STATE OF MICHIGAN
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EE LED, LLC, a Michigan limited liability company, d/b/a **MICHIGAN ENERGY BUSINESS SOLUTIONS**,

Plaintiff/Counter Defendant,

CASE NO. 2019-000030-CB
HON. DONNA B. HOWARD

v

DURGA PROPERTY HOLDINGS INC, an Ohio corporation,

Defendant/Counter-Plaintiff.

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OPINION AND ORDER FOR JUDGMENT AFTER NON-JURY TRIAL

At a session of the Berrien County Trial Court,
On the 23rd day of September, 2020, in the
City of St. Joseph, Berrien County, Michigan

PRESENT: HON. DONNA B. HOWARD, PRESIDING BUSINESS COURT JUDGE

This matter between Plaintiff/Counter-Defendant EE LED, LLC, d/b/a Michigan Energy Business Solutions ("MEBS" or "Plaintiff") and Defendant/Counter-Plaintiff Durga Property Holdings, Inc. ("Durga" or "Defendant"), culminated with a 2-day bench trial on July 21 and 22, 2020.[1] Plaintiff's Complaint, filed February 7, 2019, has three counts: claim and delivery (Count

[1] It should be noted that due to the COVID pandemic restrictions, and the need for physical distancing, the entire trial was held remotely via Zoom.

I), breach of contract (Count II), and breach of oral contract (Count III) related to product and/or services allegedly provided to Durga. (*See*, Complaint). Along with its responsive pleading, Defendant filed a Counterclaim on or about April 17, 2019, asserting breach of contract (Count I) for faulty or lack of performance by MEBS, and a claim and delivery claim (Count II), as it relates to certain materials recovered from the Mall property pursuant to a Prejudgment Order for Possession, entered by the Court on or about March 12, 2019. (*See*, Counterclaim, 4/17/19, pp 7-12; Def Trial Brf, 6/22/20, pp 2-5).

At trial, there was no request by the parties for opening statements. The testifying witnesses were Don Jollay, Emily Parfet, Ed Moore and Kumar Vemulapalli. The parties stipulated to the admission of Exhibits A-3 (11/10/18 quote) and A-4 (12/10/18 letter agreement).[2] The additional exhibits admitted during trial were: A-1 (8/22/18 quote), A-2 (8/24/18 quote), A-5 (12/14/18 email), A-6 (12/21/18 email), A-7 (email string), A-8 (2/29/20 quote), A-9 (summary w/ invoices), A-10 (inventory report), A-11 (1/9/19 email), B-1 (11/20/18 quote), B-4 (Photo), B-5 (Photo), and B-8 (I&M payment history)

After the conclusion of proofs and closing arguments, the Court took the matter under advisement for issuance of written findings of fact and conclusions of law in conformity with MCR 2.517. The Court has considered the testimony of all the witnesses and the exhibits admitted into evidence. The Court has assessed the credibility of witnesses and has applied the standard of proof by a preponderance of the evidence to Plaintiff for its allegations in the Complaint, and to the Defendant for the allegations in the Counterclaim, except where clear and convincing evidence is required as a matter of law.

FINDINGS OF FACT

Plaintiff, owned by Emily Parfet, is a company that specializes in selling and installing energy efficient lightbulbs and materials to various businesses to help save on electricity bill expenses. Plaintiff has used Don Jollay's company, Premier Closing ("Premier"), as an independent contractor to assist with the projects. Premier's primary role is to act as the main point of contact for Plaintiff with possible projects or clients. As part of Premier's work, it often processes Plaintiff's quotes, searches for and helps clients apply for the energy upgrade rebates, and may conduct installation services as well. Plaintiff's role is to put in the final quotes and furnish the materials needed for the installation project. Durga, which is owned by Kumar Vemulapalli,

[2] Plaintiff's Exhibits A-3 and A-4 were duplicative to Defendant's proposed Exhibits B-2 and B-3, respectively. To prevent any confusion in the record, only Exhibits A-3 and A-4 were admitted at trial.

purchased the Orchard's Mall in Benton Township, Berrien County, Michigan ("the Mall") in November/December 2018. Mr. Vemulapalli, individually or through business entities, has owned numerous commercial properties since 1989, including hotels and malls. Mr. Vemulapalli testified that he owns seven malls, with this Mall in Benton Township being his third mall in Michigan. Additionally, Mr. Vemulapalli was previously engaged in several other lighting replacement projects for Durga's other buildings.

Prior to Durga's ownership in the Mall, Plaintiff through Mr. Jollay contacted the Mall about upgrades and replacements of lightbulbs and/or fixtures for better energy-savings at the large retail property. Mr. Jollay had previously worked with the Mall about a year and a half prior on an upgrade project where about 1,100 lamps were swapped out in various spots throughout the common area of the Mall. The energy upgrade was part of an AEP/I&M[3] rebate program and according to Mr. Jollay was a project that was essentially "free" to the Mall and went smoothly without any issues. In 2018, Mr. Jollay spoke with Ed Moore, who was working as the Mall's General Manager at the time, in the hopes that the Mall would again want to take advantage of another AEP rebate program and possibly contract for an even larger scale project than before. In early spring of 2018 (again prior to Durga's ownership), Plaintiff supplied 800 Euri br30 LED lightbulbs to the Mall as an apparent incentive to solicit the Mall's business for a larger project. More specifically, Mr. Jollay testified that it was his belief that if the Mall went forward with a larger project, the rebates would basically cover Plaintiff's cost of those 800 "courtesy" br30 lightbulbs. According to Mr. Moore's testimony, the prior owner of the Mall declined going forward with the project as the Mall was in the process of being sold. Nevertheless, Mr. Jollay left those 800 lightbulbs with the Mall.

