



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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July 25, 2022

LETTER OPINION

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Defendant James Bruce Furr*

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Samuel Wayne Hillenburg*

Re: Signal Hill Supply, LLC vs. Signal Hill Supply & Services, Inc., et al.
Case Number CL-2019-7319

Dear Counsel:

This matter was tried before this Court in a bench trial heard on September 8, 2021, February 28, 2022, March 1, 2022, and March 2, 2022. Final post-trial closing argument briefs were filed by both parties on June 15, 2022, and the matter was taken under advisement.

Before the Court is Plaintiff's Second Amended Complaint asserting Breach of Contract (Count I), Reformation of Contract (Count II), Fraud (Count III), and Breach of Oral Contract (Count IV) in the alternative to Count I.

OPINION LETTER

Also before the Court is Defendants' Amended Counterclaim and Third-Party Complaint asserting Fraud (Count II) and Fraud in the Inducement (Count III).

During trial, the Court struck with prejudice the Reformation of Contract claim (Count II) and the Fraud claim (Count III) of Plaintiff's Second Amended Complaint. The Court took both parties' remaining motions to strike under advisement.

After considering the evidence and briefs submitted by both parties, and for the reasons stated in this Letter Opinion, the Court makes the following findings:

The Court finds that the One-Time Sale of Goods Agreement ("the Sales Contract") is a binding written contract between the plaintiff Signal Hill Supply, LLC and the defendant Signal Hill Supply & Services, Inc ("SHSS") to sell the inventory of Signal Hill Supply to SHSS for \$139,147.02. The Court further finds that the signature of defendant Samuel Wayne Hillenburg,¹ as authorized signer for his business SHSS, on page two of the Sales Contract, is a true and genuine signature and was not a forgery. As such, the Court finds that the late fee provision and attorney fee provision included in the Sales Contract are enforceable and must be applied in this matter. Additionally, the Court finds that around May of 2014 the parties entered into an oral agreement to modify the payment schedule set out in the Sales Contract from \$5,000 a month to \$2,500 a month.²

Furthermore, the Court finds the evidence produced demonstrates defendant SHSS made a total of \$ 60,000.00^{3,4} in payments towards its debt under the Sales Contract. Pursuant to the Sales

¹ Mr. Hillenburg also goes by the name "Dutch."

² Although the Sales Contract states "[n]o modification shall be made to this Contract except in writing and signed by both parties" both parties have agreed a modification was made reducing SHSS's monthly payments to \$2,500. *See* Trial Tr. 130:21-22 – 131:1-12, Mar. 1, 2022; *see also* Pl.'s Sec. Am. Compl. at 3-4; Pl.'s Post-trial Br. at 4; Defs.' Resp. Post-trial Br. at 4.

³ While a copy of check number 1259 dated July 31, 2015, for \$2,500 was not included in evidence, Plaintiff did not contest the validity of this check. *See* Trial Tr. 46:16-22 – 47:1-22, Feb. 28, 2022; *see also* Pl.'s Ex. 28; Pl.'s Post-trial Br. at 4. As such, this check was included when calculating the total amount of payments made by SHSS to Plaintiff.

⁴ While page one of Plaintiff's Exhibit 28 indicates check number 1368 dated March 3, 2016, was in the amount of \$2,500, it is clear from looking at a copy of the check on page four of the same exhibit that the check was actually made out for \$1,807.83. An email between third-party defendant James Bruce Furr and defendant Hillenburg illustrates Mr. Furr was aware of and did not protest Mr. Hillenburg's decision to reduce the March 2016 \$2,500 monthly payment by \$692.17 for merchandise Mr. Furr purchased on his own behalf from SHSS. Defs.' Ex. 16 at 176. In the email dated March 7, 2016, Mr. Hillenburg stated "[r]ather than send you a check for \$2,500 only to have you send me a check back for the items, I simply reduced the check by the cost of the goods." *Id.* Mr. Furr responded to the email a few hours later and stated "[t]hanks for the check

Contract, all late payments beginning in June of 2014 shall receive interest at five percent (5%) simple interest rate. However, based on the oral modification to the Sales Contract, no late fee shall be associated with the \$2,500 payments until such payments were missed. The Court also finds, that as the prevailing party, Plaintiff is entitled to recover reasonable attorney's fees and costs per the Sales Contract.

Since the Court has found the existence of a valid, binding written contract, Defendants' motion to strike Plaintiff's Breach of Oral Contract claim (Count IV) is granted and this count is dismissed with prejudice.

For the reasons stated above, and for the reasons stated later in this Letter Opinion, Defendants' motion to strike Plaintiff's Breach of Contract claim (Count I) is denied.

As to Defendants' Amended Counterclaim and Third-Party Complaint, the Court grants Plaintiff's motion to strike Defendants' Fraud claim (Count II) and Fraud in the Inducement claim (Count III) and dismisses these counts with prejudice.

