[Cite as *Daily Servs., L.L.C. v. Transglobal, Inc.*, 2023-Ohio-2462.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Daily Services, LLC,	:	
	:	No. 22AP-656
Plaintiff-Appellee/ [Cross-Appellant],	:	(C.P.C. No. 20CV-6704)
	:	(REGULAR CALENDAR)
v.	:	
Transglobal, Inc.,	:	
Defendant-Appellant/ [Cross-Appellee].	:	

D E C I S I O N

Rendered on July 18, 2023

On brief: *Porter Wright Morris & Arthur LLP*, *Allen T. Carter*, and *Spencer C. Meador* for Daily Services, LLC. **Argued:** *Allen T. Carter*.

On brief: *The Behal Law Group LLC* and *John M. Gonzales* for Transglobal, Inc. **Argued:** *John M. Gonzales*.

APPEAL from the Franklin County Court of Common Pleas

EDELSTEIN, J.

{¶ 1} Defendant-appellant/cross-appellee, Transglobal, Inc. ("Transglobal"), appeals from the April 11, 2022 judgment of the Franklin County Court of Common Pleas denying its motion for partial summary judgment and granting, in part, the cross-motion of plaintiff-appellee/cross-appellant, Daily Services, LLC ("Daily Services"), for full summary judgment. Transglobal also appeals from the trial court's October 17, 2022 judgment entry awarding damages to Daily Services for conversion.

{¶ 2} Daily Services cross-appeals from the trial court's October 17, 2022 judgment entry reducing the conversion damages awarded to Daily Services against Transglobal, declining to award damages for Transglobal's breach of the contract's exclusivity clause, and finding Daily Services failed to prove a sufficient evidentiary basis for any of its attorney fees, as provided for in the contract. In the event we sustain Transglobal's first or second assignments of error, Daily Services also appeals from the trial court's April 11, 2022 judgment denying, in part, Daily Services's cross-motion for full summary judgment on its alternative claims.

{¶ 3} Because we find that both of the lower court's judgments were premised on its erroneous construction and improper application of a contract we find was properly terminated by Transglobal, we reverse the trial court's April 11, 2022 and October 17, 2022 judgments and remand this matter to the trial court for further proceedings consistent with this decision.

I. FACTS AND PROCEDURAL BACKGROUND

{¶ 4} This case involves a contract dispute between two business entities, Daily Services d.b.a iforce[1] and Transglobal.

{¶ 5} Transglobal manufactures roll-up doors and other related products used by the transportation industry. It employs its own permanent staff and augments its workforce with temporary workers provided by a staffing agency. Transglobal's staffing needs are dictated by the order volume of its customers, so temporary workers are vital to Transglobal's business operations.

{¶ 6} Daily Services is a staffing management company and, relatedly, provided temporary workers to Transglobal from October 2011 to October 2019. Transglobal agreed to pay Daily Services in exchange for these staffing services. The terms of their agreement were memorialized in writing on four different occasions—in 2011, 2017, February 2018,

[1] Throughout its briefing, Daily Services refers to itself as "Surge." We note, however, that all contracts relevant to this case were between Transglobal and Daily Services d.b.a. iforce. Indeed, "iforce" has been a registered trade name of Daily Services since May 27, 2010. *See* Ohio Secretary of State, *Business Details & Filings: Daily Services, LLC*, https://businesssearch.ohiosos.gov?=businessDetails/1518734 (accessed July 14, 2023). And "Surge" was not registered as a fictitious name for Daily Services until January 14, 2019—after all contracts in this case had been executed. *See id*. Accordingly, for the purposes of this decision, "Daily Services" refers only to the LLC and its registered trade name, iforce.

and March 2018—during the parties' eight-year business relationship. Three of those agreements were signed by both parties. All four iterations of the parties' service agreements incorporated attachments setting forth the process to be followed and fees that would be incurred if Transglobal wanted to permanently hire (i.e., convert or buy-out) any of the temporary employees provided by Daily Services. And, of note, all four iterations of these agreements were drafted by Daily Services's legal team. (*See, e.g.*, Nov. 18, 2021 Roger Alonso Dep. at 25-30, 60-61; Nov. 11, 2021 Aff. of Patrick Pelphrey at ¶ 11.)

A. 2011 and 2017 Agreements

{¶ 7} In October 2011, Transglobal first contracted with Daily Services for temporary staffing services under a written service agreement ("2011 Agreement"). (Nov. 16, 2021 Patrick Pelphrey Dep., Ex. 9.) The term of this contract was "one year from the first date on which both parties have executed it," which was October 20, 2011. (Pelphrey Dep., Ex. 9 at ¶ 6.) Thus, the 2011 Agreement terminated on October 20, 2012.

{¶ 8} From October 21, 2012 to October 1, 2017, Daily Services continued providing temporary workers to Transglobal, in exchange for payment, without an enforceable written agreement in place. (*See* Alonso Dep. at 55-57.)

{¶ 9} On September 28, 2017, both parties signed a more comprehensive service agreement, which went into effect on October 2, 2017 ("2017 Agreement"). (Pelphrey Dep., Ex. 10. *See generally* Pelphrey Dep. at 112-12; Alonso Dep. at 58-74) It also had a one-year term. (Pelphrey Dep., Ex. 10 at ¶ 13.)

B. 2018 Agreements and Transglobal's 2018 Termination Notices

{¶ 10} Before the 2017 Agreement's original one-year term ended, the parties signed and executed a new service agreement in February 2018 ("February 2018 Agreement"). (Pelphrey Dep., Ex. 11.) The February 2018 Agreement clearly states that it supersedes all prior agreements. (*See* Pelphrey Dep., Ex. 11 at ¶ 14.) Thus, by entering into the February 2018 Agreement, the parties effectively terminated the 2017 Agreement.

{¶ 11} Unlike the 2011 and 2017 Agreements, the February 2018 Agreement included an exclusivity provision prohibiting Transglobal from contracting with any other staffing agency for temporary workers. (Pelphrey Dep., Ex. 11 at ¶ 20; Alonso Dep. at 76-78.) Transglobal's operations manager, Patrick Pelphrey, explained in his deposition

testimony that because Daily Services "was underperforming" after the 2017 Agreement was signed, the exclusivity clause in the February 2018 Agreement "was supposedly going to be [Daily Services's] saving grace to [address Transglobal's] staffing complaints." (Pelphrey Dep. at 113.) But, according to Mr. Pelphrey, Transglobal quickly realized the exclusivity clause "did not make a difference" in sufficiently addressing Transglobal's staffing concerns, which is why the February 2018 Agreement "was in place for such a short period of time." (*See* Pelphrey Dep. at 113. *See also* Pelphrey Dep. at 128-29.)

{¶ 12} The February 2018 Agreement included many of the same terms as the 2017 Agreement. (*Compare* Pelphrey Dep., Ex. 11, *with* Pelphrey Dep., Ex. 10.) A considerable change, however, was the addition of new provisions to the termination clause incorporated from the previous agreement. (*Compare* Pelphrey Dep., Ex. 11 at ¶ 13 *with* Pelphrey Dep., Ex. 10 at ¶ 13. *See, e.g.*, Alonso Dep. at 75-87.) One of the newly added subsections gave Transglobal the right to immediately terminate the February 2018 Agreement for any reason "with written notice to [Daily Services]." (Pelphrey Dep., Ex. 11 at ¶ 13(b). *See* Alonso Dep. at 87.) "This termination provision expire[d] on March 31, 2018." (Pelphrey Dep., Ex. 11 at ¶ 13(b). *See* Alonso Dep. at 87.) The other new subsection, Section 13(a), gave Transglobal the right to terminate the February 2018 Agreement "upon ten (10) days['] written notice, if [Daily Services] has not met [Transglobal's] staffing requests." (Pelphrey Dep., Ex. 11 at ¶ 13(a).) Notably, too, the February 2018 Agreement's exclusivity clause replaced a survival provision that was part of the 2017 Agreement. (*Compare* Pelphrey Dep., Ex. 11 at ¶ 20, *with* Pelphrey Dep., Ex. 10 at ¶ 20. *See also* Alonso Dep. at 81-83; Pelphrey Dep. at 116-17.)

{¶ 13} Shortly after executing the February 2018 Agreement, Transglobal became concerned about the newly added exclusivity clause. (*See* Pelphrey Dep. at 68-78, 122-23.) Although it did not believe Daily Services was meeting its temporary staffing needs, the exclusivity clause prohibited Transglobal from curing any staffing deficiencies by using another temporary staffing company. (*See* Pelphrey Dep. at 68-78, 122-23.) Mr. Pelphrey conveyed Transglobal's concerns about the February 2018 Agreement in emails sent to Autumn Mullins, Daily Services's regional manager, in late March 2018. (Pelphrey Dep., Ex. 5; Pelphrey Dep., Ex. 13. *See also* Pelphrey Dep. at 63-88, 126-36; Alonso Dep. at 18-19, 88-91.) In his March 27, 2018 email, Mr. Pelphrey indicated Transglobal "need[ed] to

decide if [it was] going to continue on with the current format" of the parties' agreement and asked Ms. Mullins to call him. (Pelphrey Dep., Ex. 13.) The next day, Mr. Pelphrey emailed Ms. Mullins again because he "did not receive the updated contract nor a phone call" the day before "to discuss [Transglobal's] contract renewal." (Pelphrey Dep., Ex. 5.) He also stated in his March 28, 2018 email to Ms. Mullins and others that Transglobal did not want to continue its business relationship with Daily Services under the terms of the February 2018 Agreement and offered to either revert back to the terms of the "old contract" or to negotiate the terms of a new one. (*See* Pelphrey Dep., Ex. 5; *See* Pelphrey Dep. at 62-68; Alonso Dep. at 84-100.)