Months later, after purchasing the Mall, Mr. Vemulapalli requested that Mr. Moore find a contractor for a lighting replacement project at the Mall to save on energy bills. Mr. Vemulapalli testified that the energy bills for the Mall were extremely high, ranging from $55,000 to $95,000 per month. Mr. Vemulapalli also testified that reducing the Mall's energy bills was essential to the Mall's continued operation. Mr. Moore, having previously discussed the lighting project with Mr. Jollay, referred Mr. Vemulapalli to Plaintiff. Different quotes were issued by MEBS with varied scopes for a replacement project, and varied resulting AEP rebates and out of pocket expenses to Durga. (*See, eg.* Exh B-1). During those negotiations of a larger scope project, AEP created a

[3] AEP is American Electric Power, which is the power company that provides electricity service to the Mall.

bonus incentive along with its more standard rebate. The testimony established that the regular rebate offered by AEP for the larger scope project would be $42,821.88 (*see also*, Exh A-5), but with the added bonus it would increase to $78,500 that could be applied if the upgrades were completed by early January 2019. Mr. Jollay and Ms. Parfet testified as to the uniqueness of such a significant incentive from AEP. Mr. Vemulapalli testified that he made it known during the negotiations and quoting that he did not want to spend more than $30,000 on the project.

It is clear from the evidence presented that some of the discussions between the parties prior to the execution of a final agreement involved the use of a golf cart. According to Mr. Jollay's testimony, the initial quote for the lighting project required Durga to pay approximately $37,000, however, to lower the Mall's costs further, Mr. Jollay spoke with Mr. Vemulapalli about a red golf cart he had seen in the Mall during one of the walk-throughs. (Exh B-4, B-5). Mr. Jollay testified that he offered to reduce Durga's out-of-pocket expenses to $30,000 if Mr. Jollay were to be allowed to use the red golf cart during the installation process and then retain it upon completion of the work. Mr. Jollay testified in part as follows:

> Kumar and I were going back and forth on the final quote and how to get it done…and that sort of thing…and he wanted to pull about $5000 or $5000-6000 I think, I forget what the exact number is, but it was right around that number, out of the quote and he said he would go forward with that but he needed that much more out of the quote. So in looking at it, I said well you have this cart in the center and quite honestly we could use it for logistics because in a mall setting we were going to stage our material at one end of the mall and work in several different areas. As far as labor went that would take up a lot of our time. So what I said was well why don't you allow us to use this cart for logistics in taking things back and forth during this project and at the end of the job we would procure as our payment, or I'll take that number, the $5000-$6000 off the quote and we'll basically call that a split equity for that.

(Trial, 7/21/20, 9:34 am). In further discussing the discount portion of the final quote (Exh A-3), Mr. Jollay added, "What I had done was I had discounted my labor to a portion and the other portion of that would have been for the cart. I had deducted that right off of there to show that he wouldn't be responsible for those monies as well." (Trial, 7/21/20, 9:37 am)

Both Mr. Vemulapalli and Mr. Moore denied that they ever intended to offer the red golf cart to Mr. Jollay as payment and that the Mall never even owned the red golf cart. According to Mr. Vemulapalli, he might have said Mr. Jollay could use the Mall's equipment to move around the Mall to help with the installation process if Mr. Moore said it was okay, but he did not mean the red golf cart. (Trial, 7/22/20, 9:49 am). There was a red golf cart on display in the Mall as a

prize for a promotional contest for the Mall's patrons and offered by Great Outdoor Sports, a store located in the Mall. (Exhs B-4 & B-5).

There is no question that on or about December 11, 2018, Durga entered into a signed written agreement with Plaintiff. It was undisputed that Mr. Moore executed the written agreement documents on behalf of Durga. (Exhs A-3 & A-4). The scope of the project included the following materials:

- 3900 Euri 20w Hybrid LED Tubes 4' for $21,450.00
- 83 Satco 80w LED Corn Bulb Mogul Base for $7,714.85
- 261 Satco 54 w LED Corn Bulb Mogul Base for $16,312.50
- 1250 Euri 20 w Hybrid LED Tubes 4' for $6,875.00
- 317 Euri 2x2 LED Flat Panel Fixture for $12,046.00
- 45 Straits 60w w LED Walpak Fixture for $5,625
- 1787 Euri 20 w Hybrid LED 4' Tubes for $9,828.50
- 552 Euri 15w LED 2' U-Shaped Tubes for $8,280.00

(Exh A-3). In total, the signed project quote amount was $124,169.77, which included the above materials, labor ($30,750, including lift rental costs) and sales tax ($5,287.92). (Exh A-3) As indicated in the corresponding written agreement signed by Mr. Moore on behalf of Durga:

> MIEBS agrees to convert the existing lighting system in The Orchards Mall to LED products as described on Quote #1013. The Sears and JC Penny stores, and broken fixtures are not included in this contract. All stores, including Carsons and Jo-Ann Fabrics are included. **The agreed price is $30,000 and the Red Golf Cart** from The Orchards Mall. Work to be completed by 1-15-19. Work will start once deposit is collected, and lifts are delivered. Staging area in Sears for trailer and material to be established, also cardboard disposal to be provided by the Orchards Mall on site. Stores are to move, when possible, merchandise from under scope of work on installation day. MIEBS to provide a schedule of store installation to Ed [Moore] 12-24 hours in advance. Work will need to be completed during flexible hours, night shifts included.

(Exh A-4)(emphasis added). The letter agreement also stated that $15,000 (of the $30,000) was to be paid by Durga as a deposit upon the date of signing and an additional payment for $7,500 was due on December 24, 2018, with the final payment for $7,500 would be due upon the completion of the project. (Exh A-4).

Shortly thereafter, AEP sent an email to Mr. Jollay and Mr. Moore which confirmed a $42,821.83 rebate, but the email did not include the bonus rebate quoted by Plaintiff. (Exh A-5). Mr. Jollay testified that AEP did not ever include the additional bonus in writing, but made the bonus known to Plaintiff orally. The email also contained a Customer Incentive Offer sheet that was sent for Mr. Moore's signature, but was never signed. According to testimony from Ms. Parfet

and Mr. Jollay, the Incentive Offer was to be signed when the project was completed and served as confirmation for AEP to send Plaintiff the rebate payment. AEP needed to inspect the project and approve the project prior to paying the rebate to Plaintiff.

The work on the project began the week of December 17, 2018. Mr. Moore testified that Mr. Jollay never provided a schedule prior to arriving at the Mall. Nevertheless, Mr. Jollay arrived on the first day to begin delivery of the materials and unboxing the lightbulbs. On the second day, the lifts were delivered and preliminary work began. According to Mr. Jollay, the second day primarily consisted of working out an efficient process to fix the wiring so the fixtures could accommodate the LED lighting. Both parties state that MEB installed approximately 20 bulbs over the course of the two days of work.