I. FACTUAL BACKGROUND & PROCEDURAL HISTORY

For approximately five years, third-party defendant James Bruce Furr operated a firearm supply business at the Fairfax Rod & Gun Club ("Gun Club") through his limited liability company Signal Hill Supply, LLC,⁵ for which he was the sole managing member. Sept. 8 Tr. 6:12-22 – 7:1-13. In 2013, Mr. Furr and defendant Samuel Wayne Hillenburg began to discuss Mr. Hillenburg taking over the firearm supply business and sought approval from the Gun Club board of directors with whom Mr. Furr had a lease with to operate the business on its premises. *See Id.* at 9:7-21; Def.s' Ex. 16 at 396, 405. Mr. Furr and Mr. Hillenburg also began to discuss the details of transferring the firearm business and came to the agreement that Mr. Hillenburg's newly formed corporation, SHSS, would purchase the inventory of the firearm store from Signal Hill Supply. *See* Sept. 8 Tr. 10:4-11; *see also* Def.s' Am. Countercl. and 3rd Party Compl. ¶ 5.

On October 1, 2013, Mr. Hillenburg took over operation of the firearm business at the Gun Club through SHSS. Mar. 1 Tr. 64:15-20; 153:2-6. Before re-opening the firearm store, Mr.

and look forward to getting my stuff." *Id.* A notation in the memo line of check 1368 further indicates Mr. Hillenburg's decision to reduce the March 2016 \$2,500 monthly payment by \$692.17. *See* Pl.'s Ex. 28 at 4. Although Furr is not a party to the Sales Contract, as the sole and managing member of Signal Hill Supply, who then cashed the check, he accepted this \$1,807.83 check in full satisfaction of the March 2016 \$2,500 payment. As such, the Court used the \$2,500 amount when calculating total payments made on behalf of SHSS.

⁵ Signal Hill Supply, LLC was a defunct limited liability company whose articles of cancellation were issued with an effective date of June 20, 2016. *See* Pl.'s Ex. 32 at 5. Signal Hill Supply, LLC was reinstated on April 16, 2020, under the name Signal Hill Supply No. 1, LLC because Mr. Hillenburg filed for a corporation under the same or a substantially similar name. *See* Pl.'s Ex. 33 at 1-2; Trial Tr. 51:8-20, Sept. 8, 2020.

Hillenburg, in preparation for the sale of the store inventory, began to create an inventory report using a software program named Merchant Magic by Cervelle. *Id.* at 153:5-22 – 154:1-15. The parties dispute the exact extent of involvement Mr. Furr had in the inventory process which resulted in a 30-page inventory report dated October 16, 2013. *See* Pl.’s Ex. 1B. Defendants claim Mr. Furr was present when creating the inventory report and provided the price numbers used in the report. *See* Mar. 1 Tr. 125:11-20; 153:6-22 – 155:1-2. Conversely, Plaintiff and Mr. Furr assert Mr. Furr was not present during the creation of the inventory report and did not provide or confirm the price numbers used in the inventory report. *See* Sept. 8 Tr. 11:3-22 – 12:1; Mar. 1. Tr. 125:22 – 126:1-17.

Once Mr. Hillenburg finished the inventory report, a copy was sent to Mr. Furr and they continued to add and subtract items from the inventory report until it was finalized on January 9, 2014. *See* Feb. 28 Tr. 35:12-19; *see also* Pl.’s Ex. 5 at 5; Def.s’ Ex 16 at 314. Once finalized, the total inventory to be sold by Signal Hill Supply to SHSS was detailed in three documents: a 30-page inventory report, a list of additional firearms, and a list of additional firearm suppressors. *See* Def.s’ Ex 16 at 314; Pl.’s Ex 1.

Around this same time, Mr. Hillenburg’s friend and attorney, Dennis Dean Kirk, Esq., advised Mr. Hillenburg to have the agreement to sell the inventory of Signal Hill Supply put in writing. *See* Mar. 1 Tr. 234:2-10. Mr. Kirk then prepared and sent to Mr. Hillenburg a draft “One-Time Sale of Goods Agreement” on January 1, 2014, with a sale price of \$157,000 and an effective date of December 31, 2013; however, the document inadvertently listed SHSS as the seller and Signal Hill Supply as the buyer. *See Id.*; Pl.’s Ex. 6. As the parties continued to negotiate the details and pricing of the firearm store’s inventory, the sales price listed in the Sales Contract would change; however, the December 31, 2013, effective date and transposed buyer and seller terms were not changed. *Compare* Pl.’s Ex. 6 at 3, *Id.* at 11, and Pl.’s Ex 5. The Final Sales Contract had a sales price of \$139,147.02 with equal monthly payments of \$5,000 over a 28-month period. Pl.’s Ex. 5. The final Sales Contract also authorized a five percent simple annual interest rate for late payments and attorney fees and cost to the prevailing party in any litigation to enforce its rights under the Sales Contract. *Id.*

On Wednesday, January 8, 2014, Mr. Hillenburg emailed a version of the Sales Contract to Mr. Furr stating “[p]lease review the attached. I’d like to get an agreement signed by Friday as I’m going to SHOT on Saturday.” Defs.’ Ex. 16 at 357.⁶ The next day Mr. Hillenburg emailed Mr. Furr at 6:07 p.m. what later became the final version of the Sales Contract along with the following three documents: “COMPLETE INVENTORY 2”, “Dutch wants Gun Inventory list” and “Dutch-Suppressors.copy.” *Id.* at 314. In this email, Mr. Hillenburg states he realized he had already done some additional calculations and that it “[c]omes to 139,147.02 total.” *Id.* No other email in evidence shows any further discussion of the Sales Contract. *See generally* Defs.’ Ex. 16.

