

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

COLLIERS INTERNATIONAL  
DETROIT, LLC,

Plaintiff,  
v  
Case No. 22-196197-CB  
Hon. Victoria Valentine

14 MACK LP, and SIGNATURE  
ASSOCIATES, INC., *Business Court*

Defendants,  
and

14 MACK LP, and SIGNATURE  
ASSOCIATES, INC.,

Third-Party Plaintiffs,  
v

THE DUFRESNE SPENCER GROUP, LLC,

Third-Party Defendant.

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**OPINION AND ORDER REGARDING MOTION FOR SUMMARY DISPOSITION**

At a session of said Court held on the  
27th day of November 2023 in the County of  
Oakland, State of Michigan  
PRESENT: HON. VICTORIA A. VALENTINE

This is Plaintiff, Collier International Detroit, LLC's ("Collier") Motion for Partial Summary Disposition. Plaintiff requests this Court grant Summary Disposition against Defendant Signature Associates ("Signature") on its Breach of Contract (Count I) and against Defendants, 14 Mack LP ("14 Mack") and Signature on its Third Party-Beneficiary (Count II).

The parties appeared for oral argument on September 13, 2023,<sup>1</sup> and subsequently engaged in unsuccessful mediation. The Court, having read the briefs, heard oral argument, and being fully advised in the premises, hereby GRANTS Plaintiff's motion in part, and DENIES Defendant Signature's motion under 2.116(I)(2) the reasons set forth below.

## **INTRODUCTION**

This matter relates to Defendants' failure to pay a "cooperating broker" commission to Plaintiff Colliers, a real estate broker, under an Exclusive Leasing Agreement ("Agreement") between Defendant 14 Mack, the owner of the leased property, and Defendant Signature, 14 Mack's leasing agent. The subject leased property is located at 6500 14 Mile Road, Warren Michigan ("Alternative Lease"). Colliers claims it is a third-party beneficiary to this Agreement. Plaintiff separately alleges breach of contract against Defendant Signature for Signature's failure to protect Colliers, which Colliers claims is Signature's cooperating broker. Plaintiff also alleges

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<sup>1</sup> The motion for partial summary disposition has been re-noticed for December 13, 2023. This Opinion is entered without the need for further oral argument.

that, pursuant to the terms of the exclusive Agreement between 14 Mack and Signature, and pursuant to the terms of the signed lease between 14 Mack and third-party Defendant The Dufresne Spencer Group LLC (“DSG”), Colliers is owed a commission of \$246,671.17.

Plaintiff filed suit against Defendants 14 Mack and Signature.<sup>2</sup> Defendants 14 Mack and Signature then added DSG as Third Party based on claims of indemnification.

#### **PARTIES’ POSITIONS:**

Plaintiff argues that:

- Defendants 14 Mack and Signature were parties to the Agreement, which provided a 5% commission if a lease was consummated with assistance of a “cooperating broker.”
- Plaintiff Colliers was the “cooperating broker” because it:
  - introduced Third-Party DSG to the property;
  - showed the entire Property to DSG and provided DSG with information regarding the property and surrounding area;
  - conducted numerous negotiations with Defendants Signature and 14 Mack on behalf of DSG for the Property and for the alternative space that was ultimately leased to DSG (“Alternative Lease”);
  - provided Defendants with a proposed lease and multiple Letters of Intent (LOI), including a LOI regarding the alternative space that was ultimately leased to DSG (“Alternative Lease”).
- Plaintiff Colliers was a third-party beneficiary of the Agreement between Defendants 14 Mack and Signature.
- While 14 Mack consummated a lease with DSG for the alternative space during the exclusive listing period, it failed to pay Colliers its portion of the commission. Instead, it intentionally removed Colliers from the transaction to prevent Colliers from collecting its commission.

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<sup>2</sup> Plaintiff’s Complaint alleges: Breach of Contract (Count I), Third Party Beneficiary (Count II), Breach of Implied Contract (Count III), Quantum Meruit & Unjust Enrichment (Count IV), Promissory Estoppel (Count V), Tortious Interference with Contractual Relationships (Count VI), Civil Conspiracy (Count VII), and Conversion (Counts VIII and IX).