{¶ 14} Within hours of Mr. Pelphrey's email, the parties' representatives discussed Transglobal's concerns about the February 2018 Agreement's terms. (*See, e.g.*, Pelphrey Dep. at 63-88.) They negotiated a reduction in the conversion fee structure hours and agreed to extend Transglobal's right to immediate termination until May 30, 2018. (*See, e.g.*, Pelphrey Dep. at 68-73.) Later that same day, Julie Mandusic, Daily Services's onsite workplace manager (*see* Alonso Dep. at 20-21; Pelphrey Dep. at 73-75), emailed to Mr. Pelphrey a new master services agreement that incorporated the parties' new agreed upon terms. (Pelphrey Dep., Ex. 7. *See, e.g.*, Pelphrey Dep. at 66-88; Alonso Dep. at 92-100.) Mr. Pelphrey signed and returned that new agreement to Daily Services on March 28, 2018 ("March 2018 Agreement"). (*See, e.g.*, Pelphrey Dep., Ex. 12; Pelphrey Dep. at 66-88; Alonso Dep. at 90-100; Alonso Dep., Ex. I.)

{¶ 15} The next day, Mr. Pelphrey emailed Ms. Mullins and Ms. Mandusic confirming Transglobal signed the March 2018 Agreement and requesting an update from Daily Services on Transglobal's staffing concerns. (Alonso Dep., Ex. I. *See also* Alonso Dep. at 113-20.) Those concerns were shared with Roger Alonso, Daily Services's vice president (*see* Alonso Dep. at 16), who indicated he would be putting "a plan in place" on April 2, 2018 to address Transglobal's staffing deficit. (*See* Alonso Dep., Ex. I. *See also* Alonso Dep. at 113-20.)

{¶ 16} Of note, the record before us does not contain a version of the March 2018 Agreement that was signed by an authorized representative for Daily Services. This is because neither party claimed to have it in their possession, so it was not produced in discovery. (*See, e.g.*, Pelphrey Dep., Ex. 12; Pelphrey Dep. at 66-88; Alonso Dep. at 90-100;

Dec. 16, 2020 Am. Compl., Ex. J.) In his deposition, Mr. Alonso acknowledged it was possible Daily Services signed the March 2018 Agreement, but that signed copy was not sent to Transglobal. (*See, e.g.*, Alonso Dep. at 95-99.) Mr. Alonso also conceded that he never looked for the signed March 2018 Agreement and did not know whether anyone at Daily Services had tried to locate it. (Alonso Dep. at 97.) The record does not indicate Daily Services conveyed to Transglobal its express rejection of the March 2018 Agreement after Transglobal signed and returned it. And, significantly, that agreement was drafted by Daily Services. (*See* Pelphrey Dep. at 86-87; Alonso Dep. at 90-100.)

{¶ 17} In any event, at the time it was signed, Transglobal believed the March 2018 Agreement governed the parties' relationship on and after March 28, 2018. (Pelphrey Dep. at 132. *See, e.g.*, Pelphrey Dep., Ex. 20; Pelphrey Dep., Ex. 21.)

{¶ 18} On April 24, 2018, Mr. Pelphrey emailed Daily Services written notice of Transglobal's intent to terminate the master service agreement because Daily Services was not meeting Transglobal's staffing needs and requests. (Pelphrey Dep., Ex. 8. *See, e.g.*, Pelphrey Dep. at 75-100; Alonso Dep. at 100-05.) He also indicated Transglobal wanted to continue using Daily Services's staffing services in conjunction with temporary workers provided by other staffing agencies. (*See* Pelphrey Dep., Ex. 8.; Pelphrey Dep. at 88-100.) At that time, Mr. Pelphrey believed he was terminating the March 2018 Agreement. (Pelphrey Dep. at 90-91.) Transglobal thus viewed its termination notice as authorized and proper pursuant to Section 13(a) of the March 2018 (or February 2018) Agreement.

{¶ 19} Although Mr. Pelphrey stated in his April 2018 email that Transglobal wanted to return to the parties' "original contract" and "to continue on as [the parties] have in the many years leading up to this point," he testified in his deposition that he expected Daily Services would draft and send an execution ready contract to Transglobal containing these terms. (*Compare* Pelphrey Dep., Ex. 8, *with* Pelphrey Dep. at 91-92.) But this never happened. Furthermore, nothing in the record indicates Daily Services formally accepted Transglobal's offer to enter into an oral agreement commensurate with the terms of any particular prior agreement.

{¶ 20} In May/June 2018, Transglobal began using the services of another temporary employee staffing services group. (*See, e.g.*, Pelphrey Dep. at 31-53, 162; Pelphrey Dep., Ex. 3.) Up until October 2019, Daily Services also continued providing

staffing services to Transglobal in exchange for payment. (*See, e.g.*, Pelphrey Dep., Ex. 16; Pelphrey Dep. at 77-79, 135-36, 146-223; Alonso Dep. at 139-40.)

C. Transglobal's October 2019 Termination of the Parties' Business Relationship and the Ensuing Litigation

{¶ 21} On October 8, 2019, Mr. Pelphrey emailed Daily Services written notice of Transglobal's intent to terminate its business relationship with Daily Services. (Pelphrey Dep., Ex. 16. *See, e.g.*, Pelphrey Dep. at 77-79, 100, 146-223.) Daily Services does not claim such action constituted an improper termination of the parties' business relationship. (*See, e.g.*, Dec. 16, 2020 Am. Compl. at ¶ 53-54.)

{¶ 22} In connection with the termination of the parties' relationship, Daily Services cooperated with Transglobal and facilitated the transfer of Daily Services's employees to either Focus Workforce Management, another staffing agency Transglobal had decided to use for its staffing needs, or to Transglobal's permanent payroll. (*See, e.g.*, Pelphrey Dep. at 190-92; Alonso Dep. at 120-21.) Regarding the conversion of Daily Services's employees, Mr. Pelphrey testified in his deposition that Transglobal's "goal was to honor at that point in time the obligations that we thought that we had." (Pelphrey Dep. at 149. *See also* Pelphrey Dep. at 191-92.)

{¶ 23} Daily Services worked with Transglobal to ensure its employees satisfied the minimum number of hours to be eligible for conversion. (*See, e.g.*, Pelphrey Dep. at 149-52, 191-92; Alonso Dep. at 121-23.) Critically, conversion eligibility of Daily Services's employees and the fee schedule associated with conversion varied between the parties' four written agreements. Transglobal would not be assessed a conversion fee for eligible employees who met the controlling conversion provision's requirements. But if no written agreement governed the parties' relationship after March/April 2018, then none of these conversion fee provisions would apply absent a showing that the parties agreed on which contract's terms controlled during the relevant timeframe.

{¶ 24} Notwithstanding the parties' attempt to amicably part ways, their cooperative relationship quickly dissipated after October 8, 2019. (*See, e.g.*, Pelphrey Dep., Ex. 17; Pelphrey Dep., Ex. 18.) And it became clear the parties did not agree on which contract's terms—if any—governed their relationship after March/April 2018. (*See, e.g.*, Pelphrey Dep. at 99-100, 147-51, 178-84; Alonso Dep. at 123-39; Pelphrey Dep., Ex. 20; Pelphrey

Dep., Ex. 21; Pelphrey Dep., Ex. 22.) Ultimately, the parties' disparate beliefs about which converted employees entitled Daily Services to a conversion fee from Transglobal precipitated the parties' contractual dispute. (*See, e.g.*, Alonso Dep. at 126-39; Pelphrey Dep. at 150-51, 163-211; Pelphrey Dep., Ex. 20; Pelphrey Dep., Ex. 21; Pelphrey Dep., Ex. 22; Pelphrey Dep., Ex. 23; Pelphrey Dep., Ex. 24; Pelphrey Dep., Ex. 25.)

{¶ 25} On April 16, 2020, Daily Services invoiced Transglobal a $258,089.71 "employee conversion fee" for 26 employees.[2] (Pelphrey Dep., Ex. 26. *See, e.g.*, Pelphrey Dep. at 211-23; Alonso Dep. at 127-39.) In its amended complaint, Daily Services alleged these conversion fees were assessed for Transglobal's direct or indirect conversion of 26 employees, without prior written notice, at the 30 percent rate provided for in Attachment 1, Section VI(3) of the February 2018 Agreement. (Dec. 16, 2020 Am. Compl. at ¶ 73. *See, e.g.*, Alonso Dep. at 127-39.) Transglobal explicitly disclaimed its obligation to pay Daily Services under the terms of the February 2018 Agreement. (*See, e.g.*, Am. Compl., Ex. J; Pelphrey Dep. at 211-23.)

{¶ 26} A few months later, Daily Services commenced a civil action against Transglobal in connection with Transglobal's purported breach of the February 2018 Agreement (Count 1). Daily Services claimed it was entitled to payment from Transglobal pursuant to the February 2018 Agreement's conversion fee structure and for Transglobal's breach of the exclusivity provision.[3] In the event the trial court found the February 2018 Agreement did not govern the parties' relationship, Daily Services alleged Transglobal breached the 2017 Agreement and sought recovery under the conversion fee structure provision set forth in that agreement (Count 2).[4] And, if the trial court found there was no

---

[2] In its amended complaint, Daily Services alleged the fees pertained to 25 converted employees. (Am. Compl. at ¶ 73.) But, a review of the April 16, 2020 invoice indicates conversion fees were billed for 26 employees. (Am. Compl., Ex. I; Pelphrey Dep., Ex. 26.)

