STATE OF MICHIGAN

IN THE 20[TH] CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET
414 Washington Street
Grand Haven, MI 49417
616-846-8315
* * * * *

RAVUN, INC., and **MARK KUYPER,**
Plaintiffs/Counter-Defendants,

v

NUVAR, INC.,
Defendant/Counter-Plaintiff.
/

TRIAL OPINION

File No. 21-06713-CB

Hon. Jon A. Van Allsburg

Plaintiffs brought this action for declaratory relief regarding money allegedly owed by the defendant corporation pursuant to an asset purchase agreement (hereinafter "APA") and a promissory note. Plaintiffs amended the complaint to allege a breach of the promissory note. Defendants counterclaimed alleging a breach of contractual representations and warranties. The court granted partial summary disposition to plaintiff as to Count III of defendant's counterclaim.[1] Before trial the court partially granted and partially denied defendant's motion in limine to exclude certain witnesses. The court also granted the parties' stipulation that any claims for recovery of attorney fees would be reserved for post-trial motions.

Trial was held on November 7, 8, 9, and 10, 2023, and the court ordered closing statements and proposed findings of fact to be submitted by December 8, 2023, but later approved the parties' stipulation to extend the filing deadline to January 26, 2024 to permit the completion and review of trial transcripts before the filing deadline. For the reasons stated below, the court grants plaintiffs' request for a declaratory judgment, awards a money judgment to plaintiff Kuyper in the amount of $822,299.43 plus interest, and dismisses defendant's counterclaims.

Trial Testimony and Summary of the Facts

History of the Company

Nuvar, Inc. is a contract furniture manufacturer, building and shipping office and healthcare furniture for its customers who are major office furniture manufacturers. The company was formed in 1989 by its former president, plaintiff Mark A. Kuyper, and grew to

[1] Count I of defendant's counterclaim alleged a breach of the representations and warranties in Sec. 3.05 (Finance Statements), Count II alleged a breach of the representations and warranties in Sec. 3.09 (Inventory), and Count III alleged a breach of the representations and warranties in Sec. 3.06 (Undisclosed Liabilities) of the APA.

employ about 130 employees by 2015. In early 2018 Kuyper negotiated with Amy Sparks to sell the company, and Sparks, as president of ALS Acquisition Co., signed an Asset Purchase Agreement with Nuvar on March 28, 2018. By the time of closing on May 31, 2018, a price reduction had been negotiated, and a revised APA was signed on that date (effective March 28, 2018). ALS Acquisition paid $7,000,000 at closing and signed a Promissory Note for $4,000,000. After closing, the selling corporation changed its name to Ravun, Inc. (also called "Old Nuvar"), and the purchasing corporation, ALS Acquisition Co., changed its name to Nuvar, Inc. (also called "New Nuvar").

Plaintiff Mark Kuyper testified that he has lived in Holland, Michigan since 1986. He is a graduate of Calvin University and the University of Michigan with a degree in mechanical engineering, followed by a master's degree in management from Aquinas College. He does not have an accounting background. He founded Nuvar as a contract manufacturer to the furniture and healthcare industries and served as president and CEO for the next 29 years. The company primarily served the furniture industry, with 60% of its sales made to Steelcase, 20% to Herman Miller (now MillerKnoll), and much of the remainder to smaller furniture manufacturers such as ERG, Kramer, and Brill.

Kuyper testified the typical process would involve a customer, such as Steelcase, coming to Nuvar with a product "concept," and Nuvar would work with the Steelcase engineering team to "commercialize" the product. Every product would have a parts drawing, and if Steelcase had already made decisions regarding the outsourcing of the product, it would present Nuvar with the parts list. Most Herman Miller business came through a joint product development process. Once product development was complete, Nuvar served as an "on-demand supplier" for most of its customers. Nuvar would manufacture a product based on purchase orders passed on to it by its customers, and then ship directly to its customer or the customer's dealer. Nuvar sometimes had direct contact with the end customer of the product, but generally did not. Nuvar did not advertise to the public, and its finished products were sold under its customers' brand names.

Kuyper testified that Nuvar positioned itself as a manufacturer of low-to-medium demand, high variability products, and by necessity kept an inventory of product parts to minimize the time between a customer order and Nuvar's delivery of the finished product. Herman Miller advertised 10-15 day "lead times" which he considered "pretty standard" for contract manufacturers, but some of their products required as little as a 48-hour lead time. Nuvar's customers kept scorecards on Nuvar's "on time shipping" scores (i.e., its ability to achieve delivery by the advertised lead times) as well as its quality goals.

Nuvar used a computer software program known as "Syteline" to track its products, purchase orders, parts lists, accounts receivable, and accounts payable. Each product would have an "item master" for each component part. Syteline would provide inventory lists, and inventory was tracked on a cost basis. Syteline would also track inventoried parts on a LIFO/FIFO (last in/first out, first in/first out) basis. Some inventory was considered "slow moving" as Nuvar had to be ready to manufacture furniture and other items that had lower sales volumes, for so long as their customer offered such slower-selling items for sale in the marketplace. Inventory was always valued at cost.

Kuyper testified that parts in inventory would be considered "obsolete" if a customer removed the product in which they were used from its catalog, or when a product went through an engineering change and no longer used a particular part.[2] However, even if a customer's product was no longer available for purchase, Nuvar might retain parts for that product as service parts, available to repair or replace the original parts on a previously sold product. Nuvar's customers would typically advise Nuvar ahead of time if the customer intended to pull a product from its catalog by supplying Nuvar with an "end of life" date, and Nuvar would talk to the customer about the need for service parts. The product parts that were not needed as service parts were considered excess inventory, and Nuvar and the customer would negotiate an agreed price at which the customer would buy back Nuvar's excess inventory for that product. Kuyper noted that Steelcase and Herman Miller almost always bought back excess inventory, but never bought back slow-moving inventory on continuing products. Kramer was Nuvar's only customer that sometimes bought back slow-moving inventory.

As a result of the above practices, Kuyper said Nuvar bought almost all of its parts inventory "on spec," that is, without actual purchase orders in hand, so that manufacturing could begin immediately on receipt of a purchase order in order to meet the lead times (48 hours to 15 days) advertised by its customer. If Nuvar waited for a purchase order to arrive before ordering parts, the lead time would elapse before all the parts arrived (some parts were shipped from overseas with two-to-six-week lead times). The Syteline program would flag all parts affected by the "end of life" of a particular product, and if the excess inventory was scrapped rather than sold back to the customer, Syteline would note that as well.

Negotiating the Sale of the Company

In 2015, Kuyper was approached by Leggett & Platt (a competitor also engaged in the design and manufacture of furniture components and other products), inquiring about Kuyper's interest in selling Nuvar. They had several conversations about it, but no action resulted. Kuyper testified that he had been considering whether to sell Nuvar to an employee stock ownership program (ESOP) but concluded that the ESOP plan was not a good fit. Kuyper had previously met Amy Sparks at a Steelcase supplier forum when she was working for a competitor in southeastern Michigan. On September 28, 2016, he authorized Don VanderZwaag, a business acquisition professional, to follow up with an email to Sparks, under the Subject heading: "Excel Financial Summary & 2014 Reviewed Statement," and attached two documents, an Excel spreadsheet titled "Nuvar Inc Historical Analysis 7-16," and a .pdf document titled "Nuvar Reviewed Financial Statements – 2014" (Plaintiff's Exhibit 14). He said Sparks followed up with him after that email, but nothing further came of that inquiry in 2016 or 2017.

Amy Sparks has a bachelor's degree in business administration and accounting, and worked toward a master's degree in accounting, at Grand Valley State University. She worked as a finance manager for Haworth, then for Plante & Moran, and began her own accounting practice before joining Soundtech as CFO in 2002. She completed her master's in business administration at the University of Michigan in 2013 and was president and CEO of Soundtech at the time she

[2] Kuyper noted that if a product part was no longer used in a particular product due to an engineering change, the unused parts might still be usable in another product calling for that part, but if there was no alternative use, it became a classic "obsolete part" and would be resold to the customer as excess inventory.

purchased Nuvar in 2018. Soundtech manufactured acoustical and thermal insulation for the office furniture industry, selling to Steelcase and other manufacturers.

Sparks pursued her earlier interest in Nuvar, and Kuyper identified an email received from Sparks' counsel on February 12, 2018 (copied to VanderZwaag and Sparks), advising that he was assisting Sparks in developing a "term sheet" for a potential sale of Nuvar (Plaintiff's Exhibit 4). Over the next month-and-a-half the parties came together on terms, and on March 28, 2018, Spark's counsel sent an email to Kuyper, his counsel, and Sparks, enclosing a spreadsheet summary of the financial terms and Nuvar's component valuations "in preparation for signing today…." (Plaintiff's Exhibit 8). Using 2017 averages, these terms valued Nuvar's inventory at $4,858,896, and identified a "Working Capital Target" of $8,607,691 (consisting of accounts receivable, inventory, and prepaid assets, less accounts payable). The APA was signed on March 28, 2018 with a purchase price of $12,157,000. Kuyper testified that Sparks worked on-site at Nuvar in the weeks leading up to the closing, and Kuyper provided her with an office. He said he instructed the employees to cooperate with Sparks as she was preparing to step in and run the company. Sparks left her former employer, Soundtech, at the end of April, and met with Nuvar customers Herman Miller and Kramer prior to closing.

