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

PETE'S MARKETING, INC.,

Plaintiff,

v. **Case No. 19-176610-CB**
Hon. James M. Alexander

JONES BROTHERS COFFEE DISTRIBUTION, LLC,
And JOHN W. BIRGBAUER,

Defendants.
_____/

OPINION AND ORDER RE: (1) PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION; AND, (2) /DEFENDANTS/COUNTER-PLAINTIFFS' MOTION FOR SUMMARY DISPOSITION

This matter is before the Court on cross motions for summary disposition, namely Plaintiff's Motion for Summary Disposition and Defendants/Counter-Plaintiffs' Motion for Summary Disposition. The Court dispenses with oral argument pursuant to MCR 2.119(E)(3).

By way of background, Plaintiff Pete's Marketing, Inc. and Defendant Jones Brothers Coffee Distribution, LLC ("Jones USA") entered into an Asset Purchase Agreement for the sale of Plaintiff's coffee distribution business with non-party Jones Brothers Coffee Company, BV. One of the purchased assets includes the "Assigned Contract" known as the Amended and Restated Distribution and Trademark Licensing Agreement between Plaintiff and Jones Brothers Coffee Company, BV.[1]

[1] Section 6.1 of the Amended and Restated Asset Purchase Agreement defines "Assigned Contracts" as "that certain Amended and Restated Trademark License and Distribution Agreement, dated as of September 27, 2015, by and between Jones Brothers Coffee Company BV and Seller."

It is Plaintiff's contention that Defendant Jones USA has failed to complete payment under the September 28, 2018 Amended and Restated Asset Purchase Agreement and currently owes $32,500.00 in addition to attorney fees and costs or expenses as authorized by Section 1.10 of the Agreement. As such, Plaintiff commenced litigation against Defendant Jones USA on September 16, 2019 on a Breach of Contract claim. In response to the Complaint, Defendant Jones USA filed a Counterclaim, alleging that Plaintiff breached the parties' Amended and Restated Asset Purchase Agreement with respect to its failure to make full disclosure of its liabilities and its failure to indemnify Defendant for damages incurred in a related lawsuit involving Nespresso USA, Inc., namely *Nespresso USA, Inc. v Jones Brothers Coffee Distribution*, LLC, US SD NY, Case No. 1:19-CV-03449 (April 18, 2019). In that lawsuit, Nespresso USA, Inc. sued Jones Brothers Coffee Distribution, LLC ("Jones USA") on April 18, 2019 and in the District Court of the United States, Southern District of New York, on allegations of trademark and trade dress infringement.

On February 13, 2020, Plaintiff filed a First Amended Complaint to add John W. Birgbauer, Defendant's chief executive officer, as Co-Defendant. The allegation against Mr. Birgbauer concerns his guaranty of Defendant Jones USA's performance and payment to Plaintiff. Following the parties' filing of their respective pleadings, Plaintiff filed a Motion for Summary Disposition as did Defendants/Counter-Plaintiffs. Both parties move for summary disposition pursuant to MCR 2.116(C)(10).

"A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties…in the light most favorable to the party opposing the motion. Where the proffered evidence fails to

establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood,* 461 Mich 109, 109; 597 NW2d 817 (1999); *Quinto v Cross & Peters Co.,* 451 Mich 358, 362; 547 NW2d 314 (1996).

Plaintiff's Motion for Summary Disposition

In its Motion for Summary Disposition, Plaintiff argues that there is no genuine issue of material fact that Defendant Jones USA's failure to complete payment under the Amended and Restated Asset Purchase Agreement was not excused under that Agreement. That is, Defendant Jones USA is not entitled to a setoff or indemnification under the terms of the Agreement. As of the filing of the summary disposition motion, Plaintiff represents that Defendants[2] owe $32,500.00 in damages under the Agreement, $9,365.00 in attorney fees, and $2,592.91 in expenses.[3] Moreover, Plaintiff contends that Defendants have not presented any facts that support their allegations that Plaintiff had knowledge of Nespresso's trademark infringement claims, and concealed those claims from Defendants prior to closing, or that Plaintiff engaged in the activities alleged by Nespresso in their lawsuit.