- Signature failed to protect Colliers, its licensed cooperating broker.
- As a result, 14 Mack and Signature breached their listing agreement by refusing to pay Colliers its commission. Colliers was damaged in the amount of its \$246,671.17 commission, while 14 Mack benefitted by paying less than the commission owed, and Signature benefitted by retaining funds owed to Colliers in the form of a larger commission.

Defendant Signature responds and seeks summary disposition under MCR 2.116(I)(2), arguing:

- With regard to Count I (Breach of Contract), Colliers failed to provide evidence of a contract between Colliers and Signature.
- With regard to Count II (Third Party Beneficiary), **Signature** had no obligation to pay Colliers a commission under the Agreement-rather the Agreement provides that Defendant *14 Mack* was to provide a commission to cooperating brokers.
- Alternatively, there is a question of fact as to whether Colliers is entitled to commission as the cooperating broker.

Defendant 14 Mack argues:

- there is no evidence to support Plaintiff's claim that Plaintiff *negotiated* with 14 Mack and Signature to secure the alternative space entered into between DSG and 14 Mack ("Alternative Lease").
- Rather, 14 Mack argues that DSG, 14 Mack and Signature directly engaged in discussions and negotiations for a new lease for different space.
- DSG represented to 14 Mack that Colliers was no longer representing it and 14 Mack was unaware of any conversations between DSG and Colliers.
- DSG expressly represented to 14 Mack that Colliers was not representing it regarding the Alternative Lease.
- Alternatively, 14 Mack argues that there is a material question of fact as to whether Colliers was a cooperating broker.

## FACTS

Plaintiff's Exhibit W to its Reply sets forth the following chronology of events:

<b>DATE</b>	<b>DESCRIPTION OF COLLIERS' ASSISTANCE</b>
7/29/2021	First email contact COLLIERS to Signature introducing DSG as prospective tenant for the Property -- <b>Exhibit B</b>
8/30/2021	Colliers shows entire Property to DSG representative Jon Yates, including Suite 500. <b>Exhibit T, ¶7, Exhibit U, ¶9-¶10 and Exhibit V, ¶8</b>
9/7/2021	Email from Colliers to Ian Quint on behalf of DSG. <b>Exhibit X</b>
12/20/2021	Colliers shows entire Property to DSG representative Jon Yates, including Suite 500. <b>Exhibit T, ¶7, Exhibit U, ¶9-¶10 and Exhibit V, ¶8</b>
1/5/2022	Signature email confirming Colliers' commission as "cooperating broker." <b>Exhibit D</b>
1/11/2022	LOI signed by 14 Mack and DSG, acknowledged that Colliers "exclusively represents" DSG. <b>Exhibit E</b>
1/18/2022	Colliers submits draft lease to Signature and 14 Mack, provides for Colliers' broker commission. <b>Exhibit F</b>
1/19/2022	14 Mack email confirming Colliers' commission as "cooperating broker." <b>Exhibit G</b>
2/7/2022	14 Mack signs lease with Gardner White for space DSG was negotiating for.
3/8/2022	DSG requests Colliers to review and revise proposed LOI for Suite 500. Brian Whitfield sends his revisions to DSG. <b>Exhibit J, Exhibit K</b>
3/8/2022	DSG sends proposed LOI to 14 Mack for Suite 500, which includes the language that Colliers "exclusively represents" the tenant DSG. DSG notes in email that the new LOI "closely tracks the previous signed LOI" and that the parties "could also use the previous lease form to expedite closure." <b>Exhibit L</b>
3/14/2022	Simon Yeramian of 14 Mack revisions to LOI -- "[t]here is no other broker involved in this transaction." and insisting upon the language that DSG was "not being represented in this transaction,

