IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

WILLIAM HOWARD; JASON DUEMLER; NICOLE DUEMLER; ANN DUEMLER; MICHAEL LUTZ; SHERRI HOWELL; ROCHELLE JAMMER; and MARK KOHLHORST, individually and on behalf of all others similarly situated, Plaintiffs, v. UBP BAY CITY, LLC d/b/a BAY CITY BRIDGE PARTNERS and CITY OF BAY CITY, Defendants.	Case No. 1:25-cv-10926-TLL-PTM Hon. Thomas L. Ludington **DEFENDANT UBP BAY CITY, LLC's MOTION TO DISMISS**

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Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant UBP Bay City, LLC, d/b/a Bay City Bridge Partners ("Defendant" or "UBP"), through its undersigned counsel, respectfully moves to dismiss Plaintiffs' Complaint (the "Complaint" or "Compl.") in its entirety because it fails to state a claim upon which relief can be granted.

On May 7, 2025, pursuant to Local Civil Rule 7.1(a), UBP's counsel sent a detailed email to counsel for Plaintiffs in which UBP's counsel explained the nature of the motion and the legal basis as to each individual argument and requested relief but did not obtain concurrence in the relief sought.

WHEREFORE, for these reasons and those stated more fully in the accompanying brief, Defendant respectfully requests that the Court grant its Motion to Dismiss and dismiss the Complaint in its entirety and award any other relief to which UBP may be entitled, and the Court deems appropriate.

Dated: May 7, 2025

Respectfully submitted,

/s/ Benjamin W. Jeffers
Benjamin W. Jeffers

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WILLIAM HOWARD; JASON DUEMLER; NICOLE DUEMLER; ANN DUEMLER; MICHAEL LUTZ; SHERRI HOWELL; ROCHELLE JAMMER; and MARK KOHLHORST, individually and on behalf of all others similarly situated, Plaintiffs, v. UBP BAY CITY, LLC d/b/a BAY CITY BRIDGE PARTNERS and CITY OF BAY CITY, Defendants.	Case No. 1:25-cv-10926-TLL-PTM Hon. Thomas L. Ludington **BRIEF IN SUPPORT OF DEFENDANT UBP BAY CITY, LLC's MOTION TO DISMISS**

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STATEMENT OF ISSUES PRESENTED

1. Should this Court dismiss Plaintiffs' claim for Violation of Public Trust Principles (Count I) against UBP because the Michigan public trust doctrine does not provide Plaintiffs with a private right to action against contracting parties?

Defendant UBP says: Yes.

2. Should this Court dismiss Plaintiffs' claim for Third-Party Beneficiary Claim – Breach of Contract (Count II) against UBP because Plaintiffs are not the intended third-party beneficiaries of any contract between UBP and the City of Bay City?

Defendant UBP says: Yes.

3. Should this Court dismiss Plaintiffs' claim for Breach of Contract (Count III) against UBP because Plaintiffs lack standing to enforce any contract between UBP and the City of Bay City as a non-party, and they have not plead any damages that were proximately caused by any breach?

Defendant UBP says: Yes.

4. Should this Court dismiss Plaintiffs' claim for Breach of Implied Contract (Count IV) against UBP because Plaintiffs fail to plead any facts that support the existence of any implied contract and any implied contract would be barred by the statute of frauds?

Defendant UBP says: Yes.

5. Should this Court dismiss Plaintiffs' Unjust Enrichment claim (Count V) against UBP because it is barred by the existence of a contract governing the subject matter of the claim and by the availability of legal remedies?

Defendant UBP says: Yes.

6. Should this Court dismiss Plaintiffs' Violation of Michigan Consumer Protection Act (MCPA) claim (Count VI) against UBP because UBP's operation of the Independence Bridge in Bay City, Michigan is authorized by state and federal law, and the Complaint contains no misrepresentations or omissions allegedly committed by UBP that form that basis of a statutory fraud claim?

Defendant UBP says: Yes.

7. Should this Court dismiss Plaintiffs' Injunctive Relief claim (Count VII) against UBP because injunctive relief is a remedy, not an independent cause of action?

Defendant UBP says: Yes.

STATEMENT OF CONTROLLING AUTHORITY

Pursuant to Local Rule 7.1(d)(2), Defendant UBP states that the following authorities are the controlling or most appropriate authorities for the relief requested by this Motion:

- Federal Rule of Civil Procedure 12(b)(6)
- *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)
- *Glass v. Goeckel*, 473 Mich. 667, 703 N.W.2d 58 (2005)
- *Schmalfeldt v. N. Pointe Ins. Co.*, 469 Mich. 422, 670 N.W.2d 651 (2003)
- *Koenig v. City of S. Haven*, 460 Mich. 667, 597 N.W.2d 99 (1999)
- *Greenlees v. Owen Ames Kimball Co.*, 340 Mich. 670, 66 N.W.2d 227 (1954)
- *Alan Custom Homes, Inc. v. Krol*, 256 Mich.App. 505, 667 N.W.2d 379 (2003)
- *AFT Michigan v. Michigan*, 303 Mich.App. 651, 846 N.W.2d 583 (2014)
- *Lochridge v. Quality Temp. Servs., Inc.*, 2023 WL 4303577 (E.D. Mich. June 30, 2023)
- *Convergent Grp. Corp. v. Cnty. of Kent*, 266 F. Supp. 2d 647 (W.D. Mich. 2003)
- *A & M Supply Co. v. Microsoft Corp.*, 2008 WL 540883 (Mich. Ct. App. Feb. 28, 2008)
- *Sanderson v. HCA-The Healthcare Co*., 447 F.3d 873 (6th Cir. 2006)
- *Matanky v. Gen. Motors LLC*, 370 F. Supp. 3d 772 (E.D. Mich. 2019)
- *Montgomery v. Kraft Foods Glob*., *Inc.*, 2012 WL 6084167 (W.D. Mich. Dec. 6, 2012), *aff'd*, 822 F.3d 304 (6th Cir. 2016)
- *Riley-Jackson v. Ocwen Loan Servicing, LLC*, 2013 WL 5676827 (E.D. Mich. Oct. 18, 2013)

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PRELIMINARY STATEMENT

Federal courts are tasked with deciding real cases and controversies—not policy disputes or media spectacles dressed up as legal claims. Plaintiffs are in court not because they have enforceable rights against UBP Bay City, LLC d/b/a Bay City Bridge Partners ("UBP"), but because they disagree with Bay City, Michigan's decision about a bridge located in the City. That bridge, the Independence Bridge (the "Bridge"), is a critical piece of local infrastructure that facilitates economic activity and connects the eastern and western halves of the City. In recent years, the Bridge began to deteriorate due to lack of upkeep. This was compounded by years of budget cuts and underfunding, which further drove it into disrepair. By 2020, the City, as owner and operator of the Bridge, could neither afford to maintain it nor ensure safe passage on it. Without assistance from an outside partner, the City would be unable to save the Bridge. It found one in UBP.

In 2020, UBP and the City entered into a Concession and Lease Agreement (the "Agreement"), pursuant to which UBP would undertake substantial rehabilitation work on the Bridge over the course of several years. Because the City could not afford to pay UBP for the work, both parties agreed to an alternative funding mechanism—upon UBP substantially completing the Bridge rehabilitation, it would receive the right to collect tolls from vehicles using the Bridge for a period

of 75 years. Consistent with its rights under the Agreement, upon the Bridge being substantially complete by August 2024, UBP finally began tolling in January 2025.

Not everyone was happy about this. Plaintiffs, a group of motorists who paid a toll or purchased a monthly pass and crossed the Bridge between January 1, 2025 and March 1, 2025, claim that it was unlawful for UBP to begin tolling in January 2025. Plaintiffs argue that UBP should not have charged any tolls (in other words, free crossings should have continued) if any sporadic closures of the Bridge occurred for even minor follow-up work, although the Agreement permitted UBP to begin tolling once the work was substantially complete. Plaintiffs are oddly attempting to assert rights under the Agreement—a contract that Plaintiffs did not sign, are not parties to, and under which they have no standing to sue.

Lacking any direct contractual interest, Plaintiffs simply try to invent one. They claim a slogan that UBP uses to advertise its monthly toll passes —"Save Time, Save Money"—constitutes a binding offer, that Plaintiffs accepted the offer by purchasing monthly passes, and that this somehow gives them standing to enforce a different agreement between UBP and the City. That is not contract law—it is legal fiction.

Plaintiffs' Complaint asserts seven causes of action—none of which withstand scrutiny. Each claim fails as a matter of law for reasons that include the following:

- **The Violation of Public Trust Principles claim** (Count I) fails because the doctrine does not provide private plaintiffs with a right to sue private contracting parties like UBP. It is a doctrine grounded in the State of Michigan's obligation to protect natural resources—not a private enforcement mechanism.

- **The Third-Party Beneficiary and Breach of Contract claims** (Counts II and III) fail because Plaintiffs are not signatories or intended third-party beneficiaries of the Agreement and fail to allege that any alleged damages were the proximate result of any supposed breach.

- **The Implied Contract claim** (Count IV) fails because Plaintiffs fail to plead any facts to support the existence of any implied contract, because the alleged implied contract is barred by the statute of frauds, and Plaintiffs fail to allege any damages that were the proximate result of any breach.

- **The Unjust Enrichment claim** (Count V) is barred by, among other reasons, the existence of a valid contract governing the subject matter and by the availability of legal remedies.

- **The MCPA claim** (Count VI) fails because UBP's operation of the Bridge is authorized by state and federal law, and the Complaint contains no misrepresentations or omissions allegedly committed by UBP that form the basis of a statutory fraud claim.

- **The Injunctive Relief claim** (Count VII) fails, for among other reasons, because injunctive relief is a remedy, not an independent cause of action.

* * *

Plaintiffs lack standing, misstate the law, and are challenged in understanding and interpreting a straightforward Agreement by asserting claims against UBP without any viable legal foundation. Plaintiffs' Complaint should be dismissed in its entirety, with prejudice.

RELEVANT FACTUAL BACKGROUND

The Bridge is a bascule bridge (commonly known as a "drawbridge") built in 1976. *See generally* Compl. ¶¶ 18-19, 85. It was operated by the City, but due to a lack of municipal funding in recent years, the City "determined it could no longer sustain the cost of maintaining and operating [the Bridge] while also providing free access to non-residents who used [it] regularly." *Id*. ¶ 25. Without routine repairs or maintenance, the Bridge quickly fell into a state of disrepair. *Id*. ¶¶ 23, 24. To save the Bridge, the City would eventually turn to UBP, an affiliate of the United Bridge Partners corporate family, which designs, builds, owns, and operates transportation infrastructure across the United States.

On May 1, 2023, UBP entered into the Agreement. Under the Agreement's terms, UBP undertook responsibility for the "modernization, upgrade and rehabilitation" of the Bridge, as well as its maintenance and operation for the next

75 years. Compl., Ex. 1 at 1. UBP would eventually spend over $100 million between 2020 and 2024 to repair, rehabilitate, and modernize the Bridge—none of which was paid for by the City. *Id*. at 1. Indeed, the City desperately wanted to keep the Bridge open because—but for UBP's investment, design, construction, and operation of the bridges—the Bridge would have been shut down permanently for safety reasons, as it was in serious disrepair, leaving city residents and the surrounding community without an option to use it. As consideration for its modernization work, UBP was entitled to collect tolls from drivers using the Bridge, subject to certain restrictions. *See id*. § 18. For example, UBP and the City agreed no tolls would be collected until the Bridge had been "open and operational for use by the public for highway purposes, 24 hours a day, in the ordinary course for thirty consecutive (30) days" (defined as "Completion"), and that no tolls would be collected from residents of the City in non-commercial vehicles for five years following Completion. *See id*. §§ 16, 18; *see also id*. at Exhibit C.

On January 1, 2025, with Completion having occurred the previous year, UBP began to collect tolls from non-City residents for use of the Bridge. *See* Compl. ¶ 76. Plaintiffs filed this action against UBP and the City just two months later. Plaintiffs were allegedly charged tolls for using the Bridge on or after January 1, 2025 and seek to represent a class of "all non-Bay City residents and drivers who have crossed the Independence Bridge and paid any toll or purchased an unlimited

pass [for use of the bridge]." *See id*. ¶¶ 7-13. Plaintiffs allege seven causes of action against UBP, seeking extensive monetary and injunctive relief. *See id*. ¶¶ 112, 122, 129-130, 143, 153, 160, 165.

LEGAL STANDARD

When considering a motion under Federal Rule of Civil Procedure 12(b)(6), the Court construes well-pleaded factual allegations in the light most favorable to the plaintiff, *Evans-Marshall v. Board of Education*, 428 F.3d 223, 228 (6th Cir. 2005), but "need not accept as true legal conclusions or unwarranted factual inferences," *Gregory v. Shelby County*, 220 F.3d 433, 446 (6th Cir. 2000). Indeed, "naked assertions devoid of further factual enhancement" and "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" are insufficient to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted).

A federal court sitting in diversity applies the choice-of-law rules of the forum state. *See Montgomery v. Wyeth*, 580 F.3d 455, 459 (6th Cir. 2009). "Because suit was filed in Michigan, Michigan law presumptively applies." *Allstate Imaging, Inc. v. First Indep. Bank*, 2010 WL 1524058, at *1 (E.D. Mich. Apr. 15, 2010). In actions based in contract, Michigan courts apply §§187–88 of the Restatement (Second) of Conflict of Laws. *Chrysler Corp. v. Skyline Indus. Servs., Inc*., 448 Mich. 113, 528 N.W.2d 698 (1995). Where the parties have not agreed upon the applicable law,

§188 requires courts to apply "the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties." Restatement (Second) of Conflict of Laws §188(1). Here, that is Michigan.

ARGUMENT

Each of Plaintiffs' claims suffers from threshold pleading deficiencies that warrant dismissal as a matter of law. Because the allegations in the Complaint make plain that these defects cannot be cured, all of Plaintiffs' claims should be dismissed in their entirety with prejudice. *See, e.g., SFS Check, LLC v. First Bank of Del.*, 774 F.3d 351, 355 (6th Cir. 2014) ("[C]ourts need not give leave to amend when doing so would be futile").

I. Plaintiffs Cannot State a Private Right of Action Under the Public Trust Doctrine.

In Count I, Plaintiffs claim that UBP violated Michigan's public trust doctrine, MCL § 324.32502, which generally provides that certain natural resources—*i.e.*, the Great Lakes and their adjacent lands—must be held in trust by the State for the benefit of its citizens. The doctrine requires the State of Michigan—***not private plaintiffs***—to protect and preserve the lands along the shores of the Great Lakes for the use of future generations for the benefit of the public. *See Glass v. Goeckel*, 473 Mich. 667, 674-79, 703 N.W.2d 58, 62-65 (2005) ("under longstanding principles of Michigan's common law, the state, as sovereign, has an obligation to protect and preserve" and "cannot relinquish this duty to preserve public rights."). Rights

protected by the doctrine include fishing, swimming, boating, bathing, beach walking, and the like. *See* MCL § 324.32502.

Plaintiffs fail to identify or allege any facts showing any actions by UBP that violates Michigan's public trust doctrine. But the Court need not even reach that issue, because Plaintiffs cannot bring a private right of action under the public trust doctrine. *See Glass*, 473 Mich. at 674-79, 703 N.W.2d at 62-65; *Nedtweg v. Wallace*, 237 Mich 14, 17, 208 N.W. 51, 53 (1926); *Bott v. Comm'n of Nat. Res.*, 415 Mich. 45 (1982). The State of Michigan is the sole party able to seek non-individualized, or public, remedies for alleged harms. *See id*. Therefore, Plaintiffs' claim for violation of the public trust doctrine fails as a matter of law.

II. Plaintiffs Are Not Third-Party Beneficiaries of the Agreement and Have No Standing to Enforce Its Terms.

In Count II, Plaintiffs assert a claim against UBP for breach of the Agreement with the City and allege that, despite being non-parties to the Agreement, Plaintiffs can enforce its terms because they are its third-party beneficiaries. *See* Compl. ¶ 114 ("Plaintiffs, including the Proposed Class, are third-party beneficiaries of the contractual agreement between the City of Bay City. . ."). Under Michigan law, allowing third parties to enforce a purported contract is the exception, not the rule. "[O]nly intended, not incidental, third-party beneficiaries may sue for breach of a contractual promise in their favor." *Schmalfeldt v. N. Pointe Ins. Co.*, 469 Mich. 422, 427-28, 670 N.W.2d 651, 654 (2003).

Plaintiffs' conclusory allegations do not establish third-party beneficiary status and cannot sustain their claim because they provide no indication that Plaintiffs were ***intended*** third-party beneficiaries of the Agreement between UBP and the City. Although Plaintiffs allege, in conclusory fashion, that the Agreement "was expressly entered into for the benefit of the public, including residents, commuters, and visitors who rely on the Independence Bridge for travel, commerce, commuting, and other activities," Compl. ¶ 115, Plaintiffs do not (and cannot) identify any specific language in the Agreement itself indicating that Plaintiffs were intended third-party beneficiaries.

The Agreement primarily benefits the contracting parties (the City and UBP), and Plaintiffs are (at very most) ***incidental*** beneficiaries lacking any right to sue for contract benefits. *See Schmalfeldt*, 469 Mich. at 429, 670 N.W.2d at 655. To determine whether contracting parties intended to benefit a non-signatory third party, the parties must actually and clearly express "that a promisor has undertaken a promise 'directly' to or for that person." *Id*. at 654 (citing Mich. Comp. Laws § 600.1405). Importantly, "the plain language of this statute reflects that not every person incidentally benefitted by a contractual promise has a right to sue for breach of that promise. . ." *Brunsell v. City of Zeeland*, 467 Mich. 293, 296, 651 N.W.2d 388, 390 (2002). By using the modifier "directly," the Michigan Legislature intended "to assure that contracting parties are clearly aware that the scope of their

contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract." *Koenig v. City of S. Haven*, 460 Mich. 667, 676, 597 N.W.2d 99, 104 (1999). Because Plaintiffs do not and cannot plausibly allege that the Agreement was executed "directly" for or on their behalf, their third-party beneficiary claim fails as a matter of law.

III. Plaintiffs Lack Standing to Enforce the Agreement as a Non-Party, and Their Attempt to Manufacture a Separate "Contract" Based on a Marketing Slogan Fails as Matter of Law.

In Count III, Plaintiffs assert a contract claim against UBP, claiming that it breached Sections 16 and 18 of the Agreement by prematurely collecting tolls. *See* Compl. ¶ 126. But, as Plaintiffs themselves concede, they are not parties to the Agreement (*see id*. ¶¶ 27, 34, 73), and thus have no right or standing to enforce the terms of the Agreement against UBP. *See Greenlees v. Owen Ames Kimball Co.*, 340 Mich. 670, 674, 66 N.W.2d 227, 229 (1954) (non-signatory seeking to enforce terms of agreement must show privity or third-party beneficiary status to maintain a breach claim); *Police & Fire Ret. Sys. of the City of Detroit v. Watkins*, 2009 WL 3210922, at *5 (E.D. Mich. Sept. 30, 2009) (dismissing contract claim where the defendant/counter-plaintiff was not a named party to agreement and there was no evidence that it was ever intended to be a party to the agreement).

Recognizing the futility in trying to enforce an agreement as a non-party, Plaintiffs pivot to the far-fetched theory that UBP's promotional slogan—"Save

Time, Save Money"—used in advertising its monthly toll pass, constituted a binding contractual offer that Plaintiffs allegedly "accepted" by purchasing the passes. From there, Plaintiffs take another giant leap by theorizing that the "Save Time, Save Money" slogan, together with Plaintiffs' purchases of the passes, created an enforceable ***express*** contract,[1] and that this somehow gives Plaintiffs the legal footing to enforce the entirely separate Agreement between UBP and the City.

Plaintiffs' theory is legally untenable for at least three reasons. First, a marketing slogan is not a contractual offer. Courts consistently hold that general advertisements, proposals, or promotional language presented to the public are not offers that can be unilaterally accepted and made binding, but mere invitations to negotiate. *See* 1 E. Farnsworth, *Contracts*, § 310, p. 260-61, and n.30 (3d ed. 2004); Restatement (Second) of Contracts § 26 (explaining that advertising and solicitations are "not ordinarily intended or understood as offers"); *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116, 123 (S.D.N.Y. 1999) (holding that advertisements are not offers,

[1] While there is a Terms and Conditions agreement between UBP and Plaintiffs, which is publicly available online, this agreement is not the subject of this lawsuit, nor do Plaintiffs allege that this agreement forms the basis of any of their claims. https://baycitybridgepartners.com/storage/2025/01/BC-PASS_Ts-and-Cs_v3_01032025.pdf; *Ashland, Inc. v. Oppenheimer & Co.*, 648 F.3d 461, 467 (6th Cir. 2011) (on motion to dismiss, in addition to the allegations in the complaint, courts may consider other materials that are integral to the complaint, are public records, or are otherwise appropriate for the taking of judicial notice (citation omitted)). Rather, Plaintiffs admit that their claims are based solely upon the Agreement between UBP and the City of Bay City.

but "invitation[s] to [ ] make an offer"); *Eerdmans v. Maki*, 226 Mich. App. 360; 573 N.W.2d 329 (1997) (rejecting argument that advertisement constituted offer); *Cheydleur v. Hills*, 415 F. Supp. 451 (E.D. Mich. 1976) (same). There is no specificity, no essential terms, and no clear intent to be bound—only the sort of "puffery" that is common to commercial advertising.

Second, Plaintiffs cannot plead their way around this with mere legal conclusions. In their Complaint, Plaintiffs declare by fiat that a contract was formed in the manner described above. *See* Compl. ¶ 125 ("By virtue of this offer and Plaintiffs' acceptance, an express contract was formed between [UBP] and its customers"). But merely saying that an offer was made and accepted does not make it so. *See Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Plaintiffs have not alleged—and cannot allege—facts showing that UBP's advertisement was intended to form a contract or that it contained the requisite material terms to support one.

Third, even if a valid contract arose from UBP's promotional materials (which it did not), that would still get Plaintiffs nowhere. Any such contract would, at most, govern the terms of Plaintiffs' purported toll pass purchases—it would not magically confer standing on Plaintiffs to enforce the separate and unrelated Agreement between UBP and the City. This theory fails both logically and legally.

Additionally, even if these promotional materials were found to form a "contract," Plaintiffs fail to plead any cognizable damages or that any such damages were a proximate result of a breach of the purported contract. Plaintiffs must assert damages with "reasonable certainty and may recover only those damages that are the direct, natural, and proximate result of the breach." *Alan Custom Homes, Inc. v. Krol*, 256 Mich.App. 505, 512, 667 N.W.2d 379, 383 (2003).

In short, Plaintiffs cannot enter through the front door (as parties), the side door (as third-party beneficiaries), or the back door (through marketing puffery dressed up as contract law). Their theory is not a clever workaround—it is an outright circumvention of fundamental principles of contract formation.

IV. Plaintiffs' Implied Contract Claim Should Be Dismissed Because Plaintiffs Fail to Adequately Plead an Enforceable Implied Contract or Damages.

In Count IV, Plaintiffs allege that UBP breached an implied contract. Under Michigan law, an implied-in-law contract "is a legal fiction 'to enable justice be accomplished' even if there was no meeting of the minds and no contract was intended." *AFT Michigan v. Michigan*, 303 Mich.App. 651, 660, 846 N.W.2d 583, 590 (2014) (citation omitted). Importantly, an implied contract "must still satisfy the elements of mutual assent and consideration." *Pawlak v. Redox Corp.*, 182 Mich.App. 758, 765, 453 N.W.2d 304, 307 (1990) (noting that even a preexisting duty was insufficient to satisfy the essential element of consideration needed to

create an enforceable contract). "It is hornbook law that a valid contract requires a 'meeting of the minds' on all the essential terms." *Kamalnath v. Mercy Mem'l Hosp. Corp.*, 194 Mich.App. 543, 547, 487 N.W.2d 499, 503 (1992) (citation omitted).

Plaintiffs' breach of implied contract claim fails because Plaintiffs do not, and cannot, adequately plead any of the requisite elements and, even if an implied contract existed, it would be barred by the statute of frauds. Plaintiffs also fail to plead any cognizable damages that were a proximate result of a breach of the purported contract.

First, Plaintiffs fail to plausibly allege any facts showing the existence of an implied contract. Where, as here, no explicit contract exists between the parties, "an implied contract may arise from their conduct, language, or other circumstances evidencing their intent to contract." *Lochridge v. Quality Temp. Servs., Inc.*, 2023 WL 4303577, at *7 (E.D. Mich. June 30, 2023). Courts determine whether parties mutually assented to an alleged implied contract by objectively examining "the express words of the parties and their visible acts" to determine whether "[a] meeting of the minds [has] occur[ed] on all the material facts." *Decker v. City of Wyandotte*, 2002 WL 31956958, at *6 (Mich. Ct. App. Dec. 20, 2002) (citation omitted). "Michigan courts will not lightly presume the existence of an enforceable contract because, 'regardless of the equities in a case, the courts cannot make a contract for

the parties when none exists.'" *Huntington Nat'l Bank v. Daniel J. Aronoff Living Tr.*, 305 Mich.App. 496, 508, 853 N.W.2d 481, 488 (2014) (citation omitted).