Plaintiff asserts further that Defendant Jones USA is not entitled to indemnity under Section 5.2(a)(iv) since the Distribution Agreement is an Assigned Contract, which is considered to be one of the Purchased Assets that are exempt from indemnification. Additionally, Plaintiff maintains that the Nespresso lawsuit was filed on April 18, 2019, which was after the September 18, 2018 closing. Since the Nespresso action arose after the closing, that obligation is an "Assumed Liability"[4] for which Defendant contractually agreed to pay. Finally, Plaintiff

[2] The Court will refer to Defendants/Counter-Plaintiffs as Defendants.
[3] Attached to Plaintiff's Motion is a Declaration of Attorney Anthony J. Bruozas in Support of Plaintiff's Motion for Summary Judgment in relation to the attorney fees and expenses incurred in this matter.
[4] "Assumed Liabilities. Subject to the terms and conditions set forth herein, Buyer shall assume and agree to pay, perform and discharge only those Liabilities in respect of the Assigned Contracts to the extent that such Liabilities thereunder are required to be performed after the Closing Date, were incurred in the ordinary course of business and do not relate to any failure to perform, improper performance, warranty or other breach, default or violation by Seller

contends that Defendant Jones USA has not shown that it suffered any damages as a result of the Nespresso lawsuit.

In opposition, Defendants argue that the Amended and Restated Asset Purchase Agreement was structured as an asset purchase as opposed to a stock purchase so that Defendant Jones USA could avoid responsibility for Plaintiff's liabilities related to its prior operation of the business from 2013-2018. Defendants assert further that they are entitled to indemnification for all losses arising out of any breach or inaccuracy of the representations and warranties in the Purchase Agreement. Defendants also maintain that indemnification is required for any loss incurred on account of Plaintiff's representation that it complied with all applicable laws related to the business. See Sections 2.4 and 2.9 of the Amended and Restated Asset Purchase Agreement.

Furthermore, Defendants argue that it is irrelevant whether Plaintiff had knowledge of Nespresso's trademark infringement allegations prior to closing. Defendants cite to two letters, dated August 9, 2018 and September 10, 2018, which concerned Nespresso's threatened litigation over the unlawful use of its trademarks and other intellectual property. Defendants note that these two letters were written prior to the execution of the Purchase Agreement on September 24, 2018.

Regarding Section 5.2(a)(iv) of the Purchase Agreement, Defendants assert that the exclusion of Purchased Assets from the scope of this provision does not defeat Defendant Jones USA's indemnification claim because Plaintiff's past sales of the unauthorized products from 2013-2018 were the basis of Nespresso's lawsuit. In its Reply, however, Plaintiff argues that the Assumed Liabilities, including the Assigned Contract or Distribution Agreement, were accepted by Defendant Jones USA and are excluded from indemnification under Section 5.2(a)(iv).

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on or prior to the Closing (the 'Assumed Liabilities'), and no other Liabilities." Section 1.3 of the Amended and Restated Asset Purchase Agreement.

Plaintiff also asserts that Section 5.2(a) does not provide for indemnification of amounts potentially due in the future. While Defendants' final payment was due on October 31, 2019, Plaintiff maintains that Defendants had only incurred $20,545.21 in legal fees and costs at that point in time. As such, Defendant could have paid the difference or approximately $11,500.00 toward the final payment. Instead, Defendant Jones USA withheld the entire $32,500.00 amount and as a consequence, Defendant Jones USA was the first party to materially breach the Purchase Agreement.

Defendants/Counter-Plaintiffs' Motion for Summary Disposition

In Defendants/Counter-Plaintiffs' Motion for Summary Disposition, Defendants argue that there is no genuine issue of material fact that Defendant Jones USA is entitled to indemnification from Plaintiff in relation to the representations and warranties that Plaintiff made in the Amended and Restated Asset Purchase Agreement. With regard to the terms of the Amended and Restated Asset Purchase Agreement, Defendants argue that the indemnification provision provides that Plaintiff shall reimburse Defendant Jones USA for its losses sustained in connection with any breach by Plaintiff or any inaccuracy of any representation or warranty made by Plaintiff in the Agreement. Defendants point out that losses include any liability that is known or unknown at the time of closing, including legal fees and expenses.

