Regarding Signature

As previously set forth above, the contractual indemnity provision in the 14 Mack/DSG Lease upon which Signature relies as 14 Mack's agent provides:

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<sup>16</sup> Opinion and Order dated 11/27/2023, pp 17-19.

(i) Irrespective of the adequacy of any insurance required to be maintained by Tenant hereunder, Tenant agrees that it will indemnify, defend and hold harmless Landlord, its successors, assigns, agents, employees, contractors, partners, directors, officers and affiliates (as that term is defined in the Securities Act of 1933) (collectively, the “**Landlord Indemnified Parties**”) from and against all fines, suits, losses, costs, expenses, liabilities, claims, demands, actions and judgments (including reasonable attorneys’ fees) of every kind or character arising from a claim brought by a third party and (a) arising from any breach, violation or non-performance of any term, provision, covenant, agreement or condition on the part of Tenant hereunder, (b) recovered from or asserted against any of the Landlord Indemnified Parties on account of injury or damage to person or property to the extent that any such damage or injury may be incident to, arise out of, or be caused, either approximately or remotely, wholly or in part, by any act, omission, negligence or misconduct on the part of Tenant or any of its agents, servants, employees, contractors, or invitees or of any other person entering upon the Premises under or with the express or implied invitation or permission of Tenant, (c) arising from or out the occupancy or use by Tenant, its agents, servants, employees, contractors, or invitees of the Premises or any part thereof or arising from or out of any event, circumstance, or occurrence within the Premises, howsoever caused, (d) due directly or indirectly to violations of the laws and regulations of the United States, of the State of where the Premises is located and the ordinances and laws of the City and County where the Premises is located, which are now in force or which may hereafter be in force, by Tenant, its agents, subtenants, or assignees, and/or (e) suffered by, recovered from or asserted against any of the Landlord Indemnified Parties by Tenant’s employees, agents, servants, contractors, or invitees. Such indemnification of the Landlord Indemnified Parties by Tenant shall be effective unless such damage results from the gross negligence or willful misconduct of Landlord or any of its duly authorized agents or employees.

It is undisputed that Signature was 14 Mack’s agent. And under the terms of this above provision, DSG agreed to indemnify 14 Mack’s agent, Signature, from and against all suits, liabilities, claims actions and judgments arising from a claim brought by a third party- i.e. Colliers, arising from any breach, violation or non-performance of any terms, provision covenant, agreement or condition on the party of Tenant--DSG.<sup>17</sup> As discussed above, the Court found that DSG breached section 42 of the Lease by using Colliers’ services with respect to the alternative space. And the Court previously found that Colliers, as a third-party beneficiary under the Exclusive Leasing Agreement<sup>18</sup> was owed a commission as a cooperating broker. Yet, as previously discussed above, this indemnification section requires Signature, 14 Mack’s authorized agent, to be free of gross negligence or willful

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<sup>17</sup> DSG MSD Exhibit B, section 16(i)(a).

<sup>18</sup> DSG MSD Exhibit A.

misconduct.

The Court, in its previous opinion, found that “there was not a genuine issue of material fact that Signature failed to cooperate in good faith with Colliers, who unquestionably assisted Signature in the procurement of any lease.”<sup>19</sup> Therefore, whether Signature’s failure to cooperate amounts to gross negligence or willful misconduct or whether it constitutes active or casual negligence to preclude common law indemnity are questions of fact for the trier of fact. DSG’s motion for summary disposition under MCR 2.116(C)(10) relating to Signature’s third-party complaint is DENIED.

#### CONCLUSION

Based on the above:

IT IS HEREBY ORDERED that 14 Mack’s motion under MCR 2.116(C)(10) relating to its third-party claim for contractual indemnity and common law indemnity is DENIED and that DSG’s Motion relating to 14 Mack’s third-party complaint under MCR 2.116(C) (8) and (10) is DENIED.

IT IS FURTHER ORDERED that DSG’s motion under MCR 2.116(C)(8) and (10) relating to Signature’s third-party complaint is DENIED.

This is NOT a final order and does NOT close the case.

IT IS SO ORDERED.

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<sup>19</sup> Opinion and Order dated 11/27/2023, p 16.

