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

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

Plaintiff,

v.

Case No. 16-155786-CB

Hon. Victoria A. Valentine

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

Defendants.

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OPINION AND ORDER REGARDING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10) AS TO COUNT V OF PLAINTIFF'S SECOND AMENDED COMPLAINT AND DEFENDANT COMPUTER AND ENGINEERING SERVICES' MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10) AS TO COUNTS IV AND V OF PLAINTIFF'S SECOND AMENDED COMPLAINT

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

I.

Plaintiff FCA US, LLC f/k/a Chrysler Group, LLC ("Chrysler") and Defendant RightThing, LLC ("RightThing") entered into a Master Services Agreement on May 16, 2011 whereby RightThing agreed to "provide recruitment process outsourcing services to Chrysler" with regard to salaried personnel, hourly personnel, and supplemental contract workers. In order to fulfill its obligations to Chrysler under the Master Services Agreement regarding supplemental contract workers, RightThing contracted with Defendant APC Workforce Solutions, LLC d/b/a ZeroChaos ("ZeroChaos"). The February 22, 2012 Management Services Agreement between RightThing and ZeroChaos required ZeroChaos to "administer and manage the process by which third-party vendors (the "Staffing Companies") selected by [ZeroChaos] supply their employees as workers to work at Customer on a temporary basis. . . ."

ZeroChaos entered into a Staffing Company Agreement ("SCA") with Defendant Computer and Engineering Services, Inc. ("CES") with an effective date of April 1, 2012.[1] Under the SCA, CES agreed to, among other things, "recruit, interview, select, hire and assign employees ("Staffing Company Worker"), who, in Staffing Company's judgment, are best qualified to perform the Work requested by ZeroChaos."[2]

In 2012 and 2013 Chrysler was named as a defendant in two Washtenaw County lawsuits. The plaintiffs in the lawsuits, Laura Holliday and Gregory Green, alleged injuries arising out of a July 19, 2012 automobile accident involving an individual named Bradley Erdman ("Erdman"). It was alleged that at the time of the accident Erdman was employed by CES and was driving a Chrysler-owned vehicle.[3]

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[1] Pl's Motion, Exh 2, Staffing Company Agreement.
[2] *Id.*, § 2.
[3] Second Amended Complaint, ¶¶ 11-12.; 59. Pl's Motion, Exhs 9 and 10, Green and Holliday Complaints.

CES denied Chrysler's tender of the *Holliday* and *Green* claims. Chrysler then sought coverage from ZeroChaos's insurer, National Union Fire Insurance Company of Pittsburgh, PA ("National Union"). Chrysler asserts that National Union determined that its coverage was in excess and that, as a result, it was forced to defend itself and contribute to the resolution of the *Holliday* and *Green* lawsuits. The lawsuits settled with Chrysler contributing $456,250 and National Union contributing $456,250.[4]

Chrysler filed the instant action seeking to recover the amounts it paid to defend and settle the *Holliday* and *Green* lawsuits. Chrysler alleges that CES breached the SCA by failing to provide the required insurance (Count IV) and by failing to defend and indemnify Chrysler (Count V). The instant motions relate solely to Chrysler's claims under Counts IV and V against CES with regard to the Holliday and Green lawsuits.

II.

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

[4] Pl's Motion, Exh 15, Coverage and Release Agreement.

III.

Chrysler argues, and CES apparently does not dispute, that Chrysler is an intended third-party beneficiary of the SCA between ZeroChaos and CES.[5] Under Count IV of the Second Amended Complaint Chrysler alleges that CES breached the SCA by "failing to procure and/or maintain insurance with minimum amounts and coverage naming Chrysler as an additional insured sufficient to cover the underlying *Holliday* and *Green* claims."[6] Under Count V Chrysler alleges that "CES breached the SCA by failing to defend, indemnify and hold harmless Chrysler from the underlying *Holliday* and *Green* claims which resulted from the acts and/or omissions of Erdman who was employed by CES to perform services for Chrysler under the SCA."[7]