The parties defined "Net Working Capital" as:

> "… the Seller's: (i) accounts receivable, Inventory, prepaid expenses listed on Schedule 1.01(i), and other current assets of Seller (but expressly excluding cash and cash equivalents) minus (ii) Accounts Payable and other current liabilities of Seller (but expressly excluding indebtedness for borrowed money, accrued liabilities, and Seller's health care liability account), all determined in accordance with Generally Accepted Accounting Principles." Plaintiff's Exhibit 126.

The use of the capitalized noun "Inventory" in the agreement indicates that this term was defined by the contract instead of being given its "ordinary, plain meaning" or "commonly used meaning." "Inventory," one of those capitalized terms, is defined by Section 1.01(g) of the parties' contract as:

> (g) all raw material inventory, finished goods inventory, spare parts, supplies, and other inventory of the Seller, to the extent deemed salable by Buyer (**"Inventory"**); …." *Id.*

Also in the APA, the buyer (ALS Acquisition Co.) acknowledged having "sufficient knowledge, expertise, and financial capacity to operate" the business, and to "evaluate the merits and risks" of the transaction. Section 9.06. The buyer also represented that its knowledge of the business included actual knowledge and such knowledge it "would have had if reasonable inquiry had been made." Article 4. The buyer acknowledged receipt of financial statements and other financial data that buyer considered necessary or advisable. Section 4.05. With respect to buyer's due diligence review, the APA noted that buyer's obligation to consummate the transaction was subject to the fulfillment (or waiver by buyer) of such review, and that buyer's satisfaction was subject to its sole discretion. Section 7.03. Finally, the APA contained an integration clause providing that it was the "sole and entire agreement of the parties" and supersedes "all other agreements both written and oral...." Section 9.06.

Buyer's Due Diligence as to Inventory

Kuyper testified that he had met with the Buyer's CPA, Peggy Murphy of Hungerford Nichols, prior to closing to answer her questions, and arranged for her to do "spot checks" of the inventory prior to closing. In emails between Sparks and Murphy, Sparks approved the use of a limited due diligence review of inventory, using spot checks of various inventory items. Kuyper acknowledged that Murphy inquired about "slow-moving inventory" and provided a worksheet on May 4, 2018, of 975 inventory items (representing about 5% of inventory) characterized as slow-moving parts. (Plaintiff's Exhibit P). Murphy confirmed the inventory checks in an email to Kuyper and Sparks on May 30, 2018 (Plaintiffs' 25), and ultimately sampled about 14% of all inventory. (Plaintiff's Exhibit 90). Hungerford Nichols concluded, "We believe inventory is materially stated and salable." Kuyper said he confirmed that obsolete inventory would be purged from the Syteline system. In a response email from Kuyper's finance director, Shara Klynstra, later the same day, the buyer was provided with accounts payable reports, aging reports, inventory, and prepaid accounts in Excel spreadsheet form (Defendant's Exhibit Z, Z1). These were forwarded by Murphy to Sparks and her attorneys (Plaintiffs' Exhibit 103).

Post-Closing Adjustment of the Purchase Price

The amended APA contained a formula for a potential post-closing adjustment of the purchase price, to the extent that company performance exceeded or fell short of the "Net Working Capital Target" as defined in the APA. §1.05 of the APA provided as follows:

> **Section 1.05 Purchase Price Adjustment.**
>
> (a) For purposes of this Agreement, the term **"Net Working Capital"** means the Seller's: (i) accounts receivable, Inventory, prepaid expenses listed on Schedule 1.01(i), and other current assets of Seller (but expressly excluding cash and cash equivalents) minus (ii) Accounts Payable and other current liabilities of Seller (but expressly excluding indebtedness for borrowed money, accrued liabilities, and Seller's health care liability account), all determined in accordance with Generally Accepted Accounting Principles.
>
> (b) For purposes of this Agreement, the term **"Net Working Capital Target"** means $8,607,691.00. The Net Working Capital Target was calculated as shown on the attached **<u>Schedule 1.05(b)</u>**.
>
> (c) <u>Estimated Net Working Capital Calculation</u>. On or within five (5) days before the Closing Date, Seller shall prepare and deliver to the Buyer a statement (the **"Estimated Net Working Capital Statement"**) showing the calculation of the estimated Net Working Capital as of the close of business on the Closing Date (the **"Estimated Net Working Capital"**). Estimated Net Working Capital shall be calculated in the same manner as the Net Working Capital Target. After

delivery of the Estimated Net Working Capital Statement, the Seller shall permit the Buyer to have reasonable access to the books and records pertaining to the Estimated Net Working Capital Statement, and shall provide the Buyer with copies thereof as reasonably requested by the Buyer. If the Estimated Net Working Capital exceeds the Net Working Capital Target (with the difference being referred to as the **"Estimated Excess")**, then the Purchase Price will be adjusted upward by the amount of the Estimated Excess, the amount of which increase shall be added to the Cash Payment to be paid within one hundred eighty (180) days after Closing; provided, however, that the amount of any Estimated Excess that is not paid within ninety (90) days after Closing shall bear interest at the rate of one-half percent (0.5%) per month from the ninety-first (91^{st}) day after Closing until the date such amount is paid. If the Estimated Net Working Capital is less than the Net Working Capital Target (with the difference being referred to as the **"Estimated Shortfall")**, then the Purchase Price will be adjusted downward by the amount of the Estimated Shortfall, the amount of which decrease shall be deducted from the Cash Payment.

(d) Actual Net Working Capital Calculation. Within ninety (90) days after the Closing Date, Buyer shall prepare and deliver to the Seller a statement (the **"Actual Net Working Capital Statement")** showing the calculation of the actual Net Working Capital as of the close of business on the Closing Date (the **"Actual Net Working Capital")**. Actual Net Working Capital shall be calculated in the same manner as the Net Working Capital Target. After delivery of the Actual Net Working Capital Statement, the Buyer shall permit the Seller to have reasonable access to the books and records pertaining to the Actual Net Working Capital Statement, and shall provide the Seller with copies thereof as reasonably requested by the Seller. If the Seller has any objections to the Actual Net Working Capital Statement, the Seller shall deliver to the Buyer a statement setting forth its objections thereto (an **"Objections Statement")**. If an Objections Statement is not delivered to the Buyer within thirty (30) days after delivery of the Actual Net Working Capital Statement, the Actual Net Working Capital Statement shall be final, binding, and non-appealable by the Buyer and the Seller. The Seller and the Buyer shall negotiate in good faith to resolve any Objections Statement that is timely delivered, but if they do not reach a final resolution within fifteen (15) days after the delivery of the Objections Statement, the parties shall promptly refer the disputed matters to an independent certified public accounting firm acceptable to Buyer and Seller (the **"Independent CPA")**. The Independent CPA shall be guided in reaching a determination with respect to the disputed matters by the applicable provisions of this Agreement, but shall only make determinations on those matters which remain in dispute and were included in the Objections Statement. The determination of the Independent CPA shall be conclusive and binding on Buyer and Seller absent manifest error.

The fees and expenses of the Independent CPA shall be borne by Buyer, on the one hand, and Seller, on the other hand, based upon the percentage which the aggregate portion of the contested amount (based on the last proposed written offers from each of Buyer and the Seller for the settlement of the items in dispute, taken as a whole, prior to the engagement of the Independent CPA) not awarded to each party bears to the aggregate amount actually contested by such party. For example, if the Seller claims the Actual Net Working Capital Amount is $100,000 greater than the amount determined by Buyer, and if the Independent CPA ultimately resolves the dispute by awarding the Seller $30,000 of the $100,000 contested, then the costs and expenses of the Independent CPA will be allocated 30% (i.e., 30,000 ÷ 100,000) to Buyer and 70% (i.e., 70,000 ÷ 100,000) to the Seller. At any time Buyer and Seller may agree to settle any objections raised in the Objections Statement, which agreement shall be in writing and binding upon all of the parties hereto with respect to the subject matter of any such objection so resolved and, in the event such settlement is reached with respect to each matter submitted to the Independent CPA for resolution prior to the Independent CPA' s determination, the fees and expenses of the Independent CPA shall be borne by Buyer and Seller equally.