Plaintiffs fail this baseline requirement. They assert, without support, that "in exchange for paying tolls and/or purchasing an unlimited crossing pass(es), BCBP would provide continuous, reliable access to the bridge 24 hours per day, 7 days per week." Compl. ¶ 134. But these alleged terms are from UBP's Agreement with the City, not Plaintiffs. Plaintiffs assert no objective facts establishing UBP's alleged agreement with Plaintiffs. Courts have rejected breach of implied contract claims premised on similar conclusory allegations. *See, e.g., Kingen v. Warner Norcross + Judd LLP*, 2023 WL 11965363, at *6 (W.D. Mich. Oct. 5, 2023) (dismissing claim where plaintiffs failed to allege concrete examples of defendant's assent to the purported contract or any specific terms). The same result should follow here.

Second, even if Plaintiffs could adequately allege the existence of an implied contract, it would be barred by the statute of frauds. Under Michigan law, contracts that cannot be completed within one year of formation must be "in writing and signed with an authorized signature by the party" to the contract. *See* Mich. Comp. Laws § 566.132(1); *see also Ralph Roberts Realty, LLC v. Tyson*, 2019 WL 6248354, at *3 (Mich. Ct. App. Nov. 21, 2019). Michigan's statute of frauds applies equally to implied contracts. *See, e.g., Ware v. Bronson Methodist Hosp.*, 2014 WL

5689877, at *7 (Mich. Ct. App. Nov. 4, 2014) (holding breach of implied contract claim was barred by statute of frauds).

Finally, Plaintiffs fail to plead any cognizable damages or that any such damages were a proximate result of a breach of the purported contract. Plaintiffs must assert damages with "reasonable certainty and may recover only those damages that are the direct, natural, and proximate result of the breach." *Alan Custom Homes*, 256 Mich.App. at 512, 667 N.W.2d at 383. Because Plaintiffs have not alleged a sufficient nexus between UBP's alleged misconduct and their purported injuries, resulting in their alleged damages, their breach of implied contract claims should be dismissed.

V. Plaintiffs Fail to Adequately Plead an Unjust Enrichment Claim.

Plaintiffs assert a claim for unjust enrichment in Count V. An unjust enrichment claim requires that "(1) the defendant received a benefit from the plaintiff; and (2) an inequity will result because of the defendant's retention of the benefit." *Convergent Grp. Corp. v. Cnty. of Kent*, 266 F. Supp. 2d 647, 661 (W.D. Mich. 2003); *Miller v. Sodak Gaming, Inc.*, 93 F. App'x 847, 851 (6th Cir. 2004) (granting summary judgment on unjust enrichment claim where "there is no concern about [plaintiff] suffering injustice"). "Under those circumstances, the law will imply a contract in order to prevent unjust enrichment"—but only where "there is no express contract covering the same subject matter." *Convergent Grp.*, 266 F.

Supp. 2d at 661 (internal quotation marks and citations omitted). Michigan courts employ the doctrine of unjust enrichment sparingly because it is based in *quasi-contract*—a "legal fiction" that "vitiates normal contract principles," thus warranting cautious application. *A & M Supply Co. v. Microsoft Corp.*, 2008 WL 540883, at *2 (Mich. Ct. App. Feb. 28, 2008) (citation omitted).

Plaintiffs' unjust enrichment claim fails for at least three reasons. First, there is an alleged express contract—the Agreement—covering the same subject matter forming the basis of the unjust enrichment claim. *See* Compl. ¶ 125 ("an express contract was formed between [UBP] and its customers"); ¶ 128 ("[UBP]'s conduct constitutes a material breach of the express contract"); ¶ 130 ("Plaintiffs seek all available remedies . . . and damages arising from [UBP]'s failure to honor the express contract); ¶ 131 ("[UBP]'s actions constitute breach of express contract"). Indeed, Plaintiffs argue the Agreement is a valid and enforceable contract to support their claim that they are third-party beneficiaries of the Agreement. This leads to inconsistency in Plaintiffs' positions, as their unjust enrichment claim requires the ***absence*** of any express contract. *See Convergent Grp.*, 266 F. Supp. 2d at 661. Plaintiffs cannot use an "express contract" as a sword to plead a breach of contract claim and a shield to plead an unjust enrichment claim. *See Dumas v. Auto Club Ins Ass'n*, 437 Mich. 521, 546, 473 N.W.2d 652, 663 (1991).

Second, equitable relief in the form of an unjust enrichment claim is not available where an adequate legal remedy exists. *See Glob. Crossing Telecomms., Inc. v. Michigan Bell Tel. Co.*, 2010 WL 2011502, at *4 (E.D. Mich. May 17, 2010). Plaintiffs bear the burden of showing the lack of an adequate remedy at law. *See Eyde v. Empire of Am. Fed. Sav. Bank*, 701 F.Supp. 126, 130 (E.D. Mich. 1988). They fail to plead or otherwise allege facts showing that they had no adequate means of pursuing relief other than through their unjust enrichment theory.

Finally, Plaintiffs' unjust enrichment claim fails because they paid the toll and received what they paid for—*i.e.*, passage on the Bridge—and "a traditional exchange of payment for goods and services is not a circumstance in which it is 'unjust' to allow the defendant to retain the benefit." *Tate v. EyeMed Vision Care, LLC*, 2023 WL 6383467, at *8 (S.D. Ohio Sept. 29, 2023) (citing *Gordon v. Chipotle Mexican Grill, Inc.*, 344 F. Supp. 3d 1231, 1249 (D. Colo. 2018) ("Plaintiffs paid for burritos; Plaintiffs received burritos.")). Even if Plaintiffs could otherwise allege a claim for unjust enrichment, it would fail for lack of any damages. Plaintiffs fail to plead facts alleging UBP's conduct was "unjust," as required to sustain a claim.

VI. Plaintiffs Have Not Plead a Cognizable Claim Under the Michigan Consumer Protection Act.

In Count VI, Plaintiffs claim that UBP violated the Michigan Consumer Protection Act (MCPA). Because this claim sounds in fraud, Plaintiffs "must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). This

requires plaintiffs to "allege the time, place, and content of the alleged misrepresentations [or omissions] on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Sanderson v. HCA-The Healthcare Co*., 447 F.3d 873, 877 (6th Cir. 2006) (quotation omitted); *see also Republic Bank & Tr. Co. v. Bear Stearns & Co*., 683 F.3d 239, 255-56 (6th Cir. 2012). Plaintiffs' MCPA claim fails to allege any actionable misrepresentation or omission, reliance, or materiality for three primary reasons.

First, the MCPA does not apply to transactions "specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." Mich. Comp. Laws § 445.904(1)(a); *see Liss v. Lewiston-Richards, Inc.*, 478 Mich. 203, 210, 732 N.W.2d 514, 518 (2007). "The Michigan Supreme Court construes this exemption broadly, finding that 'the relevant inquiry is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.'" *Matanky v. Gen. Motors LLC*, 370 F. Supp. 3d 772, 799 (E.D. Mich. 2019) (quoting *Liss*, 478 Mich. 293, 732 N.W.2d 514). Since federal and state law authorize UBP to operate the Bridge, Plaintiffs cannot bring an MCPA claim based on allegations that UBP engaged in unfair or deceptive practices by purportedly misrepresenting a term outlined in the Agreement. *Rosenbaum v. Toyota Motor Sales, USA, Inc.*, 2016 WL 9775018, at *3 (E.D. Mich. Oct. 21, 2016); *Matanky*, 370 F. Supp. 3d at 800.

Second, Plaintiffs fail to plead the specific factual content necessary to support a fraud-based claim under the MCPA. To do so, Plaintiffs must plausibly allege (1) that UBP was "engaged in commerce within the meaning of the Act," (2) that the MCPA prohibited UBP's conduct, and (3) that they suffered a loss. *Montgomery v. Kraft Foods Glob., Inc.*, 2012 WL 6084167, at *4 (W.D. Mich. Dec. 6, 2012), *aff'd*, 822 F.3d 304 (6th Cir. 2016). The Complaint, however, contains no allegations whatsoever describing any misrepresentation or omission—much less specific factual allegations describing, with particularity, the specific fraudulent acts allegedly committed by UBP that form the basis of a statutory fraud claim. It was not even possible for UBP to have done so, since it is undisputed that UBP had no direct interactions with Plaintiffs—and thus could not have made ***any*** representations to them, including misrepresentations. Accordingly, Plaintiffs cannot sustain their claims under MCPA subsections (c), (e), (i), (bb), and (cc) —all of which require affirmative misrepresentations by UBP. Their claim under the MCPA fails and should be dismissed.

VII. Plaintiffs' Count for "Injunctive Relief" is Not a Cause of Action.

In Count VII, Plaintiffs seek injunctive relief based on alleged violations described in their other causes of action. But this claim should be dismissed because "injunctive relief is a remedy and not an independent cause of action." *Riley-Jackson v. Ocwen Loan Servicing, LLC*, 2013 WL 5676827, at *5 (E.D. Mich. Oct.

18, 2013); *Terlecki v. Stewart*, 278 Mich.App. 644, 663, 754 N.W.2d 899, 912 (2008) ("It is well settled that an injunction is an equitable remedy, not an independent cause of action."). Rather, "[i]t is not the remedy that supports the cause of action, but rather the cause of action that supports a remedy." *Henry v. Dow Chem. Co.*, 473 Mich. 63, 96-97, 701 N.W.2d 684, 701 (2005). Therefore, a plaintiff cannot advance a request for an injunction without a legally cognizable underlying substantive cause of action. *Terlecki*, 278 Mich.App. at 663, 754 N.W.2d at 912. Plaintiffs' Count VII purports to state a separate request for injunctive relief, and, thus, fails to state a claim.

Moreover, Plaintiffs make no attempt to even identify what "specific type[] of injunctive relief" they seek. *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250, 257 (6th Cir. 2018). They also fail to allege facts showing that they have no adequate remedy at law—a prerequisite for granting a party injunctive relief. *See Perry v. Se. Boll Weevil Eradication Found.*, 154 F. App'x 467, 478 (6th Cir. 2005) (citing *Coffman v. Breeze Corp.*, 323 U.S. 316, 322 (1945)). Therefore, Plaintiffs' conclusory allegations as to injunctive relief "do not satisfy the requirements for Article III" standing, *Binno v. Am. Bar Ass'n*, 826 F.3d 338, 344 (6th Cir. 2016), which must be established "for each form of relief sought." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *see Waskul*, 900 F.3d at

257 (recognizing that requirement extends to each "specific type[] of injunctive relief"). Accordingly, Count VII should be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiffs' Complaint with prejudice.

Dated: May 7, 2025

Respectfully submitted,

/s/ Benjamin W. Jeffers

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that I caused a true and correct copy of the foregoing to be filed and served upon all counsel of record via the U.S. District Court for the Eastern District of Michigan's CM/ECF system.

Dated: May 7, 2025

/s/ Benjamin W. Jeffers
Benjamin W. Jeffers

Exhibit A

2008 WL 540883
Only the Westlaw citation is currently available.

UNPUBLISHED
Court of Appeals of Michigan.

A & M SUPPLY CO., a Michigan corporation, Individually and as Representative of all persons similarly situated, Plaintiff-Appellant,
v.
MICROSOFT CORPORATION, Defendant-Appellee.

Docket No. 274164.
|
Feb. 28, 2008.

Wayne Circuit Court; LC No. 00-031123-NZ.

Before: BANDSTRA, P.J., and DONOFRIO and SERVITTO, JJ.

Opinion

PER CURIAM.

***1** Plaintiff A & M Supply Company appeals the lower court's order denying its motion to amend its complaint and granting defendant Microsoft Corporation's motion to dismiss. We affirm.

Plaintiff first argues that the trial court erred in dismissing the case for "lack of progress." MCR 2.502. We review the trial court's action in this regard for an abuse of discretion. *Eliason Corp., Inc. v. Dep't of Labor,* 133 Mich.App. 200, 203, 348 N.W.2d 315 (1984). No abuse of discretion occurs unless the action of the trial court was outside of a range of principled outcomes considering the facts and circumstances of the case. *Saffian v. Simmons,* 477 Mich. 8, 12, 727 N.W.2d 132 (2007); *Maldanado v. Ford Motor Co.,* 476 Mich. 372, 388, 719 N.W.2d 809 (2006). Applying that standard here, we do not find an abuse of discretion.

We recognize that the lower court entered a stay of proceedings in this matter in early 2003, pending determination of class certification issues in related litigation involving another plaintiff, Fish, and defendant Microsoft. That would certainly provide justification for plaintiff's failure to prosecute its claims until the Fish certification issue had been resolved. However, the logic of the trial court's decision, with which we agree, was that plaintiff thereafter failed to appropriately advance the case.

The Fish certification issue was initially decided when the application for certification was denied by the trial court. Our Court denied an application for leave to review that decision in July 2004, and the Supreme Court similarly denied leave in November 2005. Notwithstanding those determinations of the Fish certification question and the fact that the record here clearly shows this was the question underlying the stay, plaintiff took no action to lift the stay until September 2006.[1] In other words, plaintiff took no action to lift the stay in response to the Fish decision until more than two years after that decision was first made and until almost 11 months after the Supreme Court entered an order finally resolving the possibility of any appeal of that decision. That lengthy inaction on plaintiff's part certainly justified dismissal under the Rule, which provides that an action "in which no steps or proceedings ... have been taken within 91 days" may be dismissed for lack of progress. MCR 2.502(A)(1).

[1] Plaintiff filed a motion to lift the stay *prior* to a decision on the Fish certification question, which was thus unfounded and unsuccessful for that reason, in September 2003.

Further, the record here clearly indicates that there was ample notice that dismissal was likely to occur in the face of plaintiff's failure to prosecute the case. Already in October 2003, the trial court indicated in its ruling denying plaintiff's premature motion to lift the stay, see n 1, that the case was probably subject to dismissal as a result of our Court's prior decision, *A & M Supply Co. v. Microsoft Corp.,* 252 Mich.App. 580, 654 N.W.2d 572 (2002) (*A & M I*), or that it should be remanded to the district court for consideration as an individual action rather than a class action as a result of *A & M I.* The record also shows that, shortly after the Supreme Court denied the application for review in the Fish case, the trial court initiated a telephone conference with the parties. It

asked what plaintiff's plans for the case were, and whether the case should be dismissed, to which plaintiff responded that it would make a determination and undertake further proceedings .[2] The "notice of proposed dismissal" that MCR 2.502 requires "shall be given in the manner provided in MCR 2.501(C) for notice of trial." MCR 2.502(A)(3). MCR 2.501(C) specifies that notice may be provided orally if the party is before the court and only requires a 28 days notice period, both of which provisions were amply satisfied here.

[2] And, as explained above, notwithstanding the trial court's initiative, plaintiff still took no steps to lift the stay and advance the case for 11 months.

***2** We conclude that dismissal of this action for lack of progress was warranted because plaintiff made no showing that progress was being made. MCR 2.502(A)(1). Instead, the trial court correctly determined that:

> So-and from my perspective, there has been a complete and total failure of the plaintiff to make any effort to prosecute the case since the Fish application was denied. Plaintiff knew all along and I told him all along that hey, we're going to see what happens on the Fish case and then it's going to be your responsibility to put the ball in play. You never did. You just let it sit on my docket and were perfectly happy to do that.

In light of the facts and circumstances surrounding the lower court's decision in this regard, we do not find an abuse of discretion.

Further, even if the lower court had erred in dismissing a plaintiff's action for lack of progress, it was properly subject to dismissal on the merits. In *A & M I,* a panel of our Court determined that plaintiff failed to make an appropriate showing that the persons within the proposed class suffered "actual damages" under the Michigan Anti-Trust Reform Act, MCL 445.778(2) ("MARA"). *A & M I, supra* at 635-642.[3] Upon remand, plaintiff attempted to avoid the "actual damages" requirement of the MARA by seeking to amend its complaint to allege an unjust enrichment theory of recovery. However, we agree with defendant that an unjust enrichment claim is not viable under the facts of this case.

[3] Although plaintiff criticizes *A & M I,* we conclude that it properly determined that MARA's requirement that even "indirect purchasers" like plaintiff must show "actual damages" means that a "skeptical" approach should be followed here in Michigan. See *A & M I, supra* at 635. In light of that conclusion, *A & M I* is binding upon us in this regard. MCR 7.215(J). Further, as this case does not involve any important claim of constitutional rights such as in *Locricchio v. Evening News Ass'n of MI,* 438 Mich. 84, 476 N.W.2d 112 (1991), *A & M I* also constitutes the binding law of the case.

In Michigan,[4] because the unjust enrichment doctrine relies upon the fiction of a quasi-contract which "vitiates normal contract principles," our courts employ the doctrine "with caution ." *Kammer Asphalt Paving Co. v. East China Twp. Schools,* 443 Mich. 176, 185-186, 504 N.W.2d 635 (1993). Ordinarily, the doctrine is employed in cases where a benefit is received by the defendant from the plaintiff, see, e.g., *Bell Isle Grill Corp. v. Detroit,* 256 Mich.App. 463, 478, 666 N.W.2d 271 (2003), and there was no direct receipt of any benefit by defendant here from the persons seeking class certification. Plaintiff relies on a passing reference in *Kammer, supra* at 187, 504 N.W.2d 635, that "plaintiff indirectly provided defendant a benefit." However, the facts of that case clearly show that the defendant and the plaintiff were in contact with one another during the course of plaintiff's paving activities at athletic facilities owned by the defendant, and the defendant certainly benefited directly from plaintiff's work on those facilities. *Id.* at 179, 504 N.W.2d 635. Plaintiff here can point to no similar direct contact between Microsoft and the indirect purchasers in the class they seek to have certified. Nor can they show that Microsoft received any direct payment or other benefit from those purchasers. We conclude that the unjust enrichment doctrine does not apply under the facts alleged by plaintiff here. Thus, plaintiff's attempt to amend its complaint in this fashion was futile, and the motion to make the amendment could properly have been denied on that basis. *PT Today, Inc. v. Comm'r of Office of Financial and Insur. Services,* 270 Mich.App. 110, 142-143, 715 N.W.2d 398 (2006).

[4] Plaintiff relies on foreign case law to support its unjust enrichment theory but this cause of action is a matter of state law and we are compelled to follow Michigan authorities.

***3** Plaintiff also tried, following remand, to comply with *A & M I's* direction regarding the proof needed on the "actual damages" requirement, by submitting a new affidavit from its expert Dr. Leffler ("2003 affidavit").[5] In *A & M I,* the panel extensively reviewed previous affidavits submitted by Dr. Leffler and concluded that the statistical analyses and economic theories upon which they were based could not suffice to establish "actual damages" as required by the statute with respect to the indirect purchasers constituting the plaintiff class seeking certification here. *A & M I, supra* at 637-642. We have

reviewed the 2003 affidavit and conclude, once again, that it does not establish that plaintiff will be able to show "actual damages" with proofs common to all the plaintiffs within the class and with the degree of specificity and rigor required under the "skeptical" approach mandated by MARA. *Id.* at 635, 715 N.W.2d 398.

[5] Plaintiff's amended complaint also sought to limit the class, purportedly to aid Dr. Leffler's analysis. We conclude below that the 2003 affidavit, like its predecessors, was lacking under *A & M I.* Similarly, the related attempt to limit the class, which plaintiff does not suggest had any other import, is unavailing.

A & M I noted that the prior Leffler affidavits were not based on "regression analyses [that] might be used to calculate the rate at which Microsoft's direct purchasers passed on the overcharge to indirect purchasers." *Id.* at 639, 715 N.W.2d 398. In an apparent response, the 2003 affidavit describes the results of five regression analyses performed after remand. However, Dr. Leffler quite honestly admitted in that affidavit that the data that he was working with did not account for all relevant variables and that, therefore, his results were only illustrative rather than definitive. His final, summary statement regarding his analysis claimed only that it suggested that "there is a near full pass on" of Microsoft's overcharges to indirect purchasers. And he acknowledged that even that somewhat tentative conclusion would not apply in the subset of transactions, the extent of which he suggested no way of measuring, where final sales to users were made on a "loss leader," below cost basis. Thus, while Dr. Leffler's 2003 affidavit undoubtedly was markedly more convincing than the earlier affidavits, it still only evidenced a way to "estimate damages for the class" and, thus, again "failed to bridge the gap between economic theory and the reality of economic damages." *Id.* at 639-640, 715 N.W.2d 398.

In sum, neither the amended complaint that plaintiff sought to file nor the new Leffler affidavit substantially negated the reasons upon which the *A & M I* panel determined that this matter could not proceed as a class action. Plaintiff took no action to pursue its claim as an individual rather than as a class representative, even though the *A & M I* panel clearly suggested that was a better approach. *Id.* at 642, 715 N.W.2d 398. For those reasons, the trial court could properly have dismissed this action even without concluding that plaintiff had failed to appropriately pursue it in a timely fashion.

We affirm.

All Citations

Not Reported in N.W.2d, 2008 WL 540883

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2010 WL 1524058
Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.

ALLSTATE IMAGING, INC., d/b/a Computer Imaging Supply and Media Warehouse, American Billing & Collection, Inc., d/b/a ABC Platinum Direct, Starline Communications International, Inc., U.S. Interstate Distributing, Inc., Plaintiffs,
v.
FIRST INDEPENDENCE BANK, Defendant.

No. 08-cv-11363.
|
April 15, 2010.

Attorneys and Law Firms

Barry R. Powers, Stuart M. Schwartz, Seyburn, Kahn, Southfield, MI, for Plaintiffs.

James D. Wilson, Wilson Young, Detroit, MI, for Defendant.

MEMORANDUM ORDER SELECTING APPLICABLE SUBSTANTIVE LAW

STEPHEN J. MURPHY, III, District Judge.

***1** The parties disagree on which state's law, Michigan or California, should apply to the claims in this matter, though neither have claimed that any difference in the applicable law is material and would dictate different outcomes in the case. Plaintiffs claim Michigan law applies to all of its claims because there is no other state with a substantial interest in applying its laws, and that this point defeats this federal court in Michigan (the forum state) from interest in applying anything but Michigan law. Defendant claims the court has a very minimal interest in applying the law of Michigan herein because Plaintiffs are not Michigan residents. Defendant also claims California law should apply because there is a choice of law provision in the contract Plaintiffs seek to take advantage of. The contractual provision states that California law "governs" the contract. For the reasons stated below, the Court will apply Michigan law to all claims in this case.

DISCUSSION

In this diversity action, the Court applies the substantive law of the forum state, which includes the state's choice of law rules. *Montgomery v. Wyeth,* 580 F.3d 455, 459 (6th Cir.2009). Because suit was filed in Michigan, Michigan law presumptively applies. Plaintiffs allege tort and contract claims in their complaint. Under Michigan law choice of law rules, courts must apply the law of the forum unless a "rational reason" to do otherwise exists. *Sutherland v. Kennington Truck Serv., Ltd.,* 454 Mich. 274, 286, 562 N.W.2d 466 (1997). In determining whether a "rational reason" exists for displacing Michigan law, a court undertakes a two-step analysis:

> First, [the court] must determine if any foreign state has an interest in having its law applied. If no state has such an interest, the presumption that Michigan law will apply cannot be overcome. If a foreign state does have an interest in having its law applied, we must then determine if Michigan's interests mandate that Michigan law be applied, despite the foreign interests.

Id.

California is the only other state that potentially has an interest in having its law applied in this case. Defendant, seeking to have California law applied, has the burden of demonstrating why California law should displace Michigan law in this action. Defendant claims California has a strong interest in having its law applied because Plaintiffs are California corporations with principal places

of business in California and because U.S. Bankcard, the entity Plaintiffs allege facilitated the agreement with Defendant, is also a California company. Additionally, Defendant argues, California's interest in protecting its citizens "should be viewed as primary in this instance." Def. Mem. p. 3. Finally, Defendant argues that the only contact the lawsuit has with Michigan is that Defendant is a Michigan corporation located in Michigan.

The Court finds that Defendant has properly recognized the relevant contacts the lawsuit has with California, but has not demonstrated *why* California has any interest in having its law applied here. Having contacts with the state does not necessarily establish that a state has any interest in applying its law to a dispute. Furthermore, Defendant, while claiming that California law has an interest in "protecting" its citizens, has not demonstrated how applying California law in this instance would "protect" any of Plaintiffs. Defendant has failed to demonstrate how displacing Michigan law with California law would benefit Plaintiffs and protect them.

***2** Even assuming California has *some* interest in having its law applied, however, the Court finds that, under the second step outlined in *Sutherland,* Michigan's interest in applying its own law is superior to any interest California could have in applying its law. Michigan has a strong interest in regulating the conduct of companies, especially banks, that hold a public trust, and which are chartered under its laws. Banks, specifically, are regulated by various state and federal regulations and the state under which the bank is chartered has a compelling interest in ensuring that the company follows its laws. Here, Plaintiffs allege that Defendant committed various tortious conduct in violation of Michigan law. Michigan, therefore, has a strong interest in ensuring that companies which it chartered are following its laws. Furthermore, a state always has an interest in conduct that occurs within its borders. *See Olmstead v. Anderson,* 428 Mich. 1, 30 n. 13, 400 N.W.2d 292 (1987). Since the alleged injury took place in Michigan, Michigan has an interest in applying its own law. Given Michigan's strong interest in applying its own law, the Court will not displace its application in this instance.