The parties agree that Florida law controls the claims for Breach of Contract under Counts IV and V.[8] Under Florida law, to prove a breach of contract claim the plaintiff must establish "(1) the existence of a contract, (2) breach of the contract, and (3) damages resulting from the breach." *Asset Mgt Holdings, LLC v Assets Recovery Center Investments, LLC*, 238 So3d 908, 912 (Fla App, 2018). The intent of the parties to the contract governs the construction of the contract. *American Home Assurance Co v Larkin Gen Hosp, Ltd*, 593 So2d 195, 197 (Fla, 1992). The best

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[5] The SCA states, in relevant part:

> **Intended Third-Party Beneficiary/Enforcement.** The unique abilities, knowledge and skill of Staffing Company and its Staffing Company Worker(s) constitute material consideration of this Agreement. As such, Staffing Company understands and agrees that the Services it performs and the Work provided to the Customer shall be in accordance with the standards generally observed in the industry for similar Services and/or Work and agrees that RTI and the Customer are intended third-party beneficiaries of the Services performed and Work provided and shall have the same rights, titles and interests in and to the Services performed and the Work provided as ZeroChaos, and shall be entitled to enforce such legal rights available to it under this Agreement as it would have were it a party hereto. [Pl's Motion, Exh 2, Staffing Agreement, ¶ 2(f).]

As used in the SCA, "RTI" refers to RightThing, LLC and "Customer" refers to RightThing's customer which the parties agree is Chrysler. *See Id.*, Staffing Agreement, Preliminary Statement, p 1. Pl's Motion, p 4; CES' Response, p 5 n 4.

[6] Second Amended Complaint, ¶ 55.

[7] *Id.* at ¶ 64.

[8] *See* Pl's Motion, Exh 2, SCA, § 13.

evidence of the parties' intent is the plain language of the contract. *Whitley v Royal Trails Property Owners' Ass'n*, 910 So2d 381, 383 (Fla App, 2005). Under Florida law an intended third-party beneficiary to a contract may sue for breach of the contract. *Thompson v Commercial Union Ins Co of New York*, 250 So2d 259, 261, 262 (Fla, 1971); *Health Options, Inc v Palmetto Pathology Servs, PA,* 983 So2d 608, 615 (Fla App, 2008).

A. Count IV-Breach of Contract-Insurance

CES moves for summary disposition on Count IV pursuant to MCR 2.116(C)(10).

Under the heading "REQUIRED INSURANCES" Section 5 of the SCA between ZeroChaos and CES states "Staffing Company is required to provide continuous insurance coverage as defined in Schedule E, attached hereto. . . ."[9] Schedule E § 1(c) states that:

> INSURANCE. Staffing Company will, at its own expense, provide and keep in full force and effect during the term of this Agreement the following kinds and minimum amounts of insurance:
>
> c) Automobile Liability Insurance: including contractual liability coverage for all owned, non-owned, leased, and hired, vehicles providing coverage for bodily injury and property damage liability with a combined single limit of not less than five million dollars ($5,000,000) per accident . . . .[10]

Additionally, Schedule E, Section 1.3 states that "[a]ll Staffing Company insurance will be primary with no right of contribution by ZeroChaos or Customer or their respective insurers" and the second sentence of Schedule E, Section 1.4 states "[e]ach policy required pursuant to Section 1.0 subsections (b) and (c) shall name Customer, ZeroChaos and their respective Affiliates and assignees as Additional Insured."[11]

[9] Pl's Motion, Exh 2, SCA.
[10] *Id.* Schedule E.
[11] *Id.*

The parties agree that ZeroChaos and CES executed an Amendment to Schedule E Section 1.4 which states as follows:

> **Schedule E- INSURANCE REQUIREMENTS-Section 1.4.** The second sentence of this paragraph is deleted in its entirety and replaced with the following:
>
> *General Liability policy required pursuant to Section 1.0 subsection (b) shall name Customer, ZeroChaos and their respective Affiliates and assignees as Additional Insured for the negligence of CES in its role and obligations under this agreement as a temporary staffing company. Automobile Liability Insurance policy required pursuant to Section 1.0 subsection (c) shall name Customer, ZeroChaos and their respective Affiliates and assignees as Additional Insured on Staffing Company owned automobiles.*[12]

The Amendment to Section 1.4 was one of the stated reasons for CES' rejection of Chrysler's tender of the *Holliday* and *Green* claims.[13]

In its motion, CES argues that summary disposition should be granted on Count IV because, under the Amendment to Schedule E Section 1.4, it was not required to name Chrysler as an additional insured to cover situations where, as here, injuries arose from the use of a Chrysler owned vehicle.

In its response to CES' Motion, Chrysler apparently does not dispute CES' argument with regard to the Amendment to Schedule E Section 1.4. Rather, Chrysler argues that in addition to pleading a breach of the requirements of the SCA with regard to insurance under Schedule E, it also pleaded a claim of breach of contract based upon Schedule D-7.[14] Chrysler argues that Schedule D-7, Section 11(a) of the SCA "requires that CES purchase automobile liability insurance, which named Chrysler as an additional insured in amounts and coverages sufficient to

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[12] CES Motion, Exh E, Amendment #1 to Staffing Company Agreement, ¶ 3 (Italics in original underline added.)

[13] Pl's Response, Exh 6, Miron Dep, Exh 5, letter dated October 18, 2012. The letter states:

> There is no additional insured coverage. Amendment #1 to the ZeroChaos agreement specifically provides that additional insured coverage will only be provided with respect to CES owned vehicles. Since the car at issue was owned by Chrysler, there is no additional insured coverage.

[14] Second Amended Complaint, ¶¶ 51-52.

cover all claims under the SCA." Schedule D-7 Section 11(a), upon which Chrysler relies, states in pertinent part:

> Insurance. Seller will obtain and continuously maintain in force during the Term . . . (iv) *automobile liability insurance, including owned, hired and non-owned liability*. . . in amounts and coverages sufficient to cover all claims hereunder. Such policies *will name Chrysler as an additional insurer thereunder*; be primary and not excess over or contributory with any other valid applicable and collectible insurance. . . .[15]

As Chrysler asserts, the Amendment relied upon by CES in its motion relates solely to Schedule E and does not reference Schedule D-7.[16] Section 11(a) of Schedule D-7 apparently requires that Chrysler be named as additional insured on automobile liability insurance including "non-owned liability" and thus apparently conflicts with the Amendment to Schedule E Section 1.4 which limits the additional insured requirement to "Staffing Company Owned vehicles."

CES does not discuss Schedule D-7 in its motion and although it filed a reply brief addressing Chrysler's response to its motion, CES does not address Chrysler's argument regarding Schedule D-7 Section 11(a) in its reply brief either. Thus, the Court is presented with no argument that Schedule D-7 Section 11(a) is not applicable or that it does not conflict with the Amendment to Schedule E Section 1.4. A reading of the two provisions does indicate an apparent conflict between the Amendment to Schedule E Section 1.4 and Schedule D-7 Section 11(a) with regard to the additional insured requirement. *See Weisfeld-Ladd v Estate of Ladd*, 920 So2d 1148, 1150 (Fla App, 2006) (quotation marks and citation omitted) ("A contract is ambiguous when its language is reasonably susceptible to more than one interpretation or is subject to conflicting inferences."). "If the terms of a written instrument are in dispute and are reasonably susceptible to two different interpretations, then an issue of fact is presented as to the parties intent; such an issue

[15] Pl's Response, Exh 2, SCA, Schedule D-7, Section 11(a) (emphasis added).
[16] CES Motion, Exh E.

of fact cannot be properly resolved by a summary judgment." *Ventana Condo Ass'n v Chancey Design Partnership*, 203 So3d 175, 183 (Fla App, 2016) (citation and quotation marks omitted). *See also Soncoast Comm Church of Boca Raton, Inc v Travis Boating Cntr of Florida, Inc*, 981 So2d 654, 655 (Fla App, 2008) (the trial court erred in granting summary judgment where the contract language was ambiguous, and the parties' intent was a material issue of fact).