	and Landlord shall only be responsible for paying a leasing commission to Signature Associates.” <b>Exhibit M</b>
3/16/2022	14 Mack email to DSG -- “no one at Colliers has been involved in these discussions. We don’t pay commissions to agents who don’t take part in a deal.” <b>Exhibit N</b>
3/15-16/2022	DSG asks Colliers to review and revise 14 Mack’s revisions to the LOI for the Suite 500 with DSG and DSG’s attorney. Murchison sent his revisions back to DSG on March 15, 2022. Murchison also advises DSG of its conversation with Signature that day confirming that if DSG sent a revision back to 14 Mack reinserting Colliers name in the LOI, that Signature would “work it out with Brasswater” -- the owners of 14 Mack. <b>Exhibit O</b>
3/23/2022	DSG sent 14 Mack its revisions to the LOI, including language that “Tenant is being represented by Colliers (Brad Murchison/Partrich Jett/Brian Whitfield) in this transaction, and Landlord shall be responsible for paying a leasing commission to Signature Associates.” Brad Murchison also added his comment to the LOI draft (using the initials “MB”) notifying 14 Mack that “Colliers is representing Tenant.” Simon Yeramian of 14 Mack responds ““No broker has been involved in this transaction on the Tenant’s side.” <b>Exhibit P</b>
4/6/2022	Defendants sign LOI for Suite 500 – remove Colliers names as broker. DSG uses Colliers form LOI and makes its own changes. <b>Exhibit Q</b>
5/2/2022	Defendants executed lease. DSG uses Colliers form LOI and makes its own changes. <b>Exhibit R</b>
5/3/2022	Colliers reminds Signature, through counsel, that a commission was owed to Colliers on any lease executed with DSG. <b>Exhibit S</b>

#### STANDARD OF REVIEW

Summary disposition under MCR 2.116(C)(10) may be granted where “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” This motion tests the factual sufficiency of the complaint and “must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact.” MCR 2.116(G)(4). The moving party bears the initial burden of supporting its position. *Smith v Globe Life Ins Co*, 460 Mich 446, 455 (1999). “Affidavits, depositions, admissions, or other documentary evidence in support of the

grounds asserted in the motion are required . . . when judgment is sought based on [MCR 2.116(C)(10)].” MCR 2.116(G)(3)(b).

“The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.” *Smith*, 460 Mich at 455 (citations omitted; emphasis added).

“A party’s own testimony, standing alone, can be sufficient to establish a genuine question of fact.” *Jewett v Mesick Consol Sch Dist*, 332 Mich App 462, 476 (2020). “A conflict in the evidence may generally only be removed from the trier of fact’s consideration if it is based on testimony that is essentially impossible or is irreconcilably contradicted by unassailable and objective record evidence.” *Id*. The “court cannot make findings of fact” “[i]n its review of the evidence.” *Doster v Covenant Medical Center, Inc*, 510 Mich 910 (2022). Accordingly, “when a witness’s credibility is at issue, summary disposition is inappropriate.” *Taylor Estate v Univ Physician Group*, 329 Mich App 268, 284 (2019).

MCR 2.116(I)(2) provides:

(2) If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.

## ANALYSIS

## COUNT I- BREACH OF CONTRACT AGAINST DEFENDANT SIGNATURE

Plaintiff's (C)(10) motion seeks Summary Disposition in its favor on its breach of contract count against Defendant Signature. While Plaintiff's complaint alleges a breach of contract count against Signature, its own Motion for Partial Summary Disposition fails to succinctly establish why there is no question of material fact that Signature breached an agreement. In fact, the Court is unclear as to the terms of any alleged agreement between Plaintiff and Defendant Signature that is separate from Plaintiff's claim that it is an intended beneficiary of the Agreement between 14 Mack and Signature. Section II of Plaintiff's initiating Brief, is titled "Breach of Contract/Third-Party Beneficiary"<sup>3</sup> where Plaintiff acknowledges that "[t]he contract in this case is the listing agreement signed by 14 Mack and Signature."<sup>4</sup> And the essence of Plaintiff's argument in its initiating brief relates to its status as a third-party beneficiary under the Signature/14 Mack Agreement-- not its claim for Breach of Contract against Signature.

As Signature argues:<sup>5</sup>

Count I of the Complaint alleges a cause of action for breach of contract against Signature. A breach of contract claim requires a Plaintiff to introduce evidence that a contract existed between the parties, the contract was breached, and the breach resulted in damages to the Plaintiff. See *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 100; 878 NW2d 816 (2016).

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<sup>3</sup> Plaintiff's Brief, p 11.

<sup>4</sup> Plaintiff's Brief, p 11.

<sup>5</sup> Signature's Response Brief, p 7.