(e) Adjustment for Excess. If the Actual Net Working Capital as finally determined pursuant to Section 1.5(d) above (the **"Final Amount"**) exceeds the Estimated Net Working Capital (with the difference being referred to as the **"Actual Excess"),** then the Purchase Price will be adjusted upward by the amount of the Excess and such amount will be paid in cash by the Buyer within thirty (30) days of the date on which the Final Amount is determined.

(f) Adjustment for Shortfall. If the Final Amount is less than the Estimated Net Working Capital (with the difference being referred to as the **"Actual Shortfall"),** then the Purchase Price will be adjusted downward by the amount of the Shortfall and such amount shall be paid in cash by the Seller within thirty (30) days of the date on which the Final Amount is determined.

At the closing held May 31, 2018, the parties signed an amended APA (effective March 28, 2018) with a reduced purchase price of $11,000,000 (Plaintiff's Exhibit 126).[3] Kuyper testified that sales during 2018 had gotten off to a soft start, and he and Sparks were nervous about that, so he offered the price reduction. Cash and prepaid expenses were excluded from the sale, and the purchase price was financed with a $7,000,000 down payment and a $4,000,000 promissory note held by Kuyper. He also signed a Termination Agreement as to his position as president and owner (Plaintiff's Exhibit 128). After closing, the selling corporation changed its name to Ravun, Inc. (also referred to herein as "old Nuvar"), and the purchasing corporation, ALS Acquisition Co., changed its name to Nuvar, Inc. (also sometimes referred to as "new Nuvar"). Inventory was valued at $5,083,555, resulting in a net working capital (NWC) calculation of $8,383,634, and reducing the purchase price by $224,057, as reflected in the Closing Statement (Plaintiffs' Exhibit 96). Kuyper testified that the financial information was accurate and there were no accounting or management changes affecting the calculation of NWC

[3] Sparks noted that the Closing Statement reflected a net payment of $6,734,652.80 due at closing, together with a $4,000,000 promissory note. (Plaintiff's Exhibit 96).

leading up to the closing.[4] Post-closing, Kuyper continued to work for "new Nuvar" to aid in the transition. His work schedule was initially four days per week but declined to zero over the next couple of years (that decline accelerated when the COVID-19 pandemic began in March 2020).

As the 90-day deadline for calculating "actual net working capital" approached in late August 2018, Sparks emailed Kuyper on the morning of August 28, 2018, stating that her attorney had asked "where we are" on the 90 day true up; she advised Kuyper that she had responded, "…we needed a little more time and is that okay?" Kuyper replied by email that afternoon saying, "consider this email authorization to delay the Nuvar purchase 90 day true-up until September 30, 2018." (Plaintiff's Exhibit 99). On September 25, 2018, as the extended deadline approached, Sparks emailed Kuyper, "I think we are finally there on the 90 day true up!" and attached several spreadsheets (Plaintiffs' Exhibit 100).[5]

Despite the agreed 30-day extension and Sparks' email of September 25, 2018, Sparks continued to send emails with updated calculations. On October 23, 2018, she emailed Kuyper with the subject heading, "Updated True Up," and attached two spreadsheets with various adjustments described in a detailed nine-paragraph email. She concluded saying, "Once you respond with your final approval I will go back and update AJE's and Shara and I will close this out." (Plaintiff's Exhibit 161). Kuyper did not respond to this email. Sparks' email to Kuyper on December 6, 2018 stated, "Good morning! Per our discussion yesterday, we are working to finalize (update) the purchase price allocation now that the 'True up' is complete." (Plaintiff's Exhibit 12). Sparks testified at trial that her use of the phrase "True up is complete" meant "complete" only as of the date of that email.

Kuyper testified that he never asked or agreed to extend the true up deadline beyond the 30-day extension to September 30, 2018. He wanted to shut down "old Nuvar" (Ravun, Inc.) and had filed for an extension with the IRS. Several months later, Sparks emailed Kuyper on May 20, 2019, under the subject heading "FW: Updated True Up" stating, "Good morning! I think Shara and I have the final open items on the Post 5/31 transactions sheet, reconciled to the best of our ability so that you can close 'Old Nuvar.'" In the first numbered paragraph of that email Sparks concluded, "The net amount due to New Nuvar from Old Nuvar is $476.24. I'm thinking you

[4] Kuyper noted that the Steelcase "Brody" product had gone through some significant engineering changes around the time of closing, which increased that product's profit margin and improved quality. These changes were expected to be completed by August 2018. Kuyper volunteered to Sparks that he would pick up the difference between the amount Steelcase paid for any obsoleted parts and the actual cost of the obsoleted parts. He testified that Steelcase ultimately paid $50,000 for the obsoleted inventory. Prior to that payment, Kuyper emailed Sparks on November 6, 2019, that "… I will be mailing you a check for $6,768.30 for the Global Concepts obsolete Brody inventory. It's too bad these were hanging around this long. You may want to ask Global to provide you with the scrap value of these parts…." On November 11, 2019, Sparks responded by email, "… Also, we got your check today – and I'm not planning on cashing it. ● As I mentioned – along with any other relevant 'obsolete inventory' noted above, we'd like to try to get the customer to pay for it first." (Defendant's Exhibit EEE). Kuyper's check was never cashed.

[5] Paragraph 3 of Sparks' September 25, 2018 email stated, as to one of the attached spreadsheets, "Please note there are several items in column M highlighted in "orange" that you and I have agreed we will not know the outcome of for several weeks, possibly months and you and I will "true up" with one another as they come in." Kuyper did not respond to this email, and at trial he denied making such an agreement.

and Barb can just take Jeff and I to dinner and we'll call it even. ● " In the second numbered paragraph of that email, Sparks said:

> "2. An updated Working Capital Calculation for the impact of the applicable reconciling items called "Working Capital Calculation adj for final Outstanding items 5 20 2019. This shows what the Adjustment would have been at October / May if we would have had the correct amounts. The adjusted amount would have been $5,441. In October it equaled $2,927 and we recorded that amount on the final "true up" sheet. The difference of $2,514 ($5,441 - $2,927 already paid) is what I owe you for reconciling items that went to the working capital calculation (all of these were highlighted in green on the excel file from Item #1 above).
>
> So overall – it appears the adjustments were pretty much breakeven which is great news." (Plaintiff's Exhibit 101; Defendant's Exhibit YY) (typos in original).

The next day, May 21, 2019, Kuyper responded with an email to Sparks saying, "Thanks for all your efforts to finalize the true up stuff. I forwarded this to Jeff Disselkoen for his review and input. I hope to hear back from him soon and will let you know if he has any questions or comments." Sparks responded the same day stating, "Sounds like a plan! Glad to have it finalized as well and glad it came out pretty much a wash so we can just forget it and keep moving forward." (Plaintiffs' Exhibit 102). Despite her use of the phrase "Glad to have it finalized," Sparks testified at trial that she did not intend for this to be the final "true up."

Shara Klynstra testified that she was employed by Nuvar in March 1998 as controller for the company, when Nuvar had 30 employees. She had previously worked for Beverage America in a similar role. She is not an accountant but took some relevant classes, and accrued her experience on-the-job. By 2015, when Nuvar had 170 employees, Klynstra was director of finance (this was the same role she had as controller, though she was no longer responsible for human resources). She reported directly to Mark Kuyper, and after the sale in 2018 she reported to Amy Sparks. Klynstra was responsible for overseeing inventory and prepared the monthly Syteline report. She confirmed that inventory was always booked at cost, and no reserves were used for slow-moving parts. She discussed slow-moving inventory with Sparks' CPA in an email the day before closing (May 30, 2018) (Plaintiff's Exhibit 25). There were always a few obsolete parts among the company's inventory, and these parts were switched to "obsolete" and flagged for the monthly Syteline report. No changes in these practices were made after the May 2018 sale, though she had post-closing discussions with Sparks about setting up a possible reserve for slow-moving parts. She opined that Kuyper fully complied with seller's obligations under the APA.

Klynstra identified emails sent between herself, Sparks and the CPA in December 2018 regarding deductibility issues, when Klynstra proposed to take no write-offs or write-downs of slow-moving parts (Plaintiff's Exhibit 46). None were taken prior to her retirement in March 2021. In an email between Klynstra, Sparks, and other Nuvar employees in November 2019, Sparks requested a valuation of inventory over 18 months old saying, "We would still try to sell salable inventory…." (Plaintiff's Exhibit 2). Klynstra noted that post-closing, Sparks put a focus on getting paid for obsolete parts and began charging for storage and inventory, and customers didn't like it. Before the sale, Nuvar had never charged customers for slow-moving parts. Klynstra identified emails between herself and Herman Miller on July 30, 2020, Herman Miller declined to pay for storage or slow-moving inventory (Plaintiff's Exhibit 108). On August 19, 2020, Steelcase said in an email that "it gets tricky" accounting for payments for slow-moving inventory and was unwilling to pay "ongoing monthly costs for holding inventory." (Plaintiff's Exhibit 146). Klynstra noted in an email with Sparks on January 13, 2021 that Nuvar had not succeeded in getting paid for slow-moving parts with other customers either. (Plaintiff's Exhibit 86). She acknowledged retiring from Nuvar two months later, and not on good terms, but denied being upset over the nonpayment of a bonus.