At first blush, Defendant makes a somewhat stronger, yet ultimately unpersuasive, argument in support of applying California law with respect to the contract claim. Defendant claims that the contract upon which Plaintiffs base their breach of contract claim contains a choice of law provision. Specifically, Section 6.09 of the purported Merchant Agreement provides, in relevant part: "This Agreement shall be construed and governed by the laws in the State of California." Def. Mem. Ex. E.

As an initial matter, although Defendant claims that the choice of law provision requires that California law should apply to *all* claims in this action, the Court does not agree. If the choice of law provision is valid, it would only require the application of California law with respect to the claims regarding the"Agreement" in this case, which, in the Court's view, is only the breach of contract claim on trial. The remainder of the claims (conversion, unjust enrichment, innocent misrepresentation, negligence, fraud in the inducement, account stated, and money had and received) do not relate to enforcement of the Agreement.

Assuming the choice of law clause to be valid (and no party claims it is not), the Court must determine whether to follow it and apply California law here. Under Michigan law, the law of the state chosen by the parties to govern their contractual rights and duties will be applied unless: 1) there is no substantial relationship between the chosen state and the contract or other reasonable basis for the state's selection or 2) the application of the chosen state's law would violate a fundamental policy of a state which has a materially greater interest in the disputed issue and which would have supplied the governing law in the absence of the parties' selection. *Kipin Indus., Inc. v. Van Deilen Intern., Inc.,* 182 F.3d 490, 493 (6th Cir.1999) (recognizing Michigan's adoption of Second Restatement of Conflicts of Law approach).

***3** In this case, there is a reasonable basis for the California law selection, in that Plaintiffs are California companies (with principal places of business in California), as is U.S. Bankcard, another party to the purported contract. Additionally, Plaintiff does not claim, nor does the Court find, that application of California law would violate a fundamental policy of Michigan, a state which has a materially greater interest applying its law to the contract dispute. Accordingly, neither exception to the general rule applies and the Court would normally apply California law to the dispute.

Although the court finds that California law would properly govern Plaintiffs' contract claims, the Court is not aware of any substantive difference between Michigan and California contract law as it would apply in this case. Neither party has discussed in their briefing any substantive difference between Michigan and California contract law such that the Court's instruction of the jury regarding Michigan contract law, instead of California contract law, would prejudice the Defendant in any way. On that basis, it is unclear why Defendant has raised the issue given the large number of other factual issues in this case.

It is the Court's inclination to instruct the jury on

Michigan law across the board on all claims unless Defendant establishes that there is a material difference between Michigan and California contract law such that it should instruct the jury with California contract law on Plaintiffs' contract claims, but apply Michigan law with respect to all of Plaintiffs' remaining claims. The Court sees applying different substantive laws for different claims as unduly burdensome and confusing, especially in light of the lack of difference between California and Michigan contract law, and accordingly, the Court prefers to apply Michigan law to all claims. Indeed, absent any material differences in the law, the Court would confront a "false conflict" in which there is *no conflict* between the law of the two states. In such an instance the Court should simply apply the law of the forum state. *See Miller v. Airborne Express, Inc.,* No. 07-CV-11035, 2008 WL 2782921, *3 (E.D.Mich. July 17, 2008) ("[w]hen the law of the forum is nearly identical with the law of the site of the tort, the court will apply the law of the forum"); *see also Williams v. Toys "R" Us,* No. 04-1978, 2005 WL 1655022, ----5 (6th Cir. July 14, 2005) ("Because there is no conflict of laws (indeed this is a false conflict situation), we therefore conclude that the district court did not err in applying Michigan state law in this case.").

For the reasons stated above, the Court intends to apply Michigan law to all claims in this case. At the charge conference held at the close of all evidence, if Defendant can establish that this is not a false conflict situation, but rather that California's contract law is materially different than Michigan's contract law as it would apply in this case, the Court will consider instructing the jury using California law on the breach of contract claim only. Defendant is instructed to consider whether it would benefit from having California law applied here before bringing the issue before the Court at the charging conference. Without a substantial difference between California and Michigan law on the contractual claim, Defendant should consider consenting to the application of Michigan law to that claim.

All Citations

Not Reported in F.Supp.2d, 2010 WL 1524058

End of Document

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Kenneth DECKER, Shirley Decker, Dean Eastman, Marilyn Eastman, William Lilienthal, Rose Lilienthal, Edward Rothermal, Sophia Rothermal, Robert Schrader, Geraldyn Schrader, and Donna Young, Plaintiffs-Appellants,
and
Charles BROWN, Toni Brown, and Mickel Yolan, Plaintiffs,
v.
CITY OF WYANDOTTE, Defendant-Appellee.

No. 236372.
|
Dec. 20, 2002.

Before: KELLY, P.J. and JANSEN and DONOFRIO, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** In this breach of contract case, plaintiffs appeal as of right from an order granting summary disposition to defendant. We affirm.

I. Basic Facts and Procedural History

Plaintiffs are retired non-union employees of defendant and the retirees' spouses. It is undisputed that defendant agreed to provide health insurance benefits to plaintiffs during their retirement. However, when plaintiffs reached age sixty-five, defendant required them to pay "a portion of their hospitalization insurance." Plaintiffs filed a complaint alleging that defendant's refusal to provide "fully paid hospitalization insurance" after age sixty-five constituted a breach of contract.

At the outset, it is necessary to clarify plaintiffs' claim. In plaintiffs' brief on appeal and briefs filed in the lower court, plaintiffs variously state that defendant promised: "health insurance benefits after their retirement," "the same health insurance benefits as those provided to the patrolmen under their union contracts," "fully paid hospitalization benefit[s]" and "Medicare premiums." Adding to the confusion, the trial court referred to "Plan B Medicare premiums" and "Part B Medicaid benefits." Additionally, defendant argues that plaintiffs claim defendant agreed to "provide them with Medicare Part B benefits." Based on plaintiffs' complaint, we conclude that their claim was for fully paid hospitalization insurance after age sixty-five. [1]

[1] In their first amended complaint, plaintiffs alleged, "That the Defendant City agreed to provide fully paid hospitalization insurance for Plaintiffs and their spouses during the entire period of retirement ... That the City presently provides fully paid hospitalization insurance only until the retirees reach the age of 65, at which time the City informs the retirees that they must now pay a portion of their hospitalization insurance, contrary to the contracts between the Plaintiffs and the Defendant."

Defendant filed a motion for summary disposition arguing that there was no genuine issue of fact regarding whether defendant agreed to provide fully paid hospitalization insurance after age sixty-five. Defendant also argued that plaintiffs failed to state a claim upon which relief can be granted with respect to claims based on a collective bargaining agreement and an implied contract. The trial court granted defendant's motion.

On appeal, plaintiffs argue that the trial court erred in granting defendant's motion for summary disposition because there was a genuine issue of fact as to whether defendant expressly or impliedly contracted to provide plaintiffs with fully paid hospitalization insurance after retirement and beyond age sixty-five. Further, plaintiffs argue that even if the evidence does not establish an express or implied contract, a unilateral contract was established by city counsel resolution.

II. Standard of Review

This Court reviews a trial court's decision regarding a motion for summary disposition de novo to determine if the moving party was entitled to judgment as a matter

of law. *Smith v. Globe Life Ins Co,* 460 Mich. 446, 454; 597 NW2d 28 (1999). Defendant brought a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; the motion may not be supported with documentary evidence. *Patterson v. Kleiman,* 447 Mich. 429, 432; 526 NW2d 879 (1994). In reviewing a motion under MCR 2.116(C)(10), the court considers affidavits, pleadings, admissions and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Summary disposition may be granted if the affidavits and other documentary evidence show that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 454-455.

III. Analysis

***2** Although plaintiffs frame the issue as whether there was an express or implied contract for fully paid hospitalization insurance after age sixty-five, the issue is properly framed as one of contract interpretation. Defendant has not denied that a contract for post-retirement benefits exists,[2] nor did the trial court find that such a contract does not exist.[3] Thus, the question presented is whether the contract permits the interpretation that defendant agreed to provide fully paid hospital insurance after age sixty-five. We review de novo the proper construction and interpretation of a contract. *Perry v. Sied,* 461 Mich. 680, 681, n 1; 611 NW2d 516 (2000). The basic rule in contract interpretation is to ascertain the intention of the parties. *D'Avanzo v. Wise & Marsac, PC,* 223 Mich.App 314, 319; 565 NW2d 915 (1997). In the context of a summary disposition motion, the "trial court may determine the meaning of the contract only when the terms are *not* ambiguous." *Id.* A contract is ambiguous if the language is susceptible to two or more reasonable interpretations. *Id.* If the contract is ambiguous, factual development is required to determine the parties' intent and summary disposition is inappropriate. *Id.*

2 In its answer to plaintiffs' complaint, defendant stated, "Defendant admits that the City provides fully paid hospitalization insurance until the retirees or their spouses reach the age of 65, at which time the City informs them that they must pay a portion of their hospitalization insurance."

3 Plaintiffs' confusion in this regard is evident in its brief which states, "the failure of the Trial Court to find the existence of a health insurance contract between the retirees and the City is contrary to the case law in the State of Michigan, and contrary to the facts established through the discovery process."

A. Express Contract

Plaintiffs first argue that the trial court erred in granting summary disposition of their claim that defendant breached an express agreement to provide fully paid hospitalization insurance after age sixty-five. We disagree. "An express contract is 'an actual agreement of the parties, the terms of which are openly uttered or declared at the time of making it, being stated in distinct and explicit language, either orally or in writing." ' *Benson v. DMB,* 168 Mich.App 302, 307; 424 NW2d 40 (1988). Plaintiffs rely on several items in evidence to support their express contract claim. We address each in turn.

1. Collective Bargaining Agreement

Plaintiffs alleged, "the specific hospitalization benefits for the Plaintiffs were determined by the contract provision of the [FOP], Wyandotte Lodge No. 111." However, it is undisputed that plaintiffs were not union members at the time they retired. Because plaintiffs, as non-union members, were not parties to this collective bargaining agreement, the trial court did not err in ruling that plaintiffs failed to state a claim for which relief could be granted pursuant to this agreement.

2. Personnel Handbook

Plaintiffs argue that the statements in the personnel handbook constituted an express promise that defendant would provide fully paid hospitalization insurance after age sixty-five. The portion of the personnel handbook upon which plaintiffs rely provides:

You may also continue your group health insurance benefits during retirement. For this continuation of benefits, we will pay the entire cost of the premiums for you and your spouse, or your dependents under the age of 19. This does not apply to employees on a deferred retirement.

***3** Complete details on the extent of coverage will be made available to you.

However, the evidence indicates that none of the plaintiffs saw or knew of this personnel handbook until the time of litigation. Thus, there was no mutuality of agreement on its terms. *Eerdmans v. Maki,* 226 Mich.App 360, 364; 573 NW2d 329 (1997). Additionally, the final sentence indicates that details "will be made available." Therefore, the trial court did not err in finding that the handbook alone did not constitute an express promise that defendant would provide fully paid hospitalization insurance after age sixty-five.

3. Retirement Letters from Defendant to Plaintiffs

Plaintiffs also argue that defendant sent a written notice to each of them, at the time of retirement, that included an express promise to provide fully paid hospitalization benefits after age sixty-five.

a. Plaintiffs Eastman, Decker, and Young

The retirement letters to plaintiffs Eastman, Decker and Young stated in relevant part, "Hospitalization-the city will pay all premiums for retiree and spouse until death or employed elsewhere where such coverage is offered." We agree with the trial court that the phrase "where such coverage is offered" amounted to "no promise at all." The language is insufficiently specific to create an express contract for fully paid hospitalization coverage after age sixty-five. Although the letter states that defendant will pay all premiums until the retiree or spouse's death, it also contains the limiting language "where such coverage is offered." Therefore, the trial court did not err in finding that the letters to Eastman, Decker and Young did not contain an express promise that defendant would provide fully paid hospitalization insurance after age sixty-five.

b. Plaintiffs Rothermal and Schrader

The letter to plaintiff Rothermal stated, "The City will continue to pay for you and your spouse under the Retirees Group of the City of Wyandotte as described in the attached." The letter to plaintiff Schrader was substantially similar. The document attached to the letters read as follows:

RETIREE HOSPITALIZATION COVERAGE:

At the employee's option, the employee may select one of the following coverages when applying for retirement benefits:

OPTION I

(1). The City will provide the following group health insurance for each retire employee and will pay one hundred percent (100%) of the premiums for such insurance provided that:

(2). Said coverage will be Blue Cross/Blue Shield MVF-1, Semi-Private Coverage, with a Coordination of Benefits provision, First Aid Emergency Rider (FAE) and Master Medical Option 1 ..... This coverage will also be continued as Blue Cross/Blue Shield Medicare Complementary coverage when the retiree or spouse become eligible for Medicare, as long as retirement benefit payments are being made....

OPTION II

(1). The City will provide the following group health insurance for each retire employee and will pay one hundred percent (100%) of the premiums for such insurance provided that ...

***4** (2). Said coverage will be Blue Cross/Blue Shield MVF-1, Semi-Private Coverage, with a Coordination of Benefits provision, First Aid Emergency Rider (FAE) and Master Medical Option 5, and a $5.00 Co-Pay Drug Rider.... This coverage will also be continued as Blue Cross/Blue Shield Medicare Complementary coverage when the retiree or spouse become eligible for Medicare, as long as retirement benefit payments are being made.... (Emphasis added).

The foregoing language does not state that defendant agrees to fully pay hospitalization insurance after age sixty-five. Rather, it specifies that defendant will only provide complementary coverage when the retiree or spouse becomes eligible for Medicare. Therefore, the trial court did not err in finding that the letters to Rothermal and Schrader did not contain defendant's express promise to provide fully paid hospitalization insurance after age sixty-five.

Both in the lower court and on appeal, the parties refer to *Sommer v. City of Wyandotte,* unpublished opinion per curiam of the Court of Appeals, issued November 17, 1995 (Docket No. 152632). [4] We note that *res judicata* [5] is not applicable based on *Sommer* because plaintiffs, as non-union members, were not parties to the *Sommer* class action. However, plaintiffs contend the same contract language construed in *Sommer* must be construed in this case. "An unpublished opinion is not precedentially binding under the rule of *stare decisis."* MCR 7.215(C).

4 This Court's judgment in *Sommer* was reversed in part by *Sommer v. City of Wyandotte,* unpublished order of the Supreme Court, entered March 25, 1997 (Docket No. 105647).

5 Ordinarily, *res judicata* bars a subsequent relitigation that is based on the same transaction or events as earlier litigation. *Pierson Sand & Gravel, Inc v. Keeler Brass,* 460 Mich. 372, 380; 596 NW2d 153 (1999).

After reviewing the parties' arguments and the *Sommer* opinion, we agree with the trial court's statement, "It is a gross understatement for the court to state that the arguments of the respective parties concerning the persuasive effect of *Sommers* [sic] are not entirely clear (with respect, neither is the opinion of the Court of Appeals itself)." Likewise, on appeal, plaintiffs fail to adequately analyze and apply *Sommer.* A party may not "simply ... announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his opinion." *Wilson v. Taylor,* 457 Mich. 232, 243; 577 NW2d 100 (1998). Aside from the lack of precedential authority and plaintiffs' failure to adequately discuss and apply this factually complex case, we find the *Sommer* opinion of little assistance in this case because the facts of the case and the exact language of the various contracts is not discussed with enough detail for us to provide us with guidance.

c. Plaintiff Lilienthal

Plaintiff Lilienthal retired from defendant's employ to become police chief in Brownstown Township whereupon he enrolled in the township's health insurance. Subsequently, plaintiff Lilienthal requested that defendant re-enroll him in its coverage. Defendant advised him that it would only provide complementary coverage. Based on this evidence, the trial court did not err in finding defendant did not promise to provide plaintiff Lilienthal with fully paid hospitalization insurance beyond age sixty-five.

4. Communiqué

***5** Plaintiffs argue that on March 20, 1990, defendant "sent a communiqué to all department heads" which provides evidence of a contract for fully paid hospitalization insurance beyond age sixty-five. However, the memo contains the same language as the retirement letters to plaintiffs Rothermal and Schrader which, as discussed above, does not constitute a promise that defendant would provide fully paid hospitalization insurance to plaintiffs beyond age sixty-five.

For these reasons, we find that the trial court did not err in dismissing plaintiffs' breach of express contract claim pursuant to MCR 2.116(C)(8) and (C)(10).

B. Unilateral Contract-City Council Resolution

Plaintiffs also argue that in bargaining sessions between union patrolmen and defendant, defendant adopted the same benefits for non-union employees. Plaintiffs argue that this was evidenced by a city council resolution. However, plaintiffs only produced evidence of a proposed resolution stating:

> "RESOLVED by the City Council that Council hereby approves the wage and fringe adjustments ... as recommended by the Director of Administrative Services and Director of Financial Services."

Plaintiffs argue that this "resolution" constituted a promise that defendant would pay benefits to plaintiffs which plaintiffs would accept by working. We disagree.

To begin with, plaintiffs did not plead facts to support this claim, nor did they specifically make a claim for breach of a unilateral contract in their complaint. Another

flaw in plaintiffs' argument is that there is no evidence of either the recommendations referred to in the resolution, or the actual resolution itself. Plaintiffs admit that they have not provided the actual resolution because defendant "claims that these resolutions [sic] are not available." In fact, defendant maintains, "no such resolution exists" and produced affidavits of the director of financial services and the controller stating that no such resolution took place. Moreover, the "secondary evidence" provided by plaintiff does not demonstrate a resolution that defendant would provide fully paid hospitalization insurance to plaintiffs beyond age sixty-five.

Plaintiffs also argue that defendant's agents testified to their belief that the benefits for union and non-union employees were the same. However, these "beliefs" do not constitute a contractual agreement. Even if they do provide circumstantial evidence that a contract existed, the other evidence cited by plaintiffs does not constitute a contractual agreement that defendant would provide that defendant would provide plaintiffs with fully paid hospitalization insurance beyond age sixty-five. Therefore, we find that the trial court did not err in dismissing plaintiffs' breach of unilateral contract claim.

C. Implied Contract

Plaintiffs finally argue that there was an implied agreement for fully paid hospitalization insurance after age sixty-five. We disagree.

***6** Courts will recognize an implied contract "where parties assume obligations by their conduct." *Williams v. Litton Systems, Inc,* 433 Mich. 755, 758; 449 NW2d 669 (1989). "A contract implied in law is an obligation imposed by law to do justice even though it is clear that no promise was ever made or intended. A contract may be implied in law where there is a receipt of a benefit by a defendant from a plaintiff and retention of the benefit is inequitable, absent reasonable compensation." *In re McKim Estate,* 238 Mich.App 453, 457; 606 NW2d 30 (1999), quoting *In re Lewis Estate,* 168 Mich.App 70, 74-75; 423 NW2d 600 (1988). A contract implied in fact arises " 'when services are performed by one who at the time expects compensation from another who expects at the time to pay therefore.' The issue is a question of fact to be resolved through the consideration of all the circumstances...." *Id.* at 458.

To begin with, plaintiffs' complaint does not contain a claim for breach of implied contract. In fact, the complaint states, "contrary to the express, clear, and mandatory language of the contract, the Defendant City has failed to comply with the terms of the contracts." Neither the original complaint nor the amended complaint contain any facts supporting a claim for breach of implied contract. Because plaintiffs never pleaded a claim for breach of implied contract, we find the trial court did not err in granting summary disposition of this claim. [6] "[T]his Court will not reverse where the trial court reached the right result for the wrong reason." *Lane v Kinder Care Learning Centers, Inc,* 231 Mich.App 689, 697; 588 NW2d 715 (1998).

6 Furthermore, "An implied contract cannot be enforced where the parties have made an express contract covering the same subject matter." *Scholz v. Montgomery Ward & Co, Inc,* 437 Mich. 83, 93; 468 NW2d 845 (1991). As discussed above, defendant did not deny that it contracted to provide plaintiffs with health care benefits after retirement. The dispute arose when defendant notified plaintiffs that these benefits would not continue past age sixty-five. The fact that the parties had an express contract for health insurance benefits, precludes a finding that the parties had an implied contract regarding the extent of those benefits.

Nevertheless, we find that the trial court did not err in ruling that the "past conduct of the parties is ... insufficient to create an implied contract." Elements required to establish an implied contract include: (1) parties being competent to contract, (2) proper subject matter, (3) consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Mallory v. Detroit,* 181 Mich.App 121, 127; 449 NW2d 115 (1989). An implied contract must satisfy the elements of mutual assent and consideration. *Pawlak v. Redox Corp,* 182 Mich.App 758, 765; 453 NW2d 304 (1990), quoting *Lowery v. Dep't of Corrections,* 146 Mich.App 342, 359; 380 NW2d 99 (1985).

Mutual assent means that there has been a "meeting of the minds." *Kamalnath v. Mercy Hospital,* 194 Mich.App 543, 548-549; 487 NW2d 499 (1992). A meeting of the minds must occur on all the material facts. *Id.* at 548, quoting *Stanton v. Dachille,* 186 Mich.App 247, 256; 463 NW2d 479 (1990), citing *Heritage Broadcasting Co v. Wilson Communications, Inc,* 170 Mich.App 812, 818; 428 NW2d 784 (1988). To

determine whether mutual assent has occurred, an objective test is used to examine "the express words of the parties and their visible acts," and the question should be asked whether a reasonable person could have interpreted the conduct or words in the alleged manner. *Id.*

***7** Here, plaintiffs have failed to present enough evidence to satisfy the element of mutual assent. Plaintiffs cite only to plaintiffs' beliefs, defendant's agents' beliefs and "the practice of the City in providing Plaintiffs-Appellants with the same retirement benefits as the union police officers." However, plaintiffs provide no *evidence* of this practice. Therefore, a reasonable person could not have interpreted the parties' conduct and words to mean that an implied contract existed whereby defendant would provide plaintiffs with fully paid hospitalization insurance beyond age sixty-five.

Affirmed.

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United States District Court,
E.D. Michigan,
Southern Division.

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,
Plaintiff
v.
MICHIGAN BELL TELEPHONE CO.
ak/a AT & T Michigan, Defendant.

No. 09–14686.
|
May 17, 2010.

Attorneys and Law Firms

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OPINION & ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL DISMISSAL [Doc. No. 4]

SEAN F. COX, District Judge.

***1** Plaintiff Global Crossing Telecommunications, Inc. ("Global Crossing") filed this breach of contract and tort action against Defendant Michigan Bell Telephone Company a/k/a AT & T Michigan ("AT & T") on December 1, 2009 [Doc. No. 1]. The matter is currently before the Court on AT & T's Motion to Dismiss [Doc. No. 10], in which AT & T seeks dismissal of Counts V through IX of Global Crossing's Complaint. The parties have fully briefed the issues, and a hearing was held on April 22, 2010. For the reasons below, the Court **GRANTS** AT & T's motion [Doc. No. 10], and **DISMISSES** Counts V through IX of Global Crossing's Complaint.

BACKGROUND

Consistent with Fed. R. Civ. P. 12(b)(6), the following are the relevant facts of this case as alleged in Global Crossing's Complaint [Doc. No. 1].

Global Crossing is a Michigan corporation that provides long-distance telephone service throughout the United States. [Complaint, Doc. No. 1, ¶ 1]. AT & T is also a Michigan corporation, and provides high-capacity "broadband" access services pursuant to contract. *Id.* at ¶ 2. Under FCC regulations, Global Crossing is considered a "nationwide interexchange carrier" ("IXC"), and AT & T is considered an "incumbent local exchange carrier" ("ILEC"). *Id.* at ¶¶ 1, 2.

Pursuant to FCC regulations, IXCs like Global Crossing must purchase "last mile" connections from ILECS like AT & T that link a subscriber's location to the ICX network. *Id.* at ¶ 3. Such "last mile" connections are also known as "access services." Effective October 12, 2007, AT & T began providing high-volume "broadband" access services to IXCs pursuant to contract, on terms consistent with its "Guidebook" [*See* Excerpts from Guidebook, Pl.'s Ex. A, Doc. No. 1].

One such available broadband access service provided by AT & T is its "Dedicated SONET Ring Service" ("DSRS"). *Id.* at ¶ 4. AT & T's Guidebook states that AT & T will provide DSRS to IXCs as a "dedicated customized network," for the exclusive use of one customer. *Id.* DSRS is provided by AT & T in a variety of bandwidths, capable of carrying various levels of simultaneous telephone conversations. *Id.*

In 1994, Global Crossing ordered, and AT & T provided, an "OC–48" bandwidth DSRS[1] between AT & T and Global Crossing's facility in Southfield, Michigan ("the DSRS"). *Id.* at 9. AT & T warranted that it would provide the DSRS for Global Crossing's exclusive use, and that Global Crossing would have sole discretion to determine whether it would permit another company to occupy space on the DSRS. *Id.* Global Crossing used the DSRS continuously, from the signing of the contract between itself and AT & T in 1994 to the time this lawsuit was filed. *Id.* Global Crossing has not authorized any other companies to occupy space on the DSRS.

[1] "An OC–48 can carry up to 32,256 simultaneous

> conversations. An IXC orders an OC–48 facility when it anticipates handling a very large volume of calls from a given ILEC central office." [Pl.'s Complaint, Doc. No. 1, ¶ 6].