According to Defendants, Plaintiff was placed on notice of the threatened litigation by Nespresso either through the demand letters or through additional correspondence prior to the execution of the Agreement. After the Nespresso lawsuit commenced, Defendant Jones USA exercised its purported, right to a setoff under the Purchase Agreement since its losses from the Nespresso lawsuit were anticipated to exceed $32,500.00. Even though the Nespresso lawsuit resulted in a Settlement Agreement, Defendant Jones USA contends that it incurred $35,342.00 in

attorney fees alone. Additionally, Defendant Jones USA has $16,330.00 in remaining inventory that must be destroyed. In total, Defendant Jones USA represents that its losses are $51,672.00 in addition to attorney fees, costs, and expenses.

In contrast, Plaintiff maintains that Defendant Jones USA only purchased $11,453.98 of inventory from Plaintiff as part of the Purchase Agreement. See the Affidavit of Mary Vlahos; Exhibit K to Plaintiff's Reply. As such, Defendant Jones USA could not have had $16,330.26 in remaining inventory. What is more, Plaintiff alleges that Defendant Jones USA sold some of the inventory after the execution of the Purchase Agreement. Therefore, Defendant Jones USA cannot dispute that part of its attorney fees incurred in the Nespresso lawsuit were partially related to its independent and separate liability.

Defendants also rely on Sections 2.4 and 2.9 of the Amended and Restated Asset Purchase Agreement concerning "No Undisclosed Liabilities" and "Compliance with Laws, Licensing, and Permits," respectively. In relation to Section 2.4, Defendants contend that Plaintiff breached this provision in light of Nespresso's claims of trademark infringement and Plaintiff's potential liability for that infringement. Regarding Section 2.9, Plaintiff warrants that it was in compliance with all applicable laws relative to ownership and the use of the company's assets. Yet, Defendants argue that the trademark infringement alleged by Nespresso had been ongoing since 2013. According to Defendants, Plaintiff's representations and warranties under the Purchase Agreement were, at a minimum, inaccurate.

In response to Defendants' motion, Plaintiff argues that Defendants have failed to offer any evidence in support of their claims that: 1) Plaintiff made misrepresentations regarding the threats of litigation by Nespresso and the Nespresso lawsuit; 2) Plaintiff made misrepresentations regarding undisclosed liabilities; and, 3) Plaintiff made misrepresentations regarding its

compliance with all applicable laws. With respect to the litigation, Plaintiff contends that it was only contractually responsible for litigious threats within the Seller's knowledge at the time the parties executed the Agreement. Here, Plaintiff represents that it had no knowledge of the demand letters written by Nespresso. Plaintiff attaches as Exhibit One to its Response - the Affidavit of Peter Vlahos, an officer of Plaintiff, who attests that neither he nor Plaintiff received, reviewed, or were aware of the Nespresso demand letters, which were mailed to Plaintiff's prior business address. Peter Vlahos asserts further that neither he nor Plaintiff had knowledge of or were aware that Nespresso had made any demands or threats of litigation prior to the execution of the Purchase Agreement.

Additionally, Plaintiff points out that the demand letters were mailed to Jones Brothers Coffee Company US as opposed to Plaintiff. See Exhibit Two of Defendants' Motion. Plaintiff also maintains that the email address to which the demand letters were allegedly sent belonged to non-party Jones Brothers Coffee Company, BV and not Plaintiff. See Paragraphs 12-13 of Peter Vlahos' Affidavit. Further, Plaintiff contends that the definition of "Liability" does not include the term "Litigation" as that is covered by a separate provision within the Agreement.

With regard to Section 2.9, Plaintiff argues that Defendants have not presented any facts to demonstrate that Plaintiff was not in compliance with all applicable laws at the time the Amended and Restated Asset Purchase Agreement was executed. While Defendants rely upon the allegations in Nespresso's Complaint, Plaintiff contends that those unproven allegations are not proof that Plaintiff was noncompliant with all applicable laws at the time of entering into the Agreement. Plaintiff explains further that the allegations in the Nespresso lawsuit indicate that Defendant Jones USA, not Plaintiff, engaged in unauthorized or unlawful manufacturing conduct.

See Exhibit G of Plaintiff's Motion. In his Affidavit, Peter Vlahos attests that Plaintiff did not manufacture the subject products nor did it have the right to manufacture the products.

Plaintiff also asserts that its representations were true and accurate at the time the Agreement was executed. Moreover, Plaintiff argues that Defendant Jones USA cannot demonstrate any loss for which it would be entitled to indemnification because all losses stem from the Distribution Agreement, which is exempt from indemnification under Section 5.2(a)(iv).