Klynstra noted some specific examples of Nuvar being paid for obsolete parts, including:

- Payment for Bivi crossbeam channels, based on purchase order from customer, and authorizing disposal of obsolete parts (Plaintiff's Exhibit 29);
- Payment by Herman Miller for obsolete Metaform parts (Plaintiff's Exhibit 41);
- Obsolete Metaform parts recycled for use in other products (Plaintiff's Exhibit 32);
- Possible obsolescence of Herman Miller Hudson Lock parts (Defendant's Exhibit LL);
- Recycled Izzy parts and obsoleted parts due to paint mismatch (Plaintiff's Exhibit 50)

Amy Sparks opined that Nuvar's inventory should show seven-to-nine "turns per year." Nine turns per year (meaning 365 days/9) would mean the average part in inventory should be held 40.5 days before being used. She testified that Kuyper told her he ran a "lean" operation and was proud of Nuvar's inventory usage. He also said it would be "impossible" to do a full inventory due to her relatively short due diligence period, and she therefore had to rely on the seller. She made the assumption that Nuvar's inventory would be valued at the lower of cost or market value. It was also her assumption that inventory control would drive the company's profits.

After acquiring the company and evaluating records and the activities of her administrative team, Sparks concluded that her administrative team was spending 20% or more of their time on old or slow-moving inventory, and that if the company's inventory was sold only for cost, the business would've gone under. The longer inventory is held, the more the company spends on storage, management time, insurance, and interest on borrowed funds. Sparks opined that if she could not sell inventory at a profit, she did not consider it "salable." She further noted that Nuvar's inventory was included in the list of "current assets," which to her meant they would be usable within one year. It was her opinion that if inventory sits unused for more than a year, it wipes out profitability.

Sparks testified that Nuvar's sales dropped 20% during COVID-19. Some volume has returned since then, but company revenue has never returned to the previous $30 million per year. In 2021, Nuvar initiated price increases and continued to receive business from most customers. She agreed that Steelcase has not sent Nuvar new business since the price increases (and Nuvar received only two projects from Steelcase in 2020), and Sparks is of the opinion that Steelcase has taken their product manufacturing in-house. However, although total revenue has declined, net profits have increased.

Sparks testified that Nuvar's accounts receivable typically ran 30-45 days (i.e., payments typically followed the issuance of invoices by 30-45 days), and that inventory should track with payments. Each component of the company's parts inventory is assigned an SKU number. The raw inventory data is an SKU-by-SKU listing of all parts; the company's Syteline program combined SKU parts by product lines. When Sparks tried to get an SKU-level listing of inventory and sales, the Syteline reports would come back "NA." She followed this up with Larry Smith in emails on November 25 and 26, 2019, which is how she learned that Nuvar employees had traditionally deleted old inventory purchase data from the Syteline system in order to keep the software program running more quickly and smoothly. Smith advised that inventory listed without a purchase date was assumed to be more than 18 months old. (Defendant's Exhibits FFF and DDDD). Sparks ultimately obtained the old inventory data by using the company's old backup tapes to recreate inventory spreadsheets.

Nuvar's accounting/finance manager between 2019 and 2022 was Matthew David Filus. He obtained his master's degree in accounting in 2012 and practiced 6½ years as a CPA with Plante Moran before joining the company. He oversaw all accounting functions, and initially reported to Shara Klynstra and later to Amy Sparks. He tracked sales trends using information from Syteline. Because he found the programs "canned reports" were not sufficiently detailed, he used database queries to pull detailed information from the program and opened it in Excel in spreadsheet format.

Filus noted that after 2015, Nuvar's sales declined annually. As product lines would also decline over time, both the declining sales and declining product lines would add to the aging of inventoried parts. The company held no finished products in inventory, as once a product was finished it was immediately shipped out. In 2021 Filus testified that he used old backup files, obtained from the company IT department, to access historical information, and determined that the company then had $628,646 in obsolete inventory, meaning inventory more than a year old. He contacted Steelcase to request they repurchase their inventory; Steelcase declined to pay. He had similar discussions and responses with other customers.

Larry Smith was employed by Nuvar in 2013 as its IT manager. He considered himself the company employee most experienced in the use of the Syteline program. He doesn't utilize the Syteline reports himself but provides the data to others to use in preparing spreadsheets. He described the company's practice of retaining inventory data only for 18 months, after which it was purged to keep the system running faster. He began receiving requests for old data in 2019-2020 and looked into the tape backup system. The company used an automated system to back up its computers to tape on a 90-day rolling basis and retained annual backup tapes for seven years, a practice about which the Nuvar leadership team was aware. He had initially forgotten about the retained annual backup tapes and remembered them in Spring 2021. He used the backup tapes to respond to the data requests.

Jeffrey Todd Minarik has been the vice president of operations at Nuvar for the past ten years. He has been with the company for 30 years and previously served in the supply chain and quality areas. Minarik testified that prior to the change of ownership, Mr. Kuyper never wanted the company to be late with a customer order. This led to higher inventory levels in the old Nuvar, and the bulk purchase of inventory parts. He opined that the bulk purchase of inventory parts was a better value when sales were increasing, but a bad idea during declining sales. Since Sparks acquired Nuvar, it engages in real-time tracking of inventory, and instituted a process for "tagging" slow moving inventory. He noted that Sparks raised red flags about the company's inventory "almost right away," but that business had continued as usual leading up to the May 2018 closing.

Minarik testified that Nuvar presently serves 25-30 product lines for its customers, each of which has a unique life cycle, typically over a 6–7-year period with some longer, some shorter. Several of their product lines are in the declining side of their life cycles. He said the primary procurements guy at Nuvar is Dan Diedrich, who reports to him. Dan is competent and capable, and he saw no carelessness in inventory management prior to the 2018 closing. However, he noted that the company's old inventory practices wouldn't work today, as the nature of the business has changed.

James Michael Henderson has been with Nuvar for the past 18 years, initially as materials manager, and currently as senior supply chain leader. He said that Nuvar, prior to the 2018 closing, sought per piece price reductions in inventoried parts, and bonuses could be awarded for price reductions. Since the 2018 closing, the company is focused on having the right amount of inventory, and bulk purchases are made when the company has a buyback agreement with its customer. The company's goal is to "turn" inventory four times per year. It now has less inventory and hasn't missed any delivery deadlines. Previously, product lines could be highly variable in sales, and lower sales left more parts in inventory.

Henderson noted that customers don't always communicate well about a product line ending or changing,[6] and his supply chain department now meets weekly with customers to review obsolete inventory (which is better tracked now). He agreed that Sparks is more worried about inventory than Kuyper was. Kuyper was more focused on having "safety stock," or sufficient inventory to handle any sales orders. Those levels are now lower than they were under Kuyper. Henderson noted that Nuvar has occasionally missed delivery deadlines, although he doesn't know specifically how old Nuvar and new Nuvar compare. Both old and new Nuvar continue to book all inventory parts at cost.

Sparks testified that on October 31, 2019, she sent a lengthy email to Kuyper, with copies to the parties' attorneys, advising that she had been investigating inventory issues in depth, specifically regarding old and slow-moving inventory. After some intervening email exchanges, Kuyper emailed Sparks on November 11, 2019, stating that he was working on "getting a formal point of view on the inventory situation" from his attorneys. (Defendant's Exhibit EEE). She concluded that she had purchased $635,000 in non-moving inventory, and other old "NA" inventory valued at $2 million. She now believes that she purchased no less than $800,000 in obsolete inventory. She did not consider it to be either "salable" or "fit to be sold."

On November 26, 2019, Nuvar's counsel sent a detailed letter to Kuyper, with copies to Kuyper's attorney, Jeff Helder, and to Sparks, demanding indemnification for $634,177.88 for

[6] Henderson noted an example in which a customer withdrew some color options from its catalog, obsoleting Nuvar's parts in those colors.

inventory determined by buyer to be "not usable or saleable in the ordinary course of business," and thus a breach of the representations and warranties stated in Sections 3.05 and 3.09 of the APA. (Defendant's Exhibit HHH).[7] Defendant reserved the right to later assert a setoff of the claimed amount against the payments due under the Lease, the Employment Agreement, and the Promissory Note owed to Kuyper. *Id.*

The Experts' Testimony

Defendant called Eric Larson to offer expert testimony on its behalf, though Larson's report was not admitted as it relied on a report prepared by Matthew David Filus which was not admitted into evidence. Larson is a licensed CPA, accredited in business valuation by the National Association of Commercial Valuation Appraisers (NACVA), and has been employed in commercial valuation for over twenty years. He noted that Inventory is an important factor in commercial valuation, and the term "Inventory" was specifically defined in the parties' contract. Section 1.05 provided that inventory "and other current assets of Seller" would be "determined in accordance with generally accepted accounting principles" (GAAP). Different companies have differing operating cycles, and inventory that doesn't "turn" within a company's "operating cycle" is outside the definition of a "current asset." Larson opined that the definition of "Inventory" in the APA incorporated a risk-allocation term protecting the Buyer, as shown by the use of the phrase, "to the extent deemed salable by Buyer." (Section 1.01(g), Plaintiff's Exhibit 126).