In October of 2008, Global Crossing undertook an internal investigation into whether it still needed the DSRS provided by AT & T. *Id.* at ¶ 11. During this investigation, Global Crossing discovered that 13 of its 32,256 slots on the DSRS were being used by third parties that Global Crossing had not authorized. *Id.* at ¶ 12. After its own investigation, AT & T determined that a software error had inadvertently assigned other users—who had contracted directly with AT & T in a manner similar to that of Global Crossing—to slots on the DSRS which AT & T had warranted would be for Global Crossing's exclusive use. *Id.* at ¶ 16. AT & T further acknowledged—according to Global Crossing's Complaint—that this practice had been going on since at least 1999. *Id.* at ¶ 17.

***2** Global Crossing filed this lawsuit on December 1, 2009. Global Crossing argues that AT & T "obtained revenues from its uses of the [DSRS], which revenues AT & T has not accounted for or turned over to Global Crossing." *Id.* at ¶ 20. Global Crossing also argues that, by not giving it exclusive access to the DSRS, AT & T effectively provided Global Crossing with a "Shared Network Arrangement"—a product of AT & T's which allegedly costs $600,000.00 per year less than the DSRS. *Id.* at 21. Specifically, Global Crossing's complaint alleges the following nine causes of action against AT & T: 1) breach of contract/breach of warranty; violations of 2) Section 201(b), and 3) Section 203 of the Federal Communications Act, 47 U.S.C. § 151 *et seq.;* 4) attorney fees under Section 206 of the Federal Communications Act; 5) negligence; 6) common law conversion; 7) statutory conversion under M.C.L. § 600 .2919a; 8) return of stolen property; and 9) unjust enrichment/constructive trust/accounting.

AT & T filed its motion to dismiss [Doc. No. 10] on January 29, 2010. In that motion, AT & T concedes that Global Crossing's contract and tariff-based causes of action—i.e., Counts I through IV of its complaint—are sufficiently pled to survive a Rule 12(b)(6) motion. [Def.'s Br., Doc. No. 10, p. 1]. AT & T raises three arguments, however, in favor of dismissal for Global Crossing's claims sounding in tort and in equity: 1) that dismissal of all the tort claims is proper due to Global Crossing's failure to allege a legal duty separate and distinct from AT & T's contractual obligations [Def.'s Br ., Doc. No 10, pp. 4–6]; 2) that Global Crossing's claims for conversion should be dismissed because AT & T cannot convert its own property [Def.'s Br., Doc. No. 10, pp. 6–10]; and 3) Global Crossing's claims in equity should be dismissed due to Global Crossing's adequate legal remedies at law. [Def.'s Br., Doc. No. 10, p. 11]. Global Crossing opposes AT & T's motion. [*See* Pl.'s Br., Doc. No. 14].

STANDARD OF REVIEW

AT & T bring the instant motion pursuant to Fed. R. Civ. P. 12(b)(6). In assessing a motion to dismiss for failure to state a claim under Rule 12(b)(6), the Court must treat all wellpled allegations in the complaint as true. *Kostrzewa v. City of Troy,* 247 F.3d 633, 638 (6th Cir.2001). Dismissal is only proper if it, on the pleadings themselves, the plaintiff does not have a "reasonably founded hope" of making his or her case. *Bell Atlantic v. Twombley,* 550 U.S. 554, 127 S.Ct. 1955, 1970, 167 L.Ed.2d 929 (2007).

ANALYSIS

The dispute between Global Crossing and AT & T in this action is essentially contractual in nature—and AT & T is not disputing Global Crossing's contract claims in this motion. Concurrent with its contractual claims, however, Global Crossing also advances legal theories sounding in tort law, as well as theories sounding in equity. As Global Crossing has not evidenced legal duties owed by AT & T separate and distinct from its contractual obligations, dismissal of its tort claims is proper.[2] Further, as Global Crossing has failed to evidence the inadequacy of its remedies at law, dismissal of its equitable claims is also proper. For these reasons, the Court **GRANTS** AT & T's motion [Doc. No. 10], and **DISMISSES** Counts V through IX of Global Crossing's Complaint.

[2] As Global Crossing has not alleged a duty owed by AT & T separate and distinct from its contractual obligations, dismissal of all of Global Crossing's tort claims is therefore warranted. As a result, the Court need not reach AT & T's alternative argument regarding Global Crossing's claims for common-law and statutory conversion.

I. *Global Crossing's Tort Claims Against AT & T [Counts V–VII].*

***3** In Counts V through VII of Global Crossing's Complaint [Doc. No. 1], Global Crossing advances causes of action for negligence [Count V], common-law conversion [Count VI], and statutory conversion [Count VII]. In its motion [Doc. No. 10, pp. 4–6], AT & T argues that these three causes of action should be dismissed due to the absence of a legal duty owed by AT & T separate and distinct from its contractual obligations. The Court agrees.

"Under well-settled Michigan law, where a contract exists, a tort claim may only be maintained on the basis of a legal duty that is separate and distinct from the contractual obligation." *Consolidated Rail Corp. v. Grand Trunk Western Railroad Co.,* 2009 WL 3460334, *6 (E.D.Mich. Oct.22, 2009), quoting *Rinaldo's Constr. Corp. v. Michigan Bell Tel. Co.,* 454 Mich. 65, 559 N.W.2d 647 (1997). Put another way, "if a relation exists which would give rise to a legal duty without enforcing the contract promise itself, the tort action will lie, otherwise not." *Id.* citing *Hart v. Ludwig,* 347 Mich. 559, 79 N.W.2d 895 (1956). This Court has previously recognized the sound policy reasons behind such a rule:

> [T]ort principles ... are better suited for resolving claims involving unanticipated physical injury, particularly those arising out of an accident. Contract principles, on the other hand, are generally more appropriate for determining claims for consequential damage that the parties have, or could have, addressed in their agreement.

Williams v. Scottrade, Inc., 2006 WL 2077588, *6 (E.D.Mich. July 24, 2006).

Pursuant to *Consolidated Rail,* therefore, the proper inquiry in this matter is whether AT & T owed Global Crossing "an independent duty, separate and distinct from its contractual obligations, that would give rise to the tort causes of action." *Consolidated Rail,* 2009 WL 3460334, *7. Global Crossing argues that it has alleged "a number of specific legal duties that are separate and distinct from those contained within the parties' contract...." [Pl.'s Br., Doc. No. 14, p. 6]. Specifically, Global Crossing argues that it has alleged the following:

> • AT & T had a separate duty to obtain Global Crossing's permission before selling to other carriers the services that should have been reserved for Global Crossing's exclusive use (Compl.¶ 23)....
>
> • AT & T had a duty to obtain Letters of Authorization ("LOAs") and Connection Facility Assignments ("CFAs") before permitting other customers to access or purchase the services that should have been reserved for Global Crossing's use....
>
> • AT & T had a duty not to "misappropriate and convert" the services to which Global Crossing had an entitlement of exclusive use (Compl.¶ 20)....
>
> • AT & T had a duty not to misrepresent what it was selling to Global Crossing....

[Pl.'s Br., Doc. No. 14, pp. 6–8]. As AT & T argues in its reply brief [Doc. No. 17], however, each of these purported "duties" owed by AT & T to Global Crossing are encompassed in the contractual agreement between the parties.

***4** The relevant facts of this case are analogous to those of *Consolidated Rail.* In that case, Grand Trunk claimed that Consolidated Rail had converted its railway tracks through Consolidated Rail's unauthorized use of those tracks. *Consolidated Rail* held as follows:

> This legal duty is the same legal duty that arises under its contract counterclaim: the duty not to utilize GTW's tacks in an unauthorized manner. GTW's attempt to rename this contractual duty in terms of a statutory conversion claim does not change the fact that the legal duty is the same.... As GTW has not alleged a legal duty separate and distinct from its contractual obligations, the statutory conversion counterclaim against CR is dismissed.

Consolidated Rail, 2009 WL 3460334, *8. The same is true in the instant case. In Global Crossing's claims for negligence, common-law conversion, and statutory conversion, Global Crossing has merely repackaged its contractual claims-utilizing the same legal duties arising under the contract between themselves and AT & T. As Global Crossing has failed to come forward with any legal duty owed to itself by AT & T, separate and distinct from AT & T's contractual obligations, dismissal of Global Crossing's tort claims is therefore proper.

II. *Global Crossing's Equitable Claims Against AT & T [Counts VIII & IX].*

In Counts VIII and IX of Global Crossing's Complaint [Doc. No. 1], Global Crossing advances causes of action for "return of stolen property" [Count VIII] and for "unjust enrichment/constructive trust/accounting" [Count

IX]. In its motion [Doc. No. 10, p. 11], AT & T argues that these two causes of action—for equitable, as opposed to legal, relief—should be dismissed due to Global Crossing's adequate remedies at law. The Court agrees.

Michigan courts have consistently held that plaintiffs with an adequate remedy at law may not seek equitable relief under Michigan law:

> ... [A]n independent action for equitable relief will not lie where there is a full, complete, and adequate remedy at law, absent a showing that there is some feature of the case peculiarly within the province of the court of equity.

Romeo Inv. Ltd. v. Mich. Consolidated Gas Co., 2007 WL 1264008, *9 (Mich.App. May 1, 2007), citing *EEOC v. Balimoy Mfg. Co., Inc.,* 179 Mich.App. 748, 751, 446 N.W.2d 546 (1989); see also *Everett v. Nickola,* 234 Mich.App. 632, 637, 599 N.W.2d 732 (1999) ("an equitable remedy is neither necessary nor appropriate where a resolution under the law is available"). "[T]he burden of proof is upon [the] Plaintiff[ ] to show that they do not have an adequate remedy at law." *Eyde v. Empire of America Fed. Savings Bank,* 701 F.Supp. 126, 130 (E.D.Mich.1988).

Global Crossing concedes that its causes of action for "return of stolen property" [Count VIII] and for "unjust enrichment/constructive trust/accounting" [Count IX] are equitable in nature. [Pl.'s Br., Doc. No. 14, p. 16]. Nonetheless, Global Crossing argues that dismissal of these claims would be improper at this time. The Court disagrees.

***5** With respect to its accounting cause of action, Global Crossing argues that it "needs an accounting [ ] in order to ascertain the revenues AT & T obtained as a result of its decision to sell to third parties the services that must be assumed to be reserved for Global Crossing's use." [Pl.'s Br., Doc. No. 14, p. 16]. However, "[a]n accounting is unnecessary where discovery is sufficient to determine the amounts at issue." *Boyd v. Nelson Credit Centers, Inc.,* 132 Mich.App. 774, 780, 348 N.W.2d 25 (1984). "In other words, equity will not take jurisdiction ... where the account involved is based on a claim which, in effect, is merely for damages for breach of contract ." *Lasala v. Gupta,* 2009 WL 2195102, *3 (Mich.App. July 23, 2009) (internal citation and quotation omitted). Global Crossing has provided no argument to the Court evidencing the inadequacy of discovery to determine the amount of its alleged damages. Dismissal of Global Crossing's claim for an accounting is therefore proper.

Global Crossing also argues that dismissal of its unjust enrichment claim, at this stage in proceedings, would be improper. Global Crossing argues as follows:

> Additionally, it goes without saying that Global Crossing is permitted to plead in the alternative in this stage of the proceeding. That is the purpose of Global Crossing's claim for ... unjust enrichment. If the Court eventually determines that Global Crossing can be made whole pursuant to its contract claim, then the quasi-contract claim will of course be dismissed.... In the event the Court determines Global Crossing had no contract right to exclusivity, [however], then Global Crossing would be entitled to proceed on an unjust enrichment claim[.]

[Pl.'s Br., Doc. No. 14, p. 16]. The Court disagrees.

In *Morris Pumps v. Centerline Piping, Inc.,* 273 Mich.App. 187, 729 N.W.2d 898 (2007), the Michigan Court of Appeals held that an action for unjust enrichment can only lie where no express contract exists covering the same subject matter between the parties:

> The theory underlying quantum meruit recovery is that the law will imply a contract in order to prevent unjust enrichment when one party inequitably receives and retains a benefit from another. However, a contract will be implied only if there is no express contract covering the same subject matter. Generally, an implied contract may not be found if there is an express contract *between the same parties* on the same subject matter.

Morris Pumps, 273 Mich.App. at 194, 729 N.W.2d 898 (internal quotations and citations omitted) (emphasis in original). Relying upon *Morris Pumps,* this Court has consistently dismissed alternatively-pled claims for unjust enrichment where an express contract between the parties covered the same subject matter. *See, e.g., Vergote v. Dawson,* 2009 WL 94538, *11 (E.D.Mich. Jan.13, 2009) ("there is no claim for unjust enrichment when there exists a valid contract covering the same subject matter"); *Exide Tech. v. Kmart Corp.,* 2009 WL 1438729, *6 (E.D.Mich. May 20, 2009) ("Exide's claims of quantum meruit and unjust enrichment seek recovery on the same subject matter as the parties' express Agreement. Accordingly, Kmart is entitled to summary judgment of Exide's quantum meruit and unjust enrichment claims as a matter of law").

***6** Global Crossing's argument regarding the outcome of the "exclusivity" contractual issue is similarly without merit. *Even if* the Court finds that "Global Crossing had no contract right to exclusivity," [Pl.'s Br., Doc. No. 14, p. 16], *the same subject matter* is still encompassed within the parties' express contract. For these reasons, dismissal of Global Crossing's claim for unjust enrichment is also proper.

Global Crossing's response brief [Doc. No. 14] advances no specific argument for why dismissal of its equitable claims for "return of stolen property" and for "constructive trust" would be improper at this time. As Global Crossing has failed to bring forth evidence why these claims are necessary—i.e., why no adequate remedy exists at law-dismissal of Global Crossing's claims for "return of stolen property" and "constructive trust" are also proper.

CONCLUSION

For the reasons explained above, the Court **GRANTS** AT & T's motion [Doc. No. 10], and **DISMISSES** Counts V through IX of Global Crossing's Complaint.

IT IS SO ORDERED.

All Citations

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United States District Court, W.D. Michigan, Southern Division.

Michael KINGEN and Kelley Ramsey, Individually and on Behalf of All Others Similarly Situated, Plaintiffs,
v.
WARNER NORCROSS + JUDD LLP, Defendant.

Case No. 1:22-cv-01126
|
Signed October 5, 2023

Attorneys and Law Firms

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AMENDED OPINION AND ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO DISMISS

Paul L. Maloney, United States District Judge

I. Introduction

***1** Plaintiff Kingen and others filed a three-count complaint against Defendant Warner Norcross + Judd LLP asserting negligence, breach of implied contract, and unjust enrichment claims. Plaintiffs seeks to represent a class of "all individuals within the United States of America whose PII and/or financial information was exposed to unauthorized third-parties ...." (ECF No. 1 at PID 7). Plaintiff Kingen resides in Indiana, and Plaintiff Ramsey resides in Nevada. Defendant is a law firm headquartered in west Michigan, and it moved to dismiss Plaintiffs' complaint. The Court grants in part and denies in part Defendant's motion to dismiss.

II. Procedural History and Factual Allegations

On August 24, 2022, Plaintiffs filed this class action against Defendant for failure to properly secure and safeguard Plaintiffs' and class members' personally identifiable information ("PII") that was stored within Defendant's information network. (ECF No. 1 at PID 1). Plaintiffs originally filed their complaint in the Federal District of Nevada but following Defendant's first motion to dismiss for lack of personal jurisdiction (ECF No. 9), the parties stipulated to a transfer to this Court. (ECF No. 12 & 13). Plaintiffs allege their injury stems from a data breach in Defendant's information network on October 22, 2021. (ECF No. 1 at PID 2). In particular, Plaintiffs allege the following injuries: (1) lost time spent dealing with the data breach, (2) diminution in the value of their PII, (3) "anxiety and increased concerns for the loss of privacy," (4) and "imminent and impending injury arising from the substantially increased risk of fraud, identity theft, and misuse resulting from" the breach. (*Id.* at PID 5–6).

III. Analysis and Standard of Review

Defendant moved to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1); Defendant also moved to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). (ECF No. 25 at PID 25).

A. 12(b)(1) & Article III Standing

To survive a motion to dismiss under 12(b)(1), a plaintiff must show Article III standing. *Davis v. Detroit Pub. Sch. Cmty. Dist.*, F. App'x 18, 22–23 (6th Cir. 2020). At this stage, the court "must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party." *Parsons v. U.S. Dep't. of Justice*, 801 F.3d 701, 710 (6th Cir. 2015).

To establish standing, a plaintiff must show (1) an actual or imminent injury in fact; (2) a causal connection between the injury and the defendant; and (3) that the injury is redressable by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

An injury within the meaning of Article III must be "concrete, particularized, and actual or imminent." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). "A 'concrete' injury must be 'de facto'; that is, it must actually exist." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016) (citing Black's Law Dictionary 479 (9th ed. 2009)). A concrete injury must be real and not abstract. *Id.* A future injury must be "certainly impending." *Clapper v. Amnesty Int'l. USA*, 568 U.S. 398, 401 (2013).

***2** What constitutes an injury in data breach cases is not so straightforward. In an unpublished opinion, the Sixth Circuit declared that a "Plaintiffs' allegations of a substantial risk of harm, coupled with reasonably incurred mitigation costs, are sufficient to establish a cognizable Article III injury at the pleading stage of the litigation." *Galaria v. Nationwide Mut. Ins. Co.*, 663 F. App'x 384, 388 (6th Cir. 2016). In *Galaria*, Plaintiffs alleged that their data had been stolen and was now "in the hands of ill-intentioned criminals." *Id.* In finding an injury, the Sixth Circuit said, "Where a data breach targets personal information, a reasonable inference can be drawn that the hackers will use the victims' data for the fraudulent purposes alleged in Plaintiffs' complaints." *Id.* The court also explained that although it might not be "literally certain" that Plaintiffs' data will be misused, there is a "sufficiently substantial risk of harm that incurring mitigation costs is reasonable." *Id.* "It would be unreasonable to expect Plaintiffs to wait for actual misuse." *Id.* at 388. The court maintained that the plaintiffs did not "manufacture standing by incurring costs in anticipation of non-imminent harm" because they had been subjected to credit freezes. *Id.* at 389.

The circuits are split on what constitutes a sufficient Article III injury in data breach cases. The *Galaria* court gathered some support from the other circuits, which found sufficiently concrete allegations of injury following malicious data breaches. *See Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 693 (7th Cir. 2015) ("At this stage in the litigation, it is plausible to infer that the plaintiffs have shown a substantial risk of harm from the Neiman Marcus data breach."); *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 967 (7th Cir. 2016) ("It is plausible to infer a substantial risk of harm from the data breach ...."); *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010) ("Plaintiffs–Appellants have alleged a credible threat of real and immediate harm stemming from the theft of a laptop containing their unencrypted personal data."). Other circuits have weighed in and found that mere data breaches do not constitute injuries. *See Reilly v. Ceridian Corp.*, 664 F.3d 38, 44 (3d Cir. 2011) ("Appellants have alleged no misuse, and therefore, no injury."); *Beck v. McDonald*, 848 F.3d 262, 275 (4th Cir. 2017) (declining to construe a higher probability of identity theft as a "substantial risk of harm," and finding it too speculative).

After *Galaria*, the Supreme Court handed down *TransUnion LLC v. Ramirez*, which found an injury in fact where some class members had their credit reports shared with third parties bearing misleading OFAC alerts.[1] 141 S. Ct. 2190, 2208 (2021). Most of the members of that class action did not have their reports disseminated to third parties, but instead were claiming an injury through the risk of future harm. *Id.* at 2210. As to the plaintiffs who did not have their faulty reports shared with third parties, the Supreme Court found no injuries. *Id.* at 2211 (explaining that the unpublished reports never resulted in denial of credit or any emotional injury because the reports were never shared). The Court explained that without publication to a third party, the erroneous reports did not create a present injury, and further, the prospect of future harm was just too speculative to amount to a concrete injury. *Id.* at 2212. Additionally, the plaintiffs did not present evidence that they "even *knew* that there were OFAC alerts in their internal TransUnion files." *Id. TransUnion* seems to reign in *Galaria's* future substantial risk of injury standard. In particular, future risk of injury cannot be too speculative; and in some cases, *TransUnion* may require publication to a third party and/or actual knowledge of the harm. 141 S. Ct. at 2210–12.

[1] Alerts from the Office of Foreign Assets Control ("OFAC") can label potential creditors as terrorists, drug traffickers, or serious criminals.

Another federal court in this circuit observed that "*TransUnion LLC v. Ramirez* casts some doubt on the continued viability of *Galaria*." *Brickman v. Maximus, Inc.*, No. 2:21-CV-3822, 2022 WL 16836186, at *3 (S.D. Ohio May 2, 2022). That may be true, but as that district court noted, that is a question for the Sixth Circuit, not this Court. *Id.* Therefore, the Court finds the *Galaria* framework as at least persuasive precedent.

***3** Defendant argues that Plaintiffs failed to meet the post-*TransUnion* standards because the risk of future harm alone does not provide Article III standing. (ECF No. 25 at PID 33). Plaintiffs pleaded that they have "suffered imminent and impending injury arising from the

substantially increased risk of fraud, identity theft, and misuse" resulting from the breach on Defendant's network. (ECF No. 1 at PID 6). Aside from Plaintiffs' alleged future risk of fraud and identity theft, Plaintiffs also allege (1) lost time spent dealing with the data breach, (2) diminution in the value of their PII, and (3) "anxiety and increased concerns for the loss of privacy." (ECF No. 1 at PID 5–6).

The Sixth Circuit has not reconsidered *Galaria* in light of *TransUnion*. Because Plaintiffs' allegations mirror those of the plaintiffs in *Galaria*, Plaintiffs have adequately pled a cognizable Article III injury. Additionally, Plaintiffs' facts more closely resemble the class members from *TransUnion* whose information was disseminated to third parties, and the Supreme Court found a concrete injury for that group of plaintiffs. Therefore, the Court denies Defendant's motion to dismiss for lack of jurisdiction.

B. 12(b)(6) & Failure to State a Claim

Second, Defendant argues that Plaintiffs' claims must be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state claims upon which relief may be granted based on federal pleading standards.

A defendant bringing a motion to dismiss for failure to state a claim under Rule 12(b)(6) tests whether a cognizable claim has been pled in the complaint. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988). To survive a motion to dismiss, a plaintiff must allege facts sufficient to state a claim for relief that is "plausible on its face" and, when accepted as true, are sufficient to "raise a right to relief above the speculative level." *Mills v. Barnard*, 869 F.3d 473, 479 (6th Cir. 2017) (citation omitted). "The complaint must 'contain either direct or inferential allegations respecting all material elements necessary for recovery under a viable legal theory.' " *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 774 (6th Cir. 2015) (citation omitted). To resolve a motion to dismiss, a court must accept as true all factual allegations, but it need not accept any legal conclusions. *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011).

1. Choice of Law

A "federal court sitting in diversity ordinally must follow the choice of law rules of the State in which it sits." *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 65 (2013). So here, Michigan's choice of law rules apply. For tort claims, the Michigan framework requires use of Michigan law unless a rational reason exists to do otherwise. *Sutherland v. Kennington Truck Serv., Ltd.*, 562 N.W.2d 466, 471 (Mich. 1997). For quasi-contract claims, Michigan employs the "most significant relationship" test. *Chrysler Corp. v. Skyline Indus. Servs., Inc.*, 528 N.W.2d 698, 703 (Mich. 1995). For all claims, parties primarily cite Michigan law, and both choice of law tests point to Michigan law as proper. The data breach occurred in Michigan, and the Defendant linking the entire proposed class of plaintiffs is in Michigan. The Court will apply Michigan law.

2. Plaintiffs' Negligence Claim

Plaintiffs assert a negligence claim against Defendant, arguing that it failed to use a proper standard of care when handling Plaintiffs' PII. Defendant argues that Plaintiffs have failed to allege damages sufficient to support a claim for negligence. (ECF No. 25 at PID 42). Under Michigan law, a claim for negligence requires that plaintiffs "prove (1) that defendant owed them a duty of care, (2) that defendant breached that duty, (3) that plaintiffs were injured, and (4) that defendant's breach caused plaintiffs' injuries." *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 688 (Mich. 2005).

***4** In *Henry*, exposure to potential future harm and the payment of expenses associated with monitoring and mitigating the potential future harm were not sufficient to establish an actual present injury. *Id.* at 688. "If plaintiffs' claim is for injuries they may suffer in the future, their claim is precluded as a matter of law, because Michigan law requires more than a merely speculative injury." *Id.* In rejecting "mere exposure to a toxic substance and the increased risk of future harm" as an injury for tort purposes, the Michigan Supreme Court held that "[i]t is a *present* injury, not fear of an injury in the future, that gives rise to a cause of action under negligence theory." *Id.* at 689.

Michigan courts have dismissed negligence actions for a lack of a present injury. In *Doe v. Henry Ford Health System*, a class sued a hospital after its subcontractor made available patient information through a simple google search. 865 N.W.2d 915, 918 (Mich. Ct. App. 2014). The information available included the patient's name, medical record number, visitation dates, as well as diagnoses. *Id.* The hospital fixed the issue when it learned

of the problem, and plaintiffs never pleaded that a third party viewed their private medical information. *Id.* Plaintiffs argued that the costs for the credit monitoring services related to a present, actual injury, but the Michigan Court of Appeals disagreed. *Id.* at 921. The court stated, "Absent some such indication of present injury to her credit or identity, it is clear that these damages for credit monitoring were incurred in anticipation of possible future injury." *Id.* The court explained further: "Because 'these economic losses are wholly derivative of a *possible, future* injury rather than an *actual, present* injury,' the costs of these credit-monitoring services are not cognizable under Michigan's negligence law." *Id.* (citing *Henry*, 701 N.W.2d at 688).