[3] Daily Services also sought payment for other outstanding invoices, which were attached as Exhibit H to Daily Services's amended complaint. (*See* Dec. 16, 2020 Am. Compl. at ¶ 59-62.) The parties generally agree these invoices were paid by Transglobal, and these allegations are not part of the matter before us on appeal. (*See, e.g.*, Alonso Dep. at 139-41. *But see* Pelphrey Dep. at 220-23.)

[4] In its initial complaint, Daily Services alleged breach of the 2011 Agreement in Count 2 and asserted no claims against Transglobal relating to the 2017 Agreement. (Oct. 13, 2020 Compl.) In its amended complaint, Daily Services revised Count 2's breach of contract claim as relating to the 2017 Agreement instead. (Dec. 16, 2020 Am. Compl.)

enforceable agreement between the parties after March/April 2018, Daily Services sought equitable relief from Transglobal in the alternative (Counts 3 and 4). Of note, Daily Services contended the March 2018 Agreement was an invalid novation because it was only signed by Transglobal. (Am. Compl. at ¶ 34-35.)

{¶ 27} Following extensive discovery, both parties moved for summary judgment.

{¶ 28} In its motion, Transglobal generally asserted no written contract governed the parties' relationship after March/April 2018. Accordingly, Transglobal argued for summary judgment in its favor on all four claims concerning the conversion fee, as it was based on contracts that terminated before the factual basis for any such conversion claims arose. (*See, e.g.*, Oct. 26, 2021 Mot. for Partial Summ. Jgmt.; Jan. 5, 2022 Supp. Memo in Support.) Transglobal also contended that Daily Services was not entitled to recover, as a matter of law, for any purported breach of the exclusivity clause because the 2018 Agreements terminated before any purported violation occurred.

{¶ 29} In its combined memorandum contra and cross-motion for summary judgment, Daily Services argued Transglobal did not properly terminate the February 2018 Agreement or, if it did, the 2017 Agreement governed the parties' relationship up until Transglobal's October 2019 termination notice. (*See, e.g.*, Jan. 18, 2022 Memo Contra and Cross-Mot. for Full Summ. Jgmt.) Both contracts contain employee conversion clauses and fee structures, which Daily Services claimed Transglobal breached by refusing to pay the April 2020 invoice for conversion fees. Only the February (and March) 2018 Agreement contains an exclusivity clause, which Daily Services also argued Transglobal breached by using staffing services from another provider after April 24, 2018. In addition to asking the trial court to find the February 2018 Agreement governed the parties' relationship until October 2019 and that Transglobal was in breach of the conversion and exclusivity clauses of that agreement—as alleged in Count 1 of the amended complaint—Daily Services also argued summary judgment was appropriate against Transglobal on Daily Services's requested award of damages, attorney fees, and costs. In the alternative, Daily Services argued summary judgment should be granted on Count 2 (breach of the 2017 Agreement), Count 3 (promissory estoppel), or Count 4 (quantum meruit).

{¶ 30} On April 11, 2022, the trial court issued a written decision on the parties' dueling summary judgment motions. It first found Transglobal did not properly terminate

the parties' February 2018 Agreement because its 2018 termination notices did not comply with the manner dictated by the agreement's termination clause. Finding the termination clause required notice of termination to be sent by Certified Mail and noting that Transglobal's 2018 termination notices were emailed, the trial court concluded that the February 2018 Agreement governed the parties' relationship from February 2018 until October 2019. This determination nullified Daily Services's alternative breach of contract claim based on the 2017 Agreement (alleged in Count 2). The trial court also found, over Transglobal's objection, that the February 2018 Agreement continued as a month-to-month contract after its initial one-year term expired. Thus, having found the parties operated under an enforceable contract at all relevant times, the trial court dismissed Daily Services's equitable claims (alleged in Counts 3 and 4). The court further found the February 2018 Agreement's conversion fee structure provision was a proper liquidated damages clause and not, as Transglobal alleged, an unenforceable penalty.

{¶ 31} Based on these findings, the trial court denied Transglobal's motion for partial summary judgment and granted, in part, Daily Services's cross-motion for summary judgment on its breach of contract claim concerning the conversion and exclusivity provisions of the February 2018 Agreement. The trial court left the determination of damages resulting from Transglobal's breach and attorney fees (as provided for in the February 2018 Agreement) for trial, and, accordingly, denied Daily Services's request for summary judgment on damages, attorney fees, and costs.

{¶ 32} In September 2022, the trial court conducted a bench trial on damages and Daily Services's requested attorney fees. On October 17, 2022, the trial court issued a written decision awarding some of Daily Services's requested damages and ordering Transglobal to pay court costs. It also found, however, that Daily Services failed to sufficiently prove it incurred damages from Transglobal's breach of the exclusivity provision. (Oct. 17, 2022 Decision at 3-4.) Accordingly, the trial court denied Daily Services's request for damages in connection therewith. It also denied Daily Services's request for attorney fees because it found Daily Services failed to produce sufficient evidence to support its requested award.

{¶ 33} As to damages incurred by Transglobal's breach of the conversion clause in the February 2018 Agreement, the trial court agreed Daily Services adequately proved it

incurred damages. But, the trial court found Daily Services failed to prove it was entitled to the full $961,468.43 in damages it requested. Daily Services identified 99 people at trial who it claimed were converted as a result of Transglobal's breach. But of those 99 employees Daily Services identified at trial, the trial court found just 36 were subject to the conversion fee provision because they were actual employees of Daily Services who fell within the applicable six-month window provided for in the February 2018 Agreement. (Decision at 5-6.) The others, the trial court concluded, did not.

{¶ 34} Based on these findings, the trial court awarded Daily Services a reduced liquidated damages award of $646,469.47 on its conversion claim, with 5 percent interest per month on that judgment until paid in full by Transglobal.

II. ASSIGNMENTS OF ERROR

{¶ 35} On October 28, 2022, Transglobal timely appealed from the trial court's April 11, 2022 decision on the parties' summary judgment motions and the trial court's October 17, 2022 final judgment awarding damages to Daily Services from Transglobal. Transglobal asserts the following three assignments of error for our review:

> [I.] THE TRIAL COURT ERRED BY GRANTING [DAILY SERVICES'[S]] CROSS[-]MOTION FOR SUMMARY JUDGMENT.
>
> [II.] THE TRIAL COURT ERRED BY NOT GRANTING TRANSGLOBAL'S MOTION FOR SUMMARY JUDGMENT.
>
> [III.] THE TRIAL COURT ERRED BY AWARDING LIQUIDATED DAMAGES WHEN THE EVIDENCE SHOWED THE DAMAGES WERE AN IMPERMISSIBLE PENALTY.

{¶ 36} On November 4, 2022, Daily Services filed a notice of cross-appeal. It raises the following three cross-assignments of error for our review:

> [I.] THE TRIAL COURT ERRED AS A MATTER OF LAW BY REDUCING THE CONVERSION FEE BY EXCLUDING CERTAIN EMPLOYEES FROM THE CALCULATION. THIS ERROR IS REFLECTED IN THE DECISION FOLLOWING BENCH TRIAL OF OCTOBER 17, 2022.

> [II.] THE TRIAL COURT ERRED AS A MATTER OF LAW BY REFUSING TO AWARD [DAILY SERVICES] DAMAGES FOR TRANSGLOBAL'S BREACH OF THE 2018 AGREEMENT'S EXCLUSIVITY PROVISION. THIS ERROR IS REFLECTED IN THE DECISION FOLLOWING BENCH TRIAL OF OCTOBER 17, 2022.
>
> [III.] THE TRIAL COURT ERRED AS A MATTER OF LAW BY FINDING THAT [DAILY SERVICES] HAS INSUFFICIENTLY PROVEN ITS ATTORNEYS' FEES DUE UNDER THE 2018 AGREEMENT. THIS ERROR IS REFLECTED IN THE DECISION FOLLOWING BENCH TRIAL OF OCTOBER 17, 2022.

(Brief of Cross-Appellant at ii.)

{¶ 37} In the event we find the February 2018 Agreement was terminated on or after March 28, 2018 and sustain Transglobal's first or second assignments of error, Daily Services also raises the following two contingent assignments of error for our consideration:

> [I.] THE TRIAL COURT ERRED [BY] FAILING TO APPLY THE SEPTEMBER 28, 2017 SERVICE AGREEMENT, WHICH [DAILY SERVICES] PLED IN THE ALTERNATIVE THAT THE PARTIES HAD REVIVED AND TRANSGLOBAL HAD BREACHED. THIS ERROR IS REFLECTED IN THE RECORD AT ENTRY AND ORDER OF APRIL 11, 2022, DENYING [TRANSGLOBAL'S] MOTION FOR SUMMARY JUDGMENT AND GRANTING [DAILY SERVICES] PARTIAL SUMMARY JUDGMENT.
>
> [II.] THE TRIAL COURT ERRED BY DISMISSING [DAILY SERVICES'S] ALTERNATIVE EQUITABLE CLAIMS, WHICH [DAILY SERVICES] PLED IN THE ALTERNATIVE IF NO CONTRACT GOVERNED THE RELATIONSHIP BETWEEN THE PARTIES AFTER APRIL 2018. THIS ERROR IS REFLECTED IN THE RECORD AT ENTRY AND ORDER OF APRIL 11, 2022, DENYING [TRANSGLOBAL'S] MOTION FOR SUMMARY JUDGMENT AND GRANTING [DAILY SERVICES] PARTIAL SUMMARY JUDGMENT.