In their Reply, Defendants maintain that it is irrelevant whether Plaintiff knew about Nespresso's infringement claims. What is important is the intent of the Amended and Restated Asset Purchase Agreement wherein Plaintiff provided Defendant Jones USA with broad representations and warranties that there were no known or unknown liabilities that might give rise to losses. In addition, the Agreement imposed broad indemnification obligations upon Plaintiff in the event that Defendant Jones USA suffered any losses on account of Plaintiff's prior operation of the business. What is more, Defendants assert that Nespresso's claims of trademark and trade dress infringement occurred prior to closing. Finally, Defendants argue that Section 5.2(a)(iv) does not exclude Defendant Jones USA's indemnification claim since the basis of Nespresso's third-party claims centered around products sold by Plaintiff, not Defendant.

Findings of Fact and Conclusions of Law

In this matter, the parties do not dispute that $32,500.00 is the remaining balance of the Note under the Amended and Restated Asset Purchase Agreement. What is in dispute is whether Plaintiff or Defendants are entitled to a money judgment against the other based upon the terms of the Amended and Restated Asset Purchase Agreement and in consideration of the related Nespresso lawsuit. Whereas Plaintiff argues that Defendant Jones USA is not entitled to indemnification or setoff under the Agreement, Defendants argue for indemnification and setoff

in consideration of Plaintiff's purported misrepresentations regarding the Nespresso litigation, undisclosed liabilities, and compliance with all applicable laws.

Michigan law is well-established that "[a] contract must be interpreted according to its plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). "Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate." *Holmes v Holmes*, *supra* at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

"Contracts must be construed as a whole, giving effect to all provisions. Courts must avoid interpretations that would render any part of a contract surplusage or nugatory and must also, if possible, seek an interpretation that harmonizes potentially conflicting terms." *Village of Edmore v Crystal Automation Systems Inc.*, 322 Mich App 244, 263; 911 NW2d 241 (2017). (Citations omitted).

"An indemnity contract is to be construed in the same fashion as other contracts. The extent of the duty must be determined from the language of the contract, itself. All contracts, including indemnity contracts should be construed to ascertain and give effect to the intentions of the parties and should be interpreted to give a reasonable meaning to all of its provisions. This Court has generally observed that if the language of the contract is clear and unambiguous, it is to be construed according to its plain sense and meaning." *Zahn v Kroger Co. of Michigan*, 483 Mich 34, 40–41; 764 NW2d 207 (2009). (Citations omitted).

In relation to the Nespresso lawsuit, the Court observes that the subject of "Litigation" is covered in Section 2.8 of the Amended and Restated Asset Purchase Agreement, which provides:

> Litigation. There is no Litigation of any nature pending or, to Seller's knowledge, threatened against or by Seller (a) relating to or affecting the Purchased Assets or the Business; or (b) that challenges or seeks to prevent, enjoin or otherwise delay the transactions contemplated by this Agreement. No event has occurred or circumstances exist that may give rise to, or serve as a basis for, any such Action.

Under Section 6.1 of the Amended and Restated Asset Purchase Agreement, "Litigation" is defined in pertinent part as "(i) any action, claim, cease and desist letter, demand, suit, litigation, arbitration proceeding, administrative or regulatory proceeding, citation, summons or subpoena of any nature, civil, criminal, regulatory or otherwise, in law or in equity."

Clearly, this "Litigation" provision is written in the present tense and concerns litigation that was pending or threatened at the time the Agreement was executed. While Defendants rely upon the Nespresso demand letters in support of their position, the Court observes from the Affidavit of Peter Vlahos and the Nespresso demand letters themselves that those letters were sent to Defendant Jones USA, using a prior address of Plaintiff, and were never received or reviewed by Plaintiff prior to the closing. Additionally, Mr. Vlahos attests that the subject email address belongs to non-party Jones Brothers Coffee Company, BV, and not Plaintiff. Based upon this evidence and noting that Defendants have not provided any evidence to demonstrate otherwise, the Court finds that Plaintiff did not breach this particular provision of the Agreement.

