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

BYLINE BANK,
Plaintiff,

v.

Case No. 18-169311-CB
Hon. James M. Alexander

MICHIGAN INTERLOCK, LLC and
MICHELE I. COMPTON,
Defendants.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Plaintiff's motion for summary disposition. Plaintiff is the successor by merger with Ridgestone Bank. Under the terms of a May 4, 2016 Promissory Note, Ridgestone loaned $1.6 million to Defendants.

Plaintiff claims that the Defendants defaulted on the loan by failing to make the payment due on April 1, 2018. Pursuant to the terms of the Note, Plaintiff accelerated the balance due and made demand for payment upon Defendants. Plaintiff claims that Defendants have refused to pay the amount due. As a result, Plaintiff brought this case seeking a money judgment against Defendants for the amount owed on the Note and attorney fees totaling – $1,502,757.65.

Plaintiff now moves for summary disposition under MCR 2.116(C)(9) and (C)(10). A (C)(9) motion tests a defendant's defenses to a claim. *Lepp v Cheboygan Area Schools*, 190 Mich App 726, 730; 476 NW2d 506 (1991).[1] And a (C)(10) motion tests the factual support for a plaintiff's claims.

1 Such a motion tests whether the defendant's defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery. *Lepp*, 190 Mich App at 730.

Maiden v Rozwood, 461 Mich 109, 120; 597 NW2d 817 (1999).[2]

Plaintiff's Complaint is based on a contract theory. In order to prove breach of contract, a plaintiff must establish: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from that breach. *Stoken v JET Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988). Further, "[c]ontracts of guaranty are to be construed like other contracts, and the intent of the parties, as collected from the whole instrument and the subject-matter to which it applies, is to govern." *Comerica Bank v Cohen*, 291 Mich App 40, 46; 805 NW2d 544 (2010) (internal quotation omitted).[3]

Plaintiff claims that there are no genuine issues of material fact as to Defendants obligations under the Note; and that Defendants have failed to set forth any valid defenses to its claim and, therefore, Plaintiff is entitled to a judgment. In support of their motion, Plaintiffs attach (in relevant part) (1) the Promissory Note; (2) the Loan Agreement; (3) the Affidavit of Katherine Szkutnik, Plaintiff's Assistant Vice President; (4) Affidavit of Donovan Asmar; (5)Affidavit of Edmond Burke; (6) 2017 Economics of Law Practice; and (8) the Complaint and Answer to Complaint.

Here, there is no dispute that the parties entered into the Note and Loan Agreement, and that Defendants defaulted on the loan, which resulted in damage to Plaintiff. Instead, Defendants argue that their performance under the contract is excused by the doctrines of Frustration of Purpose and Impossibility of Performance. Defendants argue that the purpose of the loan was to purchase the membership interest in Michigan Interlock, purchase equipment, and provide borrower with working

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2 In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden, 461 Mich* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

3 Michigan law is also well-established that "a court must construe and apply unambiguous contract provisions as written." *Rory v Cont'l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, "[a] contract must be interpreted

capital. Defendants argue that the purpose of the loan was frustrated when the State of Michigan issued a Summary Suspension Order, which prevented Defendants from conducting business. Defendants further argue that because they are prohibited from conducting business within Michigan, it is impossible for Defendants to perform under the loan.

In support of its argument, Defendants point to Recital D contained in the Loan Agreement, which provides:

> The Loan proceeds advanced by Lender are to be used, in whole or in part, to purchase all membership interest in Michigan Interlock, LLC, a Michigan limited liability company ("Michigan Interlock"), owned by John R. Hantz, Trustee of the John R. Hantz Trust of February 4, 1992, as may be amended ("Seller"), as well as purchase equipment and provide Borrower with working capital.

Defendants were in the business of distributing, installing, and servicing Breath Alcohol Ignition Interlock Devices (BAIID) throughout the State of Michigan. A BAIID is a device that measures a driver's breath alcohol level and prevents a vehicle from starting if it detects breath alcohol over the legal limit. The manufacture, certification, installation, removal, service, and use of BAIIDs is regulated and enforced by the State of Michigan. The State maintains a list of approved BAIID vendors. At the time of the loan, Defendant was an approved BAIID vendor.

In March 2016, the State amended the law as it related to BAIID manufactures, distributors, and vendors. Under the new law, BAIIDs were required to be equipped with a camera. As a result, Defendants were required to secure financing to purchase new BAIIDs. On May 4, 2016, Defendants secured financing from Plaintiff. On or about May 26, 2016, Defendants used the loan funds to purchase camera-equipped BAIIDs. Defendants claim that they were repeatedly assured from their supplier that the BAIIDs were compliant under the new law. Defendants claim that, despite the

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according to its plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008).

assurances, the BAIIDs did not function properly and were not compliant under the new law. As a result, the State suspended Defendants from using the non-compliant BAIIDs. The State's Summary Suspension Order was issued on March 7, 2018.