Larson referenced Nuvar's 2017 balance sheet which listed inventory amount current assets. (Defendant's Exhibit A, p. 182). The notes to the financial statement stated that inventory was listed at the lower of cost or market value. Larson opined that this is consistent with GAAP. He concluded that if obsolete or slow-moving inventory was not noted in the financial statement as something other than a current asset, this would constitute a violation of Section 3.05 of the APA. Section 3.09 of the APA states that seller's representations as to inventory are that it is "accurately reflected in the Financial Statement, and consists of a quality and quantity usable…" He concluded that if $260,000 of the company's inventory was slow-moving or obsolete, it would be reasonable for a buyer to deem it non-salable. He would further conclude that if $628,000 of inventory had not sold within five years, he would not consider it salable.

Larson noted that he did not do an independent analysis of Nuvar's inventory, and could not offer an opinion as to whether $260,000 of slow-moving inventory constituted a "material" part of the company's $5.5 million inventory, such that a footnote in the financial statement would be required to comply with GAAP. His analysis and opinion was based on the assumption that a material part of Nuvar's inventory was slow-moving. He acknowledged that the definition of slow-moving inventory is unique to each business, and that definition – as applied to Nuvar – should perhaps take into account COVID, the loss of Steelcase business, and the like. Slow-moving inventory may still be considered salable.

[7] Nuvar notes that the representations and warranties in Sections 3.05 and 3.09 of the APA survived for 18 months after the closing date, per Section 6.01 of the APA (i.e., until November 30, 2019).

Larson agreed that the parties created their own definition of "Net Working Capital," which is not defined by GAAP. He also acknowledged that the parties created their own process for resolving any disputes over the calculation of actual Net Working Capital, in Section 1.05(d) of the APA, even if the Seller had some liability over the value of Inventory.

Plaintiffs called Jeffrey Martin Katz, CPA, as their expert. Mr. Katz is principal at the BDO USA accounting firm and works in its Forensics Legal Department as head of the post-transaction litigation practice. He is licensed as a CPA in New Jersey and New York, and is certified as a Fraud Examiner, a Forensics Examiner, and a business valuation expert. He devotes approximately 60% of his practice to sitting as a neutral arbitrator, and 40% to representing clients. In this case, he did not personally evaluate Nuvar's inventory, or its Syteline records, but based his evaluation on a review of the parties' contract and his knowledge of GAAP.

Mr. Katz testified that inventory and accounts receivable are generally the top two disputed issues in post-transaction business litigation. In the present case, he noted that the APA definition of "Net Working Capital" followed a standard format of "current assets less current liabilities" but was unique in this case for two reasons: first, cash was excluded from the definition of assets, and inventory was uniquely defined in Section 1.01(g). He opined that whether inventory is a "current" asset for GAAP purposes depends upon the nature of the particular business. Inventory is often assumed to be a current asset if it is not more than a year old, but longer-held inventory may be considered current depending on the nature of the business. GAAP typically requires inventory to be valued at cost or net realizable value.

Katz noted that raw materials are generally not sold; only finished goods are sold. The inventory definition incorporated into the parties' contract implies that the raw material parts must be individually salable, whereas they were clearly intended to be incorporated into a finished product which would then be sold. He used the Merriam-Webster definition of "salable" to evaluate the effect of the definition of "Inventory" in the APA: "fit to be sold."[8] He opined that this definition provides no guarantee that a part will be sold, only that it is fit to be sold.

Katz said GAAP principles identify a "sale" comprehensively, whether the sale is a resale to a customer, to an end user at a profit, or is a sale at a loss. He described Nuvar's inventory as mostly metal parts, such as screws, fasteners, and the like, and concluded that such inventory remains fit to be sold, even if held for more than nine months. Whether there was a ready market for such parts is irrelevant, in Katz' view. In Nuvar's case, it held inventory for product lines that continued for years and required longer-held inventory to meet its delivery obligations. Old Nuvar never wrote down the value of its inventory, and maintained it on its books at cost, whether it was used in a product pursuant to a purchase order, returned to the customer for reimbursement, or sold for scrap. For these reasons, GAAP did not require Nuvar to create a reserve or note that in its financial statements. Katz opined that Nuvar acted reasonably in not setting up a reserve for inventory, and its practices did not violate GAAP.

Katz testified there may be a difference between current and long-term assets. Although many companies list inventory as a current asset, it may be appropriate to list inventory held for

[8] "Capable of being or fit to be sold: marketable." https://www.merriam-webster.com/dictionary/salable.

more than a year as a long-term asset, but that depends on the nature of the business and its operating cycle, and how it is reported doesn't affect the value of the asset. Inventory is valued as of a point in time. In this case, inventory was valued as of the date of closing on May 31, 2018, and post-closing changes in the marketplace should have no effect on any calculation of damages. If damages were calculated on the basis of obsolete inventory (rather than slow-moving inventory), they should be limited to the seller's lost profit margin. Katz again opined that Nuvar's inventory was properly valued at closing according to its then-existing financial records and was consistent with GAAP.

Analysis

I. Actual Net Working Capital Statement

The primary issue between the parties is whether defendant complied with the parties' contract in submitting an Actual Net Working Capital Statement sufficient to constitute an "Estimated Shortfall" so as to reduce the purchase price. Section 1.01(d) of the Asset Purchase Agreement (APA), titled Actual Net Working Capital Calculation, provides that:

> Within ninety (90) days after the Closing Date, Buyer shall prepare and deliver to the Seller a statement (the "Actual Net Working Capital Statement") showing the calculation of the actual Net Working Capital as of the close of business on the Closing Date (the "Actual Net Working Capital")...If the Seller has any objections to the Actual Net Working Capital Statement, the Seller shall deliver to the Buyer a statement setting forth its objections thereto (an "Objections Statement"). If an Objections Statement is not delivered to the Buyer within thirty (30) days after delivery of the Actual Net Working Capital Statement, the Actual Net Working Capital Statement shall be final, binding, and non-appealable by the Buyer and the Seller...

It is undisputed that the parties explicitly agreed to extend the deadline to complete the Actual Net Working Capital Statement to September 30, 2018. It is defendant's position that, based on the conduct of the parties, the extension was indefinite, and that because of issues cataloging inventory post-close, an Actual Net Working Capital Statement was never completed. Defendant seeks to adjust the purchase price based on a shortfall in the Actual Net Working Capital Statement of $1.3 million.

The issue is one of contract interpretation. "[P]arties to a contract are free to *mutually* waive or modify their contract notwithstanding a written modification or anti-waiver clause because of the freedom to contract. However, with or without restrictive amendment clauses, the principle of freedom to contract does not permit a party *unilaterally* to alter the original contract. Accordingly, mutuality is the centerpiece to waiving or modifying a contract, just as mutuality is the centerpiece to forming any contract. This mutuality requirement is satisfied where a waiver or modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to modify or waive the particular original contract. In cases where a party relies on a course of conduct to establish waiver or modification, the law of waiver directs our inquiry and *the significance or written modification and anti-waiver provisions regarding the parties' intent is increased.*"[9]

In this case, the APA contains both anti-waiver and modification clauses as follows:

> Section 9.09 Amendment and Modification. This agreement may only be amended, modified or supplemented by an agreement in writing signed by each party hereto.
>
> Section 9.10 Waiver. No waiver by any party of any of the provisions hereof shall be effective unless explicitly set forth in writing and signed by the party so waiving. No waiver by any party shall operate or be construed as a waiver in respect of any failure, breach or default not expressly identified by such written waiver, whether of a similar or different character, and whether occurring before or after that waiver. No failure to exercise, or delay in exercising, any right, remedy, power or privilege arising from this Agreement shall operate or be construed as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege.