⁶ According to the testimony of Mr. Furr, “SHOT show is a show -- exhibit hall activity for our dealers to come up with products for the various vendors and production people, firearms dealers and so forth.” Mar. 1 Tr. 48:17-20.

Although Defendants deny that Mr. Hillenburg ever signed the Sales Contract, the document has two signatures on the second page: one represented to be Mr. Furr's signature and the other represented to be Mr. Hillenburg's signature, each with a signing date of December 28, 2013. Pl.'s Ex. 5. While the signature blocks themselves do not represent that the parties were signing on behalf of their businesses, the first paragraph of the Sales Contract identifies each individual as the authorized signer for their respective businesses. *Id.*

The Sales Contract called for the first \$5,000 payment to be made on January 15, 2014 "with equal payments to follow the same day the next months until the final Installment in the amount of \$4,147.02 after which the debt shall be considered to be paid in full." Pl.'s Ex. 5. Mr. Hillenburg made his first payment of \$5,000 on a check dated December 30, 2013, and following \$5,000 payments on February 1, 2014, March 1, 2014, April 1, 2014, and May 1, 2014. *See* Pl.'s Ex. 28. After the May payment, Mr. Hillenburg expressed to Mr. Furr that he was having a hard time making the monthly \$5,000 payments and the two came to an oral agreement to reduce SHSS's monthly payment to \$2,500. Mar. 1 Tr. 130:21-22 – 131:1-12; *see also* Pl.'s Sec. Am. Compl. at 3-4; Pl.'s Post-trial Br. at 4; Defs.' Resp. Post-trial Br. at 4.

Despite this reduction, no payments were made from June 2014 until October 21, 2014, when the first \$2,500 payment was made. *See* Pl.'s Ex. 28. SHSS then made no payment for the month of November 2014 and made another \$2,500 payment on December 28, 2014. *Id.* On December 26, 2014, SHSS made a check out to Mr. Furr in the amount of \$873.46; however, this was not a payment towards the debt under the Sales Contract but was instead a payment to Mr. Furr for a gun order that was accidentally charged to Mr. Furr instead of SHSS. *See* Defs.' Ex 16 at 192; Sept 8 Tr. 37:5-17. This is evidenced by an email dated December 17, 2014, from Mr. Furr to Mr. Hillenburg stating "Dutch. I just noticed Dillion billed my credit card for \$873.46 for the latest Dillon order." *Id.* No other payments were made by SHSS in 2014. *See generally* Pl.'s Ex. 28.

In total, SHSS made only six payments of \$2,500 in all of 2015 and only five payments of \$2,500 in all of 2016.⁷ *See generally* Pl.'s Ex. 28. No payments were made by SHSS in 2017 and one payment was made in 2018 on April 2 in the amount of \$2,500. *Id.* SHSS has made no other payments to Signal Hill Supply or Mr. Furr. *Id.* While some of the checks in evidence have notations that indicate a higher amount was paid on the debt, the evidence shows that in total, all of the payments made from 2013 to 2018 amount to only \$60,000.⁸

⁷ Payments of \$2,500 were made by SHSS in 2015 and 2016 on the following dates: April 26, 2015; June 14, 2015; July 31, 2015; September 11, 2015; November 30, 2015; December 31, 2015; January 25, 2016; March 5, 2016; April 1, 2016; May 9, 2016; and August 16, 2016. *See* Pl.'s Ex. 28.

⁸ The January 2016 payment made via check number 1346 has in the notation line "60k + \$2500 = \$62,500." Pl.'s Ex. 28 at 4. The March 2016 check has a similar notation as discussed *supra*

In April of 2017, Mr. Furr began to ask Mr. Hillenburg for an accounting of the remaining debt. *See* Defs.’ Ex 16 at 92; *see also* Mar. 1 Tr. 187:13-22. In early 2018, after months of arguing over the remaining debt balance, Mr. Furr asked Mr. Hillenburg to come up with a plan to retire the debt and suggested Mr. Hillenburg obtain a loan. *See* Defs.’ Ex 16 at 67. Mr. Hillenburg, while still disputing the exact amount owed, suggested he was open to or in the process of seeking a loan from his bank; however, such loan process was on hold due to a pending amendment to SHSS’s 2016 tax return. *See* Defs.’ Ex 16 at 52. After no resolution, Mr. Furr, through an attorney, sent Mr. Hillenburg a demand letter. *See* Trial Tr. 47:20-21 (Mar. 2, 2022).