Next, Defendants argue that Plaintiff breached Sections 2.4 and 2.9 of the Amended and Restated Purchase Agreement. Section 2.4 of the Agreement provides:

> "No Undisclosed Liabilities. Seller has no Liabilities with respect to the Business other than those set forth in the Financial Information other than Liabilities which have arisen in the ordinary course of business and which are not, individually or in the aggregate, material in amount (and none of which, individually, is a Liability for breach of contract, breach of warranty, tort, infringement, violation of law, claim or lawsuit)."

Section 2.9, "Compliance with Laws: Licenses and Permits," of the Amended and Restated Asset Purchase Agreement provides in pertinent part that "Seller has complied, and is now complying, with all applicable Laws applicable to ownership and use of the Purchased Assets and the operation of the Business."

The Court notes that both Sections 2.4 and 2.9 are written in the present tense. At the time of execution of the Amended and Restated Asset Purchase Agreement, Plaintiff asserted that it had no undisclosed liabilities and was in compliance with all applicable laws. The documentary evidence attached to the motion filings supports Plaintiff's representations that: (1) it did not design, manufacture, or alter the subject product or packaging supplied by non-party Jones Brothers Coffee Company, BV; and, (2) it did not have any knowledge of the Nespresso demand letters regarding the alleged infringement prior to executing the Agreement. See the Affidavit of Peter Vlahos and the Nespresso demand letters. On the other hand, Defendants have not submitted any factual evidence to demonstrate that Plaintiff failed to disclose a liability with respect to trademark or trade dress infringement or that Plaintiff violated an applicable law.

Defendants rely upon the allegations of trademark and trade dress infringement in the Nespresso lawsuit to support their argument that Plaintiff misrepresented the fact that it disclosed its liabilities and complied with all applicable laws prior to executing the Amended and Restated Asset Purchase Agreement. As argued by Plaintiff, however, Defendants cannot simply rely upon Nespresso's allegations in a separate lawsuit as their evidentiary proof that Plaintiff did in fact breach these terms of the parties' Agreement, particularly when that lawsuit resulted in a Settlement Agreement between Nespresso and Defendant Jones USA. According to Black's Law Dictionary (11th ed. 2019), an "allegation" is defined as: "(1) [a] declaration that something is true; esp., a statement, *not yet proved*, that someone has done something wrong or illegal. (2)

[s]omething declared or asserted as a matter of fact, esp. in a legal pleading; a party's formal statement of a factual matter as being true or provable, *without its having yet been proved*." (Emphasis added).

Defendants have only attached to their filings, the Amended and Restated Asset Purchase Agreement, the Nespresso Demand Letters, the Nespresso Complaint, the Indemnification Notice, the Settlement Agreement in the Nespresso lawsuit, and the Varnum LLP Invoices. Contrary to Defendants' reliance upon the allegations contained in the Nespresso Complaint, Plaintiff has attached the Affidavit of Peter Vlahos, who attests that Plaintiff was never responsible for the manufacture, nor did it design, manufacture, or alter the products that were subject to the Nespresso litigation.

"In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Oliver v Smith*, 269 Mich App 560, 563–64; 715 NW2d 314 (2006). Here, Defendants have failed to support their position with affidavits, depositions, admissions, or other substantiated documentary evidence.

The parties also reference Section 1.3 of the Amended and Restated Asset Purchase Agreement regarding "Liabilities." Section 1.3 provides as follows:

> Assumed Liabilities. Subject to the terms and conditions set forth herein, Buyer shall assume and agree to pay, perform and discharge only those Liabilities in respect of the Assigned Contracts to the extent that such Liabilities thereunder are required to be performed after the Closing Date, were incurred in the ordinary course of business and do not relate to any failure to perform, improper performance, warranty or other breach, default or violation by Seller on or prior to the Closing (the "Assumed Liabilities"), and no other Liabilities.

Section 6.1 of the Amended and Restated Asset Purchase Agreement defines "Assigned Contracts" as "that certain Amended and Restated Trademark License and Distribution Agreement, dated as of September 27, 2015, by and between Jones Brothers Coffee Company BV and Seller."

The Court interprets Section 1.3 to mean that Defendant assumes the liabilities relative to the Assigned Contracts, namely the Amended and Restated Distribution and Trademark License Agreement, under three conditions, the first being that those liabilities are required to be performed after the closing date. Here, the Nespresso lawsuit was filed after the execution of the parties' Agreement. The third condition, i.e., that the liability does not relate to any warranty issue or other breach or violation of Seller on or prior to the closing date, has not been proven by any factual evidence submitted by Defendants in this matter.