Based upon the foregoing, CES' motion for summary disposition as to Count IV is denied. Additionally, to the extent that Chrysler is seeking judgment in its favor as to Count IV, that request is also denied.[17]

B. Count V-Breach of Contract-Contractual Indemnification

Both Chrysler and CES move for summary disposition on Count V under MCR 2.116(C)(10).

"In cases involving contractual indemnity, the terms of the agreement will determine whether the indemnitor is obligated to reimburse the indemnitee for a particular claim." *Camp, Dresser & McKee, Inc v Paul N Howard Co,* 853 So2d 1072, 1077 (Fla App, 2003).

Section 6(d) of the SCA

In Count V Chrysler alleges that "Section 6(d) of the SCA requires CES to indemnify, defend and hold harmless Chrysler from and against all liabilities, claims, actions, losses, judgments, costs and expenses . . . of whatever type or nature, imposed upon or incurred by

[17] In its response to CES' motion for summary disposition Plaintiff asks the Court to "enter judgment in its favor for all relief sought in Counts IV and V of Plaintiff's Second Amended Complaint. However, as was noted, Chrysler did not seek summary disposition as to Count IV and it did not cite MCR 2.116(I)(2) as a basis for relief. Moreover, judgment in its favor would not be appropriate as to Count IV where, as was explained above, there is an apparent ambiguity in the contract regarding the required insurance coverage.

Chrysler arising from any negligent or willful act or omission by workers and employees of CES."[18]

Section 6 of the SCA upon which Chrysler relies, states, in pertinent part:

> **INDEMNIFICATION BY STAFFING COMPANY.** *In addition to any indemnifications identified in Schedule C* or otherwise herein, Staffing Company will indemnify, defend and hold harmless ZeroChaos, RTI and Customer and their respective affiliates, subsidiaries, directors, officers, employees, agents and representatives from and against all liabilities, fines, penalties, demands, claims, actions, losses, judgments, costs and expenses (including reasonable attorney fees) (collectively "Damages") of whatever type or nature, imposed upon or incurred by Zerochaos, RTI or Customer to the extent arising from:
>
> (d) any negligent or willful act or omission, willful misconduct, or material breach of this Agreement by Staffing Company, Staffing Company Worker(s) or Staffing Company Resource(s).
>
> The indemnifications identified in subsections (a)-(d) of this Section 6 expressly exclude any and all claims to the extent caused by the gross negligence or willful misconduct of Customer or Customer's employees, servants or agents (excluding servants or agents provided under this Agreement) or for which Customer or Customer's employees, servants or agents is determined to be legally responsible.[19]

Chrysler argues that "[r]educed to its basic form, the indemnity language found in Section 6 of the SCA requires CES to defend, indemnify and hold harmless Chrysler against all liabilities of whatever type or nature, incurred by Chrysler and arising from any negligent act or omission of CES or its workers."[20] Chrysler argues that Section 6 does not require the act to be performed while in the course of employment. This Court agrees.

Under § 6(d) indemnification is required where Chrysler incurs liability arising from "any negligent or willful act or omission, willful misconduct, or material breach of this Agreement by Staffing Company, Staffing Company Worker(s) or Staffing Company Resources." Thus, the only

[18] Second Amended Complaint, ¶ 58.
[19] Pl's Motion, Exh 2, Staffing Agreement, § 6(d) (emphasis added).
[20] Pl's Motion and Response, p 15.

requirement is that Chrysler's liability arose from at least the negligent act of a Staffing Company Worker. There is no requirement under the unambiguous language of §6(d) of the SCA that Erdman be acting within the scope of his employment at the time of any negligent act.