Therefore, for Colliers to be entitled to summary disposition on its breach of contract claim, it must provide evidence that a contract existed between it and Signature. Colliers entire argument, however, focuses on its status as a third-party beneficiary of the Signature/14 Mack Listing Agreement. It never asserts that it contracted with Signature, and it failed to provide any evidence of a contract. Consequently, this Court should enter an order denying Colliers' Motion for Summary Disposition as to Count I of its Complaint and grant summary disposition to Signature pursuant to MCR 2.116(I)(2). That court rule provides:

- (2) If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.

No question of material fact exists with respect to Court I of the Complaint. Count I should be dismissed with prejudice.

Colliers' own motion tests the factual sufficiency of the complaint and "must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact." MCR 2.116(G)(4). As the moving party it bears the initial burden of supporting its position, *Smith v Globe Life Ins Co*, 460 Mich 446, 455 (1999), which it failed to sustain in its initiating brief.

The Court agrees with Defendant that Colliers failed to present an argument in its initiating brief regarding its separate breach of contract count or to succinctly articulate why there is no question of material fact that Signature breached that agreement.

Plaintiff's *reply* brief does touch on this issue. The Court nevertheless denies Plaintiff's motion under (C)(10) relating to Signature's breach of this "agreement." This count is separately alleged from Plaintiff's third-party beneficiary claim. And Colliers' *reply* brief is tantamount to

raising a new argument to support its own (C)(10) motion to which Signature was not afforded the opportunity to respond. See *Kinder Morgan Michigan, LLC v City of Jackson*, 277 Mich App 159, 174 (2007) (declining to address issues first raised in a reply brief because “[r]eplay briefs must be confined to rebuttal, and a party may not raise new or additional arguments in its reply brief”).

Accordingly, the Court denies Plaintiff’s request for this Court to find that Signature breached the contract. Plaintiff’s Motion regarding Count I is DENIED.

Because, however, Plaintiff has alleged a breach of contract claim in its complaint, the Court denies Signature’s motion under MCR 2.116(I)(2) at this time.

COUNT II-THIRD PARTY BENEFICIARY CLAIM AGAINST DEFENDANTS SIGNATURE & 14  
MACK

*a. Colliers is the intended third-party beneficiary.*

MCL 600.1405(1) defines the circumstances under which one is a third-party beneficiary and provides for the right of a third-party beneficiary to enforce a contract to which it is not a party:

Any person for whose benefit a promise is made by way of contract ... has the same right to enforce [the] promise that he would have had if the said promise had been made directly to him as the promisee.

(1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of [the] promise had undertaken to give or to do or refrain from doing something directly to or for [that] person.

Under MCL 600.1405, a nonparty to a contract may sue to enforce a contract only if he or she qualifies as an intended third-party beneficiary. *Farm Bureau Ins Co v TNT Equip, Inc*, 328

Mich App 667, 674 (2019). “A person is a third-party beneficiary of a contract only if the contract establishes that a promisor has undertaken a promise directly to or for that person.” *Id.* See also MCL 600.1405(1). In contrast to intended beneficiaries, incidental third-party beneficiaries may not sue to enforce a contract. *Schmalfeldt v North Pointe Ins, Co*, 469 Mich 422, 429 (2003). The contract itself determines whether a party is an intended third-party beneficiary within the meaning of MCL 600.1405(1). *Id.* at 428.

A person is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise directly to or for that person. By using the modifier directly, the Legislature intended to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract. An objective standard is to be used to determine, from the form and meaning of the contract itself, whether the promisor undertook to give or to do or to refrain from doing something directly to or for the person claiming third-party beneficiary status.

... [A] court should look no further than the form and meaning of the contract itself to determine whether a party is an intended third-party beneficiary within the meaning of § 1405. [Citations omitted.]

*Schmalfeldt v North Pointe Ins, Co*, 469 Mich at 427-428.

Here, the Court agrees with Plaintiff that it is the intended third-party beneficiary of the exclusive leasing listing agreement between Defendant Signature, the leasing agent, and 14 Mack, the Owner. The Listing Agreement provides in part:

4.01 Leasing Commissions. As consideration for the performance by Leasing Agent of its duties under Article III above, Owner agrees to pay leasing commissions, at the rates hereinafter set forth in, and in accordance with, this Article IV, to Leasing Agent on all leases procured from Leasing Agent's efforts hereunder and signed during the Term. In computing any leasing commission due hereunder, the following shall be excluded from the effective total base rental used as a basis for such computation: (a) cancellation or penalty payments for tenant termination rights; (b) late payment charges; (c) percentage rentals on retail leases; (d) security deposits; (e) utilities, electricity, services, heat and air conditioning furnished or paid for by Owner; (f) additional rent pass-throughs for taxes, insurance and common area maintenance; or (g) rental payable but not received by Owner by reason of abatement, concession or otherwise.