The APA makes clear that it was to only be modified in writing by agreement of both parties. Before the initial 90-day period to complete the Actual Net Working Capital Statement lapsed, the parties agreed by email to extend the deadline until September 30, 2018. On September 25, 2018, defendant Amy Sparks sent plaintiff Mark Kuyper an email with the subject line "True Up Reconciliation" in which she stated, "I think we are finally there on the 90-day true up!" She also noted that "there are several items in column M highlighted in 'orange' that you and I have agreed we will not know the outcome of for several weeks, possibly months and you and I will 'true up' with one another as they come in." Plaintiff Kuyper never submitted an Objection Statement. At trial, Plaintiff Kuyper testified that he believed the Net Working Capital Statement attached to the September 30, 2018 email was the final and binding Net Working Capital Statement.[10]

On October 23, 2018, defendant Amy Sparks emailed plaintiff and his accountant an "Updated True Up." In that email, she indicated that plaintiff was owed an additional $2,514. On December 6, 2018, defendant Sparks emailed plaintiff Kuyper again, this time with the subject line "Purchase Price Allocation Finalizing Form 8594." In that email, defendant Sparks wrote "Per our discussion yesterday, I'm working on the finalized update, the purchase price allocation now that the true up is complete."

At trial plaintiff Kuyper explained that for tax purposes, he needed any outstanding adjustments to be "wrapped up," so that he could shut down "old Nuvar." On May 20, 2019,

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[9] *Quality Products and Concepts Co. v Nagel Precision, Inc.*, 469 Mich 362, 364-365; 666 NW2d 251 (2003) (emphasis added).

[10] Tr. Trans., Nov. 7, 2024, p. 91, 5-9.

defendant Sparks sent plaintiff Kuyper another email about the true up, which stated in pertinent parts:

> I think Shara and I have the final open items on the Post 5/31 transactions sheet, reconciled to the best of our ability so that you can close 'Old Nuvar.' I am forwarding the Updated True Up Email and original 2 attachments from last October. Also Attached are: 1. 'Revised True Up Summary for Mark May 2019' This details the final adjustments that were needed to be made and originally highlighted in 'orange' on the 'Post 5/31 Transactions' excel file as additional open items. It also notes a check that was deposited to Old Nuvar that was really for New Nuvar but that wasn't discovered until November of last year. We decided to hold that until we had the other items figured out. The Net amount due to New Nuvar from Old Nuvar is $476.24. I'm thinking you and Barb can just take Jeff and I to dinner and we'll call it even. 2. An updated Working Capital Calculation for the impact of the applicable reconciling items called "Working Capital Calculation adj for final Outstanding items 5 20 2019. This shows what the Adjustment would have been at October/May if we would have had the correct amounts. The adjusted amount would have been $5,441. In October it equaled $2,927 and we recorded that amount on the final 'true up' sheet. The difference of $2,514 is what I owe you for reconciling items that went to the working capital calculation. So overall- it appears the adjustments were pretty much break even which is great news.

Plaintiff Kuyper responded, "Thanks for your efforts to finalize the true up stuff."[11] He testified that he thought this was the "final, final, final one."[12]

For her part, defendant Sparks testified that she believed the parties agreed to "true up" unknown items as they became known. She points to no express agreement in that respect. She indicated that the parties were in ongoing discussions about the inventory based on concerns she discovered in her first 90 days at "New Nuvar" and items of inventory that "Old Nuvar" purchased before closing. While the statement she submitted on September 25, 2018 documented many items that were accounted for and resolved as final, she believed the items in "column M" of the Net Working Capital statement detailed open items that the parties agreed they would continue to resolve. According to Sparks, the May 20, 2019, true up was intended to allow plaintiff Kuyper to close "old Nuvar," and file an amended return if necessary, but that it was not meant to be final. She testified that discussions regarding reconciling inventory and adjusting the purchase price were ongoing and continued after the May 20, 2019 date.

Based on the alleged discussions, defendant asserts that the parties agreed to extend the deadline for an actual net working capital statement indefinitely. "[I]n situations where a party relies on a course of conduct to establish modification, mutual assent is less clear and thus the

[11] Tr. Trans., Nov. 7, 2024, p. 104, 2.

[12] Tr. Trans., Nov. 7, 2024, p. 104, 5-9 & 3-6.

recission, or *waiver*, of the original contract's terms is not so evident."[13] Although "an original contract's written modification or anti-waiver clauses do not serve as barriers to subsequent modification by express mutual agreement, the significance of such clauses regarding the parties' intent to amend is heightened where a party relies on course of conduct to establish modification. This is because such restrictive amendment clauses are an *express mutual statement* regarding the parties' expectations regarding amendments."[14] Therefore, "[a]ny clear and convincing evidence of conduct must overcome not only the substantive portions of the previous contract allegedly amended, but also the parties' express statements regarding their own ground rules for modification or waiver as reflected in any restrictive amendment clause."[15]

Here, the parties entered a one-time extension *in writing* through September 30, 2018. The fact that parties made the extension in writing once, suggests to this court that they intended to abide by the strict and clear terms of the APA's modification and waiver clauses for all future amendments to the APA. Defendant Sparks's statements that "we are finally there on the 90-day true up" clearly refer to the period of time provided in the APA to submit an Actual Net Working Capital Statement and plaintiff Kuyper testified that he understood this to be the Actual Net Working Capital Statement. In subsequent emails, defendant Sparks refers to the document as the "final true up" and "completed true up." The language in the emails clearly shows that defendant Sparks intended to satisfy the contractual obligation to provide an Actual Networking Capital Statement by the agreed-upon deadline. The Court does not find that the parties agreed to any additional extensions for the Actual Net Working Capital Statement after this was submitted and that the Actual Net Working Capital Statement became final on September 25, 2018.

The Court notes that the emails between the parties create the appearance of additional agreements through course of conduct in order to reconcile issues that may have existed with the valuation of inventory listed in "column M" on the net working capital spreadsheet. This process is first mentioned in the September 25, 2018, email as items that the parties will "true up" as they become known. Emails from defendant Sparks to plaintiff Kuyper on October 23, 2018, and December 6, 2018, reflect ongoing updates about the inventory in that column through May 20, 2019. However, the alleged course of conduct is through Sparks' emails and are not supported by Kuyper's cryptic responses. The last email in this chain was sent by Sparks on May 20, 2019, wherein she indicated that adjustments to the Actual Net Working Capital Statement were pretty much "break even." She discussed the possibility of resolving any discrepancy with a shared meal and refers to the "final true up sheet." Plaintiff Kuyper's email thanking defendant Kuyper for her efforts marks an end to the additional attempts to reconcile inventory.[16]

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[13] *Quality Products and Concepts Co. v Nagel Precision, Inc.*, 469 Mich 362 at 373-374.

[14] *Id.* at 374.

[15] *Id.* at 374-375.

[16] Although Kuyper testified that he never agreed to extend the deadline for the "true-up" beyond the 30-day extension to September 30, 2018, his May 21, 2019 response to Spark's email appears to constitute an acceptance of her email of the day before. While Kuyper cannot be bound by his silence (or failure to respond to an email), his actual response approving her efforts to finalize the true-up, and his testimony that he regarded this as the "final, final, final one," might have been a sufficient basis for finding that the final true-up is reflected in Spark's May 19, 2019 email *but for the parties' contractual agreement,* which required that the modification be "expressly identified," and "explicitly set forth in writing and signed…." APA, ¶ 9.10.

It appears that this process was too informal to comport with the parties' contractual agreement. Although defendant Sparks testified that these extension agreements were ongoing, no evidence was presented that overcomes the modification and waiver clauses of the APA to show that plaintiff Kuyper explicitly assented to an ongoing agreement of that nature. Defendant's efforts to reduce inventory so as to reduce the purchase price failed to follow either the time frame or the processes set forth in the APA and must be denied.

II. Breach of Warranties and Indemnification

Next defendant claims that plaintiff breached the representations and warranties in the APA when it valued all of the inventory at cost, listed all of the inventory as a current asset regardless of age, and failed to disclose $1 to $2 million of old inventory. Specifically, defendant alleges that plaintiff breached the warranties in Sections 3.05 and 3.09 of the APA. The court disagrees.

This, like the Net Working Capital Statement, is an issue of contract interpretation. To interpret the APA, the Court must determine the parties' intent at the time they entered the contract.[17] Competent persons have the utmost liberty of contracting and their agreements voluntarily and fairly made must be held valid and enforced in the courts.[18] The primary goal in interpreting contracts is to determine and enforce the parties' intent.[19] The unambiguous language of a contract reflects the parties' intent, so the Court interprets the contract as written.[20] This is the "cardinal rule" of contract interpretation.[21] "To this rule all others are subordinate."[22]

Therefore, "this Court reads the agreement as a whole and attempts to apply the plain language of the contract itself."[23] "The language of the contract is to be given its ordinary, plain meaning; technical, constrained constructions should be avoided."[24] "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument."[25] "A contract is ambiguous only if its language is

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[17] *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 666 NW2d 251 (2003).

[18] *Lentz v Lentz*, 271 Mich App 465; 721 NW2d 861 (2006).

[19] *Edmore v Crystal Auto Sys, Inc.*, 322 Mich App 244, 269; 911 NW2d 241 (2017) (quotation marks and citations omitted); *UAW-GM Human Resource Ctr v KSL Recreation Corp.*, 228 Mich App 486, 491; 579 NW2d 411 (1998).