(Merit Brief of Appellee at ix-x.)

III. ANALYSIS

{¶ 38} Transglobal's first and second assignments of error and Daily Services's two contingent assignments of error pertain to the trial court's April 11, 2022 decision ruling on the parties' dueling summary judgment motions. We address these assignments of error, together, first.

{¶ 39} Transglobal's third assignment of error and Daily Services's three cross-assignments of error pertain to the trial court's October 17, 2022 decision ruling on Daily Services's requested award for damages, including attorney fees, as provided by the February 2018 Agreement. We address these assignments of error last.

A. Assignments of Error Related to the April 11, 2022 Decision

{¶ 40} The trial court's April 11, 2022 decision is the subject of Transglobal's first and second assignments of error, as well as Daily Services's first and second contingent assignments of error. As to these assignments of error, the primary issue before us on appeal concerns the trial court's interpretation of the termination provision in Section 13(a) and 13(b) of the February 2018 Agreement.

1. Summary Judgment Standard

{¶ 41} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996).

{¶ 42} If the moving party has satisfied its initial burden under Civ.R. 56(C), then the nonmoving party " 'has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.' " *Heimberger v. Zeal Hotel Group Ltd.*, 10th Dist. No. 15AP-99, 2015-Ohio-3845, ¶ 14, quoting *Dresher* at 293. The nonmoving party may not rest on the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that shows the existence of a genuine dispute over the material facts. *A.M. v. Miami Univ.*, 10th Dist. No. 17AP-156, 2017-Ohio-8586, ¶ 30, citing *Henkle v. Henkle*, 75 Ohio App.3d 732, 735 (12th Dist.1991). In the summary judgment context, a "material" fact is one that

might affect the outcome of the case under the applicable substantive law. *Turner v. Turner*, 67 Ohio St.3d 337, 340 (1993). A genuine dispute exists if the evidence presents a sufficient disagreement between the parties' positions. *Id.*

{¶ 43} Appellate review of summary judgment is de novo. *Gabriel v. Ohio State Univ. Med. Ctr.*, 10th Dist. No. 14AP-870, 2015-Ohio-2661, ¶ 12, citing *Byrd v. Arbors E. Subacute & Rehab. Ctr.*, 10th Dist. No. 14AP-232, 2014-Ohio-3935, ¶ 5. "When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination." *Gabriel* at ¶ 12, citing *Byrd* at ¶ 5.

2. Legal Standards Controlling Contracts

{¶ 44} A contract is "[a] promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." (Citation omitted.) *Episcopal Retirement Homes v. Ohio Dept. of Indus. Relations*, 61 Ohio St.3d 366, 369 (1991). Contract formation requires an offer, acceptance, consideration (also referred to as the bargained-for legal benefit or detriment), and mutual assent between two or more parties with the legal capacity to act. *See, e.g., Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶ 16, citing *Perlmuter Printing Co. v. Strome, Inc.*, 436 F.Supp. 409, 414 (N.D.Ohio 1976); *Lake Land Emp. Group of Akron, LLC v. Columber*, 101 Ohio St.3d 242, 2004-Ohio-786, ¶ 14. An offer is defined as " 'the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.' " *Phu Ta v. Chaudhry*, 10th Dist. No. 15AP-867, 2016-Ohio-4944, ¶ 11, quoting *Reedy v. Cincinnati Bengals, Inc.*, 143 Ohio App.3d 516, 521 (1st Dist.2001).

{¶ 45} " 'To successfully prosecute a breach of contract claim, a plaintiff must present evidence of (1) the existence of a contract, (2) plaintiff's performance of the contract, (3) defendant's breach of the contract, and (4) plaintiff's loss or damage as a result of defendant's breach.' " *Phu Ta* at ¶ 10, quoting *Barlay v. Yoga's Drive-Thru*, 10th Dist. No. 03AP-545, 2003-Ohio-7164, ¶ 6, citing *Doner v. Snapp*, 98 Ohio App.3d 597, 600 (2d Dist.1994). *See also Nexus Communications, Inc. v. Qwest Communications Corp.*, 193 Ohio App.3d 599, 2011-Ohio-1759, ¶ 31 (10th Dist.).

a. Existence and Enforceability of a Contract

{¶ 46} To prove the existence of a contract, written or oral, the party seeking to enforce it " ' "must show that both parties consented to the terms of the contract, that there was a 'meeting of the minds' of both parties, and that the terms of the contract are definite and certain." ' " *Phu Ta* at ¶ 12, quoting *Barlay* at ¶ 6, quoting *Nilavar v. Osborn*, 137 Ohio App.3d 469, 484 (2d Dist.2000), citing *McSweeney v. Jackson*, 117 Ohio App.3d 623, 631 (4th Dist.1996); *Episcopal Retirement Homes* at 369.

{¶ 47} Accordingly, for a contract to be enforceable, there must be a "meeting of the minds" as to the essential terms of the agreement, which means the essential terms of the agreement must be " 'reasonably certain and clear' " and mutually understood by the parties. *Kostelnik*, 96 Ohio St.3d at ¶ 16-17, quoting *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 376 (1997). *See also Episcopal Retirement Homes* at 369. To have a meeting of the minds, " 'there must be a definite offer on one side and an acceptance on the other.' " *Turoczy Bonding Co. v. Mitchell*, 8th Dist. No. 106494, 2018-Ohio-3173, ¶ 18, quoting *Garrison v. Daytonian Hotel*, 105 Ohio App.3d 322, 325 (2d Dist.1995). Furthermore, "[t]he relevant inquiry is the manifestation of intent of the parties as seen through the eyes of a reasonable observer, rather than the subjective intention of the parties." *Benefit v. Bolen*, 10th Dist. No. 94APE08-1202, 1995 Ohio App. LEXIS 2736, *10 (June 29, 1995), quoting *Bennett v. Heidinger*, 30 Ohio App.3d 267, 268 (8th Dist.1986). *See also Subel v. AMD Plastics, LLC*, 8th Dist. No. 111770, 2023-Ohio-1139, ¶ 29.

{¶ 48} Appellate review of the existence of a contract raises a mixed question of fact and law:

> We accept the facts found by the trial court on some competent, credible evidence, but freely review application of the law to the facts. A reviewing court should be guided by a presumption that the findings of a trial court are correct, since the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use their observations in weighing credibility of the proffered testimony.

Phu Ta, 2016-Ohio-4944 at ¶ 17-18, quoting *McSweeney* at 632. *See also Subel* at ¶ 30, quoting *Oglebay Norton Co. v. Armco, Inc.*, 52 Ohio St.3d 232, 235 (1990) ("[W]hether the

parties intended to be bound * * * is a question of fact properly resolved by the trier of fact.").

{¶ 49} However, appellate review of questions of law regarding the existence of a contract are de novo. *See, e.g.*, *Phu Ta* at ¶ 18, citing *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.*, 74 Ohio St.3d 501, 502 (1995). *See also Nexus Communications* at ¶ 32.

b. Types of Contracts

{¶ 50} Ohio law recognizes three types of contracts: express, implied in fact, and implied in law. *Fouty v. Ohio Dept. of Youth Servs.*, 167 Ohio App.3d 508, 2006-Ohio-2957, ¶ 56 (10th Dist.), citing *Legros v. Tarr*, 44 Ohio St.3d 1, 6 (1989). " 'While both express and implied contracts require the showing of an agreement based on a meeting of the minds and mutual assent, the manner in which these requirements are proven varies depending upon the nature of the contract.' " *Nexus Communications* at ¶ 33, quoting *Reali, Giampetro & Scott v. Soc. Natl. Bank*, 133 Ohio App.3d 844, 849 (7th Dist.1999).

{¶ 51} In an express contract, assent to the contract's terms is formally expressed in the parties' offer and acceptance. *See, e.g.*, *Nexus Communications* at ¶ 34; *Legros* at 6-7.

{¶ 52} "Unlike express contracts, implied contracts are not created or evidenced by explicit agreement of the parties; rather, they are inferred by law as a matter of reason and justice." *Fouty* at ¶ 56, citing *B & J Jacobs Co. v. Ohio Air, Inc.*, 1st Dist. No. C-020264, 2003-Ohio-4835, ¶ 9. *See also Legros* at 6-7. "An implied-in-fact contract arises from the conduct of the parties, or circumstances surrounding the transaction, that make it clear that the parties have entered into a contractual relationship despite the absence of any formal agreement." *Fouty* at ¶ 56. " ' "In contracts implied in fact the meeting of the minds, manifested in express contracts by offer and acceptance, is shown by the surrounding circumstances which make it inferable that the contract exists as a matter of tacit understanding." ' " *Nexus Communications* at ¶ 34, quoting *Waffen v. Summers*, 6th Dist. No. OT-08-034, 2009-Ohio-2940, ¶ 31, quoting *Hummel v. Hummel*, 133 Ohio St. 520, 525 (1938).

c. Principles of Contract Interpretation

{¶ 53} The primary issue in this case is whether Transglobal properly terminated the February 2018 Agreement. The circumstances and manner of effective termination are delineated in Section 13 of that agreement. The February 2018 Agreement is a written contract, and thus, the principles of contract interpretation apply. The interpretation of an unambiguous written contract is a question of law that we review de novo. *Boone Coleman Constr., Inc. v. Village of Piketon*, 145 Ohio St.3d 450, 2016-Ohio-628, ¶ 10, citing *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, ¶ 14. *See also Cadle v. D'Amico*, 7th Dist. No. 15 MA 0136, 2016-Ohio-4747, ¶ 22, citing *Savoy Hospitality, LLC v. 5839 Monroe St. Assocs., LLC*, 6th Dist. No. L-14-1144, 2015-Ohio-4879, ¶ 30.