Defendants argue the State's suspension prohibited them from conducting business. This, Defendants argue, frustrated the purpose of the loan. Defendants argue that the suspension could not have been foreseen by the parties at the time they entered into the Note and Loan Agreement. Defendants argue that Plaintiff, "highly sophisticated and experienced investors," would "never have made a loan of $1.6 million if it thought it was conceivable (let alone foreseeable) that ADS and Directed were going to sell Defendants BAIIDs that were not NHTSA compliant , and therefore incapable of being used by Defendants." (Defendants' Response, at 14).[4]

In *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 159–60; 742 NW2d 409 (2007) (internal citations and quotations omitted), the Court of Appeals reasoned:

> The frustration-of-purpose doctrine provides an excuse for nonperformance of a contractual obligation. Generally, the doctrine is asserted where a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract.
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> . . .
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> The following conditions must be met before a party may avail itself of the frustration-of-purpose doctrine: (1) the contract must be at least partially executory; (2) the frustrated party's purpose in making the contract must have been known to both parties when the contract was made; (3) this purpose must have been basically frustrated by an event not reasonably foreseeable at the time the contract was made, the occurrence of which has not been due to the fault of the frustrated party and the risk of which was not assumed by him.

In its reply, Plaintiff argues that regardless of the allegations Defendants have regarding the

4 ADS and Directed Electronics manufactured the BAIIDs at issue. On February 18, 2018, Defendants signed a "Distributor Agreement" with ADS, which granted Defendants the right to be the exclusive distributor of ADS BAIIDs in Michigan. Defendants claim that both ADS and Directed Electronics failed to comport with Michigan Law, and as such, are at fault for Defendants' inability to conduct business within the State. Further, Defendants allege that ADS and Directed Electronics conspired to push Defendants out of business. Defendants allege that ADS

quality of the BAIIDs or their status as a State-approved vendor, the primary purpose of the contract between Plaintiff and Defendants was not frustrated. In fact, the purpose of the contract was performed. The Court agrees.

Here, as set forth in the Loan Agreement, the proceeds from the loan were to be used, in whole or in part, to purchase all membership interest in Michigan Interlock, purchase equipment, and provide Defendants with working capital. Defendant Compton admits that she is now the sole member of Michigan Interlock. (Defendants' Response Exhibit A). Further, Defendants admit that on May 26, 2016, the loan funds were used to purchase camera-equipped BAIIDs (equipment) from ADS. (Defendants' Response, at 4). Based on Defendants' admissions, the primary purpose of the contract was performed – the membership interest and equipment were purchased with the loan funds.

Further, at all times prior to, during, and after the Note and Loan Agreement were made, the use of BAIIDs was regulated by Michigan Law. *See* MCL 257.625k. At the time Plaintiff and Defendants entered into the Note and Loan Agreement, MCL 257.625k had been amended four times. Assuming arguendo Defendants were able to establish that the purpose of the loan was frustrated, the frustration could have been reasonably foreseen. In fact, the statute was previously amended on October 31, 2010. At the time of that amendment, Defendants were in operation and subject to the amendment. Therefore, Defendants could have reasonably foreseen further amendments.

Based on the foregoing, the Court concludes that the purpose of the contract between Plaintiff and Defendants was not frustrated. As such, Defendants' performance under the loan is not excused

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acknowledged its fault in creating the conditions that lead to the Summary Suspension Order. Neither ADS nor Directed Electronics are parties to the present case.

by the doctrine of Frustration of Purpose.

Next, Defendants argue that their performance under the Note and Loan Agreement is excused based on the doctrine of Impossibility of Performance.

> [T]he essence of the modern defense of impossibility is that the promised performance was at the making of the contract, or thereafter became, impracticable owing to some extreme or unreasonable difficulty, expense, injury, or loss involved, rather than that it is scientifically or actually impossible * * *. The true distinction is not between difficulty and impossibility. A man may contract to do what is impossible, as well as what is difficult, and be liable for failure to perform. The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. If so, the risk should not fairly be thrown upon the promisor. *Bissell v. L.W. Edison Co.*, 9 Mich App 276, 285; 165 NW2d 623 (1967).

The Court of Appeals has further held:

> Although absolute impossibility is not required, there must be a showing of impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved. The question whether a promisor's liability is extinguished in the event his contractual promise becomes objectively impossible to perform may depend upon whether the supervening event producing impossibility was or was not reasonably foreseeable when he entered into the contract. Risk of nonperformance of a contract should not fairly be thrown upon the promisor, if an unanticipated circumstance had made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. *Roberts v. Farmers Ins. Exchange*, 275 Mich App 58, 74; 737 NW2d 332 (2007) (internal citations omitted).

Here, as previously discussed, it was reasonably foreseeable that the law could have been amended regarding the use of BAIIDs. As such, the "supervening event producing impossibility" should have been reasonably within the contemplation of both parties when they entered into the contract. Based on the same, the doctrine of Impossibility of Performance is not available to Defendants. As Plaintiff argues, although the relationship

between Defendants and its supplier changed drastically, it did not alter the basic assumptions and obligations to the underlying note between Plaintiff and Defendants.

In the instant case, Defendants took out a loan for the operation of its business. Unfortunately, Defendants were not successful in their endeavors. Defendants argue that their hardships arise from their supplier's conduct, and Defendants may have a successful claim for the same. The supplier's actions and conduct do not, however, have any bearing on the present case, nor does it alter or extinguish Defendants' obligations under the Note and Loan Agreement.

Based on the foregoing, Plaintiff's motion for summary under (C)(9) and (C)(10) is GRANTED. Judgment is entered in favor of Plaintiff and against Defendants, jointly and severally, in the amount of $1,502,757.65 plus interest at the contract rate.

This is a final order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

April 17, 2019_____ __/s/ James M. Alexander_____
Date Hon. James M. Alexander, Circuit Court Judge