Under the language of the SCA Erdman was a Staffing Company Worker. Under § 2 of the SCA "Staffing Company will recruit, interview, select, hire and assign employees ("Staffing Company Worker"), who, in Staffing Company's judgment, are best qualified to perform the Work requested by ZeroChaos." CES acknowledges that it placed Erdman with Chrysler.[21]

In support of its argument that it is not responsible to indemnify Chrysler under Section 6(d) CES puts forth a definition of "Staffing Company Worker" as an employee performing "the Work requested by ZeroChaos."[22] However, this interpretation is not supported by the clear language of the SCA. As was noted above, § 2 of the SCA states "Staffing Company will recruit, interview, select, hire and assign employees ("Staffing Company Worker") who, in Staffing Company's judgment, are best qualified to perform the Work requested by ZeroChaos." In § 2, the term "Staffing Company Worker" is defined with reference to employees and prior to any reference to Work. Moreover, CES' reliance on the definition of "Work" in the Preliminary Statement of the SCA in support of its argument is not persuasive.

The SCA provides separate definitions for "Work" and "Staffing Company Worker." "Work" is defined in the Preliminary Statement as "the work effort of the Staffing Company's employees on assignment to the Customer."[23] While the definition of "Work" incorporates the

[21] CES Motion, p 2. CES does not argue that Erdman was not its employee and evidence presented by CES indicates that it considered Erdman to be an employee. A "Termination Report" attached to CES' motion lists Erdman as an "employee," and Chrysler as a "customer." CES Response, Exh D. It states that Erdman's start date was July 5, 2011, and termination date was August 24, 2012. The reason given for the termination was "assignment completed" and "assignment ended" "hired direct by customer." *Id.* The Termination Report was prepared by Michele Presley, an account manager for CES. *Id.*; Pl's Motion, Exh 7, Presley Dep, p 7.
[22] CES' Response, pp 8-9.
[23] Pl's Motion, Exh 2, SCA.

term "Staffing Company Employee" the term "Staffing Company Worker" does not incorporate the term "Work."

Schedule C, Section 8.1 of the SCA

CES also argues that it is entitled to summary disposition on Count V based upon the indemnification provisions of Schedule C, Section 8.1 of the SCA. As CES points out, Section 6 of the SCA, the provision relied upon by Chrysler, is prefaced by the statement "[I]n addition to any indemnifications identified in Schedule C."

Schedule C, ¶ 8.1 of the SCA states:

> **ADDITIONAL INDEMNIFICATION & LIMITATION OF LIABILITY.**
>
> Staffing company shall defend, indemnify and hold harmless Customer from any and all actual or threatened claims, damages, losses, suits, judgments, fines, settlements, penalties, interest, costs and expenses (including reasonable legal fees and disbursements, and costs and expenses of investigation, litigation, settlement and judgment*)* or *liabilities of any kind, including damage or destruction of any property or injuries to persons (except for customer vehicles driven with customer consent) (collectively, "Losses")* arising from or related to (i) the breach of this Agreement and/or the actions, errors, or omissions of Staffing Company or Staffing Company's agents or employees, or (ii) violation of any applicable law by Staffing Company or its respective employees, agents or representatives, <u>except that</u> this indemnification expressly excludes any and all claims to the extent arising out of or in connection with the acts, omissions, negligence or intentional misconduct of Customer or Customer's employees, servants or agents (excluding servants or agents provided under this agreement).[24]

CES argues that it is not required to provide indemnification for the *Holliday* and *Green* claims because ¶ 8.1 states, in pertinent part, that indemnification will be provided for *"*liabilities of any kind, including damage or destruction of any property or injuries to persons *(except for customer vehicles driven with customer consent)* (collectively, 'Losses')" and therefore, excludes

[24] Pl's Motion, Exh 2, SCA, Schedule C § 8.1 (emphasis added).

indemnification for claims, such as that at issue here, involving a Chrysler owned vehicle driven with Chrysler's consent.