On the third day, Mr. Jollay arrived and asked a mall security officer for access to the red golf cart. Mr. Jollay testified that the mall security officer was not aware of their ability to use the red golf cart and did not have a key to it. Furthermore, the red golf cart was allegedly uncharged and otherwise unusable. Mr. Jollay testified that he decided to take the red golf cart to be serviced so that he could use it during installation per the agreement. At the same time, Mr. Moore arrived to the Mall after being contacted by the mall security officer with questions about the red golf cart. Upon arrival, Mr. Moore, apparently knowing nothing about the use of the red golf cart, prevented Mr. Jollay from taking the red golf cart. According to Mr. Moore, prior to his arrival Mr. Jollay placed the red golf cart on a trailer Mr. Jollay brought with him. The red golf cart's roof was dismantled and tires deflated, allegedly so that the red golf cart could fit through the Mall doors.

According to Mr. Jollay, Mr. Moore did not explain why the red golf cart could not be taken off of the property. Conversely, Mr. Moore testified that he explained to Mr. Jollay that the red golf cart did not belong to the Mall and that he was not aware of the red golf cart ever being offered as payment. Mr. Moore further testified that he offered a different golf cart to help with the installation process, but Mr. Jollay denied the offer. Mr. Jollay testified to leaving the Mall after Mr. Moore prevented them from taking the red golf cart because Mr. Jollay had to travel to a different project in Illinois. Admittedly, both Mr. Moore and Mr. Jollay had argued and were disgruntled by the incident. It does not appear that Mr. Moore and Mr. Jollay spoke again.

Rather, the evidence indicates that soon thereafter, Mr. Moore notified AEP that the Mall lighting project was placed on hold, and Mr. Moore had the rented lifts returned. Mr. Jollay emailed Mr. Moore on December 21, 2018, stating that he was notified by AEP about the project officially being placed on hold. (Exh A-6) Ms. Parfet then communicated with Mr. Moore about the incident

in an effort to see if something could be worked out in continuing the project. (Exh A-7). Mr. Moore directed Ms. Parfet to follow up with the Mall's legal counsel. Mr. Moore also told Ms. Parfet that Mr. Jollay's allegedly unprofessional behavior during the "red golf cart dispute" as the reason Durga placed a hold on the project. (Exh A-7). Mr. Vemulapalli and Mr. Moore denied that they ever received an offer from Ms. Parfet for a different contractor to complete the job. However, Plaintiff presented communication from Ms. Parfet to Durga's legal counsel about hiring a different independent contractor, AlarmTek, to complete the project. (Exh A-11). Ms. Parfet testified that AlarmTek would have likely completed the project at a higher labor cost than Premier Closings (Mr. Jollay's company). In addition, Ms. Parfet was unsure if AEP would honor the rebate bonus that was offered with the signed quote. Despite the anticipated higher cost and needing to get the rebate reconfirmed by AEP, Ms. Parfet testified that Plaintiff was still willing to go forward with the project. Written communications between Plaintiff and Durga appeared to cease after Ms. Parfet's communication with Durga's legal counsel on or about January 9, 2019. (Exh A-11).

Ms. Parfet and Mr. Jollay then attempted to recover the materials that were still stored at the Mall. According to Mr. Jollay, he attempted to retrieve the lightbulbs several times, but was denied entry or would arrive when Mr. Moore was not present. Plaintiff filed an *ex parte* motion for an order of prejudgment possession with this Court on February 15, 2019. At the hearing, where Durga failed to appear or otherwise respond to the motion, the Court entered the Order granting the motion on March 12, 2019, allowing for the seizure of the delivered lightbulbs. By the Order, Plaintiff was allowed during pendency of this action to retrieve:

- 3,100 Euri 20w Hybrid LED Tubes 4';
- 81 Satco 80w LED Corn Bulb Mogul Base;
- 241 Satco 54w LED Corn Bulb Mogul Base; and
- 800 Euri br30 LED lightbulbs

On March 20, 2019, the Court was notified that Plaintiff had not yet been allowed to retrieve the materials successfully from the Mall. However, on a later date, Plaintiff was able to enter the Mall and obtain a large portion of the lightbulbs. At trial, Mr. Jollay indicated that Plaintiff retrieved all of the requested lightbulbs, except only about 200 (of the 800) Euri br30 LED bulbs that were supplied by Mr. Jollay prior to Durga's purchase of the Mall were available.

Ms. Parfet further testified that she attempted to either cancel the shipment of several different lightbulb orders or sell off received lightbulbs that were intended for the project and in the possession of Plaintiff. For those that could be returned, Plaintiff incurred restocking fees. (Exh

A-9). The remainder of the lightbulbs that were not accepted back to the respective distributors had to be placed in a rented storage unit. (Exh A-9) There was no evidence presented indicating the cost of the storage. Unfortunately, Ms. Parfet testified that Plaintiff subsequently lost those lightbulbs that had been placed in a rented storage unit due to unpaid storage fees.

CONCLUSIONS OF LAW

A. Breach of Contract

As the above facts describe, the allegations of breach of contract (Counts II & III of the Complaint) are the primary claims of this action, and therefore, are addressed first. Michigan law states that "a party asserting a breach of contract must establish by a preponderance of the evidence that 1) there was a contract 2) that the other party breached 3) thereby resulting in damages to the party claiming the breach." *Miller-Davis Co v Ahrens Constr Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014).

1. Express Contract

For Count II of the Complaint, Plaintiff alleged breach of the written contract. Both Plaintiff and Defendant agreed that there were signed agreement documents on or about December 11, 2018. (Exhs A-3 & A-4) The agreement existed between them to complete certain upgraded lightbulb installation under an AEP rebate program. It was undisputed that of the project costs, Defendant was to pay the out-of-pocket monetary amount of $30,000 (with an initial $15,000 down payment), and pending AEP approval upon completion there would be a rebate payment from AEP (anticipated to be $78,500) that was to be paid to Plaintiff. (Exh A-3). The parties' dispute surrounds the balance of the terms which constituted the contract, namely the inclusion of the red golf cart to reduce the cash payment by Defendant and which party breached first when the dispute over the red golf cart came to light in the form of a late-night argument between Mr. Jollay and Mr. Moore.