[20] *Coates v Bastian Brothers, Inc.*, 246 Mich App 498, 503; 741 NW2d 539 (2007).

[21] *Grosse Pointe Park v Michigan Municipal Liability and Property Pool*, 473 Mich 188, 197; 702 NW2d 106 (2005) (quoting from *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992).

[22] *Id.* Quoting *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924).

[23] *Id.*

[24] *Id.*

[25] *Rory v Continental Ins Co.*, 473 Mich 457, 464; 703 NW2d 23 (2005).

reasonably susceptible to more than one interpretation."[26] A dispute between the parties about the language does not in itself create an ambiguity and "[i]f the terms of the release are unambiguous, contradictory inferences become 'subjective and irrelevant,' and the legal effect of the language is a question of law to be resolved summarily."[27] Moreover, "[i]nartfully worded or clumsily arranged contract terms do not render a contract ambiguous if it fairly admits to one interpretation."[28] Ultimately, the Court cannot create an ambiguity where none exists and the Court should avoid consideration of extrinsic evidence except as required to clarify ambiguities in the Contract.[29]

The Court must also "avoid an interpretation that would render any part of the contract surplusage or nugatory"[30] or that "would impose an absurd or impossible condition on one of the parties."[31] Instead it must, "if possible, seek an interpretation that harmonizes potentially conflicting terms."[32]

a. Section 3.05 Financial Statements

Section 3.05 of the APA, titled Financial Statements, warrants that plaintiff provided "true and complete copies of the following financial statements:"

> (a) The balance sheets and related statements of income and cash flows of the Business for the fiscal years ended December 31, 2015, December 31, 2016, and December 31, 2017, and (b) the internally prepared balance sheet and related statements for each full calendar month in 2018 that has ended prior to the Closing Date. All financial statements have been prepared in accordance with usual and customary accounting principles, are in accordance with the books and records of Seller, and such books and records of Seller are true, complete, and accurate in all respects. To the extent Seller's usual and customary accounting principles differ from Generally Accepted Accounting Principles, such differences have been described in footnotes to the reviewed Financial Statements, or shall be described in Schedule 3.05. Each of the balance sheets included in the Financial Statements fairly presents in all material respects the results of operations and cash flows of the Business as of its date. All Financial Statements have been prepared consistently with past practices of Seller.

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[26] *Gortney v Norfolk Western Ry Co*, 216 Mich App 535, 540-541; 549 NW2d 612 (1996).

[27] *Id.*

[28] *Hastings Mutual Insurance Co. v Safety King, Inc.*, 286 Mich App 287 at 292.

[29] *Smith v Physicians Health Plan*, 444 Mich 743, 514 NW2d 150 (1994).

[30] *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

[31] *Wembelton Development Co v Travelers Ins Co*, 45 Mich App 168, 172; 206 NW2d 222 (1973).

[32] *Hastings Mutual Insurance Co. v Safety King, Inc.*, 286 Mich App 287 at 263.

It is defendant's position that plaintiff breached this warranty when it failed to disclose over $1 million of old inventory. Plaintiff listed all of the inventory as a current asset and did not include any reserve for inventory on the financial statements, although plaintiff included a note that all inventory is listed at cost. At trial, defendant Sparks testified that current assets are expected to turn a profit within an ordinary business cycle, so without any sort of note in the financial statements themselves, she had no way to know, on review, that any of the inventory was old or obsolete. In support, Eric Larson, CPA, who testified as an inventory expert opined that there should have been a reserve or write-down, which would reduce the net value of the current assets. He indicated that this is especially important to include where the end user of the financial statement is a third-party, as defendant was before closing.

Jeffrey Katz, CPA, testified, consistent with Mr. Larson, that current assets are typically those that will be used within an operating cycle of the business. He tended to agree that old inventory might be listed as a long-term rather than current asset, but that the valuation would not change, and that the error was merely one of classification and that it could differ depending on the business. He did not believe that the misclassification violated GAAP. Mr. Katz also testified that failure to include a contra asset was not a GAAP violation here where items were valued at cost when items would eventually sell, even if it was just at cost through reimbursement from the buyer. Mr. Katz explained that the financial statements have to make sense for the business and that "GAAP doesn't require you to show reserve for inventory on the face of the financial statements." In this case, it was necessary for Nuvar to keep inventory on hand to accommodate on-demand requests for furniture.

The language in Section 3.05 is unambiguous. It warrants that the financial statements for the three years prior to the close of the sale at issue were true and complete, and that they comply with GAAP unless otherwise noted. It also warrants that the financials are consistent with the past practices of the seller. This warranty is clearly intended to protect the defendant from falsified financial statements. There is no evidence that the financial statements plaintiff provided were altered or were inconsistent with past practices. Although defendant claims a reserve should have been included for old inventory, Mr. Katz testified that failure to do so does not violate GAAP. The warranty does not require that plaintiff maintain records beyond what is required by GAAP and the Court cannot add such a requirement just because defendant is dissatisfied with the plaintiff's past policies regarding inventory.

b. Section 3.09 Inventory

Section 3.09 of the APA, titled Inventory, states that:

> All of the inventory of the Business (including, without limitation, the Inventory), is properly, accurately, and completely reflected in the Financial Statements (and will be properly, accurately, and completely reflected in the Estimated Net Working Capital Statement) and consists of a quality and quantity usable and, with respect to finished goods, saleable, in the ordinary course of business. The quantities of each item of inventory are consistent with past practices of Seller. The Seller has not sold inventory to customers, distributors, sales agents, reseller or similar Persons in excess of such Person's reasonable anticipated needs in the

ordinary course of business, including through volume discounts, rebates, or similar incentives or credit terms not reasonably consistent with prior practices with respect to such customer, distributor, sales agent, reseller or similar person.

Defendant alleges multiple breaches of this warranty based on the usability and salability of the inventory.

First, defendant argues that all of the inventory reflected in the Financial Statements should have been salable, as deemed by the seller. Defendant's position arises out of the definition of Inventory in 1.01(g), which includes "all raw material inventory, finished goods inventory, spare parts, supplies, and other inventory of the seller, to the extent deemed salable by the buyer." In short, defendant argues that the term "saleable" in the first clause of the warranty in 3.09 qualifies raw material, finished goods, spare parts, supplies, and other inventory of the seller, just as it does in 1.01(g). The Court disagrees.

Plainly, section 3.09, warrants that finished goods are salable and that everything else is "usable." To interpret the contract otherwise would render the phrase "with respect to finished goods," nugatory. This is also the only logical interpretation of the warranty. Nuvar does not sell raw material inventory, spare parts, or supplies. It uses those pieces of inventory to manufacture finished goods, specifically furniture, that it sells to the buyer. Additionally, it would be impossible, at the time of close, for plaintiff to know which items defendant would deem salable as defined by 1.01(g). In other words, while defendant only agreed to *buy* "capital I" inventory that it deemed salable, which she had an opportunity to define with the Actual Net Working Capital Statement, this warranty clause warrants that *all* of the inventory, inclusive of the property defendant ultimately purchased, was usable, and that a small portion of that – finished goods – was salable. These are two distinct portions of the APA and the warranty clause is unaffected by defendant's discretion to deem inventory salable. Defendant purchased an insignificant amount (less than $2,000) of finished goods inventory from plaintiff, and there is no evidence that any of it was not "saleable."

Next, defendant argues that the inventory did not consist of a quality and quantity "usable," because there was no demand for some of the inventory, and some of it was obsolete, or non-existent. Specifically, defendant identified $628,000 of inventory that was not used within 3 years after close of the sale. Some inventory was purchased by the end customer at cost for culled products, and some inventory was listed in Syteline (Nuvar's inventory tracking software) for new product lines that were discussed with a manufacturer, but never created.

The term usable is not defined by the contract. Merriam Webster defines "usable" as "capable of being used."[33] This warranty provision is clearly intended to warrant the quality of the goods being sold, not the quantity. It is irrelevant that in defendant's opinion, plaintiff had too much inventory on hand for all of it to be "usable." In this case, usability is a question of whether, at the time of closing on May 31, 2018, if a customer ordered an item, the raw material inventory was of such a quality that it was "capable of being used" to create a finished good. There is absolutely no evidence that any of the inventory was damaged or destroyed or that

[33] Merriam-Webster.com, https://www.merriam-webster.com/dictionary/usable (last visited March 22, 2024).

defendant would have been otherwise unable to fulfil a customer order with the inventory on hand that it purchased on May 31, 2018.