Chrysler argues that paragraph 8.1 of Schedule C does not limit the indemnity owed to Chrysler because "the indemnity offered by Section 6(d) is broader in application. Chrysler also argues that the parenthetical exception in Schedule C ¶ 8.1 "except for customer vehicles driven with customer consent" applies only to indemnification for property damage and does not apply to indemnification for personal injuries.

The Court determines that an ambiguity exists in the indemnification provisions of the SCA.[25] Specifically, there is an apparent conflict between § 6(d) and Schedule C paragraph 8.1, where §6(d) is preceded by the phrase "in addition to any indemnification identified in Schedule C." *See Weisfeld-Ladd*, 920 So2d at1150 (Fla App, 2006) (quotation marks and citation omitted) ("A contract is ambiguous when its language is reasonably susceptible to more than one interpretation, or is subject to conflicting inferences.").[26]

[25] CES, citing, *USB Acquisition Co, Inc v Stamm*, 660 So2d 1075, 1079 (Fla App, 1995), argues that the SCA must be construed in favor of CES as the indemnitor. However, *Stamm* did not involve the situation where, as here, the indemnitee is a third-party beneficiary to a contract. Nor did it involve the circumstances in this case where there is deposition testimony that representatives of CES, including its vice president, were involved in negotiating the terms of the SCA with ZeroChaos including "several" discussions regarding the scope and application of the indemnity language in the SCA. Pl's Motion, Exh 6, Deposition of Miron, pp 21-23.

[26] The Court notes CES' reference to the "general principle of contract interpretation that a specific provision dealing with a particular subject will control over a different provision dealing only generally with that same subject." *See Papunen v Bay Nat'l Title Co*, 271 So3d 1108, 1111 (Fla App, 2019). However, the Court finds that such principle is not violated here where the provisions of Section 6(d) and Schedule C are linked by the "[i]n addition to" language of the first sentence of Section 6.

Additionally, CES notes the principle that contracts must be interpreted in a way not to render any provision meaningless, *Super Cars of Miami, LLC v Webster*, 300 So3d 752, 755 (Fla App, 2020). In this context, the provisions of the contract must be construed "in conjunction with one another so as to give reasonable meaning and effect to all of the provisions. *Id.* That is the "contract must be "construe[d] as a whole." *Id.* Considering the SCA as a whole, as explained above, there is an apparent ambiguity in the indemnification provisions.

Additionally, the Court finds, if this section applies at all, that there is an ambiguity in Schedule C Section 8.1 itself with regard to the parenthetical exception "except for customer vehicles driven with customer consent." Such exception is susceptible of different interpretations.

For the above-stated reasons, the Court determines that a question of fact exists as to the interpretation of the indemnification provisions of the SCA. Accordingly, both CES and Chrysler's motions for summary disposition on Count V are denied. *See Ventana Condo Ass'n*, 203 So3d at 183 (where terms of a written instrument are in dispute and are reasonably susceptible to two different interpretations, then an issue of fact is presented); *Soncoast Comm Church of Boca Raton, Inc*, 981 So2d at 655 (Fla App, 2008) (ambiguity in contract presents a question of fact that cannot be resolved through summary judgment).

IV.

THEREFORE, IT IS HEREBY ORDERED that Defendant Computer and Engineering Services, Inc.'s Motion for Summary Disposition under MCR 2.116(C)(10) as to Count IV of Plaintiff's Second Amended Complaint is **DENIED** and any request by Plaintiff for judgment in its favor as to Count IV is also **DENIED.**

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Disposition under MCR 2.116(C)(10) as to Count V is **DENIED** and Defendant Computer and Engineering Services, Inc.'s Motion for Summary Disposition under MCR 2.116(C)(10) as to Count V is also **DENIED.**

IT IS SO ORDERED.

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

/s/Victoria A. Valentine

HON. VICTORIA A. VALENTINE
BUSINESS COURT JUDGE

Dated: 11/22/22