In an unpublished opinion, the Michigan Court of Appeals rejected the argument that Michigan law recognizes an "imminent risk of future harm as a present injury capable of supporting a claim for damages." *Rakyta v. Munson Healthcare*, No. 354831, 2021 WL 4808339, at *2 (Mich. Ct. App. Oct. 14, 2021). The court reasoned:

> Although Michigan courts have not always carefully distinguished between the concepts of injury and damages, those concepts are distinct. Economic losses can constitute damages, but not all economic losses will establish the element of damages; only damages that arise from an actual, present injury, are cognizable under Michigan law. Accordingly, in order to establish the damages element of a claim for negligence, a plaintiff must allege that he or she suffered damages from an actual, present injury.

Id. at *3 (internal citations omitted). *Rakyta* began when unknown attackers accessed email accounts belonging to some of the defendant's employees, which allowed access to thousands of patients' medical records. *Id.* at *1. The plaintiffs sued and alleged negligence among other claims. *Id.* Plaintiffs alleged that Munson's actions provided persons with opportunities to commit fraud, caused an increased risk of actual harm, and caused a loss in value for their PII. *Id.* The trial court dismissed all of plaintiffs' claims and the Michigan Court of Appeals affirmed. *Id.* at*7.

Here, the inquiry for the Court becomes whether Plaintiffs' allegations amount to an "actual present injury" under Michigan law sufficient to sustain a negligence claim. *Henry*, 701 N.W.2d at 688. Plaintiffs allege they

> *have suffered* and will suffer injury, including but not limited to: (i) actual identity theft; (ii) the loss of the opportunity of how their PII and financial information is used; (iii) the compromise, publication, and/or theft of their PII and financial information; (iv) out-of-pocket expenses associated with the prevention, detection, and recovery from identity theft, tax fraud, and/or unauthorized use of their PII and financial information; (v) lost opportunity costs associated with effort expended and the loss of productivity addressing and attempting to mitigate the actual and future consequences of the Data Breach, including but not limited to, efforts spent researching how to prevent, detect, contest, and recover from embarrassment and identity theft; (vi) the continued risk to their PII and financial information, which may remain in Defendant's possession and is subject to further unauthorized disclosures so long as Defendant fail to undertake appropriate and adequate measures to protect Representative Plaintiff's and Class Members' PII and financial information in its continued possession; (vii) and future costs in terms of time, effort, and money that will be expended to prevent, detect, contest, and repair the impact of the PII and financial information compromised as a result of the Data Breach ....

***5** (ECF No. 1 at PID 21–22) (emphasis added). Plaintiffs' complaint makes it difficult to surmise which alleged injuries have already happened and which injuries could happen. Plaintiffs have alleged, however, that they have suffered injury beyond a mere risk of future injury.

Plaintiffs' complaint is sufficiently distinct from *Doe v. Henry Ford Health System* to survive a motion to dismiss. Plaintiffs allege their injuries have occurred, whereas in *Doe*, the plaintiffs merely alleged future risk of harm. 865 N.W.2d 915, 921 (Mich. Ct. App. 2014) ("Absent some such indication of present injury to her credit or identity, it is clear that these damages for credit monitoring were incurred in anticipation of possible future injury."). Additionally, the *Doe* plaintiffs did not plead any third parties viewed their exposed PII. *Id.* In this case, a third party stole Plaintiffs' PII. *Rakyta* is also not dispositive at this stage because Plaintiffs pled more than an immediate risk of harm, unlike the plaintiffs in *Rakyta*. In sum, Plaintiffs alleged damages sufficient to survive a motion to dismiss.[2] The Court denies Defendant's motion to dismiss Plaintiffs' negligence claim.

[2] Defendant raises similar lack of damages arguments for both the unjust enrichment claim and Plaintiffs' breach of implied contract claim. Those arguments fail for similar reasons.

3. Plaintiffs' Unjust Enrichment Claim

To sustain an unjust enrichment claim under Michigan

law, a plaintiff must establish "(1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Belle Isle Grill Corp. v. City of Detroit*, 666 N.W.2d 271, 280 (2003). Plaintiffs argue "[i]t is a reasonable inference that Defendant was collecting information because doing so provided some benefit and Plaintiffs are entitled to draw such inferences in their favor at this stage." (ECF No. 33 at PID 78). The Court disagrees because Plaintiffs did not plead any specific factual allegations explaining how Defendant benefitted from possessing Plaintiffs' PII.[3] Plaintiffs' mere assertion that "Defendant received profits, benefits, and compensation" at the expense of Plaintiffs' is conclusory. Other courts have found that it was the third-party hackers—not the defendants—that benefited from a data breach. *See, e.g.*, *In re Gallagher Data Breach Litig.*, 631 F. Supp. 3d 573, 592 (N.D. Ill. 2022) ("[T]hird-party hackers, not Defendants, are the ones who benefitted from the Data Breach."); *Griffey v. Magellan Health Inc.*, 562 F. Supp. 3d 34, 50 (D. Ariz. 2021) (same). The Court is permitted to disregard conclusory allegations at this stage. Plaintiffs did not "raise a right to relief above the speculative level." *Mills v. Barnard*, 869 F.3d 473, 479 (6th Cir. 2017). Therefore, Defendant's motion to dismiss is granted as to Plaintiffs' unjust enrichment claim.

[3] Courts "routinely reject" the proposition that an individual's PII has independent monetary value. *Welborn v. IRS.*, 218 F. Supp. 3d 64, 78 (D.D.C. 2016) (citing *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688, 697 (7th Cir. 2015)).

4. Plaintiffs' Breach of Implied Contract Claim

Plaintiffs allege an implied contract claim. To maintain a breach of contract claim under Michigan law, a plaintiff must allege that (1) parties are competent to contract; (2) a proper subject matter was contracted over; (3) legal consideration existed; (4) agreement was mutual; (5) and mutual obligations existed. *Mallory v. City of Detroit*, 449 N.W.2d 115, 118 (Mich. Ct. App. 1989). "Courts recognize implied contracts where parties assume obligations by their conduct." *Williams v. Litton Sys., Inc.*, 449 N.W.2d 669 (Mich. 1989).

***6** Defendant argues that Plaintiffs failed to plead with specificity a factual basis for a meeting of the minds or consideration. (ECF No. 25 at PID 48). Plaintiffs' complaint alleges a meeting of the minds occurred when they agreed to provide their PII and financial information to Defendant "in exchange for, amongst other things, the protection of their PII and financial information." (ECF No. 1 at PID 23). Plaintiffs pleaded that through its "course of conduct," Defendant entered into an implied contract. (*Id.* at PID 22).

Plaintiffs' implied contract claim suffers from a similar defect as their unjust enrichment claim: The allegations are insufficient and conclusory. Plaintiffs did not sufficiently allege the terms of the implied contract. Plaintiffs did not cite any factual basis for its claim or explain how Defendant assented to an implied contract. Plaintiffs also fail to allege specific terms of the implied contract, including to what extent Defendant was bound and for how long. Although there exists little Michigan law regarding implied contract claims stemming from data breaches, other federal courts have summarily rejected arguments like Plaintiffs'. *See, e.g.*, *Griffey v. Magellan Health Inc.*, 562 F. Supp. 3d 34, 51–52 (D. Ariz. 2021) (rejecting the argument that "[b]ecause there was a data breach, [Defendants]'s data security must have been inadequate, which is a breach of the implied contracts. And, because [Defendant] did not conform to an unclear standard of data security, [Defendant] must have breached the implied contracts"). Plaintiffs needed to provide concrete examples of how Defendant assented to the terms of the alleged contract but failed to do so. Therefore, Defendant's motion to dismiss is granted as to Plaintiffs' breach of implied contract claim.

5. Plaintiffs' References to Amending Their Complaint

Plaintiffs request that, if the court were to dismiss any of their claims, they should be permitted leave to amend their complaint to cure any defects pursuant to Federal Rule of Civil Procedure 15. (ECF No. 33 at PID 78). Plaintiffs' request in their brief is not a proper motion, and a court does not abuse its discretion in denying an opportunity to amend under such circumstances. *D.E.&J. Ltd. P'ship v. Conaway*, 133 F. App'x 994, 1001 (6th Cir. 2005). Moreover, Plaintiffs have not provided a proposed amended pleading to the Court for review. W.D. Mich. LCivR 5.7(f) (requiring a proposed amended pleading must be attached to the motion for leave to amend). Absent the substance of the proposed amendment, a court has no basis to determine whether "justice so requires" an amended complaint. *Roskam Baking Co. v. Lanham Mach. Co.*, 288 F.3d 895, 906 (6th Cir. 2002). Plaintiffs' request is rejected by the Court.

IV. Conclusion

In summary, Plaintiffs' complaint pled facts sufficient for the Court to find Article III standing because Plaintiffs' factual allegations mirrored those from the plaintiffs' complaint in *Galaria*. Plaintiffs pled damages sufficient to sustain their negligence claim. Plaintiffs' complaint failed to allege a sufficient factual basis beyond bare allegations to support either their unjust enrichment claim or their breach of implied contract claim.

ORDER

Defendants' 12(b)(1) motion to dismiss for lack of jurisdiction is **DENIED.** Defendant's 12(b)(6) motion to dismiss is **GRANTED** in part pertaining to Plaintiffs' unjust enrichment claim and breach of implied contract claim and is **DENIED** in part pertaining to Plaintiffs' negligence claim.

For these reasons, Defendant's motion to dismiss (ECF No. 24) is **DENIED** in part and **GRANTED** in part.

***7 IT IS SO ORDERED.**

All Citations

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United States District Court, E.D. Michigan, Southern Division.

Michael LOCHRIDGE, individually and on behalf of all others similarly situated, Plaintiff,
v.
QUALITY TEMPORARY SERVICES, INC. d/b/a Qualified Staffing, Defendant.

Case No. 22-cv-12086
|
Signed June 30, 2023

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ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS THE SECOND AMENDED CLASS ACTION COMPLAINT (ECF No. 22)

F. Kay Behm, United States District Judge

I. INTRODUCTION

***1** This matter is before the court on Defendant Quality Temporary Services' Motion to Dismiss Plaintiff's Second Amended Class Action Complaint. (ECF No. 22). Plaintiff Michael Lochridge filed his Second Amended Class Action Complaint on March 31, 2023, alleging that his personal identifiable information (PII) was exposed as a result of Defendant's failure to properly safeguard their computer network. (ECF No. 20). Plaintiff brings claims on behalf of himself and all other similarly situated individuals for Negligence (Count I), Unjust Enrichment (Count II), and Breach of Implied Contract (Count III), and seeks a Declaratory Judgment (Count IV). (*Id.*). On April 14, 2023, Defendant filed a Motion to Dismiss Plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). (ECF No. 22). This case was initially before District Judge Paul D. Borman, but was reassigned to the undersigned on February 6, 2023. The court held a hearing on June 21, 2023, wherein both parties participated in oral argument. (*See* ECF No. 24). For the reasons stated below, the court **GRANTS IN PART** and **DENIES IN PART** Defendant's motion.

II. FACTUAL BACKGROUND

Defendant is a Michigan corporation providing job recruiting and staffing services across the United States. (ECF No. 20, PageID.198). To assist in placing individuals in employment opportunities, Defendant collects various PII from applicants. (*Id.*, PageID.204). Plaintiff alleges he provided his PII to Defendant "with the reasonable expectation and mutual understanding that Defendant would comply with its obligations to keep such information confidential and secure from unauthorized access." (*Id.*).

In October 2021, Defendant detected suspicious activity on its computer system and launched an investigation. (ECF No. 22, PageID.258). With the assistance of forensic computer specialists, Defendant determined they had been "the victim of a sophisticated cyberattack involving ransomware, and that an unauthorized actor may have accessed and/or acquired a limited amount of data stored on its systems between September 28, 2021 and October 13, 2021." (*See* ECF No. 20-1, "Notice of Data Privacy Event"). The cyberattack resulted in hackers potentially gaining access to 81,355 individuals' PII, including their "names, addresses, Social Security numbers, driver's license or state identification card numbers, passport numbers, financial account information, payment card numbers, medical information, and health insurance information." (*Id.*). Plaintiff alleges he received a notification letter from Defendant on or around June 14, 2022, informing him that various pieces of his PII had potentially been exposed. (ECF No. 20,

PageID.201). The letter encouraged any affected individuals to "remain vigilant against incidents of identity theft and fraud by reviewing account statements, explanation of benefits, and monitoring free credit reports for suspicious activity and to detect errors," but clarified that they were not aware of any actual or attempted misuse of information. (*See* ECF No. 20-1, "Notice of Data Privacy Event").

***2** Plaintiff alleges that, as a result of the breach, he and the other members of the proposed class have incurred, and will continue to incur, an increased risk of "harm, damaged credit, depravation of the value of their Private Information, loss of privacy, and/or additional damages ..." (ECF No. 20, PageID.200). Additionally, Plaintiff alleges that he was directly injured when his personal information was used to fraudulently apply for a loan and to open a financial account in his name. (*Id.*, PageID.204). Plaintiff argues that these injuries were all directly and proximately caused by the data breach. (*Id.*, PageID.205).

III. STANDARDS OF REVIEW

A. Rule 12(b)(1)

A motion brought under Federal Rule of Civil Procedure 12(b)(1) alleges that the court does not have subject matter jurisdiction over the claims as presented. Fed. R. Civ. P. 12(b)(1). Allegations that a plaintiff lacks standing can be brought as a motion to dismiss for lack of subject matter jurisdiction. *Stalley v. Methodist Healthcare*, 517 F.3d 911, 916 (6th Cir. 2008) ("We review de novo a district court's dismissal of a case for lack of standing – lack of subject matter jurisdiction – under Fed. R. Civ. P. 12(b)(1)."). Motions brought under Rule 12(b)(1) fall into two categories: facial attacks and factual attacks. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). A facial attack is a "challenge to the sufficiency of the pleading itself" whereas a factual attack "is a challenge to the factual existence of subject matter jurisdiction." *Id.* In this case, Defendant brings a facial attack challenging the sufficiency of Plaintiff's allegations that he suffered a concrete injury in fact. *Id.* Because this is a facial attack, the court must "accept[ ] the material allegations in the complaint as true and construe[ ] them in the light most favorable to the nonmoving party." *Id.*

B. Rule 12(b)(6)

A motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6) alleges that a complaint fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). In reviewing a motion to dismiss under this section, the court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *DirectTV v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). The court may not consider matters outside of the pleadings except for "the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Ashh, Inc. v. All About It, LLC*, 475 F. Supp. 3d 676, 679 (E.D. Mich. 2020) (citing *Bassett v. Nat'l Coll. Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008)).

To survive a motion to dismiss under Rule 12(b)(6), a complaint must provide " 'a short and plain statement of the claim showing that the pleader is entitled to relief' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' " *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Although a plaintiff's factual allegations are assumed to be true, they must "do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief." *LULAC v. Bredsen*, 500 F.3d 523, 527 (6th Cir. 2007). A complaint will not suffice if it offers only "a formulaic recitation of the elements of a cause of action" or if it "tenders naked assertion[s] devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (citing *Twombly*, 550 U.S. at 557).

IV. ANALYSIS

A. Article III Standing

***3** The court must first analyze whether Plaintiff has Article III standing to pursue his claims in federal court.[1] Defendant argues that Plaintiff has failed to plead facts showing he suffered a concrete injury in fact sufficient to give rise to Article III standing. Plaintiff responds by arguing he has suffered the following injuries: (1) he has "had a financial account fraudulently opened using his personal information and had a loan fraudulently applied for using his information;" (2) he has spent "numerous hours" responding to the data breach; (3) he has suffered "diminution in value of his PII;" (4) he has suffered "loss

of the benefit of the bargain;" and (5) he has an "ongoing risk of identity theft." (*See* ECF No. 23, PageID.292). Likewise, Plaintiff argues that he has sufficiently pled Article III standing to pursue his claims. (*Id.*, PageID.294).

[1] Where, as here, the court addresses standing prior to class certification, the analysis will focus on the standing of the named plaintiff. *See In re Packaged Ice Antitrust Litigation*, 779 F. Supp. 2d 642, 657 (E.D. Mich. 2011). To demonstrate standing, "named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Id.* (citing *Lewis*, 518 U.S. 343, 347 (2011)).

Article III of the Constitution limits the jurisdiction of federal courts to hear actual "cases" and "controversies." U.S. Const. Art. III § 2 cl. 1. For there to be a case or controversy under Article III, a plaintiff must have a "personal stake" in the case, otherwise known as standing. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). In a proposed class action matter, each named plaintiff must personally demonstrate standing independent of any claims brought on behalf of a putative class. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996). To establish standing, a plaintiff bears the burden to show: "(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). "Each element of standing 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at successive stages of litigation.' " *Fair Elections Ohio v. Husted*, 770 F.3d 456, 459 (6th Cir. 2014). At the pleading stage of litigation, "the plaintiff must 'clearly allege facts demonstrating' each element" and the court "must accept as true all material allegations and construe the complaint in favor of the complaining party." *Galaria v. Nationwide Mut. Ins. Co.*, 663 F. App'x 384, 388 (6th Cir. 2016) (citations omitted).

i. Injury in Fact

To establish an injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (citing *Lujan*, 504 U.S. at 560). To be concrete, an injury must "actually exist," but it may be tangible or intangible. *Id.* The most obvious concrete injuries are tangible, such as physical or monetary harms. *TransUnion*, 141 S. Ct. at 2204. However, intangible harms can also be concrete, particularly when they have a "close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts," including, for example, "reputational harms, disclosure of private information, and intrusion upon seclusion." *Id.* Where a plaintiff seeks to establish standing based on an imminent injury, the "threatened injury must be *certainly impending* ... allegations of *possible* future injury are not sufficient." *Galaria*, 663 F. App'x at 388. This standard does not require plaintiffs to demonstrate that it is "literally certain that the harms they identify will come about," rather, the Supreme Court has recognized that a " 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm," can be sufficient to confer standing. *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 414 n.5 (2013) (citations omitted).

***4** The Sixth Circuit has previously addressed a factually similar case brought by victims of a data breach, *Galaria v. Nationwide Mut. Ins. Co.* While the *Galaria* decision is unpublished and not technically binding on this court, its analysis on the issue of standing is persuasive. *See U.S. v. Flores*, 477 F.3d 431, 433-34 (6th Cir. 2007); *Smith v. Astrue*, 639 F. Supp. 2d 836, 841 (W.D. Mich. 2009) ("like judges throughout the Sixth Circuit, this court regularly discusses nonprecedential decisions when they can illuminate an issue."). In *Galaria*, the plaintiffs argued that they were injured because they had incurred, and would continue to incur, a number of costs for "purchasing credit reporting services, purchasing credit monitoring and/or internet monitoring services, frequently obtaining, purchasing, and reviewing credit reports, bank statements, and other similar information, instituting and/or removing credit freezes and/or closing or modifying financial accounts." *Galaria*, 663 F. App'x at 386-87. The Sixth Circuit reasoned that theft of an individual's personal data "places them at a continuing, increased risk of fraud and identity theft beyond the speculative allegations of 'possible future injury' or 'objectively reasonable likelihood' of injury that the Supreme Court has explained are insufficient." *Id.* (citing *Clapper*, 568 U.S. at 409). Likewise, the court held that the "[p]laintiffs' allegations of a substantial risk of harm, coupled with reasonably incurred mitigation costs, [were] sufficient to establish a cognizable Article III injury at the pleading stage of the litigation." *Id.* at 398.

The basic facts of this case are almost identical to the

facts of *Galaria.* In both cases, the defendant's computer servers were breached by hackers who obtained access to a large amount of PII. *Galaria*, 663 F. App'x at 385; (ECF No. 20, PageID.200). The accessed PII in both cases was composed of highly sensitive information, including social security numbers and birth dates, that are "not easily changeable or replaceable." *See Finesse Express, LLC v. Total Quality Logistics, LLC*, No. 1:20CV235, 2021 WL 1192521, at *3 (S.D. Ohio Mar. 30, 2021) (one factor to consider is whether the type of information compromised is "easily changeable or replaceable information, such as credit and debit card information ..."); *see also Galaria*, 663 F. App'x at 385; (ECF No. 20, PageID.200). Both cases also involved allegations that the hackers had used or attempted to use the PII obtained in the breach. *See Galaria*, 663 F. App'x at 387; (ECF No. 20, PageID.204). Likewise, *Galaria*'s analysis will guide the court's decision.

Defendant argues that, following the Supreme Court's decision in *TransUnion*, the holding of *Galaria* is no longer valid. (ECF No. 22, PageID.266). The court disagrees. First, the Sixth Circuit has yet to officially reconsider *Galaria* in light of *TransUnion. See Brickman v. Maximus, Inc.*, No. 2:21-CV-3822, 2022 WL 16836186, at *4 (S.D. Ohio May 2, 2022). Additionally, the injuries in *TransUnion* can be distinguished from those present in *Galaria.* In *TransUnion*, the plaintiffs were individuals whose internal credit files had been incorrectly marked as a potential match to a list of " 'specially designated nationals who threaten America's national security." *TransUnion*, 141 S. Ct. at 2201. The Court held that only the plaintiffs whose internal credit files had been actually disseminated to a third party had suffered an injury sufficient to confer standing. *Id.* at 2212. In *Galaria*, the core of the alleged injury also involved the dissemination of information, but it was to third party cybercriminals, not a legitimate credit reporting agency. *Galaria*, 663 F. App'x at 387 ("where a data breach targets personal information, a reasonable inference can be drawn that the hackers will use the victims' data for fraudulent purposes."). Given these differences, *Galaria* more readily considered the unique threats present when information is obtained during a targeted cyberattack.

Viewing the facts of this case in the light most favorable to Plaintiff, and applying the Sixth Circuit's rationale from *Galaria*, Plaintiff has alleged a sufficient injury in fact to support Article III standing. Plaintiff alleges that, as a result of the "immediate, imminent, and heightened risk of all manners of identity theft," he and the other class members have needed to take mitigation actions including "placing 'freezes' and 'alerts' with credit reporting agencies, contacting their financial institutions, closing or modifying financial accounts, and closely reviewing and monitoring bank accounts and credit reports for unauthorized activity." (ECF No. 20, PageID.200, 212). It would be "unreasonable to expect Plaintiffs to wait for actual misuse" before taking these mitigation steps, especially when they were specifically suggested by Defendant in the notification letter. *Galaria*, 663 F. Appx. at 387. Additionally, Plaintiff argues that he "had a financial account fraudulently opened using his personal information and had a loan fraudulently applied for using his information." (ECF No. 20, PageID.204). These allegations further support a finding that plaintiff has met the injury in fact requirement. *See In Re Medical Collection Agency Inc. Customer Data Sec. Breach Litig.*, No. CV 19-MD-2904, 2021 WL 5937742, at *8 (D.N.J. Dec. 16, 2021) ("they have suffered the actionable intangible harm of the wrongful use and dissemination of their private information, like the interests protected by common law privacy torts."). Likewise, Plaintiff's allegations of a substantial risk of harm, coupled with his reasonably incurred mitigation costs, are sufficient to establish a cognizable Article III injury at the pleading stage.[2] *See Galaria*, 663 F. App'x at 387.

[2] Plaintiff also argues that he has suffered a diminution in value of his private information as a result of the data breach. (ECF No. 20, PageID.205). Courts have previously held that "a loss in value of personal information supports a finding that a plaintiff has suffered an injury in fact." *Finesse Express, LLC v. Total Quality Logistics, LLC*, 2021 WL 1192521, at *3 (citing *Svenson v. Google, Inc.*, 2015 WL 1503429, at *5 (N.D. Cal. Apr. 1, 2015)). However, other courts have cautioned that plaintiffs have failed to allege an injury in fact "when there are no allegations that the plaintiffs attempted to sell their personal information or ... the data breach forced them to accept a decreased price for that information." *Id.* (citing *Chambliss v. Carefirst, Inc.*, 189 F. Supp. 3d 564, 572 (D. Md. 2016)). Here, Plaintiff does not allege any specific facts showing he planned to sell his information, just that it must have decreased in value because of the data breach. (*See* ECF No. 20, PageID.205). Likewise, the court does not find that this suffices as an independent injury in fact sufficient to confer standing in this case.

ii. Traceability

***5** To have Article III standing, Plaintiff must also sufficiently allege that his injury is "fairly traceable" to the conduct at issue. *California v. Texas*, 141 S. Ct. 2104, 2113 (2021). The key question under this factor is whether there is a "causal connection between the injury

and the conduct complained of ...” that is not “th[e] result [of] the independent action of some third party not before the court.” *Lujan*, 504 U.S. at 560-61 (citing *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)). Here, Plaintiff has reasonably argued that his alleged injuries were caused by Defendant’s failure to secure their computer system, leading to the cyberattack. Further, Defendant does not directly contest that Plaintiff has met this factor. The facts presented in Plaintiff’s complaint are “more than speculative but less than but-for causation.” *Id.* (citing *Parsons v. U.S. Dept. of Justice*, 801 F.3d 701, 714 (6th Cir. 2015)). Likewise, this factor has been satisfied.

iii. Redressability

Finally, Plaintiff must show that it is likely, not just merely speculative, that his injury will be “redressed by a favorable decision.” *Id.* at 561. Here, Plaintiff seeks damages in the form of “monetary relief, including compensatory damages, punitive damages, attorney fees, expenses, costs, and such other and further relief as is just and proper” as well as “injunctive and other equitable relief as necessary.” (ECF No. 20, PageID.240). Again, Defendant does not directly contest this factor. Given Plaintiff’s alleged injuries, a favorable verdict would provide redress. *See Galaria*, 663 F. App’x at 391. Likewise, this factor is also satisfied.