Plaintiff alleged that Defendant breached the contract by preventing Mr. Jollay from using the red golf cart and subsequently terminating the contract by preventing Plaintiff from finishing lighting project after the dispute about the red golf cart occurred with Mr. Moore. Conversely, Defendant alleged that Plaintiff first breached the contract by demanding early payment of the red golf cart prior to completing the project, delaying the project by installing twenty lightbulbs over two days of work, refusing to return to the Mall to complete the remainder of the lighting installation project, failing to deliver all lightbulbs that were paid for by the $15,000 deposit. (*See,* Def Trial Brf; Def Closing Arguments)

"The rule in Michigan is that one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." ***Flamm v***

Scherer, 40 MichApp 1, 8–9, 198 NW2d 702 (1972). "However, that rule only applies when the initial breach is substantial." *Michaels v Amway Corp.*, 206 Mich App 644, 650; 522 NW2d 703 (1994) citing *Baith v Knapp–Stiles, Inc.*, 380 Mich 119, 126; 156 NW2d 575 (1968). The Supreme Court has stated that a substantial breach:

> [C]an be found only in cases where the breach has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible, such as the causing of a complete failure of consideration or the prevention of further performance by the other party.

McCarty v Mercury Metalcraft Co, 372 Mich 567, 574; 127 NW2d 340 (1964) (citations omitted). "To determine whether a substantial breach occurred, a trial court considers 'whether the nonbreaching party obtained the benefit which he or she reasonably expected to receive.'" *Able Demolition, Inc v City of Pontiac*, 275 MichApp 577, 585; 739 NW2d 696 (2007), quoting *Holtzlander v Brownell*, 182 MichApp 716, 722; 453 NW2d 295 (1990). In *Walker & Co. v Harrison*, 347 Mich 630, 635; 81 NW2d 352 (1957), the Michigan Supreme Court further listed several "influential" factors in deciding whether a contractual breach was substantial. Those factors include "[t]he extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated," and "[t]he extent to which the party failing to perform has already partly performed or made preparations for performance." *Id*. A party arguing that the contract breach was substantial bears the burden of proof. *Livingston Shirt Corp v Great Lakes Garment Mfg Co*, 351 Mich 123, 129; 88 NW2d 614 (1958).

Michigan law also recognizes the doctrine of "frustration of purpose" as a basis for establishing a breach of contract. "Frustration of purpose is generally asserted where 'a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract'" *City of Flint v Chrisdom Properties Ltd*, 283 MichApp 494, 499; 770 NW2d 888 (2009), quoting *Liggett Restaurant Group v City of Pontiac*, 260 MichApp 127, 133-134; 676 NW2d 633 (2003). "The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract.'" And "'the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made.'" *Id.* quoting *Liggett, supra at* 135. *See also, Adams v Edward M Burke Homes, Inc*, 14 MichApp 578, 590; 166 NW2d 34 (1968)(Levin, J., concurring), quoting 3 Corbin on Contracts, § 571, p 349, noting that "'[i]n any kind of contract, if the right of one party to compensation is conditional upon the rendition of some service or other performance by him or on his behalf, it is nearly always a breach

of contract for the other party to act so as to prevent or to hinder and delay or to make more expensive the performance of the condition.'"

Evidence demonstrates that following the night Mr. Jollay and Mr. Moore got into the dispute over the red golf cart, Mr. Moore took action by notifying AEP that the project was placed on a hold, returning the rental lifts leased to Plaintiff, and hiring legal representation to communicate with Plaintiff. These actions were done without any consult or communication with Plaintiff. (Exhs A-6, A-7). Once Plaintiff found out about the project hold and tried to discuss the project with Mr. Moore, he clearly directed both Mr. Jollay and Ms. Parfet to further communicate with Defendant's legal counsel regarding the project. (Exhs A-6, A-7). Communications between the two parties ended after Ms. Parfet communicated with Mr. Moore via email on December 28 and 29, 2018. (Exh A-7). Both parties were well aware that the AEP rebates associated with the project as quoted were time sensitive, and pursuant to the agreement and operation of the rebates, the project had a set completion date. These facts support the finding that Defendant, through Mr. Moore and after its legal counsel, took affirmative action to terminate or at least frustrate the terms of the written agreement.

By Defendant's actions, Plaintiff was prevented access to the property to attempt a timely and satisfactory completion of the project as contracted. In this way, Defendant substantially breached the contract by frustrating and/or otherwise preventing Plaintiff a reasonable opportunity to perform its work under the contract. Even after Plaintiff offered to bring in another contractor, AlarmTek, instead of Mr. Jollay's company, Premier Closings, to do the installation, Defendant did not allow Plaintiff back on the Mall property to continue the work. (Exh A-11).

Further, Defendant's allegations that Plaintiff breached the contract first are unavailing and not supported by the admissible evidence or applicable law. First, Defendant alleged that Plaintiff breached the contract by delay because Plaintiff only provided the defective installation of approximately 20 lightbulbs in the Mall over the course of three days of work. In this case the contract expressly stated that the lighting project was to be completed by January 15, 2019. Plaintiff also had an incentive to complete the project by January 13, 2019, because that was the time for the bonus and rebate to remain valid. As mentioned above, the rebates and bonuses frequently change and the rebate was the basis for Plaintiff's payment. Mr. Jollay's and Ms. Parfet's testimony also made it clear that the bonus of the magnitude made available by AEP were rare, as demonstrated by a subsequent quote done in February 2020. (Exh A-8). Additionally, the alleged dispute and hold on work occurred on or about December 22, 2018. While both parties

acknowledge that only 20 or so light bulbs had been installed, Mr. Jollay testified that they were simply attempting to create an efficient system for those lighting fixtures that needed rewiring, as they would be more time-consuming than the balance of the lights that simply needed to the lightbulbs swapped out. Mr. Jollay testified that once the process was figured out, the rate of installation would significantly increase. In preventing Plaintiff from continuing the work after only three days into the work, Defendant was premature and the breaching party causing the delay.

Second, Defendant alleged that Plaintiff walked off of the job and stopped performance when Plaintiff improperly demanded payment of the red golf cart prior to completing any of the work, or delivering all of the lightbulbs. Defendant contests that the red golf cart payment should not be enforced because it was never actually offered by Mr. Vemulapalli or Mr. Moore as payment for the contract since it did not actually belong to the Mall.