{¶ 54} When reviewing a contract, a court's primary role is to ascertain and give effect to the intent of the parties. *Hamilton Ins. Servs. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273 (1999). " 'The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement.' " *Hlad v. Step Lively Foot & Ankle Ctrs., Inc.*, 10th Dist. No. 21AP-479, 2022-Ohio-3060, ¶ 10, quoting *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 132 (1987). To determine the parties' intent in the language of the contract, a reviewing court must read the contract as a whole and give effect, when possible, to every provision in the agreement. *Clark v. Humes*, 10th Dist. No. 06AP-1202, 2008-Ohio-640, ¶ 12.

{¶ 55} We must first ascertain whether the termination provision (Section 13) of the February 2018 Agreement is ambiguous. Whether a contract is ambiguous is a question of law. *Atelier Dist. v. Parking Co. of Am., Inc.*, 10th Dist. No. 07AP-87, 2007-Ohio-7138, ¶ 17, citing *Ohio Historical Soc. v. Gen. Maintenance & Eng. Co.*, 65 Ohio App.3d 139, 146 (10th Dist.1989).

{¶ 56} A contract that is, by its terms, clear and unambiguous requires no interpretation or construction and will be given the effect called for by its plain language. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 53 (1989). When the terms in an existing contract are clear and unambiguous, we cannot create a new contract "by finding an intent not expressed in the clear language employed by the parties." *Alexander v. Buckeye Pipeline Co.*, 53 Ohio St.2d 241, 246 (1978). "If the meaning is apparent, the terms of the agreement are to be applied, not interpreted." *Albert v. Shiells*,

10th Dist. No. 02AP-354, 2002-Ohio-7021, ¶ 20, citing *Carroll Weir Funeral Home v. Miller*, 2 Ohio St.2d 189, 192 (1965).

{¶ 57} If the language of the contract is ambiguous, however, the intent of the parties becomes a question of fact. *See, e.g.*, *Atelier Dist.* At ¶ 17; *Beverly v. Parilla*, 165 Ohio App.3d 802, 2006-Ohio-1286, ¶ 26 (7th Dist.). Appellate courts will not reverse a factual finding of the trial court if it is supported by some competent, credible evidence. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus. *See also Atelier Dist.* at ¶ 17 (explaining "the trial court's determination will not be overturned absent an abuse of discretion.").

{¶ 58} A contract is considered ambiguous if the language is "unclear, indefinite, and reasonably subject to dual interpretations or is of such doubtful meaning that reasonable minds could disagree as to its meaning." *Beverly* at ¶ 24. *See also Hlad* at ¶ 11, citing *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 11. "Only when a definitive meaning proves elusive should rules for construing ambiguous language be employed. Otherwise, allegations of ambiguity become self-fulfilling." *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, ¶ 11.

{¶ 59} If an ambiguity exists, courts are permitted to consider extrinsic evidence to determine the parties' intent. *Atelier Dist.* at ¶ 17; *Wells Fargo Bank, N.A. v. TIC Acropolis, LLC*, 2d Dist. No. 2015-CA-32, 2016-Ohio-142, ¶ 47. Extrinsic evidence includes the circumstances surrounding the parties at the time the contract was made and the objectives they intended to accomplish by entering the contract. *See, e.g.*, *Oryann, Ltd. v. SL & MB, LLC*, 11th Dist. No. 2014-L-119, 2015-Ohio-5461, ¶ 26. This includes consideration of the parties' negotiations. *Id.*, citing *Pharmacia Hepar, Inc. v. Franklin*, 111 Ohio App.3d 468, 475 (12th Dist.1996). If the parties' intent cannot be determined from consideration of extrinsic evidence, then the contract must be construed against the drafter. *See, e.g.*, *In re Estate of Taris*, 10th Dist. No. 04AP-1264, 2005-Ohio-1516, ¶ 33.

{¶ 60} With these principles in mind, we turn our attention to the language of the February 2018 Agreement and the trial court's decision.

3. Analysis of Transglobal's 2018 Termination Notices

{¶ 61} In its first assignment of error, Transglobal argues the trial court erred by granting Daily Services's cross-motion for summary judgment. Transglobal also contends in its second assignment of error that the trial court erred by denying its summary judgment motion.

{¶ 62} Daily Services argues in its first and second contingent assignments of error that if we conclude the 2018 Agreement did not govern the parties' relationship after March or April 2018, we should find the trial court erred in dismissing Daily Services's alternative breach of contract claim under the 2017 Agreement[5] and/or its equitable claims against Transglobal. (Merit Brief of Appellee at 38-43.) Indeed, we note that Daily Services argued two alternative bases for recovery against Transglobal in its summary judgment motion. (*See* Jan. 18, 2022 Memo Contra and Cross-Mot. for Full Summ. Jgmt. at 11-15.) *First*, Daily Services argued that if the trial court found the February 2018 Agreement did not govern the parties' relationship after March/April 2018, it was entitled to judgment as a matter of law on its conversion claim under the terms of the 2017 Agreement. (*Id*. at 11-13, 15.) *Second*, Daily Services contended that, in the event the trial court found no contract governed the parties' relationship after March/April 2018, it was entitled to judgment as a matter of law on its equitable claims of promissory estoppel and quantum meruit, as pled in Counts 3 and 4, respectively, of its amended complaint. (*Id*. at 13-15.) Daily Services reiterates these claims on appeal. (Merit Brief of Appellee at 38-43.)

{¶ 63} Our resolution of these assignments of error turns, in part, on whether Transglobal properly terminated the February 2018 contract and, if so, whether any other written contract controlled the parties' business transactions between March 2018 and October 2019. The trial court found Transglobal did not properly terminate the February 2018 Agreement because it did not send notice of its termination by Certified Mail. (Apr. 11, 2022 Entry and Order at 9-12.) For the following reasons, we disagree.

---

[5] The 2017 Agreement did not contain an exclusivity clause, so Daily Services's exclusivity claims would no longer be viable. (*See* Pelphrey Dep., Ex. 10.)

a. Sections 13(a) and (b) of the February 2018 Agreement did not Require Transglobal to Send its Written Notice of Termination to Daily Services via Certified Mail.

{¶ 64} The February 2018 Agreement outlined the circumstances and manner by which either party could cancel the agreement:

> Term. The term of this Agreement shall commence as of the date first shown above and shall continue in effect for one year or until canceled by either party upon not less then [sic] thirty (30) days' prior written notice to the other subject, however to any minimum length of term provided in any addendum made hereto. Such notice shall be deemed given when mailed by Certified Mail, postage prepaid, to the respective addresses as shown on the first page of this Agreement. [Daily Services] reserves the right, however, to terminate this Agreement upon not less than ten (10) days' prior notice in the event of non-payment of any [Daily Services's] invoice received by the Customer under Paragraph (4) above. Customer recognizes that [Daily Services] possesses the knowledge and experience to uniformly procure and manage Customer's staffing needs. Therefore, Customer agrees not to contract with any [Daily Services's] Vendor directly for the procurement or management of staffing services during the term of this agreement and for 1 year thereafter.
>
> **(a) Customer shall have the right to terminate this Agreement, upon ten (10) days written notice, if [Daily Services] has not met Customer's staffing requests.**
>
> **(b) <u>Notwithstanding the above provisions</u>, Customer shall have the right to terminate this Agreement on [or before] March 31, 2018, with written notice to [Daily Services]. This termination provision expires on March 31, 2018.**

(Emphasis added.) (Pelphrey Dep., Ex. 11 at ¶ 13.)

{¶ 65} The parties agree this provision of the February 2018 Agreement is clear and unambiguous. (*See, e.g.*, Merit Brief of Appellee at 19; Reply Brief of Appellant at 5-6.) We likewise find that, as a matter of law, Section 13 of the February 2018 Agreement is clear and unambiguous. Therefore, "the terms of the agreement are to be applied, not interpreted." *Albert*, 2002-Ohio-7021 at ¶ 20, citing *Carroll Weir Funeral Home*, 2 Ohio

St.2d at 192. As a result, we may not turn to evidence outside the four corners of the contract to alter its meaning. *See Westfield Ins. Co.,* 2003-Ohio-5849 at ¶ 11; *Aultman Hosp. Assn.*, 46 Ohio St.3d at 53 ("Intentions not expressed in the writing are deemed to have no existence and may not be shown by parol evidence."). We cannot "delete words used or insert words not used." *Cleveland Elec. Illum. Co. v. Cleveland*, 37 Ohio St.3d 50 (1988), paragraph three of the syllabus. For the reasons that follow, we find Transglobal properly terminated the February 2018 Agreement in accordance with the plain and unambiguous language of that provision.

{¶ 66} On March 28, 2018, Mr. Pelphrey sent Ms. Mullins an email with the subject line: "Transglobal/ I-Force [i.e., Daily Services] / New Contract." (Pelphrey Dep., Ex. 5.) Also copied on that email were Ms. Mandusic and Transglobal's owners, James Schroeder and president Mark Schroeder. (Pelphrey Dep. at 17-18; Pelphrey Dep., Ex. 5.) In that email, Mr. Pelphrey stated:

> Please note I did not receive the updated contract nor a phone call yesterday to discuss our contract renewal. Transglobal is interested in continuing a partnership although we would like to negotiate the terms. This is notice that we do not want the automatic renewal UNTIL this is discussed further. If no discussion takes place[,] then we will revert back to the old contract until something else is proposed.
>
> It is important that we talk this morning.