Considering the above factors, the court is satisfied that, viewing the facts in the light most favorable to Plaintiff, he has sufficiently alleged an injury in fact that is fairly traceable to Defendant’s conduct and can be redressed by a favorable decision. Plaintiff has met his burden to plead Article III standing at this stage of the litigation.

B. Common Law Claims

In his Second Amended Complaint, Plaintiff asserts claims for Negligence (Count I), Unjust Enrichment (Count II), and Breach of Implied Contract (Count III), and seeks a Declaratory Judgment (Count IV). (ECF No. 20, PageID.230-40). Defendant argues that Plaintiff has “failed to plead sufficient facts to support any of the causes of action set forth in the Second Amended Complaint.” (ECF No. 22, PageID.269). The court agrees as to Plaintiff’s claims for Unjust Enrichment and a Declaratory Judgment but will permit his Negligence and Breach of Implied Contract claims to proceed.

i. Negligence

To plead a claim for negligence under Michigan law,[3] a plaintiff must satisfy the following elements: “(1) [t]he defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant’s breach was a proximate cause of the plaintiff’s damages.” *Powell-Murphy v. Revitalizing Auto Communities Env’t Response Tr.*, 333 Mich. App. 243, 243 (2020) (citing *Hill v. Sears, Roebuck & Co.*, 492 Mich. 651, 660 (2012)). A duty of care may be one that the defendant owes specifically to the plaintiff, or it may be one that is owed to the general public. *Id.* (citations omitted). Generally, a person has an obligation to “use due care, or so govern his actions as to not unreasonably endanger the person or property of others.” *Id.* at 243-44 (citing *Clark v. Dalman*, 379 Mich. 251, 261 (1967)).

[3] As an initial matter, the parties do not contest that Michigan law should be used to analyze the common law claims at this stage in the proceedings. (*See* ECF No. 22, PageID.270 (“Michigan law should apply to Plaintiff’s tort claims and his contract claim.”); ECF No. 23, PageID.304 (“Nevertheless, for brevity, Plaintiff addresses each claim under Michigan law.”)). Therefore, while a full choice of law analysis may be premature at this stage, the court will utilize Michigan law to address whether Plaintiff has sufficiently stated a claim.

***6** Plaintiff argues that Defendant “had full knowledge of the sensitivity of the Private Information it maintained and the types of harm that Plaintiff and Class Members could and would suffer if the Private Information were wrongfully disclosed.” (ECF No. 20, PageID.230). Likewise, “Defendant had a duty to Plaintiff and each Class Member to exercise reasonable care in holding, safeguarding, and protecting that information.” (*Id.*). Numerous courts have previously held that companies have a duty to “take reasonable precautions due to the reasonably foreseeable risk of danger of a data breach incident.” *See In re Equifax, Inc., Customer Data Sec. Breach Litig.*, 362 F. Supp. 3d 1295, 1325 (N.D. Ga. 2019); *In Re Am. Med. Collection Agency, Inc. Customer Data Sec. Breach Litig.*, No. CV 19-MD-2904, 2021 WL 5937742, at *14 (D.N.J. Dec. 16, 2021). Plaintiff argues that Defendant breached that duty when they failed to take reasonable steps to protect his and the class members’ PII. (ECF No. 20, PageID.234). He argues that this breach caused the parties to suffer reasonably

foreseeable damages, including actual instances of individuals attempting to fraudulently use Plaintiff's information to open financial accounts. (*Id.*, PageID.204).

Defendant does not contest that Plaintiff has satisfied the duty, breach, or causation elements of a negligence claim, and argues only that Plaintiff has failed to demonstrate an "actual *injury* to person or property." (ECF No. 22, PageID.272). However, viewing the complaint in the light most favorable to Plaintiff, accepting all of its allegations as true, and drawing all reasonable inferences in favor of Plaintiff, he has alleged damages sufficient to state a claim for negligence. *See DirectTV*, 487 F.3d at 476. Even though Michigan law has recognized that "damages 'incurred in anticipation of possible future injury rather than in response to present injuries,' are not cognizable under Michigan law," *Doe v. Henry Ford Health Sys.*, 308 Mich. App. 592, 600 (2014), the fact that Plaintiff alleges that his information was already used to fraudulently open an account and apply for a loan is sufficiently concrete to state a claim.[4] Likewise, Plaintiff's Second Amended Complaint sufficiently states a claim for negligence.

[4] Defendant argues that Plaintiff has not alleged enough facts to suggest that his information was actually used to fraudulently open an account or apply for a loan. (ECF No. 22, PageID.262) ("[h]e has still not given details on what happened or how it injured him."). However, at this stage in the proceedings, Plaintiff is not required to provide full details as to the extent of his injuries, his allegations must simply not be "naked assertion[s] devoid of further factual enhancement." *Ashcroft*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 557). Plaintiff's allegations are beyond the cases in which courts have found insufficient facts to state a claim. *See Edwards v. Rougeau*, 736 F. App'x 135, 137-38 (6th Cir. 2018) (court found that the plaintiff failed to state a claim where the complaint did not contain *any* factual allegations regarding certain elements of the cause of action); *E.M.J. by & through M.J. v. Garrard Cnty. Bd. of Educ.*, No. CV 5:18-45-DCR, 2018 WL 11407570, at *1 (E.D. Ky. Feb. 20, 2018) (court found that the plaintiff failed to state a claim where their complaint merely contained a list of words and phrases that were each legal terms of art); *Small v. Fetter*, No. CIV.A. 5:14-006-KKC, 2015 WL 1393585, at *5 (E.D. Ky. Mar. 25, 2015) (court found that plaintiff failed to state a claim where the alleged conduct did not itself rise to the level of a Fourth Amendment violation).

ii. Unjust Enrichment

To sufficiently plead a claim for unjust enrichment under Michigan law, a plaintiff must establish "(1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps v. Centerline Piping, Inc.*, 273 Mich. App. 187, 195 (2006) (citing *Barber v. SMH (US), Inc.*, 202 Mich. App. 366, 375 (1993)). "In other words, the law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Id.*

***7** Plaintiff argues that "[t]hrough the use of Plaintiff's and Class Member's Private Information, Defendant received monetary benefits." (ECF No. 20, PageID.235). Additionally, "Defendant enriched itself by saving the costs it reasonably should have expended on data security measures to secure Plaintiff's and Class Members' Private Information." (*Id.*). These allegations do not satisfy the first element of a cause of action for unjust enrichment, which requires a defendant to have received a benefit directly from the plaintiff. *Morris Pumps*, 273 Mich. App. at 195 ("the receipt of a benefit by the defendant *from the plaintiff*") (emphasis added). A plaintiff cannot state a claim for unjust enrichment where the only benefit received was the result of a contract or agreement between the two parties, not something received directly from the plaintiff. *Karaus v. Bank of New York Mellon*, 300 Mich. App. 9, 24 (2012) ("Mellon has not received a benefit *from* plaintiff because if anything, Mellon has merely received the benefit from the contract between Plaintiff and [a third party]."). Likewise, even viewing the complaint in the light most favorable to Plaintiff, he has not pled any facts tending to show that Defendant did, in fact obtain some monetary benefit or profit from Plaintiff. Plaintiff has, therefore, failed to state a claim for unjust enrichment and Count II is dismissed.

iii. Breach of Implied Contract

To state a claim for breach of contract under Michigan law, a plaintiff "must plead three elements: (1) a contract, (2) Defendants' breach of the contract, and (3) damages to Plaintiffs caused by the breach." *Emergency Dep't. Physicians P.C. v. United Healthcare, Inc.*, 507 F. Supp. 3d 814, 828 (E.D. Mich. 2020) (citing *Bank of Am., NA v. First Am. Title Ins.*, 499 Mich. 74, 100-01 (2016)). When an explicit contract does not exist between two parties, an implied contract may arise from their conduct, language, or other circumstances evidencing their intent to contract. *Featherston v. Steinhoff*, 226 Mich. App. 584 (1997). To form an implied contract, parties must have: "(1)

competency to contract, (2) proper subject matter, (3) consideration, (4) mutuality of agreement, and (5) obligation." *Id.* (citing *Mallory v. City of Detroit*, 181 Mich. App. 121, 127 (1989)). Defendant argues that Plaintiff has failed to show there was mutuality of agreement, known as a "meeting of the minds," between the two parties and has also failed to plead damages. (ECF No. 22, PageID.277). As discussed above, Plaintiff has sufficiently alleged damages resulting from the disclosure of his data in the cyberattack. Likewise, the court's analysis will focus on the "meeting of the minds" element.

When looking at an implied contract, there must be mutuality of agreement between the two parties, "even though it is not manifested by direct or explicit words." *Auto-Owners Ins. Co. v. Lepp*, No. 297534, 2011 WL 2858778, at *3 (Mich. Ct. App. July 19, 2011) (citing *City of Detroit v. City of Highland Park*, 326 Mich. 78, 99 (1949)). Prior cases from courts in this circuit have found that similar allegations were sufficient to show a meeting of the minds. In *Bowen v. Paxton Media Group*, the court found that, by asking for the plaintiffs' personal information as a condition of their employment, the defendants impliedly agreed "to safeguard and protect such information, to keep such information secure and confidential, and to timely and accurately notify [p]laintiffs and the Subclass if their data had been breached ..." *Bowen v. Paxton Media Grp., LLC*, No. 5:21-CV-00143-GNS, 2022 WL 4110319, at *2 (W.D. Ky. Sept. 8, 2022). Further, in *McKenzie v. Allconnect*, the court agreed that "[i]mplicit in the employment agreement between [Defendant] and its employees was the *obligation that both parties would maintain information confidentially and securely.*" *McKenzie v. Allconnect*, 369 F. Supp. 3d 810, 821 (E.D. Ky. 2019).

Plaintiff similarly argues that Defendant required Plaintiff to provide his information to utilize their services, thereby creating an implied contract that they would "protect Plaintiff's and Class members' Private Information and [ ] timely notify them in the event of a data breach." (ECF No. 20, PageID.237). By arguing that Defendant did not protect their information or notify them in a timely matter, Plaintiff sufficiently states a claim for breach of implied contract.

iv. Declaratory Judgment

***8** The Declaratory Judgment Act (DJA) permits a court to issue a declaratory judgment "[i]n a case of actual controversy." 28 U.S.C. § 2201(a). The DJA does not create an independent cause of action, but rather acts as a "remedy for existing cases or controversies." *In Re American Medical Collection Agency*, 2021 WL 5937742 at *36 (citing *In re AZEK Bldg. Prod., Inc. Mktg & Sales Pracs. Litig.*, 82 F. Supp. 3d 608, 624 (D.N.J. 2015)). When considering declaratory relief, a court should consider:

> (1) whether the declaratory action would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata;" (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective.

Larry E. Parrish P.C. v. Bennett, 989 F.3d 452, 457 (6th Cir. 2021) (citing *Grand Trunk W. Rail Co. v. Consolidated Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984)). However, before a court can consider these five factors, they must look to whether the basic jurisdictional requirements have been met. *Id.* "A plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought," including declaratory and injunctive relief. *Bowen*, 2022 WL 411039 at *9 (citations omitted). Importantly, to establish standing when an alleged injury is a future injury, "the plaintiff must demonstrate that the threatened injury is certainly impending or there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citing *Clapper*, 568 U.S. at 414 n.5).

Plaintiff argues that, because Defendant still possesses Plaintiff's PII and has failed to specify any steps they have taken to prevent another data breach from occurring, he and the class members are at risk of harm caused by a subsequent breach. (ECF No. 20, PageID.239). Likewise, he seeks a declaration that: "(1) Defendant's existing security measures do not comply with its duties of care to provide reasonable security procedures and practices appropriate to the nature of the information to protect customers' personal information, and (2) to comply with its duties of care, Defendant must implement and maintain reasonable security measures...." (*Id.*). Both a declaration that Defendant's existing security measures are insufficient, and an injunction requiring Defendant to implement and maintain security measures going forward are aimed at preventing a future attack of Defendant's network. While, as discussed above, Plaintiff may have alleged a sufficient risk of future identity theft as a result of the previous data breach, he has not alleged any facts

tending to show that a second data breach is currently impending or there is a substantial risk that one will occur. *See Hall v. Centerspace, LP*, No. 22-CV-2028 (KMM/DJF), 2023 WL 3435100, at *4 (D. Minn. May 12, 2023) (court found no risk of a second data breach where the plaintiff failed to suggest "[defendant] is currently being targeted by hackers, or that something about their operations makes them uniquely vulnerable to incursions."). Defendant argues that Plaintiff cannot seek injunctive relief designed to prevent a future breach, only relief that would address the breach that already occurred. (ECF No. 22, PageID.279.). The court agrees. Viewing the facts in the light most favorable to Plaintiff, he has failed to meet the jurisdictional requirements to bring a claim for declaratory or injunctive relief. *See also Bowen*, 2022 WL 411039 at *9 ("Plaintiffs have failed to allege a live controversy warranting declaratory relief."). Likewise, Count IV is dismissed.

V. CONCLUSION

***9** For the reasons stated above, Defendant's Motion to Dismiss (ECF No. 22) is **GRANTED IN PART** and **DENIED IN PART.** Counts II and IV are dismissed for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6).

SO ORDERED.

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United States District Court,
W.D. Michigan,
Southern Division.

Pamela MONTGOMERY, on behalf of Herself and for the Benefit of All with the Common or General Interest, Any Persons Injured, and All Others Similarly Situated, Plaintiffs,
v.
KRAFT FOODS GLOBAL, INC., a Delaware Corporation; and Starbucks Corporation, a Washington Corporation, Defendants.

No. 1:12–CV–00149.
|
Dec. 6, 2012.

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OPINION

GORDON J. QUIST, District Judge.

***1** Plaintiff, Pamela Montgomery, filed a Complaint in this Court on February 20, 2012. Plaintiff seeks recovery against Kraft Foods Global, Inc. (now Kraft Foods Group, Inc.) (Kraft) and Starbucks Corporation (Starbucks) for (1) violation of the Michigan Consumer Protection Act (MCPA), Mich. Comp. Laws § 445.901 *et seq.,* and similarly worded state laws, (2) breach of express and implied warranties, and (3) breach of contract.[1,2]

[1] The content and page designations herein refer to Plaintiff's First Amended Complaint (docket no. 31), filed October 9, 2012.

[2] Although Plaintiff re-pleaded her innocent misrepresentation claim (Count II) in her First Amended Complaint, Plaintiff has previously conceded that she has abandoned her innocent misrepresentation claim. (Docket no. 22, Page ID 132.) Plaintiff also acknowledges that she has abandoned her Lanham Act claim (Count V). (*Id.;* Docket no. 30, Page ID 230.) Finally, Plaintiff concedes, and the Court confirms, that the Federal Trade Commission Act, 15 U.S.C. §§ 45(a)(1) and 52(a)(2), does not give rise to a private right of action before this Court. (*See* Docket no. 31, Page ID 232, n. 2.; *see also* 15 U.S.C. § 45(d); *Miles Labs. v. FTC,* 140 F.2d 683, 684–85 (D.C.Cir.1944)).

Each Defendant has filed a motion to dismiss (docket nos. 14, 16) and a renewed motion to dismiss (docket nos. 33–34) pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court heard oral argument on the initial motions to dismiss on September 24, 2012. After careful review of the record, the Court will grant Defendants' motions to dismiss with regard to the following claims: violation of MCPA relating to Michigan Compiled Laws §§ 445.903(3)(1)(h), (n), (p), (q), (t), (u), and (w), breach of express warranty, breach of implied warranty, and breach of contract. The Court will deny Defendants' motions to dismiss with respect to Plaintiff's claims for violations of MCPA under Michigan Compiled Laws §§ 445.903(3)(1)(a), (c), (s), (bb), and (cc).

I. FACTUAL BACKGROUND[3]

[3] The following facts are taken from Plaintiff's First Amended Complaint.

The Kraft–Tassimo single-serving coffee brewing system (Tassimo) is a consumer coffee machine that prepares one-cup servings of various brands of coffee, tea, hot chocolate, and other drinks. Tassimo is a closed system, meaning the machine utilizes only "T-discs"[4] specifically manufactured for the Tassimo machine, as opposed to

loose ground coffee.

[4] In her original and First Amended Complaints, Plaintiff refers to the serving-size coffee inserts as "t-cups." Defendants refer to the units as "T-discs." Plaintiff later refers to the units as "T-disks" in her Brief in Opposition of Defendant's Motion to Dismiss Class Action Complaint (docket no. 22, Page ID 131). The Court will refer to them as "T-discs."

Plaintiff alleges that Defendants have disseminated false and misleading information since approximately January 2010 for a period of approximately two years by jointly marketing, packaging, distributing, and selling Tassimo machines in packaging containing the Starbucks logo and statements related to Starbucks coffee T-discs. Among her allegations, Plaintiff contends that Defendants failed to inform consumers that the future affiliation between Defendants was uncertain, misled consumers into believing that Starbucks T-discs would be available for a "reasonable" amount of time into the future (docket no. 31, Page ID 236), and breached a duty to warn consumers that Defendants' affiliation might soon or had already come to an end.

Between 2004 and February 28, 2011, Kraft exclusively developed and promoted Starbucks' consumer packaged goods business, including Starbucks coffee T-discs for Tassimo machines. In November 2010, Starbucks made public statements that it was terminating its agreements with Kraft. On November 29, 2010, Kraft sent a letter to its "Valued Customers" stating that Kraft had initiated an arbitration proceeding to challenge Starbucks' attempt to terminate their agreements. (Compl. Ex. 5, Docket no. 31, Page ID 294.) Kraft stated that it "reasonably expect[ed] Starbucks to honor the contract," and assured its customers that Kraft was "continuing to conduct business under the terms of its contractual arrangements with Starbucks." (*Id.*) Kraft further informed its customers that it continued to represent the Starbucks brand at retail. On February 28, 2011, Kraft's exclusive agreement with Starbucks ended. The terms of the relationship between Kraft and Starbucks beginning on March 1, 2011, are not detailed in the pleadings. Moreover, there is no record of which entity or entities retained control over marketing, packaging, distribution, or sales of existing Tassimo machines or Starbucks coffee T-discs.

***2** After comparing brands, Plaintiff purchased her Tassimo from "Fred Meijer," although she does not allege the exact date of her purchase. (Compl., Docket no. 31, Page ID 240.) She claims that she purchased the Tassimo as a result of the false and misleading representations, including Starbucks' "widely familiar symbol, logo, and trademark, which defendants jointly marketed, printed and displayed prominently on said packaging and materials, and statements that defendants' system afforded exclusive use of [Starbucks] single portion brewing cups." (Compl., Docket no. 31, Page ID 233.) After an unspecified amount of time, Plaintiff alleges "it became increasingly difficult and impossible to find and purchase the Starbucks [T-discs]." (*Id.* at 239.) Plaintiff alleges that Defendants continued to engage in marketing, packaging, distributing, and/or selling Tassimo machines with the Starbucks logo "for a protracted period of ... approximately two (2) years" after January 2010, "despite knowing their agreements allowing continued distribution of the [Starbucks T-discs] had terminated or would imminently terminate[.]" (*Id.* at 235.)

II. STANDARD OF REVIEW

The instant matter before the Court is Defendants' motions to dismiss for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). A claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). Although detailed factual allegations are not required, "a plaintiff's obligation to provide the 'grounds' for his 'entitle[ment] to relief' requires more than labels and conclusions[.]" *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555–56, 127 S.Ct. 1955, 1964–65, 167 L.Ed.2d 929 (2007) (quoting *Conley v. Gibson,* 355 U.S. 41, 46, 47, 78 S.Ct. 99, 102, 103, 2 L.Ed.2d 80 (1957)). "[A] formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 556, 127 S.Ct. 1965.

For purposes of a 12(b)(6) motion, the court must accept all of the plaintiff's factual allegations as true and construe the complaint in the light most favorable to the plaintiff. *Gunasekera v. Irwin,* 551 F.3d 461, 466 (6th Cir.2009). A complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 570, 127 S.Ct. at 1974. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). Although the plausibility standard is not equivalent to a " 'probability requirement,' ... it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly,* 550 U.S. at 556, 127 S.Ct. at 1965). "[W]here the well-pleaded facts do not permit the court to infer

more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show [n]'—that the pleader is entitled to relief." *Id.* at 679, 129 S.Ct. at 1950 (quoting Fed.R.Civ.P. 8(a)(2)).

***3** Although a court is normally precluded from considering matters outside of the pleadings in addressing a motion to dismiss for failure to state a claim, courts recognize an exception for documents attached to or referenced in the complaint. "When a court is presented with a Rule 12(b)(6) motion, it may consider the Complaint and any exhibits attached thereto ... so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. NCAA,* 528 F.3d 426, 430 (6th Cir.2008) (citation omitted).

III. DISCUSSION

A. Michigan Consumer Protection Act

In Count I of Plaintiff's Complaint, Plaintiff alleges that Defendants' conduct violated the following provisions of the MCPA, Mich. Comp. Laws § 445.903(3)(1), by:

> (a) Causing a probability of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
>
> (c) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that he or she does not have;
>
> (h) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity in immediate conjunction with the advertised goods or services;
>
> (n) Causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction;
>
> (p) Disclaiming or limiting the implied warranty of merchantability and fitness for use, unless a disclaimer is clearly and conspicuously disclosed;
>
> (p) Representing or implying that the subject of a consumer transaction will be provided promptly, or at a specified time, or within a reasonable time, if the merchant knows or has reason to know it will not be so provided;
>
> (s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer;
>
> (t) Entering into a consumer transaction in which the consumer waives or purports to waive a right, benefit, or immunity provided by law, unless the waiver is clearly stated and the consumer has specifically consented to it;
>
> (u) Failing, in a consumer transaction that is rescinded, canceled, or otherwise terminated in accordance with the terms of an agreement, advertisement, representation, or provision of law, to promptly restore to the person or persons entitled to it a deposit, down payment, or other payment, or in the case of property traded in but not available, the greater of the agreed value or the fair market value of the property, or to cancel within a specified time or an otherwise reasonable time an acquired security interest;
>
> (w) Representing that a consumer will receive a rebate, discount, or other benefit as an inducement for entering into a transaction, if the benefit is contingent on an event to occur subsequent to the consummation of the transaction;
>
> ***4** (bb) Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is; and
>
> (cc) Failing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner.

Mich. Comp. Laws § 445.903(3)(1) *et seq.*

To state an MCPA claim, a plaintiff must (1) establish that a defendant is engaged in commerce within the meaning of the Act, § 445.902(1)(g), (2) establish that a defendant's conduct is prohibited by the Act, § 445.903(3), and (3) where individual or class damages are sought, show that the plaintiff is a "person who suffered loss" within the meaning of § 445.911(3). *See* Mich. Comp. Laws § 445.903(1) *et seq.* The parties do not dispute that Defendants engaged in commerce within the meaning of the Act.

1. Probability of Confusion of the Source, Sponsorship, Approval, or Certification

Plaintiff first alleges that Defendants violated MCPA § 445.903(3)(1)(a) by providing "false and misleading product information" that "caused and resulted in a high probability of confusion or misunderstanding among consumers as to the overall state of affairs surrounding the Tassimo/Starbucks system." (Compl ., Docket no. 30, Page ID 245.) Specifically, Plaintiff alleges that Defendants misrepresented that Starbucks' sponsorship, approval, or certification of Starbucks T-discs "existed and would continue to exist, despite defendants' actual and constructive knowledge to the contrary," which Defendants possessed "from or before October, 2010[.]"

Defendants respond that Plaintiff's allegations fail to meet the particularity standard of Federal Rule of Civil Procedure 9(b) for fraud claims. Defendant Starbucks further contends that Starbucks cannot mislead consumers as to its own approval of its products: either Starbucks permitted Kraft to advertise that Starbucks approved, which makes the advertisement accurate and not misleading, or Starbucks did not permit Kraft to advertise Starbucks' approval, "then Starbucks cannot be responsible for Kraft's decision to do otherwise." (Docket no. 15, Page ID 76.)