It is long established in Michigan law that "a contract must be construed so as to effectuate the intent of the parties when it was made; and, to ascertain the intent of the parties, a contract should be construed in the light of the circumstances existing at the time it was made." *Kunzie v. Nibbelink*, 199 Mich 308, 314; 165 NW 722 (1917); *Sobczak v Kotwicki*, 347 Mich 242, 249; 79 NW2d 471 (1956); *Klapp v United Ins. Group Agency*, 468 Mich 459, 473; 663 NW2d 447 (2003). If the contractual language is unambiguous, courts must interpret and enforce the contract as written, because an unambiguous contract reflects the parties' intent as a matter of law. *Kendzierski v. Macomb County*, 503 Mich. 296, 931 N.W.2d 604 (2019). "A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be enforced as written." *Rory v Continental Ins. Co.*, 473 Mich. 457, 468; 703 N.W.2d 23 (2005). "Courts have long held parties to agreements they make, regardless of the harshness of the results." *Nexteer Auto Corp v Mando America Corp.*, 314 MichApp 391, 396; 886 NW2d 906 (2016). Therefore, an unambiguous contract must be enforced as written where it does not violate public policy, the law, or one of the traditional defenses to the enforceability of a contract because an unambiguous contract reflects the parties' intent as a matter of law. *See, In re Smith Trust*, 480 Mich 19; 745 NW2d 754 (2008); *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362; 666 NW2d 251 (2003).

The question of whether contract language is ambiguous is a question of law, and if contract language is clear and unambiguous, its meaning is also a question of law. *UAW–GM Human Resource Ctr v KSL Recreation Corp*, 228 MichApp 486, 491; 579 NW2d 411 (1998). Ambiguity exists only where words in a contract may reasonably be understood in different ways, and courts

may not create ambiguity where none exists. *Id.* Further, words in a contract must be interpreted according to their common meanings, and their plain meaning may not be distorted. *Henderson v State Farm Fire & Cas. Co.*, 460 Mich. 348, 354–355, 596 NW2d 190 (1999).

Despite Defendant's assertions that the red golf cart was not intended to be part of the contract, the contract (Exhs A-3 & A-4) clearly and unambiguously include the red golf cart as part of the consideration within the terms of the contract (on two separate documents, Exhs A-3 & A-4) executed by Defendant. Defendant attempts to counter Plaintiff's assertion that the red golf cart would serve as payment through extrinsic evidence that the red golf cart was never offered and proof that the red golf cart was never in Defendant's possession. The Court cannot accept Defendant's attempt to counter unambiguous terms of a contract with parol evidence. Parol evidence may be used "to dispose of a potential contractual ambiguity, to prove the existence of a potential ambiguity, or to indicate the actual intent of the parties where an actual ambiguity exists." *Wonderland Shopping Center Venture Ltd Partnership v CDC Mortgage Capital, Inc*, 274 F3d 1085, 1095 (6th Cir 2001)(applying Michigan law). However, parol evidence is generally not admissible to vary or contradict the terms of a clear and unambiguous contract. *Barclae v Zarb*, 300 MichApp 455, 480; 834 NW2d 100 (2013); *In re Kramek Estate*, 268 MichApp 565, 573-74; 710 NW2d 753 (2005); *UAW-GM Human Res Ctr v. KSL Recreation Corp*, 228 MichApp 486, 492; 579 NW2d 411 (1998); *Meagher v. Wayne State Univ*, 222 MichApp 700, 722; 565 NW2d 401 (1997)(a contracting party may not vary contract terms with parol evidence). Here, because the contract terms are unambiguous and clear regarding the red golf cart as part of the consideration to be paid by Defendant, the Court cannot consider parol evidence and instead must enforce the unambiguous terms of the contract.

Third, Defendant alleged that Plaintiff failed to deliver all of the lightbulbs that were paid for by the $15,000 deposit. This allegation is also not persuasive because there is nothing in the contract that states the initial $15,000 was strictly for the cost of the lightbulbs, as opposed to labor, taxes, or other part of the project listed therein. Furthermore, Defendant provided no accounting or other evidence to the Court that the deposit was paid for the purpose of receiving a material purchase, rather than the installation of new LED lightbulbs at the Mall property.

Finally, Defendant alleged that Plaintiff failed to perform the upgrades and installations as agreed upon by the written agreement. For the reasons stated above, the Court finds that the failure or inability of Plaintiff to perform the installation was actually first caused by Defendant in not allowing Plaintiff to enter the Mall to complete the project, rendering its performance impossible.

Mr. Moore on behalf of Defendant, took affirmative and premature action that prevented the further completion of the project by placing a hold on the project with AEP, and returning the rental lifts ordered by Plaintiff. Consequently, Defendant's allegations of first breach by Plaintiff are unavailing, and the Court finds Plaintiff sufficiently demonstrated by a preponderance of the evidence that Defendant substantially breached the contract.

2. Verbal Contract

In Count III of Plaintiff's Complaint, Plaintiff alleges a breach of a verbal contract; namely as alleged that the parties agreed that Plaintiff would provide Defendant with "800 Euri br30 flood lamps in exchange for [Durga] assigning all of its right, title and interest to rebate revenue to be received because of the lights' installation." (Complaint, Count III, ¶ 21, p5) However, at trial Plaintiff failed to sustain its burden of proof by a preponderance of the evidence of the existing of an enforceable verbal contract. Claims under verbal contracts is the same as written contracts in that "[c]ontractual liability is consensual and will not arise unless the parties mutually assent to be bound. *Barber v SMH (US), Inc*, 202 MichApp 366, 369; 509 NW2d 791 (1993), citing *Rood v General Dynamics Corp*, 444 Mich 107; 507 NW2d 591 (1993).

At trial, Mr. Jollay testified that the 800 Euri br30 lightbulbs were given to the Mall (while under prior ownership) as a "courtesy" to the larger lighting project he had hoped to get under contract in the summer months of 2018, which was prior to Defendant's ownership of the Mall. The evidence demonstrates that if there was an agreement, as Plaintiff alleges, it was an agreement with the prior owner of the Mall, not Defendant. Clearly, Mr. Jollay was notified by Mr. Moore that the prior owner was trying to sell the Mall and was not interested in going forward with a large lighting project at that time. At that point, Plaintiff was on notice that the larger lighting project under which Plaintiff gave the 800 Euri br30 lightbulbs to the Mall was not going forward. Yet, there was no evidence that Mr. Jollay or Plaintiff attempted to get those 800 Euri br30 lightbulbs back from the prior owner of the Mall. It follows then that when Defendant purchased the Mall, it became owner of the Mall's personal property, including those approximately 200 (or the original 800) Euri br30 LED lightbulbs.