To the extent that a portion of the inventory was unusable because it was attached to products that were culled by the customer before closing, there is evidence that the inventory was reimbursed by the end customer. There is also evidence that plaintiff removed those items from Syteline and from the purchase. Indeed, any reimbursement Nuvar received for items that were culled pre-closing, was credited to Old Nuvar and plaintiff Kuyper. Anything that was culled after the sale is irrelevant as this warranty applies to the status of inventory *at the time of close*. There was no guarantee that demand for the end products for which defendant purchased inventory would remain. Plaintiff did not breach Section 3.09 of the APA.

c. Sections 6.02 and 6.05: Indemnification and Setoff

Section 6.02 of the APA provides for Indemnification by Seller and Owner, in this case plaintiff, as follows:

> Subject to the terms and conditions contained herein, Seller and Owner shall, jointly and severally, defend, indemnify and hold harmless Buyer, its affiliates and their respective members, managers and employees (collectively the "Buyer Indemnified Parties") from and against all claims, judgments, damages, liabilities, settlements, losses, costs and expenses, including attorneys' fees and disbursements (collectively "Losses"), arising from or relating to: (i) any inaccuracy in or breach of any of the representations or warranties of Seller or Owner contained in this Agreement or any document to be delivered hereunder; (ii) any breach or non-fulfillment of any covenant, agreement, or obligation to be performed by Seller or any Owner pursuant to this Agreement or any document to be delivered hereunder; (iii) any product shipped by, or any services performed or provided by, the Seller, in whole or in part, prior to the Closing, including without limitation Losses relating to warranty work performed by Buyer; or (iv) any all other debts, liabilities, and obligations of Seller of any kind or character whatsoever (other than the Assumed Liabilities) existing or arising from facts and circumstances in existence at, before or after the Closing, including, without limiting the generality of the foregoing, debts, liabilities, and obligations of Seller arising from negligence, gross negligence, strict liability, tort, toxic tort, environmental liabilities, violates of law, Taxes, default under any contract, otherwise attributable to Seller or for which Seller shall be responsible, and whether any such debts, liabilities, and obligations are accrued, absolute, contingent, matured, not matured, unknown, or otherwise. Despite the preceding, the Seller Parties shall not have any obligation to indemnify and hold harmless the Buyer Indemnified Parties pursuant to Section 6.02(i) or Section 6.02(iii) unless and until the aggregate amount of all Losses for which Seller Parties would be liable pursuant to Section 6.02(i) and 6.02(iii) exceed on a cumulative basis an aggregate amount equal to $50,000 (the "Basket"). When the Basket threshold has been reached, the Seller Parties shall indemnify the Buyer Indemnified Persons for all Losses, regardless of the Basket.

Section 6.05 provides for a Right of Setoff as follows:

Buyer shall, upon not less than thirty (30) days' prior written notice to Seller, have the option to set off the amount of any losses incurred by Buyer for which Buyer is entitled to indemnification under the Article VI against payments to be made by Buyer under the following Closing Documents (which right of setoff must be exercised in the following order of priority): first, as to the Lease (but not in an amount to exceed $200,000); second, as to the Employment Agreement (but not in an amount to exceed $200,000); and third as to the Promissory Note.

Defendant alleges that it is entitled to indemnification for breach of Sections 3.05 and 3.09 of the APA in the amount of $491,055.48 to be setoff against the Promissory Note. The alleged damages are comprised of $628,646.19 in unsold inventory, interest on the note that would not have been incurred if defendant had not purchased the inventory, $254,559.000 in labor costs associated with the unsold inventory, and $236,496.48 in storage costs for the unsold inventory, less an offset of $741,500.52.

The Court of Appeals, in an unpublished opinion, *Hubbell-Foley Properties LLC v Williams and Williams II, LLC*, explained that "an indemnity contract is to be construed in the same fashion as other contracts."[34] As to determining damages, "[t]he term 'arise' has been defined to mean 'to appear; spring up…to result; spring or issue."[35] In other words, the damage must be a result of the breach.

The Court finds no breach of warranty in this case. Defendant Sparks was well aware of slow-moving inventory based on pre-closure disclosures and discussions with plaintiff Kuyper. She had access to Syteline to review the inventory, and completed an independent audit where it was determined that the inventory was materially accounted for and salable. Buyer's due diligence was reasonable and its decision to proceed with closing constituted its acceptance of the fact that inventory was "materially stated and salable." The "true-up" process was intended to allow defendant Sparks the opportunity to reduce the purchase price by identifying the "Estimated Shortfall," i.e., the extent to which the company's "Actual Net Working Capital" fell below the "Net Working Capital Target" (whether by reduced inventory or other reasons), the parties agreed on a specific process and time frame for that calculation. Neither the contracted time frame nor the process was followed. Defendant has not proved its entitlement to indemnification, and setoff is denied.

III. Breach of Promissory Note

Finally, plaintiff asks the Court to enter a judgment for the payments for which defendant is in default. In December 2021, defendant wired $1,860,452 to plaintiff and attempted to satisfy the debt on the promissory note through an accord and satisfaction. The Court found that there was no accord and satisfaction because the payment was not accompanied by clear, full and

[34] *Hubbell-Foley Properties LLC v Williams and Williams II, LLC*, unpublished opinion of the Court of Appeals, issued Oct. 28, 2014 (Docket No. 315759), p. 7. The court recognizes that it is not bound by this unpublished decision, MCR 7.215(C)(1); *Charles Reinhart Co v Winiemko*, 444 Mich 579, 588 n 19; 513 NW2d 773 (1994), and merely views the opinion as persuasive, *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2003).

[35] *Id.* at 8.

explicit statement of defendant's intent to satisfy the debt.[36] Since the Court rejected the accord and satisfaction, and plaintiff retained the payment, it was defendant's position that the payment was a prepayment through July 2026. The Court also rejected this argument.[37] It remains the Court's position that there is no mutual agreement between the parties to modify the terms of the promissory note or the payments scheduled therein. Because the Court finds that defendant is not entitled to indemnification or setoff, plaintiff is entitled to payment of the promissory note according to its terms.

The promissory note provides that "beginning July 1, 20221 and continuing on a quarterly basis (October 1, January 1, April 1 and July 1) until this Note is paid in full, Borrower will make twenty-eight (28) equal payments of principal and interest in the amount of $166,994.15. Unless otherwise agreed or required by applicable law, payments will be applied first to any accrued unpaid interest; then to principal; then to any late charges; and then to any unpaid collection costs." The interest rate on the note is 4.65% per annum and is "computed on a 365/365 basis; that is, by applying the ratio of the interest rate over a year of 365 days, multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding."

The parties do not dispute that Defendant made its interest-only payments prior to July 1, 2021. Defendant had refinanced and made an early $2,000,000 principal payment in July 2020. Therefore, there was a balance due of $2,000,000 with reduced interest-only payments made between August 2020 and July 2021. Defendant was obligated to make its first quarterly payment of $166,994.15 on July 1, 2021, but did not. Plaintiff testified and presented his records showing that defendant made a partial payment of $83,325.65 on July 6, 2021, and a partial payment of $83,625.60 on October 6, 2021. Defendant's last payment was made in the amount of $1,138,657.11 on December 22, 2021. That payment paid all interest accrued to that date, and the balance of the payment reduced the principal owed on the note. Because the quarterly payments were fixed at $166,994.15, the additional payment did not change the amounts due thereafter, but instead only reduced the term of the loan.[38]

The court calculates the balance due on the promissory note, based upon 4.65% simple interest calculated daily over a 365-day year as required by the note, as follows:

$2,000,000.00	Balance due as of 7/1/21
+1,273.97	Interest to 7/6/21 (5 days @ $254.7945/day)
2,001,273.97	
-83,325.65	Payment on 7/6/21
1,917,948.32	Balance as of 7/6/21
+22,479.41	Interest to 10/6/21 (92 days @ $244.3413/day)
1,940,427.73	

[36] Opinion and Order Denying Defendant's Second Motion for Summary Disposition, May 8, 2023.

[37] *Id.*

[38] Promissory Note (Plaintiff's Exhibit 126), ¶ 2.

-83,325.60	Payment on 10/6/21
1,857,102.13	Balance as of 10/6/21
+18,217.41	Interest to 12/22/21 (77 days @ $236.5897/day)
1,875,319.54	
-1,138,657.11	Payment on 12/22/21
$736,662.43	Balance as of 12/22/21

The balance due on the note has continued to accrue since December 22, 2021, at the rate of $93.8488/day, or $34,254.80 per year. As of June 22, 2024, additional interest of $85,637.00 has accrued, bringing the total balance due on the note to $822,299.43 as of that date. Had payments on the note continued as provided, the balance of the note would have now been paid in full.

Conclusion

Plaintiff is entitled to payment of the unpaid balance due on the Promissory Note in the amount of $822,299.43 (as of June 22, 2024, with interest accruing until paid at $93.8488/day). Defendant's counterclaims are dismissed, and Plaintiff shall submit a Judgment and final order closing this case.

Dated: June 25, 2024

Hon. Jon A. Van Allsburg, Circuit Judge