First, regarding particularity, Rule 9(b) requires a party to plead "with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed.R.Civ.P. 9(b). In her Brief in Opposition to Kraft's Motion to Dismiss, Plaintiff agrees that it is proper to construe the provisions of the MCPA "with reference to the common-law tort of fraud."[5] *Mayhall v. A.H. Pond Co., Inc.,* 129 Mich.App. 178, 182–83, 341 N.W.2d 268 (1983); *but see In re Packaged Ice,* 779 F.Supp.2d 642, 666 (E.D.Mich.2011) (noting that Rule 9(b) does not apply to all MCPA claims because not all MCPA claims are based on fraud). The Sixth Circuit reads rules 9(b) liberally, requiring a plaintiff, at a minimum, to "allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent; and the injury resulting from the fraud." *See Coffey v. Foamex L.P.,* 2 F.3d 157, 161–62 (6th Cir.1993). Allegations of fraudulent misrepresentation must be made with a sufficient factual basis to support an inference that they were knowingly made. *Id.* at 162. Rule 9(b) specifically allows a party to allege malice, intent, knowledge, and other conditions of a person's mind "generally" rather than particularly. Fed.R.Civ.P. 9(b).

[5] However, in Plaintiff's Memorandum Opposing Starbucks' Motion to Dismiss, Plaintiff argues that her MCPA claims are not based on fraud, but rather "unambiguous, printed [false] statements conspicuously located on the carton of a product." (Docket no. 23, Page ID 148.) Therefore, Plaintiff argues that the particularity standard of Federal Rule of Civil Procedure 9(b) does not apply to Plaintiff's MCPA claims. Alternatively, Plaintiff argues that if the particularity standard applies, she satisfies the rule because she sufficiently pleads an actionable misrepresentation.

***5** Here, Plaintiff states that the misrepresentations occurred from approximately January 2010 to January 2012. The place is the Tassimo packaging on which the misrepresentations were placed and the retail locations at which the packages were sold, presumably including vendor websites. The content of the misrepresentation is the Starbucks logo and statements on the box related to Starbucks coffee T-discs. Plaintiff has further alleged the following facts as the basis of fraud: Defendants misrepresented or failed to disclose material facts about the relationship between Defendants during the period of two years starting approximately January 2010, including the affirmative publication of false or misleading information in the form of the Starbucks logo on Tassimo packaging immediately prior to and after the termination of the Kraft–Starbucks Tassimo/T-disc distribution relationship. (Docket no. 22, Page ID 136.) Plaintiff has also alleged that Kraft, in response to numerous public inquiries, offered misleading information and even "actively concealed" information known to it about the impending termination of the Kraft–Starbucks relationship in order to mislead consumers. (Compl., Docket no. 31, Page ID 235.) Moreover, Plaintiff contends that Defendant Kraft knew of the termination but did not take actions to correct Tassimo's false labeling and statements. Finally, Plaintiff alleges as her resulting injury that she purchased a machine that she "cannot use" to brew Starbucks coffee. (Compl., Docket no. 31, Page ID 250 .) In light of these allegations, the Court finds Plaintiff states a claim with sufficient plausibility to satisfy the requirements of Rule 8(a) and with sufficient particularity to satisfy Rule 9(b). *Cf. Meyer v. Citimortgage, Inc.,* No. 11–13432, 2012 WL 511995, at *11 (E.D.Mich. Feb.16, 2012) (dismissing an MCPA claim for failure to state a claim where plaintiff offered a mere recitation of activities prohibited by MCPA, without identifying the factual basis for the purported violation).

Second, regarding Starbucks' argument that it could not,

logically, mislead consumers as to its own approval of its products, the Court disagrees. Because the record lacks contrary evidence of the division of control between Starbucks and Kraft regarding Tassimo and Starbucks T-discs beginning March 1, 2011, and because the Court will presume Plaintiff's allegations to be true for the purpose of the instant motions, the Court finds that it is plausible that the presence of the Starbucks logo could cause a *probability of confusion or misunderstanding* as to the sponsorship or approval of goods. Starbucks does not indicate if or when it withdrew its approval of the presence of its logo or Starbucks-related representations on Tassimo packaging. For example, plausibly, if Starbucks approved of its logo on Tassimo packaging although it knew that its agreement with Kraft had terminated and that Starbucks coffee T-discs would imminently be unavailable or were no longer available, Starbucks may be liable for creating a probability of confusion or misunderstanding as to Starbucks' approval or sponsorship of Tassimos. Therefore, the Court will deny Defendants' motions to dismiss Plaintiff's claim under Mich. Comp. Laws § 445.903(3)(1)(a).

2. Representing that Goods Have Uses or Benefits They Do Not Have

***6** Plaintiff alleges Defendants violated MCPA § 445.903(3)(1)(c) by "the aforementioned false and misleading product information," namely Starbucks' logo and statements regarding Starbucks coffee T-discs on Tassimo packaging, "despite defendants' actual and constructive knowledge to the contrary, which knowledge defendants possessed, on information and belief, from or before October 2010[.]" (Compl., Docket no. 31, Page ID 246.)

Defendants similarly respond that Plaintiff fails to plead this claim with particularity, pursuant to Rule 9(b). Fed.R.Civ.P. 9(b). Defendant Starbucks further contends, as above, that Starbucks could not have misled consumers as to its own approval of its products.

As above, the Court finds that Plaintiff has pleaded with sufficient particularity to satisfy Rule 9(b). Because the Starbucks logo could have plausibly caused Plaintiff to make the reasonable assumption that the purchaser of a Tassimo could use it to brew Starbucks coffee, the Plaintiff states a claim that Defendants represented that the Tassimo had uses or benefits that it did not have. Therefore, Defendants' motions to dismiss Plaintiff's claim under Mich. Comp. Laws § 445.903(3)(1)(c) will be denied.

3. Intent Not to Supply Reasonable Expectable Demand

Next, Plaintiff contends that Defendants violated MCPA § 445.903(3)(1)(h) by "independently and jointly advertis[ing] and [selling] the Tassimo system and corresponding Starbucks [T-discs] including false and misleading information regarding the same despite their actual or constructive knowledge and intent that reasonably expectable public demand for the Starbucks [T-discs] would not be met." (Compl., Docket no. 31, Page ID 246.)

Defendants respond that subsection (h) is designed to address "door-buster" sales which advertise exceedingly low-price goods without disclosing the limited quantity in conjunction with the advertisement. Defendant Starbucks cites several state cases involving similarly worded consumer protection laws to illustrate the intended application of subsection (h). *See, e.g., Smith v. Baldwin,* 611 S.W.2d 611, 615 (Tex.1980) (finding a nearly identical statute addresses "bait and switch" advertisements that are designed to attract customers through advertising products at a very low price that the vendor intends to sell in nominal quantities, leading responding consumers to buy a more expensive alternative).

Here, the Court finds that subsection (h) is inapplicable to the facts alleged by Plaintiff. Moreover, Plaintiff fails to identify any precedent holding that a defendant is liable under subsection (h) for discontinuing a product or other facts similar to those alleged here. The Court also notes that Plaintiff failed to specifically respond to Defendants' arguments regarding subsection (h) in either of Plaintiff's briefs in opposition to the motions to dismiss, thereby effectively abandoning the claim. Therefore, the Court will grant Defendants' motions to dismiss Plaintiff's claim under MCPA § 445.903(3)(1)(h).

4. Probability of Confusion as to the Legal Rights, Obligations, or Remedies

***7** Plaintiff next argues that Defendants violated MCPA § 445.903(3)(1)(n) by "conduct as described herein above and below." (Compl., Docket no. 31, Page ID 246.) Plaintiffs do not make any additional allegations or provide explanation as to how Defendants' actions caused

"a probability of confusion or of misunderstanding" as to the "legal rights, obligations, or remedies of a party to a transaction."

Defendants respond that Plaintiff's factual allegations are insufficient under Rules 8(a) and 9(b) because Plaintiff's allegations are a mere "formulaic recitation" of the statute. (Docket no. 15, Page ID 81.)

The Court finds that the presence of the Starbucks logo or statements related to Starbucks coffee T-discs alone do not plausibly, without more explanation, cause a probability of confusion or misunderstanding regarding the legal rights, obligations, or remedies of a party to a transaction. Therefore, the Court will grant Defendants' motions to dismiss Plaintiff's claim under MCPA § 445.903(3)(1)(n).

5. Disclaiming or Limiting Implied Warranties

Plaintiff also alleges Defendants violated MCPA § 445.903(3)(1)(p) because defendants "will claim that certain information or notice operated in some way to affect the warranty of merchantability and fitness for use, or other obligation, right, remedy, or benefit to which plaintiff and consumers are entitled, despite not clearly and conspicuously disclosing the same as required [.]" (Compl., Docket no. 31, Page ID 246.) Plaintiff also alleges that local retailers, including Fred Meijer and Walmart Stores, would not refund Tassimo purchases or otherwise provide a remedy. (*Id.* at Page ID 246.) Plaintiff further alleges that Defendants and Defendants' agents did not promptly restore payments to Plaintiff, class members, or others. (*Id.* at Page ID 247.) Plaintiff does not allege that she attempted to return her Tassimo directly to either Defendant.

As above, Defendants argue that Plaintiff's allegations are insufficient to satisfy Rules 8(a) and 9(b). Defendant Starbucks further asserts that Plaintiff's claim is deficient because it is a speculative claim that Defendants *will* disclaim an implied warranty in the future. (Docket no. 15, Page ID 81–82.)

The Court agrees that Plaintiff's factual allegations do not state a claim under subsection (p). Even if Plaintiff did allege that Defendants directly refused to issue refunds, Plaintiff does not state a claim that Defendants disclaimed or limited the implied warranties of merchantability or fitness of use as proscribed in subsection (p). As Defendants highlight, Plaintiff merely states that Defendants "will" disclaim a warranty at a future date. The Court does not interpret Defendants' defense in the present lawsuit as an attempt to disclaim a warranty. Rather, as Defendants' responses to Plaintiff's implied warranty claim illustrate, Defendants' position is that they did not breach any warranty. Finally, even if Plaintiff did state a claim in her Complaint, Plaintiff failed to respond to Defendants' arguments regarding subsection (p) in either of her briefs in opposition to the motions to dismiss, effectively abandoning the claim. The Court will therefore grant Defendants' motions to dismiss Plaintiff's claim under MCPA § 445.903(3)(1)(p).

6. Representing that the Subject of a Transaction Will Be Provided Promptly

***8** Plaintiff further contends that Defendants violated MCPA § 445.903(3)(1)(q) by implying through the use of the Starbucks logo and statements related to Starbucks coffee T-discs that compatible Starbucks T-discs would be available despite knowing that T-discs "would not be provided promptly, or at a specified time, or within a reasonable time." (Compl., Docket no. 31, Page ID 246–47.)

As above, Defendants argue that Plaintiff's allegations are insufficient under Rules 8(a) and 9(b). Fed.R.Civ.P. 8(a), 9(b). Defendant Starbucks further argues that the subject of the consumer transaction is the Tassimo, not Starbucks T–Discs. Moreover, Starbucks asserts, subsection (q) proscribes situations in which a merchant accepts payment for a good but fails to provide the good at the time agreed, which is distinguishable from the present case. *See, e.g., Temborius v. Slatkin,* 157 Mich. Ct.App. 587, 597–98, 157 Mich.App. 587, 403 N.W.2d 821, 827 (1986) (per curiam).

The Court finds that, for the purposes of subsection (q), the Tassimo was the subject of the instant consumer transaction(s), not the Starbucks T-discs. Plaintiff does not allege that Tassimo machines were promised but not provided promptly by Defendants. Therefore, subsection (q) is not applicable to the facts in this case. The Court will grant Defendants' motions to dismiss Plaintiff's claim under MCPA § 445.903(3)(1)(q).

7. Failure to Reveal a Material Fact, Which Tends to Mislead or Deceive Consumer

Plaintiff further alleges that Defendants violated MCPA §

445.903(3)(1)(s) by "independently and jointly" advertising, distributing, and selling Tassimos and corresponding Starbucks coffee T-discs "including the false and misleading information mentioned herein while failing to reveal to Plaintiff, Class members, and the public the true status of their relationship, association, agreements and disputes" as they "related to the continued availability and supply of Starbucks [T-discs] as represented, which information constitutes material facts, the omission of which by defendants tended to and did actually mislead and deceive plaintiff, the Class, and the Public, and which facts could not reasonably have been known or ascertained by plaintiff, the Class, or the Public[.]" (Compl., Docket no. 31, Page ID 247.)

Defendants assert that Plaintiff's allegations are insufficient under Rules 8(a) and 9(b). Fed.R.Civ.P. 8(a), 9(b). Moreover, Defendant Starbucks argues that Plaintiff's allegations are inapplicable to Starbucks because Starbucks never "sold Tassimo brewers or said anything (to anyone, much less to Plaintiff) concerning the future availability of Starbucks T-discs." Therefore, Starbucks contends that even if Plaintiff's allegations satisfy Rule 9(b), they do not state a claim under Rule 8(a) against Starbucks specifically.

First, regarding particularity, Plaintiff alleges both that Defendant Kraft actively concealed the status of its terminating relationship with Starbucks and that Defendants "independently and jointly" continued to market, package, distribute, and/or sell Tassimo machines in packaging containing the Starbucks logo and statements about Starbucks Coffee T-discs even after the relationship between Defendants had terminated. As such, the Court finds Plaintiff's factual allegations satisfy the requirements of Rules 8(a) and 9(b). Fed. R. Civ. P 8(a), 9(b).

***9** Second, regarding Starbucks' argument, Plaintiff alleges that Starbucks and Kraft *jointly* marketed Starbucks' consumer packaged goods. Plaintiff explicitly and implicitly alleges throughout her Complaint that Starbucks authorized the placement of the Starbucks logo on Tassimo packaging. (*See, e.g.,* Compl., Docket no. 31, Page ID 233.) Because the Court must accept Plaintiff's factual allegations as true and construe the complaint in the light most favorable to the Plaintiff, *Gunasekera,* 551 F.3d at 466, Starbucks' attempt to distinguish itself from Kraft for purposes of subsection (s) at this time must be rejected. Plaintiff has plausibly pleaded that Defendants failed to reveal a material fact—the impending termination or previous termination of the Kraft–Starbucks relationship, or, the imminent unavailability of Starbucks coffee T-discs—despite Defendants' knowledge of the material fact, the omission of which may have misled or deceived consumers into believing Starbucks T-discs would continue to be available and the information could not have reasonably been known by consumers. Therefore, Defendants' motions to dismiss Plaintiff's claim under MCPA § 445.903(3)(1)(s) will be denied.

8. Consumer Waiver of a Right, Benefit, or Immunity

Plaintiff also contends that Defendants violated MCPA § 445.903(3)(1)(t) by "conduct as described herein above and below ... for reason that defendants caused confusion and misunderstanding among consumers as to their legal obligations, rights, remedies, and benefits in relation to their purchase or receipt of a Tassimo brewing system." (Compl., Docket no. 31, Page ID 246.) As with subsection (n), Plaintiffs do not make any additional allegations or provide explanation as to how Defendants' actions caused consumers to *waive or purport to waive a right, benefit or immunity provided by law.* The Court therefore agrees with Defendants that Plaintiff's allegations do not plausibly, without more explanation, state a claim that Plaintiff entered a transaction in which she waived or purported to waive a right, benefit, or immunity provided by law. Therefore, the Court will grant Defendants' motions to dismiss Plaintiff's claim under MCPA § 445.903(3)(1)(t).

9. Promptly Restore a Deposit, Down Payment, or Other Payment

Next, Plaintiff alleges Defendants violated MCPA Section 445.903(3)(1)(u) because "upon plaintiff's, Class members' and others' attempts to rescind, cancel, or otherwise terminate purchases of the Tassimo system in accordance with defendants' advertisements, representations, and other provisions of law, defendant and defendants' agents did not promptly restore the payments such persons gave for the Tassimo systems." (Compl., Docket no. 31, Page ID 247.)

Defendant Kraft argues that Plaintiff fails to state a claim under Rule 8(a) because Plaintiff fails to specifically allege that she attempted to return her product to either Defendant and neither of the local retailers mentioned in the pleadings—Meijer and Walmart—act on behalf of Defendants. Moreover, Starbucks argues Plaintiff fails to identify *any* consumer transaction that was *rescinded,*

canceled, or otherwise terminated in accordance with the terms of an agreement, advertisement, representation, or provision of law. Starbucks argues that subsection (u) "applies when a party agrees (or is otherwise obligated) to refund a deposit or similar payment when a transaction is cancelled, and fails to do so." (Docket no. 15, Page ID 80.)

***10** The Court finds that subsection (u) does not apply when a party seeks cancellation of a contract, such as the return of a purchased item, as a remedy in a lawsuit. *See Knobelspiesse v. Wright Ventures, Inc.,* No. 223340, 2002 WL 1308788, at *4 (Mich.Ct.App. June 14, 2002) ("[P]laintiffs ... are seeking rescission *as a remedy*.... Therefore, because plaintiffs had not, at the time of filing their complaint, rescinded their contract, the trial court properly dismissed plaintiffs' claim under [MCPA] subsection (u), which requires that rescission has already occurred."). Since Plaintiff does not allege that any consumer transaction between Plaintiff and Defendants was ever rescinded, canceled, or otherwise terminated as a result of Plaintiff's inability to purchase Starbucks T-discs, Plaintiff fails to state a claim. Therefore, Defendants' motions to dismiss Plaintiff's claim under MCPA § 445.903(3)(1)(u) will be granted.

10. Rebate, Discount, or Other Benefit as an Inducement for Entering a Transaction

Plaintiffs also allege that Defendants violated MCPA § 445.903(3)(1)(w) because Defendants made false representations—the Starbucks logo and statements on Tassimo packaging related to Starbucks coffee T-discs—to induce Plaintiff and purported class members to purchase Tassimo machines. Namely, the logo and statements were a statement to consumers that consumers would have the "benefit of having available and using compatible Starbucks [T-discs], when in actuality that benefit was not reasonably certain and secure for the subject time period" and was actually "contrary to law, contingent on events and conditions defendants knew had not occurred, consummated, or [had] become assured prior to the systems being purchased." (Compl., Docket no. 31, Page ID 247–48.)

Defendant Kraft first responds that Plaintiff's allegations about the presence of Starbucks' logo and statements about Starbucks coffee T-discs do not amount to a statement to consumers that Starbucks coffee T-discs will continue to be available. Second, Kraft argues that Plaintiff fails to allege that any consumer who purchased a Tassimo was unable *that day* to buy Starbucks coffee T-discs for the Tassimo, so consumers were not denied any benefits made as an inducement to purchase a Tassimo. Third, Defendant Starbucks argues that from the statutory list of "rebate, discount, or other benefit," neither rebate nor discount are applicable to the present facts. Moreover, "other discount" should be construed according to the statutory interpretation canon of *ejusdem generis:* "whereby in a statute in which general words follow a designation of particular subjects, the meaning of the general words will ordinarily be presumed to be and construed as restricted by the particular designation and as including only things of the same kind, class, character or nature as those specifically enumerated." *See, e.g., People v. Smith,* 393 Mich. 432, 436, 225 N.W.2d 165, 166 (1975). Therefore, Starbucks argues, the provision's reference to "another benefit" should be construed to include benefits similar to a rebate or discount, not the benefit of brewing a certain brand of coffee. Finally, Starbucks contends that even if some "other benefit" were used to induce a consumer to purchase a Tassimo, there was no representation that the benefit would be available perpetually.

***11** The Court agrees that the "other benefits" anticipated by subdivision (w) do not include the more abstract benefit of use of a coffee machine to brew a specific brand of coffee. Therefore, because Defendants did not represent that Plaintiff would receive a rebate, discount, or other similar benefit as an inducement to purchase a Tassimo, the Court will grant Defendants' motions to dismiss Plaintiff's claim under MCPA § 445.903(3)(1)(w).

11. Representation of a Material Fact

Plaintiff further alleges that Defendants violated MCPA § 445.903(3)(1)(bb) by displaying Starbucks' logo and statements related to Starbucks coffee T-discs on Tassimo packaging. Plaintiff alleges the logo and statements "caused and resulted in a high probability of confusion or misunderstanding among consumers as to the overall state of affairs surrounding the Tassimo–Starbucks system," including that the Kraft–Starbucks relationship "existed and would continue to exist, despite defendants' actual and constructive knowledge to the contrary ... possessed ... from or before October, 2010." (Compl., Docket no. 31, Page ID 245–46.)

Defendant Starbucks asserts the same arguments in response to Plaintiff's claims under subsections (s), (bb), and (cc): Plaintiff fails to allege her claims with particularity, Fed.R.Civ.P. 9(b), and Starbucks made no

representations because Kraft, not Starbucks, distributed Tassimos with the Starbucks logo.

As with subsection (s), because Plaintiff sufficiently alleges the time, place, and content of the misrepresentations, and further alleges generally a fraudulent scheme, fraudulent intent, and injury, the Court finds Plaintiff satisfies Rule 9(b).[6] Additionally, the Court finds unavailing Starbucks' attempt to distinguish itself from Kraft in this context. For purposes of a 12(b)(6) motion, the Court assumes that plausible facts alleged by Plaintiff are true. *See Twombly,* 550 U.S. at 553, 127 S.Ct. at 1963. The allegations before the Court plausibly suggest that Kraft did not have unilateral control over the placement of Starbucks' logo or statements about Starbucks coffee T-discs on Tassimo packaging. Thus, the Plaintiff alleges a claim that the Starbucks logo or statements on Tassimo packaging was a representation or statement of fact material to a transaction such that a person could reasonably believe the represented or suggested state of affairs differed from reality. Defendants' motions to dismiss Plaintiff's claim under M.C.L. § 445.903(3)(1)(bb) will therefore be denied.

[6] *See supra* note 5. Plaintiff does not fully concede that her MCPA claims are based on fraud. (Docket no. 23, Page ID 148.)

12. Failure to Disclose Material Facts

Plaintiff's final MCPA claim is that Defendants violated § 445.903(3)(1)(cc) by "failing to reveal to plaintiff, the Class, and the public facts material to their purchases of the Tassimo/Starbucks system in light of defendants' affirmative and positive representations regarding the state of affairs surrounding the Tassimo/Starbucks system and the continued availability of compatible Starbucks [T-discs], which representations included, but were not limited to, the images and information printed on the Tassimo system's outside carton." (Compl., Docket no. 31, Page ID 248.) Plaintiff also alleges that Defendants "actively concealed" from the public, despite "numerous inquiries and other calls for response from consumers and the public requesting clarification of the continued availability of [T-discs]" information "known to them at the time in an effort to mislead consumers and the marketplace." (*Id.* at 235.) In support of Plaintiff's claim, she attaches a letter from Kraft, which states:

> ***12** Today, Kraft Foods announced that it initiated an arbitration proceeding to challenge Starbucks attempt to independently end the agreement under which Kraft Foods has successfully built Starbucks retail grocery coffee business.
>
> Kraft Foods and Starbucks entered into a contract that remains in effect indefinitely, subject to certain limitations and protections. Kraft Foods reasonably expects Starbucks to honor the contract. Let me assure you that Kraft Foods is continuing to conduct business under the terms of its contractual arrangements with Starbucks
>
> ....
>
> Until there is resolution to this situation, the Kraft Foods Sales team continues to represent the Starbucks brand at retail. If you have any questions, please contact your Kraft Foods Sales representative.

(Compl.Ex.5.) Neither party states when the arbitration between Starbucks and Kraft ended. However, Plaintiff alleges that although Defendants "knew or had reason to know their agreements concerning the continued distribution of [Starbucks T-discs] were in dispute; had terminated; or would terminate in the future, defendants concealed the information by failing to correct the packaging of the Tassimo brewing system; by failing to disclose the same to consumers; and by engaging in systemic concealment as regarded its retailers, online sellers, and the consuming public." (Compl., Docket no. 31, Page ID 237.) Additionally, Plaintiff attaches communications between Kraft and Starbucks, (*id.,* Exs. 1, 3, and 4), showing that the relationship between Defendants had deteriorated and then ended.

In response to Plaintiff's claim, Defendants assert Plaintiff's allegations are insufficient to state a claim under Rules 8(a) and 9(b). Starbucks also attempts to distinguish itself from Kraft because it claims Starbucks never sold or distributed Tassimo brewers.

As above, the Court finds Plaintiff's allegations sufficiently state a time, place, content of the misrepresentation, a fraudulent scheme, fraudulent intent, and injury. *See Coffey,* 2 F.3d at 161–62. Moreover, in light of the facts alleged and for purposes of the instant motion, the Court disagrees that Starbucks is distinguishable from Kraft with respect to Plaintiff's subdivision (cc) claim. Therefore, the Court will deny Defendants' motions to dismiss Plaintiff's claim under MCPA § 445.903(3)(1)(cc).

In summary, Defendants' motions to dismiss Plaintiff's claims under MCPA §§ 445.903(3)(1)(a), (c), (s), (bb), and (cc) will be denied. Defendant's motions to dismiss Plaintiff's claims under MCPA § 445.903(3)(1)(h), (n), (p), (q), (t), (u), and (w) will be granted.