Moreover, there is no question that Plaintiff and Defendant negotiated several versions of a lighting project before settling on the express written contract the parties executed. (Exhs A-3 & A-4). Had Plaintiff and Defendant intended to include the 800 Euri br30 lightbulbs as part of the agreed consideration for entering the written contract (*i.e.* doing the lightbulb installations), it would have and should have been clearly stated so in the executed contract. Despite the several thousand lightbulbs

included in the written contract, the 800 Euri br30 lightbulbs are not so listed. The Court cannot rewrite terms into a clear and unambiguous contract, *Rory, supra* at 468, and Michigan law will not imply a contract where an express written contract is entered between the parties covering the same subject matter. *Barber, supra* at 375. Plainly, there is no objective support of a meeting of the minds or verbal agreement between Plaintiff and Defendant as it relates to the 800 Euri br30 lightbulbs, and the law does not allow one to be implied. Consequently, on Count III of the Complaint for breach of a verbal contract Defendant is entitled to a no cause of action in its favor, and against Plaintiff.

B. Claim & Delivery

Next, in Count I of Plaintiff's Complaint is its possession claim for retention of the lightbulbs delivered to the Mall, also known as claim and delivery. The Michigan Court Rules provide that claim and delivery is a civil action to recover: (1) possession of goods or chattels which have been unlawfully taken or unlawfully detained; and (2) damages sustained by the unlawful taking or unlawful detention. MCR 3.105(A). Claim and delivery, formerly referred to as replevin, is determined by the plaintiff's right to possession and allows the plaintiff to obtain the actual possession of personal property that is wrongfully detained by the defendant when the action is initiated. *Multiplex Concrete Machinery Co v Saxer*, 310 Mich 243, 250; 17 NW2d 169 (1945); *Broughton v. Detroit Trust Co*., 271 Mich 701, 705; 261 NW 115 (1935); *Pioneer Finance Co v Dart Nat Bank*, 365 Mich 455, 459; 113 NW2d 775 (1962). Claim and delivery actions focus on the unlawful possession of the property by the defendant at the time the action is initiated, regardless of whether defendant lawfully acquired the property. *United Store Fixture Co v Grubiak*, 287 Mich 671, 676; 284 NW 602 (1939); *Oakland County v Bice*, 386 Mich 143, 151; 191 NW2d 338 (1971). Although possession may be awarded to a party pending final judgment, a defendant can still recover the property from the plaintiff even if plaintiff were granted possession in the prejudgment motion. MCR 3.105(E)(1)-(4). The prejudgment order for possession is based upon whether the claim for recovery is probably valid, rather than if the possession is rightfully theirs. MCL § 600.2920.

As noted, on February 15, 2019, this Court granted Plaintiff an *ex parte* order that Defendant "shall refrain from damaging, destroying, concealing, disposing of, or using so as to substantially impair its value" of various listed lightbulbs, pursuant to MCR 3.105(E)(2)(a). That Order further directed Defendant to show cause why Plaintiff was not entitled to immediate possession, pursuant to MCR 3.105(E)(2)(b). MCR 3.105(3)(b) provides that at the hearing on the motion for possession pending final judgment, "the plaintiff must establish (i) that the plaintiff's

right to possession is probably valid; and (ii) that the property will be damaged, destroyed, concealed, disposed of, or used so as to substantially impair its value, before trial." Defendant did not appear or respond to the motion held on March 12, 2019, and the Court entered an Order on March 12, 2019, allowing for the prejudgment retrieval of the delivered lightbulbs by Plaintiff.

Based upon the evidence presented, the Court finds that Plaintiff sustained its burden of demonstrating by a preponderance that Defendant unlawfully detained the lightbulbs when it stopped the contracted project from going forward, except for the approximately 200 Euri br30 LED lightbulbs that were given (as part of the 800 Euri br30 bulbs) to the Mall as a "courtesy" prior to Defendant taking ownership. As outlined above, those 800 Euri br30 LED lightbulbs were provided by Mr. Jollay on behalf of Plaintiff as an incentive for the prior owner to contract again with Plaintiff on a larger lighting project. Mr. Jollay had knowledge that the prior Mall owner was not going to go forward with the project, yet neither Mr. Jollay, nor Plaintiff, took any action to have those "incentive" lightbulbs returned from the prior owner. Furthermore, Plaintiff also did not include the 800 (or remaining 200) Euri br30 LED lightbulbs as part of its claim for damages presented at trial. (*See eg*, Exh A-9). Therefore, the Court finds Plaintiff is entitled to a possession judgment in its favor, in part, for all the retrieved lightbulbs under the March 12, 2019 Order, excluding the 200 Euri br30 LED lightbulbs. Possession judgment in favor of Defendant, in part, is entered for the 200 Euri br30 LED lightbulbs.

C. Damages

Having demonstrated a breach of the contract by Defendant occurred, the next element Plaintiff has the burden of showing is for damages, if any, resulting from the breach. *See, Miller-Davis, supra.* Plaintiff sets forth two different alternative means for calculating damages – actual costs incurred or lost profits.[4] (Pltf Trial Brf, ¶¶ 11-12, pp 3-4) The determination of damages, including the method of calculation, is based upon the testimony of Ms. Parfet, Mr. Jollay, and Mr. Moore, and primarily, but not exclusively, the admitted Exhibits A-3, A-4, A-5, and A-9.

It is well-established in Michigan law, that damages recoverable for breach of contract are those that arise naturally from the breach or those that were reasonably in the contemplation of the parties at the time the contract was made. *Kewin* v *Massachusetts Mut Life Ins Co*, 409 Mich 401, 414; 295 NW2d 50, 52–53 (1980). Defendant properly summarized the principles of determining contract damages in pertinent part as follows:

[4] In its Trial Brief, Plaintiff refers to lost profits as "specific performance" damages. (*See*, Pltf Brf, ¶11, p 3).