\* \* \*

4.04 Cooperating Broker. Leasing Agent will cooperate in good faith with outside brokers and real estate agents. In any lease procured by the Leasing Agent with the assistance of another licensed real estate broker or brokers or real estate agent or agents, Owner agrees to pay a leasing commission to such brokers and agents in such transaction as set forth in Exhibit B.

#### EXHIBIT B

#### COMMISSION SCHEDULE

	<b>Payment to Leasing Agent as a % of Total Base Rent</b>	<b>Payment to Cooperating Broker as a % of Total Base Rent</b>
Lease (years 1-5):		
Co-Brokered	2.5%	2.5%
Direct	4.0%	--
Lease (years 6-10):		
Co-Brokered	1.5%	1.5%
Direct	2.0%	--

The Court finds that the Agreement between Signature and 14 Mack specifically references a "Cooperating Broker," and its Exhibit B also specifically references the percentage payment to the "Cooperating Broker." Therefore, under the exclusive listing agreement, the promisor/owner--14 Mack—and the leasing agent--Signature, undertook promises directly for the benefit of a cooperating broker—Colliers. As a result, the Court finds that Colliers, which is alleged to be the "cooperating broker," is an intended third-party beneficiary of the Agreement

between Signature and 14 Mack. See *Farm Bureau Ins Co v TNT Equip, Inc*, supra; *Schmalfeldt v North Pointe Ins, Co*, supra and MCL 600.1405(1).

*b. Liability under the third-party beneficiary claim*

Under ¶ 4.04 of this Agreement, a leasing commission payment by 14 Mack, as Owner, to cooperating broker was conditioned upon, “**any** lease procured by the Leasing Agent [Signature] with the assistance of another real estate broker [Colliers] . . .” (emphasis added). It is undisputed that Signature procured the Alternative Lease at issue for which it was paid a commission by 14 Mack. The issue then is whether Colliers “assisted” Signature in procuring “any” lease and whether Signature cooperated in “good faith” with Colliers, the “cooperating” broker. Signature does not dispute that Colliers is an intended beneficiary. Rather, it argues that under the language of the Agreement, *it* is not obligated to pay Colliers a commission. Rather, Signature argues that the Agreement specifically provides that the “**Owner** agrees to pay a leasing commission to such brokers and agents in such transaction as set forth in Exhibit B.”<sup>6</sup> As a result, Signature seeks summary disposition under MCR 2.116(I)(2).

However, this same paragraph upon which Signature relies, also provides that “*Leasing Agent [Signature] will cooperate in good faith with outside brokers and real estate agents.*”<sup>7</sup>

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<sup>6</sup> Plaintiff’s MSD Exhibit A: Exclusive Listing Agreement ¶ 4.04 (Emphasis added).

<sup>7</sup> Plaintiff’s MSD Exhibit A: Exclusive Listing Agreement ¶ 4.04 (Emphasis added).

4.04 Cooperating Broker. Leasing Agent will cooperate in good faith with outside brokers and real estate agents. In any lease procured by the Leasing Agent with the assistance of another licensed real estate broker or brokers or real estate agent or agents, Owner agrees to pay a leasing commission to such brokers and agents in such transaction as set forth in Exhibit B.

The well settled cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. *Highfield Beach at Lake Mich V Sanderson*, 331 Mich App 636, 654 (2020).

The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties; to this rule all others are subordinate. 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. Unless 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. If the language of a contract is ambiguous, testimony may be taken to explain the ambiguity. [Quotation marks, citations, and alteration brackets omitted.]

Here, while the terms of the Agreement provides that it is 14 Mack and not Signature who is to pay for any “cooperating broker” commissions, the same Agreement also provides that “Leasing Agent [Signature] will cooperate in good faith with outside brokers and real estate agents.”<sup>8</sup> Therefore, *Signature’s motion* under MCR 2.116(I)(2) is DENIED because the fact that commissions would be paid by the Owner does not negate Signature’s contractual requirement to cooperate in good faith with Colliers.