With regard to indemnification, Article 5 of the Amended and Restated Asset Purchase Agreement outlines indemnification by the Seller, namely Plaintiff, in Section 5.2(a).

Section 5.2(a) provides as follows:

> (a) Indemnification by Seller. Seller shall indemnify Buyer and its Affiliates, and each of their respective stockholders, officers, directors, employees, agents, partners, representatives, successors and assigns (collectively, the "Buyer Parties") and save and hold each of them harmless against and pay on behalf of or reimburse such Buyer Parties as and when incurred for any Losses that any such Buyer Party may suffer, sustain or become subject to, as a result of, in connection with, relating or incidental to or by virtue of:
> (i) Any breach by Seller or any inaccuracy of any representation or warranty made by Seller in this Agreement or in any Ancillary Agreement;
> (ii) Any nonfulfillment or breach of any covenant, agreement, or other provision by Seller under this Agreement or any Ancillary Agreement;
> (iii) Any Excluded Liability; or
> (iv) Any Third-Party Claim based upon, resulting from or arising out of the business, operations, properties, assets or obligations of Seller or any of its Affiliates (other than the Purchased Assets) conducted, existing or arising on or prior to the Closing Date.

"Loss" or "Losses" is defined under Section 6.1 as "any loss, Liability, demand, judgment, claim, action, cause of action, cost, damage, deficiency, Tax, penalty, fine or expense, whether or not arising out of third-party claims and whether or not an actual breach of a representation, warranty or covenant is ultimately proven (including interest, penalties, reasonable legal, consulting and other professional fees and expenses and all amounts paid in investigation, defense or settlement of any of the foregoing)."

Pursuant to Section 6.1 of the Amended and Restated Purchase Agreement, "Liability" is defined as "any direct or indirect Indebtedness, guaranty, endorsement, liability or obligation, *known or unknown*, absolute or contingent, secured or unsecured, matured or unmatured, or determined or determinable, regardless of whether the same is required to be accrued on the financial statements of a Person." (Emphasis added).

As stated previously, Defendants have been unable to demonstrate through factual evidence that Plaintiff breached the Agreement and/or made an inaccurate representation or warranty to Defendant Jones USA to satisfy Section 5.2(a)(i). Moreover, Defendants are unable to seek indemnification under Section 5.2(a)(iv) based upon Nespresso's third-party claims that arise out of the assets and/or purported obligations of Plaintiff because the Purchased Assets, which includes the Distribution Agreement, are exempt from indemnification. Neither party raises provisions 5.2(a)(ii) or (a)(iii) in support of their respective arguments and so there is no need for the Court to address them at this time.

Under Section 5.2(c) of the Amended and Restated Purchase Agreement, "Buyer Parties shall be entitled to set off any amounts due and payable to any of Buyer Parties by Seller pursuant to this Section 7.2 [Amendment, Waivers, etc.] against any amounts otherwise due and payable by any of the Buyer Parties or any of their Affiliates to Seller." Defendants rely on this section in

their effort to seek a setoff against their $32,500.00 obligation under the Note. However, there are no amounts due and payable by Plaintiff to Defendant Jones USA, based upon the Court's analysis herein. As such, Section 5.2(c) is not applicable.

For the foregoing reasons, Plaintiff's Motion for Summary Disposition is GRANTED, and Defendants/Counter-Plaintiffs' Motion for Summary Disposition is DENIED. Within fourteen (14) days, Plaintiff shall submit a proposed Judgment for damages, attorney fees, and costs/expenses, in addition to its verified bill of costs, under the Seven Day Rule to allow Defendants an opportunity to review Plaintiff's calculations with regard to attorney fees and costs/expenses and to object to the requested attorney fees and costs/expenses if so desired.[5]

IT IS SO ORDERED.

August 19, 2020
Date

/s/ James M. Alexander
Hon. James M. Alexander
Circuit Court Judge

[5] Once a fee applicant submits its detailed billing records, the opposing party may contest the reasonableness of the requested attorney fees. "If a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence." *Smith v Khouri*, 481 Mich 519, 532; 751 NW2d 472 (2008).