> "Contract damages are intended to give the party the benefit of the party's bargain by awarding him [a] sum of money that will, to the extent possible, put it in as good a position as it would have been in had the contract been fully performed. . . ." MCivJI 142.31 (citing *Jim-Bob, Inc v Mehling,* 178 MichApp 71; 443 NW2d 451 (1989); *Lawrence v Will Durrah & Assoc,* 445 Mich 1; 516 NW2d 43 (1994) (and others)).
>
> The purpose of damages for breach of contract is to protect the non-breaching party's expectation interest in the promisor's performance. Damages should put the non-breaching part in as good a position as if the breaching party fully performed. *See, e.g. Jim-Bob, supra; Body Rustproofing, Inc v Michigan Bell Tel Co,* 149 MichApp 385; 385 NW2d 797 (1986).

(Def Trial Brf, ¶ 21, p 6). A fundamental precept of contract law, then, is that the remedy for a breach focus on making the nonbreaching party, as close as possible, to whole. *Corl v Huron Castings, Inc*, 450 Mich 620, 626, 544 NW2d 278 (1996); *Roberts v Farmers Ins Exch*, 275 Mich App 58, 737 NW2d 332 (2007). Contract law is geared toward the goal of compensating an injured party, not punishing the breaching party. *Corl, supra* at 626 n8. Thus, the focus of damages calculations will be on the nonbreaching party's expectations. *See Soloman v Western Hills Dev Co,* 110 Mich App 257, 312 NW2d 428 (1981); *Tel-Ex Plaza, Inc v Hardees Rests, Inc*, 76 Mich App 131, 255 NW2d 794 (1977).

Damages must be proven with reasonable certainty and may not be based on speculation or conjecture. *Ensink v Mecosta County Gen Hosp*, 262 MichApp 518, 525; 687 NW2d 143 (2004). "Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision. It is sufficient if a reasonable basis for computation exists, although the result [may] be only approximate." *Berrios v Miles, Inc,* 226 MichApp 470, 478; 574 NW2d 677 (1997)(citations omitted). A lack of precise proof of damages does not preclude recovery. *Id*. "Moreover, the certainty requirement is relaxed where the fact of damages has been established and the only question to be decided is the amount of damages." *Hofmann v Auto Club Ins Ass'n*, 211 MichApp 55, 108; 535 NW2d 529 (1995).

Further, "[w]here one person has committed a breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could have been avoided." *Morris v Clawson Tank Co,* 459 Mich 256, 263-264; 587 NW2d 253 (1998), citing *Shiffer* v *Gibraltar School Dist Bd of Ed*, 393 Mich 190, 197; 224 NW2d 255 (1974).

The opposing party bears the burden to show there was a failure to mitigate damages. *Higgins* v *Lawrence*, 107 MichApp 178, 181; 309 NW2d 194 (1981).

Based upon the above authority, the Court concludes that the best measure of damages in this case is to use a lost profits/benefit calculation. By its briefed argument, Defendant agrees that the non-breaching party should have the benefits had the contract been "fully performed," (albeit in support for its own claimed damages from the alleged breaches by Plaintiff). (*See*, Def Trial Brf, ¶21, pp 6-7). Additionally, Defendant's cursory argument that lost profit damages claimed by Plaintiff "were not remotely within the contemplation of the parties at the time of contract formation" is unpersuasive. Notably, in the above-cited *Lawrence* case, an insurance policy on a truck used for commercial purposes was sufficient to establish that lost profits were reasonably within the contemplation of the parties at the time the truck was insured. In this instance, the December 2018 contract was for the installation and replacement to several thousand high efficiency LED lightbulbs in a large commercial building, *i.e.* the Mall by Plaintiff. Thus, it can reasonably be said that lost profits (or lost value as Defendant claimed) would have been in contemplation of the parties at the time the contract was signed.

Considering the admitted evidence, the Court finds that had the contract gone forward, Plaintiff would have received $30,000 cash payment from Defendant, the red golf cart, and $78,500 from AEP in the rebates. Mr. Jollay testified that he placed a $5,000-$6000 value discount on Defendant's payment with the inclusion of the red golf cart. The AEP rebate award letter confirmed the standard AEP rebate of $42,821. (Exh A-5) In addition, both Ms. Parfet and Mr. Jollay gave credible testimony as to the additional AEP bonus end-of-year rebate being offered which brought the AEP bonus up to the $78,500, including its rarity of such a bonus rebate with AEP based upon their past experiences. Notably, Plaintiff also did not include that additional AEP bonus rebate amount under "discount" on the contract. Rather, it was clearly a contractual amount under rebates from AEP "to be received by Michigan Energy Business Solutions." (Exh A-3) Defendant did not refute or rebut with any credible evidence either the value of the red golf cart, or the AEP rebates included in the quote. Therefore, the gross revenue amounts to $113,500.00.

Next, to determine lost profits the calculation must take into account and deduct any payments or costs built into the contracted amounts. Again, it is clear from the evidence presented that Defendant made a $15,000 cash deposit that must be deducted. Also, Plaintiff would have taken a loss of $4,995.35 on the product (*i.e.* lightbulbs) ordered and to be installed at the Mall, and would have paid labor costs of $30,750 had the contract been performed. (Exhs A-3, A-4 &

A-9). Deducting these additional amounts from the gross revenue, this Court finds that Plaintiff has sustained its burden of demonstrating with a sufficient and rational basis that it suffered breach of contract damages in the amount of $62,754.65.