The Court will next address *Plaintiff’s motion* that there is no question of material fact that

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<sup>8</sup> Plaintiff’s MSD Exhibit A, ¶ 4.04.

it “assisted” Signature under the Agreement for which 14 Mack is to pay Colliers a cooperating broker commission. The Court agrees with Plaintiff that the above-reference language of the Agreement does not require the cooperating broker to have engaged in negotiations for the final lease. Rather, the language requires Signature to “cooperate in good faith” with outside cooperating brokers to whom a commission will be paid by 14 Mack for “any” lease “procured” by Signature with the “assistance” of the cooperating broker.

A written contract must be interpreted according to its plain and ordinary meaning. *Woodington v Shokoohi*, 288 Mich App 352, 373-374 (2010). Contracts must be construed as a whole. *Village of Edmore v Crystal Automation Sys, Inc*, 322 Mich App 244, 262 (2017). 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). “A dictionary may be consulted to ascertain the plain and ordinary meaning of words or phrases used in the contract.” *Auto Owners Ins Co v Seils*, 310 Mich App 132, 145 (2015).

“Any” is defined as “one or some indiscriminately of whatever kind.” See Merriam-Webster Dictionary. “Assistance” is defined as “the act of helping or assisting someone or the help supplied: AID.” See Merriam- Webster Dictionary.

And, with regard to “procuring cause” the Court of Appeals in *Leger v Image Data Services*, 2002 WL 1463555 \* 1 stated:<sup>9</sup>

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<sup>9</sup> While unpublished decisions of this Court are not binding, MCR 7.215(C)(1), they can be “instructive or persuasive,” *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136 n 3, (2010).

Black's Law Dictionary defines "procuring cause" as "the cause originating a series of events, which, without a break in their continuity, result in the accomplishment of the prime object." Black's Law Dictionary (6th ed, 1990), p 1208. With respect to the sale of real estate, "[a] broker will be regarded as the 'procuring cause' of a sale, so as to be entitled to commission, if his or her efforts are the foundation on which the negotiations resulting in a sale are begun."

Also,

"[i]t is . . . settled law in Michigan as well as in other States (there being nothing in the sales agreement to the contrary) that a real estate broker who furnishes a buyer for property, ready, willing and able to complete the purchase on the owner's terms, is entitled to his agreed compensation if the owner wrongfully refuses to complete the sale."

*Advance Realty Co v Spanos*, 348 Mich 464, 468 (1957).

Further, "Plaintiff must show that he was the procuring cause of the sale; that the purchaser learned of the property through him; and that through his efforts a sale was made."

*Schmidt v Maples*, 291 Mich 225, 236 (1939).

The Court finds that there is 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. The Court further finds that 14 Mack is, therefore, responsible for commissions owed to Colliers who was the cooperating broker. The facts establish that:

- Colliers introduced DSG to Signature as prospective tenant for the Property on July 29, 2021.<sup>10</sup>
- The LOI advised Signature that Colliers "exclusively" represented DSG. Signature acknowledged receipt of Colliers' LOI and responded to the LOI with proposed revisions on 8/17/2021.<sup>11</sup>

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<sup>10</sup> Plaintiff's MSD Exhibits B: 7/29/2021 email with initial LOI; T: Affidavit of Brad Murchison ¶¶ 4 & 6; U: Affidavit of Patrick Jett, ¶6.

<sup>11</sup> Plaintiff's MSD Exhibit C.