(Pelphrey Dep., Ex. 5.)

{¶ 67} After the parties spoke, Ms. Mandusic sent Mr. Pelphrey an email with the subject line "Contract vendor extension" later that same day. (Pelphrey Dep., Ex. 7. *See* Pelphrey Dep. at 69-76.) In that email, Ms. Mandusic wrote: "Here is the contract renewal, expires May 30, 2018." (Pelphrey Dep., Ex. 7.) An unsigned service agreement was attached to her email. (Pelphrey Dep., Ex. 7.) The only relevant change to this agreement, however, was that Transglobal's right to terminate expired on May 30, 2018. (Pelphrey Dep., Ex. 12 at ¶ 13(b).) Although Mr. Pelphrey signed and returned the March 2018 Agreement to Daily Services on March 28, 2018, the parties did not locate a version of that agreement that had also been signed by Daily Services. (Pelphrey Dep., Ex. 7.)

{¶ 68} Pursuant to the plain and unambiguous language of the February 2018 Agreement, either party is permitted to terminate the agreement, for any reason and at any time, with 30-days' written notice. (Pelphrey Dep., Ex. 11 at ¶ 13.) The next sentence of the February 2018 Agreement states that ***"[s]uch notice*** shall be deemed given when mailed by Certified Mail."[6] (Pelphrey Dep., Ex. 11 at ¶ 13.) Critically, there is no general stand-alone notice provision applying to all notices provided for in the Agreement. To the contrary, Daily Services's use of the phrase "such notice" in the sentence immediately following the sentence relating to the "general termination provision" clearly reflects an intention that notice provided pursuant to this provision, alone, will "be deemed given when mailed by Certified Mail."

{¶ 69} A plain reading of the February 2018 Agreement shows the specified termination provisions outlined in Sections 13(a) and 13(b) relate to the exclusivity provision. The first three sentences of Section 13 are nearly identical to the termination provision contained in the 2017 Service Agreement, which had no exclusivity clause. (*Compare* Pelphrey Dep., Ex. 11 at ¶ 13, *with* Pelphrey Dep., Ex. 10 at ¶ 13.) The last two sentences of Section 13 and its two subsections were added to the February 2018 Agreement, which contained, for the first time, an exclusivity clause.

{¶ 70} Of note, the two sentences preceding Section 13(a) and 13(b) have no relation to termination but instead pertain to exclusivity-related matters. They state as follows:

> [Transglobal] recognizes that [Daily Services] possess the knowledge and experience to uniformly procure and manage [Transglobal's] staffing needs. Therefore, [Transglobal] agrees not to contract with any [Daily Services] Vendor directly for the procurement or management of staffing services during the term of this agreement and for 1 year thereafter.

(Pelphrey Dep., Ex. 11 at ¶ 13.) No lead-in sentence or clause precedes the termination clause's newly added subsections to suggest any connection between the termination notice requirements for the specific and narrow circumstances described in these two subsections

[6] Of note, Transglobal notified Daily Services of its intention to terminate their business relationship via email on October 8, 2019. (*See* Pelphrey Dep., Ex. 16.) And, notwithstanding this provision, Daily Services agreed that such action constituted a termination of the parties' business relationship. (Dec. 16, 2020 Am. Compl. at ¶ 53-54.)

and the Certified Mail requirement for general termination notice as provided in the first three sentences of Section 13.

{¶ 71} Indeed, these two subsections do not contain any language suggesting the drafters intended to incorporate anything from the "general termination provision" into these subsections (e.g., "as described above"). To the contrary, by expressly stating the manner of notice in each subsection ("written notice") and omitting any reference to "Certified Mail," a plain and unambiguous reading of the provision suggests the drafters intended there to be a difference in the manner of notice that will suffice when Daily Services is either not meeting Transglobal's staffing requirements (Section 13(a)) or Transglobal decides to terminate the agreement before its March 31, 2018 expiration date (Section 13(b)).

{¶ 72} Further, Section 13(b)'s prefatory clause—"notwithstanding the above provisions"—clearly indicates that ***none*** of the previous provisions, including those about timing or the method of notice, apply if written notice of termination is given before March 31, 2018. We stress the importance of the term "notwithstanding." Ordinarily the use of a "notwithstanding" clause establishes that the next clause is to prevail over any contradictory clauses. *See, e.g., Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) ("[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section."); Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 126-28 (2012) ("[T]he catch[-]all notwithstanding is a fail-safe way of ensuring that the clause it introduces will absolutely, positively prevail.").

{¶ 73} Accordingly, we find that Section 13(b)'s "notwithstanding" clause plainly and clearly sets forth the parties' intent that the clause supersede any contradictory clause preceding it. Section 13(b) only requires "written notice" whereas the preceding general termination provision requires "written notice" "mailed by Certified Mail." We find these provisions contradict each other because the former creates an exception to the latter. Thus, the drafter's use of "notwithstanding" in Section 13(b) reflects an intention to override the general termination provision in certain circumstances.

{¶ 74} For these reasons, we find the trial court erred in holding that Transglobal was required to send its termination notice under Section 13(b) via Certified Mail.

b. Transglobal's March 2018 termination of the February 2018 Agreement under Section 13(b)

{¶ 75} In addition to arguing that Transglobal's March 28, 2018 email failed to terminate the February 2018 Agreement because it was not sent via Certified Mail, Daily Services also contends the email was too equivocal to communicate a termination. That argument is not well-taken.

{¶ 76} On March 27, 2018, Transglobal sent Daily Services an email expressing its concerns about the February 2018 Agreement and indicating it was considering terminating the agreement. (Alonso Dep., Ex. E.) The next day, Transglobal sent Daily Services an email stating it "would like to negotiate the terms" and did "not want the automatic renewal UNTIL this is discussed further." (Emphasis sic.) (Pelphrey Dep., Ex. 5.) Transglobal also conveyed a contingent cancellation: "[i]f no discussion takes place[,] then we will revert back to the old contract until something else is proposed." (Pelphrey Dep., Ex. 5.)

{¶ 77} Notably, this email was sent three days before Transglobal's immediate termination right expired on March 31, 2018, as set forth in Section 13(b) of the February 2018 Agreement. (Pelphrey Dep., Ex. 11 at ¶ 13(b).) Significantly, too, Mr. Alonso later acknowledged in his deposition testimony that Daily Services understood Mr. Pelphrey's March 28, 2018 email as indicating Transglobal's intent to terminate the February 2018 Agreement pursuant to Section 13(b) and return to the 2017 Agreement. (*See* Alonso Dep. at 84-87.) This acknowledgment thus belies Daily Services's contention on appeal that the email communication was equivocal. (*See, e.g.*, Brief of Appellee at 2, 17-18, 22-28.)

{¶ 78} Furthermore, Daily Services's argument that Transglobal's March 28, 2018 termination notice email was equivocal is undermined by the actions of its employees in response to it. Finding no ambiguity in this email, Daily Services had a conversation with Transglobal about its concerns that day. (Pelphrey Dep. at 63-88.) After negotiating different terms, Daily Services modified the contract and emailed it to Transglobal on March 28, 2018. (Pelphrey Dep., Ex. 7. *See* Pelphrey Dep. at 63-88, 128-32.) Daily Services wrote in that email: "Here is the contract renewal, expires May 30, 2018." (Pelphrey Dep., Ex. 7.) And, later that day, Transglobal signed that modified agreement and returned it to Daily Services. (Pelphrey Dep., Ex. H; Pelphrey Dep. at 134-43.) Further, on March 29,

2018, Transglobal emailed Daily Services stating, among other things, that "Julie [Mandusic] was able to push the revised contract through yesterday which [Transglobal] signed." (Pelphrey Dep., Ex. 14. *See also* Pelphrey Dep. at 135-43; Alonso Dep. at 113-20.)

{¶ 79} Having determined that termination under Section 13(b) of the February 2018 Agreement could be properly effectuated by any written correspondence to Daily Services sent on or prior to March 31, 2018, and rejecting Daily Services's contention that Transglobal's March 28, 2018 termination notice was equivocal, we therefore find the trial court erred, as a matter of law, in concluding that Transglobal's March 2018 written correspondence to Daily Services did not properly terminate the February 2018 Agreement.

c. Transglobal's April 2018 termination of the 2018 Agreement(s) under Section 13(a).

{¶ 80} Even assuming Transglobal's termination notice was not sufficiently clear in March 2018, there is no dispute that Transglobal's April 2018 written notice of termination, pursuant to Section 13(a) of the February 2018 Agreement or March 2018 Agreement (collectively, the "2018 Agreements") was clear and unequivocal.

{¶ 81} On April 24, 2018, Transglobal sent Ms. Mandusic an email stating the following: "Please note we would like to terminate the current contract terms with I-Force and return to our original contract. We still value the relationship between our companies. We would like to continue on as we have in the many years leading up to this point." (Pelphrey Dep., Ex. 8. *See also* Pelphrey Dep. at 88-100.)

{¶ 82} Attached to this email was a letter from Transglobal's attorney. (Pelphrey Dep., Ex. 8.) That letter, dated April 20, 2018, stated as follows:

> Please be advised this serves as Transglobal's ten (10) day written notice pursuant to paragraph thirteen (13), term "A". Transglobal hereby gives its ten (10) day written notice and it enforces its right to terminate this agreement as [Daily Services] has not met customer staffing requests. It's Transglobal[']s specific request that the Master Service Agreement granting exclusivity be terminated. Transglobal is still desirous of working with [Daily Services], but would like the Master Service Agreement of February 22, 2018 terminated within ten (10) days.