With that said, there remains the issue of mitigation of damages by Plaintiff and the setoff or recoupment raised by Defendant to be considered. (*See,* Def Aff Defenses, 4/17/19, ¶ 8, p 6; Counterclaim, 4/17/19). Setoff or recoupment "refers to a defendant's right, in the same action, to 'cut down the plaintiff demand'" by providing the Court with "'an equitable reason why the amount payable to the plaintiff should be reduced.'" *McCoig Materials, LLC v Galui Construction, Inc*, 295 MichApp 684, 695 (2012), quoting *Mudge v Macomb Co*, 458 Mich 87, 106-107; 580 NW2d 845 (1998). Defendant bears the burden of proving entitlement to the setoff. *Id.*

Based upon the evidence and claims presented at trial, the Court finds that Plaintiff took necessary steps to mitigate its damages by cancelling certain lightbulb orders, attempting to return as many of the lightbulbs as possible, and placing the balance into storage. Defendant presented no evidence that there was a failure to mitigate by either party. In fact, Mr. Moore testified about his efforts as well to mitigate loss by returning the rented lifts. At the same time, the necessary mitigation of damages by Plaintiff entitles Defendant to some equitable relief in the form of a setoff of Plaintiff's damages to the extent Plaintiff pursued possession, through the claim and delivery, of the delivered lightbulbs as well. It was proper (if not required) for Plaintiff to take reasonable steps to mitigate its damages and therefore the recovery of the delivered lightbulbs and attempting to return them was likewise proper. *Klanseck v Anderson Sales & Serv, Inc,* 426 Mich 78, 91; 393 NW2d 356 (1986); *Shiffer v Bd of Ed of Gibraltar Sch Dist,* 393 Mich 190, 198; 224 NW2d 255 (1974) ("mitigation of damages is . . . the machinery by which the law seeks to encourage the avoidance of loss"). However, now considering damages, Plaintiff should not be entitled to the full lost profit damages (Count II) and to keep the lightbulbs that were delivered to the Mall under the contract but never installed. Consequently, the Court finds that Defendant is entitled to a setoff for the value of those recovered lightbulbs (under the March 12, 2019 prejudgment possession Order), except the 200 Euri br30 LED lightbulbs, which were not part of the contract or breach by Defendant. As an aside, it should be noted that even if setoff had been appropriate for those lightbulbs as well, there was no credible evidence presented at trial as to the cost or value of the 200 Euri br30 LED lightbulbs so a setoff amount for those lightbulbs could not be determined.

From the testimony as to the recovered lightbulbs which were included in the contract, and the admitted Exhibits A-3 and A-9 as to the value Defendant received in those lightbulbs, there is

a rational basis for the setoff amounts to be calculated as follows: $17,050.00 (3100 Euri 20w Hybrid 4' @ $5.50 per); $7,528.95 (81 Satco 80w LED Corn Bulb @ $92.95 per); and $15,062.50 (241 Satco 54w LED Corn Bulb @ $62.50 per). Adding those amounts together results in a total setoff amount of $39,641.45. Taking the setoff amount into consideration then, the MEB's damages for the breach are depicted as follows:

	$ 78,500.00	AEP rebates
	$ 30,000.00	Durga's contracted payment
	$ 5,000.00	Red Golf Cart
	$113,500.00	Gross Revenue Subtotal
-	$ 15,000.00	Durga deposit
-	$ 4,995.35	MEBS loss taken on product
-	$ 30,750.00	Deduction for not having to pay labor
	$ 62,754.65	Net Lost Profit
-	$ 39,641.45	Setoff
	$ 23,113.20	**DAMAGES**

In light of the above, verdict is entered on Count II of the Complaint for breach of contract in favor of Plaintiff and against Defendant in the amount of **$23,113.20**.

D. Counterclaim by Durga

With respect to the Counterclaim, Defendant/Counter-Plaintiff Durga alleged a breach of contract claim arising from MEBS's performance or lack of performance on the installation project (Count I), and a separate claim and delivery claim arising from the Court's March 12, 2019 Order allowing MEBS prejudgment possession of the lightbulbs (Count II). For the reasons stated above, Durga has not sustained its burden of demonstrating a separate breach of contract. As to the claim and delivery claim, it is untenable as a matter of law. MEBS lawfully obtained a prejudgment order of this Court to allow the possession of the lightbulbs during the pendency of this action. (Order 3/12/19). Therefore, the taking of possession under the March 12, 2019 Order was proper. Nonetheless, as described above, the Court has found that Durga is instead entitled to a setoff of MEBS's damages for those lightbulbs that had been in Durga's possession prior to the March 12, 2019 Order for prejudgment possession; with the exception of the 200 Euri br30 LED lightbulbs. Again, there was no credible evidence presented at trial as to the value of the 200 Euri br30 LED lightbulbs so a setoff amount for those lightbulbs could not be determined. Rather, under the claim and delivery claim of MEBS, this Court granted Durga repossession of those 200 Euri br30 LED lightbulbs from MEBS.

The Court finds Defendant/Counter-Plaintiff has not sustained its burden of proof on its separate counterclaims. Consequently, a no cause of action is entered in favor of Plaintiff/Counter-Defendant MEBS, and against Defendant/Counter-Plaintiff Durga on its counterclaims for breach of contract and claim and delivery.

CONCLUSION

In light of the foregoing reasons, and the Court being otherwise advised in the premises, the Court concludes as follows:

IT IS HEREBY ORDERED that on Count I of the Complaint (claim and delivery) based upon the findings of fact and conclusions of law by this Court, a verdict for Plaintiff in part and against Defendant for final possession of the recovered lightbulbs from the March 12, 2019 Order is rendered, except for the 200 Euri br30 LED lightbulbs. As to the 200 Euri br30 LED lightbulbs, only, verdict is entered for Defendant, and must be returned to Defendant at the Mall within 21-days of the final Judgment, unless the parties stipulate in writing to an additional setoff from Plaintiff's damages owed by Defendant, or other post-judgment resolution on damages.

IT IS HEREBY FURTHER ORDERED that on Count II of the Complaint (breach of express contract) based upon the findings of fact and conclusions of law by this Court, a verdict of **$23,113.20** in damages is rendered in favor of Plaintiff and against Defendant.

IT IS HEREBY FURTHER ORDERED that on Count III of the Complaint (breach of oral contract) based upon the findings of fact and conclusions of law by this Court, a verdict of no cause of action is rendered in favor of Defendant and against Plaintiff.

IT IS HEREBY FURTHER ORDERED that on the Counterclaim Count I (breach of contract) and Count II (claim and delivery), this Court enters a verdict of no cause of action in favor of Plaintiff/Counter-Defendant and against Defendant/Counter-Plaintiff.

IT IS HEREBY FINALLY ORDERED that within 14 days of the date of this Order, Plaintiff MEBS shall submit a proposed Judgment by stipulated form under MCR 2.602(B)(2) or under the seven-day notice rule of MCR 2.602(B)(3), consistent herewith, and as the prevailing party, Plaintiff is to include its allowable taxed costs under MCR 2.625(A)(1), if any.

IT IS SO ORDERED.

September 23, 2020
Date

/s/ Donna B. Howard
Hon. Donna B. Howard (P57635)