On May 3, 2018, Mr. Furr, in his individual capacity, filed a breach of contract suit against Mr. Hillenburg in his individual capacity and SHSS seeking \$109,147.02 in damages “or such other amount as the Court deems appropriate together with late fees at 5%.” CL-2018-6897 Compl. 1-3. On June 1, 2018, SHSS and Mr. Hillenburg filed their Answer to the Complaint and a demurrer alleging Mr. Hillenburg was not a party to the Sales Contract and, therefore, not a proper party to the case. *See* CL-2018-6897 Defs.’ Answer and Dem. On August 17, 2018, the Court sustained the demurrer and dismissed Mr. Hillenburg as a defendant from the suit. CL-2018-6897 Order Sustaining Dem. The matter then proceeded to trial on March 19, 2019, before the Honorable Judge Richard E. Gardiner. At the conclusion of all the evidence, SHSS made a motion to strike on the ground that Mr. Furr did not have standing to bring the breach of contract action as the Sales Contract at issue was entered into by Signal Hill Supply and not by Mr. Furr in his individual capacity. CL-2018-6897 Judge Gardiner’s Mot. to Recons. Op. Letter at 1 (Apr. 4, 2019). The Court granted SHSS’s motion to strike and dismissed the matter for lack of standing.⁹ *See* CL-2018-6897 Order to Dismiss (Mar. 20, 2019).

The instant action was then filed on May 24, 2019, by Signal Hill Supply against SHSS and Mr. Hillenburg. The Defendants then filed their Counterclaim and Third-Party Complaint on November 6, 2019. Later, Mr. Furr filed a Third-Party Counterclaim on November 27, 2019, which was ultimately dismissed in full with prejudice by agreed order. *See* Agreed Order (Aug. 25, 2020). This matter proceeded to trial on September 8, 2021, February 28, 2022, March 1, 2022, and March 2, 2022. The issue of attorney’s fees was bifurcated. *See* Mar. 1 Tr. 267: 4-16.

At trial, the Court heard from three witnesses called by Plaintiff in its case in chief. First, the Court heard from third-party defendant James Bruce Furr who testified both he and Mr. Hillenburg signed the Sales Contract which memorialized the agreement to sell the inventory of Signal Hill Supply to SHSS at a cost that was determined by an inventory list initially created by Mr. Hillenburg. *See* Sept. 8 Tr. 10:1-22 – 14:1-5; Feb. 28 Tr. 39:5-14. Mr. Furr stated the parties

note 4. The April 2016 check has in the notation line “\$65k + \$2.5k = 67.5k.” Pl.’s Ex. 28 at 4. Finally, the April 2018 check has in the notation line “\$72.5k + \$2.5 = \$75k.” *Id.* at 5.

⁹ The Court later denied Plaintiff’s Motion for Reconsideration. *See* Gardiner’s Op. Letter.

negotiated back and forth, modifying the inventory lists, and came up with a final sales price of \$139,147.02. Feb. 28 Tr. 35:12-19.

The Court then heard from David L. Hainsworth, a certified public accountant (“CPA”), who performed a series of computations, including late fees and interest, to determine the amount of damages based on a variety of scenarios including ones where SHSS was credited with paying \$60,000, \$72,500, and \$75,000. Mar. 1 Tr. 27:22 – 33:1-11. Notably, Mr. Hainsworth was not aware the parties had agreed to reduce payments from \$5,000 to \$2,500 and therefore calculated all the payments of \$2,500 as deficient \$5,000 payments associated with a late fee interest rate.¹⁰ Mar. 1 Tr. 46:6-22 – 47:1-12.

Finally, the Court heard from defendant Samuel Wayne Hillenburg who testified he paid a total of \$75,000 on the debt: \$60,873 in checks and \$14,127 of offsets for unpaid merchandise Mr. Furr ordered from SHSS. *See* Mar. 1 Tr. 188:1-22 – 190:1-14. Mr. Hillenburg also testified that Mr. Furr owed SHSS an additional \$46,971.56 for unpaid merchandise Mr. Furr ordered from SHSS. *Id.* at 192:8-22 – 195:1-2. Lastly, Mr. Hillenburg testified that he never signed the agreement and that he knows of this because he was home sick with his son around the time Plaintiff alleged the Sales Contract was signed. *Id.* at 238:4-11.

The Court also admitted, in lieu of live testimony, the previous trial transcript testimony of document examiner Katherine Mainolfi Koppenhaver.¹¹ Ms. Koppenhaver testified she examined the alleged signature of Mr. Hillenburg on the Sales Contract and compared it to ten known signature of Mr. Hillenburg. Trial Tr. 74:7-10 (March 19, 2019). Ms. Koppenhaver further testified the signature on the Sales Contract was a complex signature and that the “more complex a signature, the more difficult it is to copy.” *Id.* at 79:7-12. Ultimately, Ms. Koppenhaver testified the signature on the Sales Contract was “a genuine signature of Samuel Wayne Hillenburg.” *Id.* at 80:15-17.

The Defendants’ called only Mr. Hillenburg in their case in chief. Mr. Hillenburg testified he and Mr. Furr entered into a “gentleman’s agreement” to transfer operation of the gun store to Mr. Hillenburg though SHSS. Mar. 2 Tr. 20:19-22 – 21:1-4; 25:5-7. Mr. Hillenburg stated he and Mr. Furr created the inventory report together and that some items listed in the inventory report were taken back by Mr. Furr, already sold to a customer, used, or missing components. *Id.* at 28:12-22 – 31:1-5. Mr. Hillenburg further testified that he did not sign the Sales Contract and if he had “it would have been notarized and reviewed by [his] attorney.” *Id.* at 47:4-7. Mr. Hillenburg stated he had a stroke in 2011 which made his handwriting “shakier” and that the alleged signature on the Sales Contract was indicative of his pre-stroke signature. *Id.* at 52:9-20.