(Pelphrey Dep., Ex. 8.) This letter could be construed as referencing either the February 2018 Agreement or the March 2018 Agreement because both agreements state they were "made and entered into" on February 22, 2018. (Pelphrey Dep., Ex. 5; Pelphrey Dep., Ex. 12. *See also* Pelphrey Dep. at 95-96; Alonso Dep. at 88.) But, Mr. Pelphrey testified that, at the time this email and letter were sent, Transglobal believed the March 2018 Agreement governed the parties' relationship. (Pelphrey Dep. at 132.) He therefore believed Transglobal was terminating that agreement in April 2018. (*See* Pelphrey Dep. at 132.)

{¶ 83} In any event, even if Transglobal's March 2018 termination was equivocal ***and*** the March 2018 Agreement was not properly executed because Daily Services failed to sign it, Transglobal clearly expressed in April 2018 its intent to terminate an agreement with a "Section 13(a)" provision. Indeed, Transglobal's April 2018 correspondence to Daily Services stated its termination notice was being given pursuant to that section. (*See* Pelphrey Dep., Ex. 8.) Only the February 2018 and March 2018 Agreements contained a "Section 13(a)" provision. (*Compare* Pelphrey Dep., Ex. 11 and Pelphrey Dep., Ex. 12, *with* Pelphrey Dep., Ex. 9 and Pelphrey Dep., Ex. 10.) Thus, we find that Transglobal's April 2018 communication to Daily Services unequivocally expressed its intention to terminate both (or either) the February 2018 Agreement and the March 2018 Agreement.

{¶ 84} To argue otherwise, Daily Services generally takes issue with the fact that Transglobal's April 2018 termination email was only sent to Ms. Mandusic.[7] (Merit Brief of Appellee at 11-12.) It points out that Ms. Mandusic had been approved to move over to Transglobal's permanent payroll the day before the April 24, 2018 email was sent. (Merit Brief of Appellee at 11.) But, Daily Services fails to explain the significance of that point. It is undisputed that Ms. Mandusic was employed by Daily Services on and after April 24, 2018 and did not switch over to Transglobal's payroll until May 2018. (*See, e.g.*, Sept. 13, 2022 Tr. Vol. II at 259; Sept. 12, 2022 Tr. Vol. I at 215.) And, Daily Services concedes it promptly received Transglobal's April 2018 written notice of termination. (*See, e.g.*, Am. Compl. at ¶ 38; Alonso Dep. at 100-05.)

[7] At the bench trial, Transglobal's president, Mark Schroeder, testified that the letter written by Transglobal's attorney was also separately mailed to iforce (i.e., Daily Services) and Surge. (Sept. 12, 2022 Tr. Vol. I at 216-17.)

{¶ 85} Additionally, nothing in Section 13(a) of the 2018 Agreements specified the person(s) to whom Transglobal was required to tender its written notice in order for it to be proper under this provision. Section 13(a) only states the written notice must be given, but does not designate any specific recipient for that notice. Thus, under the plain text of this provision, Transglobal's tendering of its written notice to Ms. Mandusic clearly complied with the plain language of Section 13(a). Moreover, the record indicates Ms. Mandusic was an appropriate and obvious recipient of such notice because she received and responded to Transglobal's March 2018 termination email on behalf of Daily Services the month before. (*See, e.g.*, Pelphrey Dep., Ex. 5; Pelphrey Dep., Ex. 7. *See also* Pelphrey Dep. at 73-75, 83-90.)

{¶ 86} For these same reasons, we also reject Daily Services's contention that, to properly terminate the 2018 Agreements under Section 13(a), Transglobal had an affirmative obligation to prove Daily Services was not meeting its staffing requirements. (*See* Merit Brief of Appellee at 28-29.) Nothing in Section 13(a) imposes such obligation. Rather, that section merely states that Transglobal had the right to terminate the Agreement upon ten days' written notice "if [Daily Services] has not met [Transglobal's] staffing requirements." (Pelphrey Dep., Ex. 11 at ¶ 13(a); Pelphrey Dep., Ex. 12.) And Transglobal stated this as the precise reason for terminating the 2018 Agreements in its April 2018 correspondence to Daily Services. (*See* Pelphrey Dep., Ex. 8.) Moreover, because Daily Services drafted these contracts, we construe any ambiguities in Section 13(a) against it and find that Transglobal had no obligation to "show cause" for termination under this provision. Even if it did, we find the record supports Transglobal's claim that its staffing needs were not being met by Daily Services. (*See generally* Pelphrey Dep. at 63-143; Pelphrey Dep., Ex. 13; Pelphrey Dep., Ex. 5; Pelphrey Dep., Ex. 14; Alonso Dep. at 113-20.)

{¶ 87} Because it is undisputed that Daily Services received Transglobal's written notice of termination in April 2018, and having already found that Section 13(a) of the 2018 Agreements did not require notice of termination be sent via Certified Mail, we find Transglobal's April 2018 email and letter to Daily Services unequivocally and properly terminated the 2018 Agreements in accordance with the plain and unambiguous language of Section 13(a).

{¶ 88} Moreover, if, as described above, the March 2018 Agreement governed the parties' relationship after March 28, 2018, then Transglobal also clearly complied with Section 13(b)'s provision conferring upon Transglobal the "right to terminate this Agreement on [or before] May 30, 2018, with written notice to [Daily Services]." (Pelphrey Dep., Ex. 12 at ¶ 13(b).) This is because Transglobal sent written notice of its unequivocal intention to terminate the Agreement to Daily Services via email on April 24, 2018. (Pelphrey Dep., Ex. 8. *See* Pelphrey Dep., Ex. 8.)

4. A material question remains as to whether the parties' business relationship was governed by a contractual agreement after March (or April) 2018.

{¶ 89} Although both parties acknowledge Daily Services charged Transglobal the standard rate for the month-to-month services provided after March 28, 2018, the parties have embraced different theories on the applicability of whether any—and if so, which—agreement governed the parties' business transactions after March 28, 2018 (or, after April 24, 2018) up until their relationship undoubtedly ended in October 2019.

{¶ 90} As a matter of law, we find the 2017 Agreement terminated when both parties signed the February 2018 Agreement. The "entirety clause" of the February 2018 Agreement states:

> This document shall be the entire understanding and agreement between the parties with respect to the subject matter set forth herein, and all prior agreements, understandings, covenants, promises, warranties, and representations, oral or written, express or implied, not incorporated herein are superseded hereby. This Agreement may not be amended, modified, altered, supplemented[,] or changed in any way except in writing, signed by the parties and attached hereto as an amendment or attachment when relating to the job duties and costs for services.

(Pelphrey Dep., Ex. 11 at ¶ 14.)

{¶ 91} When Transglobal emailed Daily Services on March 28, 2018 to terminate the February 2018 Agreement, Transglobal offered to either "revert back to the old contract" or to negotiate a new contract. (Pelphrey Dep., Ex. 5.) Of note, Transglobal did not specify whether it was referring to the 2011 Agreement or the 2017 Agreement.

{¶ 92} In any event, assuming Transglobal's March 28, 2018 email constituted an offer to revert back to the 2017 Agreement, we find that offer was, as a matter of law, rejected by Daily Services's email response. Instead of agreeing to revert back to the 2017 Agreement, Daily Services sent a new proposed contract. (Pelphrey Dep., Ex. 7. *See also* Pelphrey Dep. at 66-88.) In accordance with general contract principles, "[a]n acceptance of an offer forms a binding contract only if it corresponds to the offer in every respect." *Collopy v. DeWitt*, 10th Dist. No. 97APE12-1615, 1998 Ohio App. LEXIS 3621, *5 (Aug. 4, 1998). "If the offeror must assent to additional terms, as in the instant case, the reply is not acceptance but a rejection and a counteroffer." *Id.*, citing *Foster v. Ohio State Univ.*, 41 Ohio App.3d 86, 88 (10th Dist.1987). From the record, it is evident that Daily Services's March 28, 2018 email response to Transglobal constituted a counteroffer.

{¶ 93} Transglobal accepted that counteroffer when its representative signed the new contract (the March 2018 Agreement) and sent that signed contract back to Daily Services. (Pelphrey Dep., Ex. 12. *See also* Pelphrey Dep. at 66-88.) But, again, the record does not contain a version of the March 2018 Agreement signed by Daily Services.

{¶ 94} While it is true that Transglobal emailed Daily Services in April 2018 again offering to "revert back" to the parties' "original contract," and assuming Transglobal was referring to the 2017 Agreement in that email, the record before us does not clearly establish Daily Services's assent to those terms. To the contrary, Daily Services has maintained throughout the pendency of this case that the February 2018 Agreement controls. And, of note, when it filed its initial complaint, Daily Services made no reference to the 2017 Agreement. (*See* Oct. 13, 2020 Compl.)

{¶ 95} Because the trial court first found the February 2018 Agreement was the "enforceable contract between [the parties]" and that Transglobal's 2018 emails did not properly terminate it, the trial court only substantively addressed Daily Services's breach of contract claim predicated on the February 2018 Agreement. As a result, the trial court did not consider whether the parties' business transactions after March/April 2018 were governed by the terms of any other agreements and, if not, whether Daily Services was entitled to equitable relief when it ruled on the parties' summary judgment motions. Based on our review of the record, and in light of our determinations above, we thus find questions

of fact remain as to whether the parties reached a meeting of the minds concerning the bounds of their business relationship after March 28, 2018 and then after April 24, 2018.