- Colliers conducted two (2) showings of the entire Property to Jon Yates, DSG representative - on August 30, 2021, and December 20, 2021.<sup>12</sup>
- On January 5, 2022, Signature confirmed to Colliers that the "commission schedule" to Colliers as a "cooperating broker"- was 2.5% commission (years 1-5) and 1.5% (years 6-10).<sup>13</sup>
- On January 11, 2022, 14 Mack and DSG executed a letter of intent ("LOI") for approximately 275,800 square feet of space within the Property, which "acknowledged" that Colliers "exclusively represents" DSG and that 14 Mack would be responsible to "pay a commission as per Signature Associates' exclusive listing agreement which will be split on a 50/50 basis with Colliers International."<sup>14</sup>
- On January 18, 2022, Colliers forwarded to 14 Mack, Signature and DSG an initial draft lease for the parties to review and revise, which provided that Colliers represented the tenant and Signature represented the landlord to whom commissions would be owed.<sup>15</sup>
- 14 Mack and Signature acknowledged receipt of the lease draft from Colliers.<sup>16</sup>
- On January 19, 2022, 14 Mack also confirmed the same "commission schedule" to Colliers as a "cooperating broker," as earlier confirmed by 14 Mack's broker, Signature (Exhibit C).<sup>17</sup>
- On January 25, 2022, Signature sent a revised copy of the lease to Colliers for DSG's review, which included Colliers' status as the broker "representing Tenant" DSG.<sup>18</sup>
- Between January 25, 2022, and February 7, 2022, 14 Mack, however, executed a lease for the same space with a different tenant -- Gardner White.
- On March 8, 2022, DSG sent Brian Whitfield of Colliers its proposed LOI for the *alternative space* at the Property for Colliers' review.<sup>19</sup>
- The proposed LOI for the alternative space again acknowledged that Colliers "exclusively represents" DSG, the tenant.<sup>20</sup>
- Brian Whitfield of Colliers made several revisions to the proposed LOI for the alternative space (using the initials "BW") and sent it back to DSG.<sup>21</sup>

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<sup>12</sup> Plaintiff's MSD Exhibits T ¶ 7, U ¶¶ 9-10, V ¶ 8.

<sup>13</sup> Plaintiff's MSD Exhibit D.

<sup>14</sup> Plaintiff's MSD Exhibit E.

<sup>15</sup> Plaintiff's MSD Exhibit F.

<sup>16</sup> Plaintiff's MSD Exhibit G.

<sup>17</sup> Plaintiff's MSD Exhibit H.

<sup>18</sup> Plaintiff's MSD Exhibit I.

<sup>19</sup> Plaintiff's MSD Exhibit J.

<sup>20</sup> Plaintiff's MSD Exhibit J p 9 of 10.

<sup>21</sup> Plaintiff's MSD Exhibits K, T ¶9 and V ¶10.

- On March 8, 2022, DSG emailed the proposed LOI for the alternative space containing Colliers' revisions directly to 14 Mack.<sup>22</sup>
- The LOI, as revised by Colliers, again "acknowledged" that Colliers "exclusively represents" the tenant DSG for the alternative space at the Property.<sup>23</sup>
- Further DSG's LOI stated that 14 Mack "shall be responsible to pay a commission" to Colliers "as per Signature's exclusive listing agreement which will be split on a "50/50" basis."<sup>24</sup>
- The proposed LOI for the alternative space (Exhibit K) was substantially identical in language to the initial LOI submitted by Colliers on behalf of DSG and signed by both DSG and 14 Mack two months earlier. (Exhibit E, Exhibit J).
- 14 Mack responded to the DSG letter of intent with revisions.<sup>25</sup>
  - It deleted the language acknowledging Colliers' right to a commission, stating that DSG was "not being represented in this transaction, and Landlord shall only be responsible for paying a leasing commission to Signature Associates."
  - In the LOI draft, Simon Yeramian ("SY" in the comments) of 14 Mack also stated that "[t]here is no other broker involved in this transaction."
- DSG forwarded 14 Mack's response to Colliers' Brad Murchison.<sup>26</sup>
- 14 Mack also sent an email to DSG declaring that "no one at Colliers has been involved in these discussions. We don't pay commissions to agents who don't take part in a deal."<sup>27</sup>
- DSG also forwarded this 14 Mack email to Colliers' Brad Murchison.<sup>28</sup>
- The Colliers' team immediately contacted Signature to confirm its involvement with the deal. Signature advised Colliers that DSG should send an LOI revision back to 14 Mack reinserting Colliers' name and that Signature would confirm Colliers' involvement with 14 Mack.<sup>29</sup> It is averred that:

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<sup>22</sup> Plaintiff's MSD Exhibit L.

<sup>23</sup> Plaintiff's MSD Exhibits K, p 9 of 10.

<sup>24</sup> Plaintiff's MSD Exhibit L. p 6 of 11.

<sup>25</sup> Plaintiff's MSD Exhibit M.