¹⁰ The Court took under advisement admission of Plaintiff’s Exhibit 12 – Mr. Hainsworth’s various computations of late payment penalties. Because Mr. Hainsworth’s calculations were based on incorrect information, the Court denies the request to admit Plaintiff’s Exhibit 12.

¹¹ Upon the agreement of the parties, pages 59 – 92 of the March 19, 2019 trial transcript in CL-2018-6897 were admitted.

On rebuttal, Plaintiff called Mr. Furr's wife Ruth Furr, who testified she saw Mr. Hillenburg at her and Mr. Furr's house around the winter of 2013 or 2014. *Id.* at 94:12-13. Ms. Furr testified that a few weeks later, possibly after Christmas, she saw Mr. Furr and Mr. Hillenburg in Mr. Furr's home office "passing papers between them" with pens in their hands acting "like they were signing something." *Id.* at 94:17-21; 97:19-22 – 98:1-3.

At the conclusion of the trial, the Court instructed the parties to submit written closing arguments and took the case under advisement.

II. DISCUSSION

A. Breach of Contract (Count I)

"The elements of a breach of contract action are (1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation." *Filak v. George*, 267 Va. 612, 619, 594 S.E.2d 610, 614 (2004).

Defendants dispute that there was ever a valid binding contract between Signal Hill Supply and SHSS. Furthermore, even if the Court were to find the existence of a contract, Defendants contend that Plaintiff has not met its burden to prove damages with reasonable certainty and that Plaintiff's breach of contract claim (Count I) is barred, in full or in part, by the applicable statute of limitations

The Court will address each argument in turn.

i. Is there a Valid Binding Contract?

To prove a breach of contract claim, the plaintiff must first establish by clear and convincing evidence the existence of a valid binding contract. *Dean v. Morris*, 287 Va. 531, 536, (2014) (citation omitted). Therefore, the Court must first determine whether there is a binding contract between Signal Hill Supply and SHSS.

To prove a contract's existence, Plaintiff must show "a complete agreement which requires acceptance of an offer, as well as valuable consideration." *Montagna v. Holiday Inns, Inc.*, 221 Va. 336, 346 (1980) (citation omitted). The contract must also encompass the elements of completeness which "denotes that the contract embraces all the material terms," and that of certainty which "denotes that each one of those terms is expressed in a sufficiently exact and definite manner." *Dean*, 287 Va. at 537 (quoting *Mullins v. Mingo Lime & Lumber Co.*, 176 Va. 44, 49 (1940)). Therefore, an incomplete contract "is one from which one or more material terms have been entirely omitted." *Id.* at 538. On the other hand, an uncertain contract "may, indeed, embrace all the material terms, but one of them is expressed in so inexact, indefinite or obscure language that the intent of the parties cannot be sufficiently ascertained to enable the court to carry it into effect." *Id.*

The Court need not address Plaintiff's alternative count, Breach of Oral Contract (Count IV), and whether there was an oral agreement between Signal Hill Supply and SHSS, Mr. Furr and Mr. Hillenburg, or some combination of the four, as the Court was presented with a written agreement signed by Mr. Furr and Mr. Hillenburg¹² that constitutes a valid and binding written contract.

Here, the Sales Contract and its attachments identified all essential terms including the goods to be sold, the price of the goods, the method of delivery for the goods, and payment details. The Sales Contract also identified the parties involved in the contract, although the buyer and seller were transposed. Despite this typographical error, the parties were well aware of who the seller and who the buyer were as evidenced by their testimony¹³ and respective signatures under the correct headings on page two of the Sales Contract. As such, the Court can readily determine the intent of the parties. Additionally, the Sales Contract included a provision that "the parties intend this writing to be the final expression of the terms of their agreement and further intend that this writing be the complete and exclusive statement of all the terms of their agreement." Therefore, the Sales Contract encompasses the element of completeness.

Additionally, Defendants contend the fact that the exact date the agreement was signed is unknown demonstrates there is no valid binding contract. To the contrary, "[a]n agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined." Va. Code § 8.2-204(2).

Finally, based on the evidence presented at trial, the Court finds there was mutual assent to the terms of the Sales Contract. The original proposed Sales Contract was created by Mr. Hillenburg's then attorney Mr. Kirk. As the parties continued to negotiate the price and payment terms, Mr. Hillenburg, himself, would alter the Sales Contract and send a revised version to Mr. Furr. The terms of the Final Sales Contract that would later be signed by Mr. Furr and Mr. Hillenburg were inputted by Mr. Hillenburg and he then sent this final version to Mr. Furr. In this email, Mr. Hillenburg states he wanted to get the agreement signed by Friday, just two days after

¹² For the reasons stated later in this Opinion, the Court finds that the signature of Mr. Hillenburg, as authorized signer for his business SHSS, that appears on page two of the Sales Contract is a true and genuine signature and was not a forgery.

¹³ See exchange between Plaintiff's counsel and Mr. Furr, Sept. 8 Tr. 27:8-11:

Q: Was there ever any confusion between yourself and Mr. Hillenburg or his corporation asked to who the seller was and who the buyer was?

A: None whatsoever.