{¶ 96} According to Mr. Pelphrey, Transglobal believed the March 2018 Agreement governed until Transglobal sent written termination notice to Daily Services on April 24, 2018.[8] (*See* Pelphrey Dep. at 132; Pelphrey Dep., Ex. 8.) The March 2018 Agreement was nearly identical to the February 2018 Agreement (which Daily Services did sign), except in a few respects. The differences in the March 2018 Agreement (which Daily Services does not appear to have signed) reflected the parties' newly agreed-upon terms following their March 28, 2018 discussion. (*See, e.g.*, Pelphrey Dep.at 68-73.) Transglobal's signature on, and return of, the "execution ready" copy of the March 2018 Agreement, which was drafted and offered by Daily Services, ***could*** constitute a "meeting of the minds" as to all the essential terms of that agreement. *See, e.g.*, *Kostelnik*, 2002-Ohio-2985 at ¶ 15-17. We note, however, that neither party claimed in the trial court or in their appellate briefs that the March 2018 Agreement was enforceable as an express contract, implied contract, or otherwise. Although appellate review of questions of law regarding the existence of a contract is de novo, *Phu Ta*, 2016-Ohio-4944 at ¶ 18, such arguments have been forfeited by both parties, at least for purposes of this appeal. *See, e.g.*, *Nexus Communications*, 2011-Ohio-1759 at ¶ 41, citing *Maust v. Meyers Prods., Inc.*, 64 Ohio App.3d 310, 313 (1989) (concluding the failure to raise an issue in the trial court waives a litigant's right to raise that issue on appeal).

{¶ 97} In any event, Mr. Pelphrey testified in his deposition that, in April 2018, Transglobal believed it was terminating the March 2018 Agreement and the parties' business relationship was thereafter governed by the terms of the 2017 Agreement. (*See, e.g.*, Pelphrey Dep. at 88-100, 132, 148-49, 167. *See also* Pelphrey Dep., Ex. 8.) After Transglobal officially terminated its relationship with Daily Services on October 8, 2019,

[8] Before addressing the efficacy of Transglobal's 2018 email terminations, the trial court made the sweeping determination that because the March 2018 Agreement did not eliminate the exclusivity clause Transglobal "did not want," there was "no evidence the parties reached a meeting of the minds" as to the enforceability of that contract. (Apr. 11, 2022 Entry and Order at 8-9.) But this rudimentary analysis ignores compromises the parties made on other provisions, which are reflected in the March 2018 Agreement and supported by the record. It also ignores evidence in the record supporting the opposite conclusion—that the parties intended the March 2018 Agreement to govern their relationship after the March 28, 2018 termination email.

however, Transglobal sent Daily Services a copy of the March 2018 Agreement and suggested it controlled. (*See, e.g.*, Pelphrey Dep., Ex. 20. *See also* Pelphrey Dep. at 172-84.) Furthermore, Mr. Pelphrey testified that after learning on October 22, 2019 that Daily Services had not signed the March 2018 Agreement (Pelphrey Dep., Ex. 21), Transglobal then believed there was no written agreement in place between the parties after March 28, 2018, and certainly not after April 24, 2018. (*See* Pelphrey Dep. at 70, 88-92, 99-100, 147, 178-84. *See also* Dec. 16, 2020 Am. Compl., Ex. J.) Thus, when Daily Services invoiced Transglobal in April 2020 for the conversion fee provided for in the February 2018 Agreement, Transglobal disclaimed any obligation to pay it. (*See, e.g.*, Pelphrey Dep. at 219-23; Am. Compl., Ex. J.) Transglobal has also explicitly disclaimed any obligation to pay fees associated with its purported breach of the 2018 Agreement's exclusivity clause contained in the 2018 Agreement and other damages Daily Services claims it is owed under the terms of the 2017 and/or 2018 Agreements. (Am. Compl., Ex. J.)

{¶ 98} The record is similarly inconsistent in establishing Daily Services's belief about the terms that controlled the parties' relationship after March/April 2018. Daily Services has asserted the March 2018 Agreement was an invalid novation because Daily Services never signed it. (*See, e.g.*, Pelphrey Dep., Ex. 21; Am. Compl. at ¶ 34-35.) The record suggests Daily Services believed the February 2018 Agreement governed the parties' relationship in October 2019, which it maintains today. (*See, e.g.*, Alonso Dep. at 53-54; Pelphrey Dep., Ex. 20; Pelphrey Dep. at 172-84. *But see* Alonso Dep. at 83-86.) But, in his 2021 deposition testimony, Mr. Alonso stated that Daily Services believed the terms of the 2017 Agreement controlled the parties' relationship after March 28, 2018. (*See* Alonso Dep. at 83-87.)

{¶ 99} Indeed, on appeal and in the trial court below, Daily Services argues, in the alternative, that if the February 2018 Agreement was properly terminated, the parties impliedly contracted for the terms of the 2017 Agreement to govern their relationship after March/April 2018. (*See, e.g.*, Merit Brief of Appellee at ix, xi, 3, 38-41, 43; Jan. 18, 2022 Memo Contra and Cross-Mot. for Full Summ. Jgmt. at 11-13.) Of course, implied contracts require a meeting of the minds and mutual assent. *See, e.g.*, *Nexus Communications*, 2011-Ohio-1759 at ¶ 34, 39. But the trial court did not make any factual findings on the existence

of an implied contract between the parties after March/April 2018 because it found the February 2018 Agreement governed at all relevant times.

{¶ 100} It would be inappropriate for us to consider and rule upon this matter for the first time on appeal. Accordingly, we decline to do so. *See State v. Atchley*, 10th Dist. No. 07AP-412, 2007-Ohio-7009, ¶ 9 ("To address [these] argument[s] for the first time at this stage of the proceedings would be for this court to act as the trial court rather than as an appellate court."). Our role is to conduct a de novo review of the trial court's decision. *See, e.g.*, *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 360 (1992); *O'Brien v. Ohio State Univ.*, 10th Dist. No. 06AP-946, 2007-Ohio-4833, ¶ 10, citing *Hardy v. Fell*, 8th Dist. No. 88063, 2007-Ohio-1287, ¶ 29 ("This court * * * is not a trial court, and we cannot be the de novo trier of fact.").

{¶ 101} Accordingly, a remand of this matter to the trial court is necessary to evaluate Daily Services's alternative claims.

5. Disposition

{¶ 102} Based on the foregoing, we find the trial court erred, as a matter of law, in interpreting Sections 13(a) and 13(b) of the February 2018 Agreement as requiring Transglobal to send written notice of termination pursuant to these provisions to Daily Services by Certified Mail. We therefore find the trial court erred in concluding that Transglobal's March 2018 and/or April 2018 email correspondence to Daily Services did not properly terminate the February 2018 Agreement because it was not sent via Certified Mail. This determination necessitates that both the April 11, 2022 and the October 17, 2022 judgment entries be reversed.

{¶ 103} Because the trial court did not consider the alternative grounds for (and against) summary judgment asserted by the parties—and because we decline to do so in the first instance—we must remand this matter to the trial court for further review and proceedings consistent with this decision. Should the trial court determine on remand that the parties had no meeting of the minds—and therefore no express or implied agreement governed their relationship at any point after March/April 2018—then Daily Services's equitable claims must be considered and resolved.

{¶ 104} Accordingly, we sustain, in part, and overrule, in part, Transglobal's first and second assignments of error, as well as Daily Services's first and second contingent assignments of error.

a. Assignments of Error Related to the October 17, 2022 Judgment Entry.

{¶ 105} All of the remaining assignments of error pertain to the trial court's October 17, 2022 judgment entry granting, in part, and denying, in part, Daily Services's request for damages, attorney fees, and costs as authorized by the February 2018 Agreement.

{¶ 106} As to Transglobal's breach of the conversion clause, the trial court ordered Transglobal to pay Daily Services a reduced conversion fee in accordance with the conversion fee structure in Attachment 1, Section VI of the February 2018 Agreement. In its third assignment of error, Transglobal argues the damages awarded under this provision were improper. Daily Services contends in its first cross-assignment of error that the trial court erred in reducing the conversion fee.

{¶ 107} Although the trial court found Transglobal breached the exclusivity clause of the February 2018 Agreement (Sections 13 and 20), it declined to award any damages to Daily Services in connection with that breach. Daily Services attributes error to this component of the trial court's October 17, 2022 decision in its second cross-assignment of error.

{¶ 108} The trial court also declined to award Daily Services's requested attorney fees. In its third cross-assignment of error, Daily Services ascribes error to this portion of the trial court's decision.

{¶ 109} Our resolution of Transglobal's first and second assignments of error and Daily Services's first and second contingent assignments of error, however, controls our disposition of these remaining assignments of error. Having found the February 2018 Agreement was properly terminated, we conclude the entire October 17, 2022 judgment entry must be reversed because it was premised on the trial court's erroneous determination that the February 2018 Agreement governed the parties' relationship from

March/April 2018 until October 2019. This resolution thus renders moot Transglobal's third assignment of error and Daily Services's cross-appeal in its entirety.

IV. CONCLUSION

{¶ 110} Having sustained, in part, Transglobal's first and second assignments of error, as well as Daily Services's two contingent assignments of error, we reverse the trial court's April 11, 2022 decision and October 17, 2022 judgment entry and remand this matter to the trial court for further proceedings consistent with this decision.

Judgments reversed;
cause remanded with instructions;
cross-appeal rendered moot.

LUPER SCHUSTER and LELAND, JJ., concur.