<sup>26</sup> Plaintiff's MSD Exhibit M.

<sup>27</sup> Plaintiff's MSD Exhibit N.

<sup>28</sup> Plaintiff's MSD Exhibit N.

<sup>29</sup> Plaintiff's MSD Exhibits U ¶12 & V ¶11.

11. On or around March 15, 2022, Patrick Jett and I had a phone call with Signature representative Greg Hudas confirming that Colliers was still involved in assisting DSG with the negotiations for the alternative space DSG would ultimately lease at the Property – and that 14 Mack was attempting to remove Colliers from the deal. Signature told us to make sure that DSG reinserted Colliers' agents names into the LOI, and then Signature would work it out with 14 Mack.

- On March 15, 2022, Brad Murchison of Colliers was asked by DSG to review and revise 14 Mack's revisions to the LOI for the alternative space with DSG and DSG's attorney. Murchison sent his revisions back to DSG on March 15, 2022, and also advised DSG of its conversation with Signature that day confirming that, if DSG sent a revision back to 14 Mack, commission is owed to Colliers on any lease executed with DSG.<sup>30</sup>
- Nevertheless, 14 Mack and DSG signed the LOI on April 6, 2022, which excluded Colliers' right to a commission. Rather, the LOI specifically provided that "Landlord shall be responsible for paying a leasing commission of Signature Associates."<sup>31</sup>
- Effectively April 28, 2023,<sup>32</sup> DSG and 14 Mack entered into the Alternative Lease, which provides in part:

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.

- On May 3, 2022, Bill Michelson of Colliers sent a letter to Signature advising Signature of Colliers' involvement on behalf of DSG in the evaluation and negotiation of property under 14 Mack's control.<sup>33</sup>
- Thereafter. Colliers filed this lawsuit claiming that 14 Mack refused to pay Colliers its commission and Signature failed to protect Colliers' right to a commission.

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<sup>30</sup> Plaintiff's MSD Exhibit O.

<sup>31</sup> Plaintiff's MSD Exhibit Q, p 4 of 10.

<sup>32</sup> Plaintiff's MSD Exhibit R ¶42.

<sup>33</sup> Plaintiff's MSD Exhibit S.

- Colliers allege that:
  - upon information and belief, 14 Mack paid Signature a commission, which was at a higher percentage as a result of the Defendants' exclusion of Colliers from the deal.
  - upon information and belief, 14 Mack also retained financial savings in an amount to be determined, as a result of the Defendants' exclusion of Colliers' commission from the deal.

The Court agrees with Plaintiff that there was not a break in continuity with regard to Plaintiff's involvement as the cooperating broker in Signature's procurement of "any" lease for which 14 Mack was obligated to pay a commission. Signature had knowledge of Colliers involvement; DSG listed Colliers as its broker in its initial LOI proposals; it is undisputed that Colliers introduced DSG to Signature; Colliers communicated with Signature regarding Colliers being DSG's exclusive broker; Signature was aware that Colliers was involved in the deal regarding the Alternative Lease; and Signature was aware that the LOI revision regarding the Alternative Lease needed to reinsert Colliers' name as a broker; and 14 Mack deleted language in the LOI for the Alternative Lease that referenced Colliers as the broker. Yet, and despite Signature's awareness of Colliers' involvement, the Alternative Lease was finalized without Colliers' inclusion as a cooperating broker. And allegedly, by Signature not protecting Colliers, Signature benefited by receiving an *extra* 1.5 percent commission and 14 Mack benefitted by paying less than the commission owed.

The Court therefore finds that based on the exhibits, there is NO genuine issue of material fact that Colliers, as the cooperating broker, assisted Signature in the procurement of

“any lease.” Colliers’ motion for Summary Disposition as to Count II- the third-party beneficiary claim-against Signature and 14 Mack is GRANTED.

#### CONCLUSION

Based on the above, the Court:

GRANTS Plaintiff’s motion under MCR 2.116(C)(10) as to Count II for breach of third-party beneficiary count against Defendants Signature and 14 Mack;

DENIES Plaintiff’s motion under MCR 2.116(C)(10) as to Count I for the breach of contract count against Defendant Signature; and

DENIES Signature’s motion under 2.116(I)(2).

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

IT IS SO ORDERED.



11/27/23