See also exchange between Plaintiff's counsel and Mr. Hillenburg, Mar. 1 Tr. 244:21-22 – 245:1-3.

Q: But was there ever at any time any confusion between the two of you as to who the seller was and who the buyer was?

A: No. We had a gentleman's agreement between myself and Mr. Furr.

sending the email. This evidences Mr. Hillenburg had no intention of further negotiating the terms of the agreement and his signature on the Sales Contract evidences his assent to the terms included.

Therefore, the Court holds the Sales Contract is a binding written contract between Signal Hill Supply and SHSS. As such, all of the terms in the Sales Contract, including the attorney's fee provision and late fee provision, are enforceable.

ii. Was Mr. Hillenburg's Signature on the Sales Contract Forged?

Defendants contend that Mr. Hillenburg did not sign the Sales Contract and that the alleged signature of Mr. Hillenburg appearing on page two of the Sales Contract is a forgery. Therefore, even if the Court found the Sales Contract to be a valid agreement, it could not be enforced against Defendants as a contract for the sale of goods for the price of \$500 or more is unenforceable unless it is evidenced by a writing "signed by the party against whom enforcement is sought." Code § 8.2-201(1).

While each party presented evidence on the issue of whether Mr. Hillenburg's signature was authentic or was a forgery, the Court finds the following evidence tipped the balance in favor of the plaintiff:

- The numerous emails admitted showing Mr. Hillenburg emphasized getting an agreement signed prior to a SHOT show on January 11, 2014;
- No further urging by Mr. Hillenburg to get an agreement signed in the hundreds of emails dated after January 11, 2014, that were admitted into evidence; and
- The testimony of Ms. Koppenhaver, the document examiner, that:
 - Mr. Hillenburg's signature was complex;
 - the "more complex a signature, the more difficult it is to copy;"
 - the writing characteristics found in the signature on the Sales Contract were similar to writing characteristics found in authentic signatures of Mr. Hillenburg used for comparison;
 - it was not possible that the signature had been traced from another document containing Mr. Hillenburg's authentic signature; and
 - in her opinion, the signature on the Sales Contract is "a genuine signature of Samuel Wayne Hillenburg."

As such, the Court finds that the signature of Mr. Hillenburg appearing on page two of the Sales Contract is a true and genuine signature and was not a forgery.

iii. Was the Contract Breached and Were Damages Sufficiently Proven?

Having found the Sales Contract constitutes a binding written agreement signed by both parties, the Court now turns to whether the plaintiff has met its burden of proving damages with reasonable certainty.

In a claim for breach of contract, proof of damages is an essential element and a plaintiff's failure to prove "with reasonable certainty the amount of damages and the cause from which they

resulted” requires dismissal of the action. *Shepherd v. Davis*, 265 Va. 108, 125 (2003) (internal citations and quotation marks omitted); see also *Manchester Oaks Homeowners Ass’n, Inc. v. Batt*, 284 Va. 409, 423 (2012); *Collelo v. Geographic Servs.*, 283 Va. 56, 72 (2012); *Sunrise Continuing Care, LLC v. Wright*, 277 Va. 148, 156 (2009). “Damages based on uncertainties, contingencies, or speculation cannot be recovered.” *Shepherd*, 265 Va. at 125 (2003). Rather, Plaintiff must “furnish evidence of sufficient facts and circumstances to permit the fact-finder to make at least an intelligent and probable estimate of the damages sustained.” *Dillingham v. Hall*, 235 Va. 1, 4 (1988) (internal quotation marks omitted). “Proof with mathematical precision is not required, but there must be at least sufficient evidence to permit an intelligent and probable estimate of the amount of damage.” *Id.* at 3–4 (internal quotation marks omitted).

Here, Plaintiff established there was a binding agreement between Signal Hill Supply and SHSS which established a monthly payment schedule. SHSS breached this agreement by failing to make payments in accordance with the schedule set out in the Sales Contract as early as June 2014. Both Mr. Furr and Mr. Hillenburg confirmed via testimony that SHSS missed numerous consecutive payments and then stopped making payments all together.¹⁴ Email exchanges admitted by both Plaintiff and Defendants also evidence missed monthly payments in breach of the contract. As a result of the breach, Plaintiff suffered damages.

As proof of damages, Plaintiff introduced the original contract price of \$139,147.02, checks showing payment on the debt totaling \$60,000, and emails concerning payment and/or non-payment. Mr. Furr testified the checks in evidence were all the checks he received associated with installment payments and Mr. Hillenburg testified that he did in fact pay only \$60,873 in checks. Notably, Mr. Hillenburg does not allege any checks are missing or that he paid more than \$60,873 via check. The Court has determined that the check in the amount of \$873.43 made by SHSS to Mr. Furr was not a payment on the debt but was instead compensation for a gun order made by SHSS that was inadvertently charged to Mr. Furr or Signal Hill Supply. Therefore, the Court finds that SHSS paid only \$60,000 towards its \$139,147.02 debt under the Sales Contract.

Plaintiff called Mr. Hainsworth, a CPA, to testify about the various computations he had run to determine how much interest had accumulated as a result of a five percent late fee. While the Court has denied admittance of his computations into evidence, Plaintiff need not prove damages with mathematical precision.

Defendants contend that some of the checks contain a notation that evidences \$14,127 in offsets towards the debt due to alleged unpaid merchandise order by Mr. Furr from SHSS. Defendants also claim an additional \$46,971.56 in offsets for additional merchandise Mr. Furr ordered from SHSS but allegedly did not pay for.

¹⁴ See exchange between Plaintiff’s counsel and Mr. Hillenburg, Mar. 1 Tr. 187:8-12:

Q: Right. And you never made any payments after that; did you?

A: I stopped making payments at that point because that’s right after Mr. Furr filed a suit against me.

An individual who asserts a claim of setoff bears the burden of proving such a claim. *Broaddus v. Gresham*, 181 Va. 725, 735 (1943). “An essential requisite is that the debts must be mutual, that is, they must be owing between the same parties.” *Id.* (citing *Elswick v. Combs*, 171 Va. 112, 114 (1938); *Dickenson v. Charles*, 173 Va. 393, 399 (1939)).

To support their claim of offsets, Defendants introduced into evidence Defense Exhibit 23 which is a list of merchandise Mr. Furr ordered from or through SHSS but allegedly never paid for. This list was created by Mr. Hillenburg after the 2018 case by going through emails between Mr. Hillenburg and Mr. Furr. Most notably, Defendants do not contend that Mr. Furr ordered any of the alleged unpaid merchandise on behalf of his business Signal Hill Supply. As such, Defendants cannot claim an offset for debt between Signal Hill Supply and SHSS by alleging Mr. Furr owes SHSS a debt.

However, even if the debts were between the same parties, the Court finds that the Defendant failed to meet its burden of proving offsets as the Sales Agreement specifies alterations to the contract must be made in writing and signed by both parties. Furthermore, the hundreds of emails admitted demonstrate the parties’ usual course of conduct was to pay for items rather than treat them as offsets towards the debt.¹⁵ The only exception to this, as discussed previously in note 4, was an offset in the amount of \$692.17 that was not contested by Plaintiff. As such, the Court holds the Defendants are not entitled to any offsets above the \$692.17 amount previously discussed.

Therefore, the Court finds Plaintiff sustained \$79,147.02¹⁶ in damages as a result of SHSS’s breach of the Sales Contract. Pursuant to the Sales Contract, Plaintiff shall receive interest at five percent (5%) simple interest rate on all late payments beginning in June of 2014. However, based on the oral modification to the Sales Contract, no late fee shall be associated with the \$2,500 payments until such payments were missed.

iv. Is this Claim Barred by the Applicable Statute of Limitations?

Finally, having found the Sales Contract to be a valid binding contract between Signal Hill Supply and SHSS, the Court must now determine whether this claim is barred by the statute of limitations. As the Court has determined the parties entered into a binding written contract for the sale of goods, the applicable statute of limitations is four years. Va. Code § 8.2-725(1). Additionally, a “cause of action accrues when the breach occurs.” *Id.* at § 8.2-725(2).

Here, SHSS breached the contract on June 16, 2014, when it failed to make its June monthly payment under the Sales Contract on or prior to June 15, 2014. As such, a suit for breach of contract must have been initiated by June 16, 2018. The initial suit was initiated on May 3, 2018, less than four years after SHSS’s breach, and therefore, within the statute of limitations.

¹⁵ See Defs.’ Ex. 16 at 42, 105, 119, 125, 144, 191, 192, 238, 256, 304.

¹⁶ \$139,147.02 in debt minus \$60,000 in payments (including \$692.17 in setoff) = \$79,147.02.

Defendants contend the statute of limitations was not tolled until Plaintiff filed its Complaint in this matter on May 24, 2019, and therefore can only recover damages for breaches stemming from May 24, 2015, and after. Virginia Code § 8.2-725(3) specifically provides:

Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

The 2018 case was dismissed on March 20, 2019, for lack of standing and the action was refiled a little over two months later. Therefore, Defendants' argument is without merit and Plaintiff's breach of contract claim is not barred, in full or in part, by the statute of limitations.

B. Defendants' Counterclaim & Third-Party Complaint

i. Fraud (Count II)

Defendants allege Plaintiff and Mr. Furr forged Mr. Hillenburg's signature on the Sales Contract. For the reasons previously stated in this Letter Opinion, the Court finds Mr. Hillenburg's signature is a true and genuine signature and was not a forgery. As the Court has found there was no forgery, Defendants have no basis to support their claim of fraud.

As such, the Court finds Defendants have failed to prove their claim of fraud (Count II) by clear and convincing evidence, grants the Plaintiff's Motion to Strike, and dismisses this count with prejudice.

ii. Fraud in the Inducement (Count III)

Defendants allege Plaintiff and Mr. Furr misrepresented that the inventory of Signal Hill Supply was new and had good title when much of the inventory was in fact used, missing components, belonged to Mr. Furr, or belonged to third parties on consignment.

To prove fraud in the inducement, Defendants must show by clear and convincing evidence a "false representation of a material fact, constituting an inducement to the contract, on which the purchaser had a right to rely . . ." *Abi-Najm v. Concord Condo., LLC*, 280 Va. 350, 362 (2010).

The Court finds the evidence presented by Defendants in support of their fraud in the inducement claim falls short of clear and convincing. Mr. Hillenburg testified that many of the inventory items he received were used, missing components, belonged to Mr. Furr, or were already sold to a third party. In support of these allegations, Defendants admitted Defense Exhibit 22 which was a summary list created by Mr. Hillenburg showing alleged items that were already sold, used, or missing components. Defendants did not present any pictures of items that were alleged to have

been used or missing components, nor did Defendants present any further evidence in support of their claim.

Therefore, the Court finds Defendants have failed to meet their burden of proof, grants the Plaintiff's Motion to Strike, and dismisses the Defendants' fraud in the inducement claim (Count III) with prejudice.

C. Attorney's Fees

Generally, under the "American Rule" a prevailing party cannot recover attorneys' fees from the losing party." *Ulloa v. QSP, Inc.*, 271 Va. 72, 81 (2006) (citing *Lee v. Mulford*, 269 Va. 562, 565 (2005)). Parties are free however to adopt provisions that shift the responsibility of attorneys' fees to the losing party in disputes involving the contract. *See id.*; *Mullins v. Richlands Nat'l Bank*, 241 Va. 447, 449 (1991). A "prevailing party" is the "party in whose favor a judgment is rendered, regardless of the amount of damages." *Sheets v. Castle*, 263 Va. 407, 413, (2002) (quoting *Black's Law Dictionary* 1145 (7th ed.1999)). However, a prevailing party "is not entitled to recover fees for work performed on unsuccessful claims." *Ulloa*, 271 Va. at 82, (citing *Chawla v. BurgerBusters, Inc.*, 255 Va. 616, 624 (1998)).

Here, the Sales Contract included a provision that "[i]n any litigation . . . by which one party . . . seeks to enforce its right under this Sales Contract . . . the prevailing shall be awarded reasonable attorney fees, together with any costs and expenses . . ."

The Court holds that Plaintiff is the prevailing party in this litigation and is therefore entitled to such reasonable attorney's fees and costs associated with its breach of contract claim (Count I) as it may later prove.

III. CONCLUSION

To summarize the Courts rulings:

Defendants' motion to strike Plaintiff's Breach of Oral Contract claim (Count IV) is granted and this count is dismissed with prejudice.

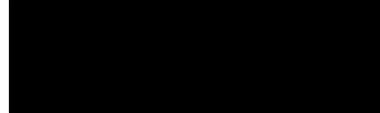
Defendants' motion to strike Plaintiff's Breach of Contract claim (Count I) is denied and the Court finds for the Plaintiff with respect to the Breach of Contract claim. Plaintiff is entitled to recover \$79,147.02 in damages plus interest at five percent (5%) simple interest rate on all late payments beginning in June of 2014. Plaintiff is also entitled to recover attorney's fees and costs associated with litigating this count.

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As to Defendants' Amended Counterclaim and Third-Party Complaint, the Court grants Plaintiff's motion to strike Defendants' Fraud claim (Count II) and Fraud in the Inducement claim (Count III), and dismisses these counts with prejudice.

An Order, in accordance with this Letter Opinion, shall issue this day.

Sincerely,



Randy I. Bellows
Circuit Court Judge

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Signal Hill Supply, LLC)	
)	
Plaintiff/Counter-Defendant,)	
v.)	
)	
Signal Hill Supply & Services, Inc., et al.)	Civil Case No. CL-2019-7319
)	
Defendants/Counter-Plaintiffs,)	
v.)	
)	
James Bruce Furr)	
)	
Third-Party Defendant.)	

ORDER

For the reasons stated in the Letter Opinion issued today, which is hereby incorporated by reference, the Court finds as follows:

On Count One of the Second Amended Complaint (Breach of Contract): Verdict for Plaintiff.

On Count Two of the Second Amended Complaint (Reformation of Contract): Previously dismissed with prejudice.

On Count Three of the Second Amended Complaint (Fraud): Previously dismissed with prejudice.

On Count Four of the Second Amended Complaint (Breach of Oral Contract): Defendant's Motion to Strike is granted and the count dismissed with prejudice, in light of the Court's finding in Count One.

On Defendants' Amended Counterclaim and Third-Party Complaint asserting Fraud (Count II) and Fraud in the Inducement (Count III), the Plaintiff's Motion to Strike is granted and the counts dismissed with prejudice. (Count I was previously dismissed.)

Plaintiff's attorney is ordered to calculate late fees owed in accordance with the Court's Letter Opinion and to submit a proposed final order no later than August 26, 2022. In the event that the

defendants' attorney disagrees with the plaintiff's calculation, he may file his position by September 9, 2022. The matter shall be set for September 16, 2022, on this Court's 10 a.m. civil docket.

With regard to "reasonable attorney fees and costs" to the prevailing party, in accordance with the contract, the parties are ordered to confer in order to determine whether they can agree on the amount of fees and costs to be awarded, with the defendant preserving all objections to the Court's ruling on the merits of the case. If the parties are unable to agree on attorney fees and costs, each party shall submit their position no later than September 9, 2022, and the Court will resolve the issue at the hearing set for September 16, 2022. In the event the Court determines that an evidentiary hearing is required, the Court will set the hearing at that time.

SO ORDERED, this 25 day of July 2022.



Judge Randy I. Bellows

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.