B. Breach of Express and Implied Warranties

Plaintiff next alleges the Tassimos that she and purported class members purchased are subject to express and implied warranties as provided in Michigan Compiled Laws § 440.2313 *et seq.*

1. Express Warranty

Under the Uniform Commercial Code (UCC), "an affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." Mich. Comp. Laws § 440.2313(1)(a). It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he or she have a specific intention to make a warranty. *Id.* § 440.2313(2). However, a mere affirmation of the value of goods or a statement of the seller's opinion or commendation of goods generally does not create a warranty. *Id.*

***13** In order to prevail on an express warranty claim, a plaintiff must establish that the plaintiff and defendant were in privity of contract. *See, e.g., Heritage Res., Inc. v. Caterpillar Fin. Servs. Corp.,* 284 Mich.App. 617, 638, 774 N.W.2d 332, 344 (2009). The absence of privity of contract requires dismissal of a claim for breach of express warranty. *See Downriver Internists v. Harris Corp.,* 929 F.2d 1147, 1150 (6th Cir.1991) (finding that the plaintiff was neither a party to the disputed contracts nor a third-party beneficiary under controlling state laws and, therefore, did not have rights under contract or express warranty theories); *Bark River Culvert & Equip. Co. v. Northern Land & Lumber Co.,* No. 206511, 1999 WL 33433540, at *2 (Mich.Ct.App. Oct.29, 1999) (per curiam) ("[T]he warranty is unenforceable against a third-party defendant because there was no privity of contract"). Under Michigan law, no privity of contract exists between a consumer, who buys from a retailer, and the manufacturer who has not sold a product directly to the consumer. *See Gernhardt v. Winnebago Indus.,* No. 03–73917, 2003 WL 23976324, at *4 (E.D.Mich. Dec.30, 2003) ("[A]n express warranty running from a remote manufacturer to a consumer does not create the requisite contractual privity."). However, an intended third-party beneficiary is in privity of contact with the original parties for purposes of an express warranty. *See* Mich. Comp. Laws § 600.1405(1).

When determining whether the parties to a contract intended to create a third-party beneficiary, a court should examine the contract using an objective standard. *Dynamic Const. Co. v. Barton Malow Co.,* 214 Mich.App. 425, 427–28, 543 N.W.2d 31, 33 (1995) (per curiam) (citing *Kammer Asphalt Paving Co. v. East China Twp. Schools,* 443 Mich. 176, 189, 504 N.W.2d 635, 642 (1993) and *Arrow Sheet Metal Works, Inc. v. Bryant & Detwiler Co.,* 338 Mich. 68, 79–80, 61 N.W.2d 125, 131 (1953)). Only intended, rather than incidental, third-party beneficiaries may sue when a contractual promise in their favor has been breached. *Kisiel v. Holz,* 272 Mich.App. 168, 170, 725 N.W.2d 67, 69 (2006); *see also Dynamic,* 214 Mich.App. at 428, 543 N.W.2d at 33 (holding that a third party could not maintain an action upon a contract merely because he would receive a benefit from the performance or because he was injured by the breach thereof). Under Michigan law, a third party for whose benefit a promise was made in a contract may enforce that promise if he or she can establish that the promisor "has undertaken to give or to do something directly to or for said person." Mich. Comp. Laws § 600.1405(1); *see also Brunsell v. City of Zeeland,* 467 Mich. 293, 297, 651 N.W.2d 388, 391 (2002) (observing that the plain language of § 600.1405 reflects that not every person incidentally benefitted by a contractual promise has a right to sue for breach of that promise, but rather only if the promisor has undertaken to give or to do or refrain from doing something directly to or for said person does that person have a claim).

***14** In the present case, Plaintiff argues that Defendants made affirmations of fact or promise regarding the ability of Tassimo systems to brew Starbucks coffee, and that Starbucks coffee T-discs would be available for a reasonable period of time in the future. The parties do not dispute that privity of contract is required for Plaintiff to state a claim for breach of an express warranty. Plaintiff claims that she is in privity of contract with Defendants because, as a consumer, she was a third-party beneficiary to the agreement between Defendants regarding Tassimo and Starbucks coffee T-discs. Plaintiff argues that Defendants intended consumers to have the exclusive benefit of using their Tassimos to brew Starbucks coffee. In fact, Plaintiff asserts that Plaintiff and purported class members were the "only" beneficiaries of the Starbucks–Kraft agreement, and by purchasing Tassimos, they "received exclusive rights to purchase Starbucks coffee for their Tassimo[s]." (Docket no. 22, Page ID 138, 142.)

Defendants argue that the alleged misrepresentations do

not constitute affirmations of fact or promises that Starbucks T-discs would "remain available into the future" because any representations related solely to the Tassimo itself. (Docket no. 15, Page ID 86.) Defendant Starbucks equates Plaintiff's argument to a purported warranty that replacement parts would remain available into the future or the cost of supplies for a product would remain low, which courts have rejected. (Docket no. 15, Page ID 86–87.) Defendants finally argue that Plaintiff was not an intended beneficiary and therefore lacks privity of contract with Defendants.

Although Plaintiff claims Defendants intended her to benefit from having "a right to exclusively purchase Starbucks coffee for [her] Tassimo machine," the Court finds this is insufficient to confer third-party beneficiary status. Plaintiff's allegations fail to show that Defendants intended in entering their contract to directly benefit Plaintiff, nor that Defendants undertook to do something directly to or for Plaintiff. As a result, Plaintiff merely alleges that she is a third-party beneficiary, which does not meet the required plausibility standard. *See Twombly,* 550 U.S. at 570, 127 S.Ct. at 1974 (The complaint must contain "enough facts to state a claim to relief that is plausible on its face"); *Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendants is liable for the misconduct alleged."). Therefore, Plaintiff's claim for breach of express warranty will be dismissed.

2. Implied Warranty

Plaintiff further alleges that Defendants breached the implied warranty of merchantability. (Compl., Docket no. 31, Page ID 249.) Plaintiff does not allege breach of any warranty of fitness for a particular use. Michigan Compiled Laws § 440.2314 governs implied warranties,

> ***15** (1) Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind ....
>
> (2) Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under the contract description; and
>
> (b) in the case of fungible goods, are of fair average quality within the description; and
>
> (c) are fit for the ordinary purposes for which such goods are used; and
>
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all unites involved; and
>
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
>
> (f) conform to the promises or affirmations of fact made on the container or label if any.

Mich. Comp. Laws § 440.2314. These provisions are not an exhaustive list of attributes of merchantability. *See id.* at UCC cmt. 6. To establish a prima facie case of breach of implied warranty,

> [A] plaintiff must show that goods were defective when they left the possession of the manufacturer or seller. Under implied warranty theory, a defect is established by proof that a product is not reasonably fit for its intended, anticipated or reasonably foreseeable use. Merchantable is not a synonym for perfect. The warranty of merchantability is that goods are of average quality in the industry .... As to goods accepted, the burden is on the buyer to establish any claimed breach of warranty.

Computer Network, Inc. v. AM Gen. Corp., 265 Mich.App. 309, 316–17, 696 N.W.2d 49, 56 (2005) (citing *Guaranteed Constr. Co. v. Gold Bond Prods.,* 153 Mich.App. 385, 392–93, 395 N.W.2d 332, 336 (1986)). Under Michigan law, privity of contract is not required for implied warranty claims. *Pack v. Damon Corp.,* 434 F.3d 810, 818 (6th Cir.2006); *Farley v. Country Coach, Inc.,* 403 Fed. App'x 973, 977 (6th Cir.2010).[7]

[7] The Court acknowledges Defendant Kraft's footnote regarding the current state of Michigan case law on privity of contract for implied warranties. (*See* Docket no. 17, Page ID 118 n. 7.)

Plaintiff alleges that because she "cannot use" her Tassimo to brew Starbucks coffee, Defendants have breached an implied warranty under § 440.2314. (Compl., Docket no. 31, Page ID 250.) Plaintiff further alleges that because Starbucks coffee T-discs were difficult to find and, later, unavailable, Defendants have breached an implied warranty. Plaintiff does not specifically allege which subsections of § 440.2314 Defendants violated.

Defendants argue that the Tassimo machines purchased by Plaintiff and proposed class members were capable of brewing single-serving coffee T-discs, including Starbucks coffee and other brands, as well as other hot beverages. Therefore, Defendants argue that the Tassimo

machines did not fail in their "ordinary purpose for which the system was designed to be used." (Docket no. 25, Page ID 222.) On that basis, Defendants contend, "the product was clearly merchantable." (*Id.*) Defendants further emphasize that Plaintiff has not alleged that she was unable to brew Starbucks coffee T-discs on the date she purchased her Tassimo. Rather, Defendants contend, Plaintiff's complaint is only that she is now unable to obtain Starbucks coffee T-discs, not that her Tassimo is unfit to brew any T-discs.

***16** Although Plaintiff does not allege the specific subsections of § 440.2314 that Defendants violated, the Court finds two provisions applicable to the alleged facts. First, subsection (2)(c) states that "[g]oods to be merchantable must be at least such as ... are fit for the ordinary purposes for which such goods are used[.]" Second, subsection (2)(f) requires goods to "conform to the promises or affirmations of fact made on the container or label if any." *Id.*

a. Fit for Ordinary Purposes

Goods are typically not fit for the ordinary purposes when they (1) are completely useless, not fit for any purpose, (2) are not fit for the expected or obvious purpose, (3) break as a result of an early use for the ordinary purposes intended or expected, (4) need frequent or extensive repairs, or (5) are unsafe for use in a normal manner. *See* Am. L. Prod. Liab.3d § 20.14 (2012) (citations omitted). Merchantability requires that a product conform to its ordinary and intended use; it does not impose a general requirement that goods precisely fulfill the expectations of the buyer. *See AM Gen. Corp.,* 265 Mich.App. at 317, 696 N.W.2d at 56.

Another federal court has recently considered an implied warranty claim similar to Plaintiff's. In *Green v. Green Mountain Coffee Roasters, Inc.,* the court held that a plaintiff failed to state an implied warranty claim where plaintiff's single-serving coffee brewer failed to brew the exact amount of coffee advertised. 279 F.R.D. 275, 283 (D.N.J.2011). The court found that the "general purpose" of the brewer was to brew hot beverages. *Id.* Although the defendants may have advertised that the machines would brew a specific amount, the judge reasoned that the advertisement did not "transform the 'general' purpose." *Id.* (citing *Lieberson v. Johnson & Johnson,* 865 F.Supp.2d 529, 2011 WL 4414214, at *8 (2011)). Since Plaintiff did not allege that the brewer was inoperable, such as failing to brew coffee at all, the complaint failed to state a claim. *Id.* (citing *Hughes v. Panasonic Consumer Elecs. Co.,* Civ. No. 10–846, 2011 WL 2976839, at *22–23 (D.N.J. July 21, 2011)) ("[Plaintiff] has not sufficiently alleged that his brewer was unfit for its ordinary purpose of brewing beverages *at the time of purchase."*) (emphasis added); *Anderson v. Chrysler Corp.,* 184 W.Va. 641, 646, 403 S.E.2d 189, 194 (1991) (finding a plaintiff must present evidence, either direct or circumstantial, of a defect or malfunction to prove a breach of implied warranty claim).

In the present case, Plaintiff does not allege that her Tassimo is defective in brewing Starbucks coffee or other T-discs. Moreover, Plaintiff does not allege that she was unable to brew Starbucks coffee or other T-discs at the time of her purchase. Rather, Plaintiff alleges that the unavailability of Starbucks coffee T-discs makes it impossible for her to brew Starbucks coffee. Similar to the court in *Green,* the Court finds that the unavailability of Starbucks coffee T-discs does not "transform the general purpose" of the brewer, and therefore does not state a claim that the brewer is unfit for its ordinary purpose.

b. Conformity with Promises or Affirmations on Container or Label

***17** Plaintiff alleges that "statements contained on the outer container in which [Tassimos] were packaged, and which defendants and their affiliates placed on display" and Defendants' "advertising and conduct" breach the implied warranty of merchantability. At no point in her complaint does Plaintiff quote or otherwise detail the contents of the statements contained on the outer Tassimo container. Plaintiff does, however, allege that the "statements" on the container were false "so as to mislead consumers into believing the Tassimo system afforded consumers the present and continued availability of compatible [Starbucks T-discs] ." (Compl., Docket no. 31, Page ID 234.)

Defendants respond that Plaintiff has failed to allege that her Tassimo was defective or ever "failed to perform ... in its intended and anticipated way." (Docket no. 17, Page ID 119.)

As outlined above, Michigan Compiled Laws § 440.2314 governs implied warranties. To be merchantable, at a minimum, goods must "conform to the promises or affirmations of fact made on the container or label if any." Mich. Comp. Laws § 440.2314(2)(c).

Although Plaintiff alleges that the "statements" on

Tassimo containers misled consumers into believing Starbucks T-discs would continue to be available, Plaintiff does not allege that the container made any promise or affirmation about the continued availability of Starbucks T-discs. Absent specific factual allegations regarding the content of the "statements" on Tassimo containers, the Court finds it implausible that the container made a promise or an affirmation of fact that Starbucks T-discs would continue to be available. *See Twombly,* 550 U.S. at 570, 127 S.Ct. at 1974 (The complaint must contain "enough facts to state a claim to relief that is plausible on its face"); *Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendants is liable for the misconduct alleged."). Therefore, Plaintiff fails to state a claim of breach of the implied warranty of merchantability.

C. Breach of Contract

Finally, Plaintiff alleges that her and purported class members' "transactions to purchase [Tassimos] constitute valid, enforceable contracts." (Compl., Docket no. 31, Page ID 251.) Plaintiff argues that Defendants breached the contracts by failing to "provide or ensure a reasonable supply and availability of compatible Starbucks [coffee T-discs]." (*Id.*)

Defendants respond that Plaintiff's breach of contract claim must fail because Plaintiff and Defendants were not in privity of contract.

Contractual privity is an essential element of a breach of contract claim under Michigan law. *See Downriver Internists,* 929 F.2d at 1149 (citing *Nat'l Sand, Inc. v. Nagel Constr., Inc.,* 182 Mich.App. 327, 331, 451 N.W.2d 618, 620 (1990)). No privity of contract exists between a consumer, who buys from a retailer, and a manufacturer who has not sold directly to the consumer. *See Gernhardt,* 2003 WL 23976324 at *4 (finding plaintiffs, who purchased a vehicle from a dealer, failed to establish contractual privity with the original manufacturer.).

***18** The parties do not dispute that privity of contract is required for Plaintiff's breach of contract claim. Rather, Plaintiff claims she has privity as a third-party beneficiary. However, as with Plaintiff's express warranty claim, the Court finds Plaintiff lacks third-party beneficiary status. *See, e.g., Kisiel v. Holz,* 272 Mich.App. 168, 170, 725 N.W.2d 67, 69 (2006); *see also Dynamic,* 214 Mich.App. at 428, 543 N.W.2d at 33 (holding that a third party could not maintain an action upon a contract merely because he would receive a benefit from the performance or because he was injured by the breach thereof). A third party for whose benefit a promise was made in a contract may enforce that promise if he or she can establish that the promisor "has undertaken to give or to do something directly to or for said person." Mich. Comp. Laws § 600.1405(1); *see also Brunsell v. City of Zeeland,* 467 Mich. 293, 297, 651 N.W.2d 388, 391 (2002) (observing that the plain language of § 600.1405 reflects that not every person incidentally benefitted by a contractual promise has a right to sue for breach of that promise, but rather only if the promisor has undertaken to give or to do or refrain from doing something directly to or for said person). Since Plaintiff states that she purchased her Tassimo from "Fred Meijer," (Compl., Docket no. 31, Page ID 240), and fails to allege that Defendants have *undertaken to give or do something directly to or for her,* Plaintiff lacks privity of contract with Defendants. As a result, Defendants' motions to dismiss Plaintiff's claim for breach of contract will be granted.

IV. CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss will be granted with regard to Plaintiff's claims for MCPA violations under Michigan Compiled Laws §§ 445.903(3)(1)(h), (n), (p), (q), (t), (u), and (w), breach of express warranty, breach of implied warranty, and breach of contract. Defendants' motions to dismiss will be denied as to Plaintiff's claims for violations of the MCPA under Michigan Compiled Laws §§ 445.903(3)(1)(a), (c), (s), (bb), and (cc).

An Order consistent with this Opinion will be entered.

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United States District Court,
E.D. Michigan,
Southern Division.

POLICE AND FIRE RETIREMENT SYSTEM OF the CITY OF DETROIT, a pension plan and trust established by the Charter and Municipal Code of the City of Detroit, Michigan, both in its own capacity and in its capacity as Administrative and Collateral Agent for the Police and Fire Retirement System of the City of Detroit and the General Retirement System of the City of Detroit; and the General Retirement System of the City of Detroit, a pension plan and trust established by the Charter and Municipal Code of the City of Detroit, Michigan, Plaintiffs/Counter–Defendants,
v.
Donald V. WATKINS, an individual, and Watkins Aviation, LLC, a Delaware limited liability company, Defendants/Counter–Plaintiffs/Third–Party Plaintiffs,
v.
North Point Advisors, LLC, Adrian Anderson, and Jeffrey Conry, Third–Party Defendants.

No. 08–12582.
|
Sept. 30, 2009.

Attorneys and Law Firms

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ORDER:

(1) GRANTING PLAINTIFFS' MOTION TO DISMISS DEFENDANTS' FIRST AMENDED COUNTER COMPLAINT;

(2) DENYING PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS; AND

(3) DENYING THIRD–PARTY DEFENDANTS' MOTION TO DISMISS

VICTORIA A. ROBERTS, District Judge.

I. INTRODUCTION

***1** The Police and Fire Retirement System of the City of Detroit ("PFRS") and the General Retirement System of the City of Detroit ("GRS") (collectively, "the Funds") sued Donald V. Watkins and his company, Watkins Aviation, LLC, (collectively, "the Watkins Defendants" or "Watkins") for breach of contract. Watkins filed a counter complaint for breach of contract and a third-party complaint against Adrian Anderson and his company, North Point Advisors (collectively, "North Point").

Before the Court are: (1) the Funds' Amended Motion to Dismiss Watkins' First Amended Counter Complaint

(Dkt.# 50); (2) the Funds' Motion for Judgment on the Pleadings as to Liability (Dkt.# 51); and (3) North Point's Amended Motion to Dismiss Watkins' Third–Party Complaint (Dkt.# 31).

The Court **GRANTS** the Funds' motion to dismiss, **DENIES** the Funds' motion for judgment on the pleadings, and **DENIES** North Point's motion to dismiss.

II. BACKGROUND

A. Contractual Framework

This lawsuit has its roots in a deal to invest in the development of a cargo airline company. On February 26, 2008, Watkins Aviation acquired 77% of the outstanding shares of TradeWinds Airlines, Inc., becoming its majority shareholder. The same day, the Funds, Watkins and TradeWinds executed a series of interrelated agreements designed to finance the acquisition of TradeWinds, pay off the airline's debt, and provide it with needed capital. The Watkins Defendants allege North Point is the Funds' agent and financial advisor on this transaction.

1. Credit Agreement and Term Notes

The cornerstone of the deal is the Second Amended and Restated Aircraft Purchase Money Credit Agreement ("the Credit Agreement"). Through this Credit Agreement, the Funds promised to lend $30 million to TradeWinds ("the Loan"). In return, TradeWinds signed two term notes worth $15 million each, one payable to PFRS and the other to GRS.

The Credit Agreement lists several "Events of Default." If any one occurs, the Funds may demand complete and immediate repayment of the Loan. These include if TradeWinds: (1) files for bankruptcy; (2) receives permission to file for bankruptcy from its board of directors ("the Board"); or (3) fails to receive $5 million from Watkins Aviation within 30 days of signing the Loan, and another $5 million after six months.

2. Watkins and Watkins Aviation Guaranties

As part of the arrangement, Mr. Watkins and Watkins Aviation executed two separate guaranty agreements ("the Guaranties") by which they assume the risk of TradeWinds' default and promise to repay the Loan in full at maturity, or earlier if required. Under these Guaranties, the Watkins Defendants waive any defense or counterclaim against the Funds that could otherwise be invoked by TradeWinds.

3. Stockholders' Agreement

The Funds, Watkins Aviation and TradeWinds' then-president Jeffrey Conry also signed a Stockholders' Agreement, which requires Watkins Aviation to contribute $5 million in capital to TradeWinds within 30 days of the Loan, and another $5 million within six months. Failure to receive these payments is an Event of Default.

***2** On March 26, 2008, Watkins Aviation conveyed $5 million to TradeWinds in cash and stock with related carbon credit entitlements. On April 9, Mr. Anderson informed Mr. Conry by e-mail that the contribution was, according to him, "reasonable." The Funds did not initially object to the contribution.

B. Events Leading to TradeWinds' Bankruptcy

On May 30, 2008, the Board authorized TradeWinds' management to reorganize the company, up to and including Chapter 11 restructuring. Under the Credit Agreement, the authorization of bankruptcy proceedings is an Event of Default.

On June 9, 2008, the Funds sent TradeWinds a notice of default, citing the Board's bankruptcy resolution. The Funds also claimed TradeWinds did not receive the first $5 million contribution from Watkins Aviation. A few days later, on June 13, the Funds accelerated the Loan, and on July 25, TradeWinds instituted Chapter 11 bankruptcy proceedings in U.S. Bankruptcy Court for the Southern District of Florida. Filing for bankruptcy is an Event of Default.

C. Procedural Background

After TradeWinds' default, the Funds sued Mr. Watkins and Watkins Aviation for breaching their respective Guaranties. In their Original Complaint, the Funds also claimed Watkins Aviation breached the Stockholders' Agreement by failing to make the required $5 million contribution; the Funds dropped this claim when they amended their complaint.

The Watkins Defendants filed a counter complaint accusing the Funds of breaching the Credit Agreement by, *inter alia,* wrongfully declaring TradeWinds in default and accelerating its debt. On March 12, 2009, the Funds moved to dismiss Watkins' counter complaint and for judgment on the pleadings on the issue of liability.

The Watkins Defendants also filed a third-party complaint against North Point and Mr. Anderson, accusing them of fraudulently misrepresenting the adequacy of Watkins Aviation's capital contribution. North Point moved to dismiss the third-party complaint pursuant to Fed.R.Civ.P. 12(b)(6).

III. ANALYSIS

The Funds couch their motion against Watkins' counter complaint as a motion for judgment on the pleadings under Fed.R.Civ.P. 12(c). However, the Funds' arguments relate to whether Mr. Watkins and Watkins Aviation have standing to file a breach of contract claim. Therefore, this motion is treated as a motion to dismiss for failure to state a claim under Rule 12(b)(6). *See Bleiler v. Cristwood Constr., Inc.,* 72 F.3d 13, 15 n. 1 (2d Cir.1995) (in general, courts should dismiss claims that lack standing under Fed.R.Civ.P. 12(b)(6)). *See also* 2 James W. Moore et al., Moore's Federal Practice—Civil § 12.34[4][a] & n. 52 (3d ed.2009) (citing cases).

To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim,

> a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

***3** *Ashcroft v. Iqbal,* —— U.S. ——, ——, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (*quoting Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). When reviewing a motion to dismiss for failure to state a claim, the district court "must construe the complaint liberally in the plaintiff's favor and accept as true all factual allegations and permissible inferences therein." *Gazette v. City of Pontiac,* 41 F.3d 1061, 1064 (6th Cir.1994) (*citing Westlake v. Lucas,* 537 F.2d 857, 858 (6th Cir.1976)). *See also Miller v. Currie,* 50 F.3d 373, 377 (6th Cir.1995). However, "a plaintiff's obligation to provide the 'grounds' of his 'entitle [ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555 (citation omitted) (alteration in original). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal,* 129 S.Ct. at 1950 (*citing Twombly,* 550 U.S. at 556).

If matters outside the pleadings are submitted, a district court may treat a motion to dismiss as one for summary judgment. Fed.R.Civ.P. 12(d). However, the court maintains "complete discretion to determine whether or not to accept" material beyond the pleadings on a motion to dismiss. *Barrett v. Harrington,* 130 F.3d 246, 253 (6th Cir.1997) (*quoting* 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d § 1366, pp. 491–93 (1990)). The Watkins Defendants submit various exhibits in their opposition to North Point's motion to dismiss. The Court does not consider these exhibits for purposes of this ruling.

The standard on a Rule 12(c) motion is substantially the same as for a motion to dismiss. *See Barany–Snyder v. Weiner,* 539 F.3d 327, 332 (6th Cir.2008) (when considering a motion for judgment on the pleadings, courts must "construe the complaint in the light most favorable to the nonmoving party, accept the well-pled factual allegations as true, and determine whether the moving party is entitled to judgment as a matter of law." (*quoting Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.,* 508 F.3d 327, 336 (6th Cir.2007)); *Sensations, Inc. v. City of Grand Rapids,* 526 F.3d 291, 295–96 (6th Cir.2008); *EEOC v. J.H. Routh Packing Co.,* 246 F.3d 850, 851 (6th Cir.2001).

A. The Funds' Motion to Dismiss the Counter Complaint

The Funds claim the Watkins Defendants lack standing to assert their breach of contract claims. The Watkins Defendants contend they are either parties to the Credit Agreement, or third-party beneficiaries.

1. Whether the Watkins Defendants are Parties to the Credit Agreement

The Funds argue the Watkins Defendants are parties to the overall transaction, but not to every contract executed in furtherance of the deal. Specifically, the Funds contend Mr. Watkins and Watkins Aviation are not parties to the Credit Agreement, and thus cannot seek damages for its alleged breach.

***4** In Michigan, the general rule is that one who is not a party to a contract cannot pursue a claim for breach of that agreement. *First Sec. Sav. Bank v. Aitken,* 226 Mich.App. 291, 305, 573 N.W.2d 307 (1997), *rev'd on other grounds, Smith v. Globe Life Ins. Co.,* 460 Mich. 446, 597 N.W.2d 28 (1999). When interpreting contractual language, a court's primary goal is to determine and enforce the parties' intent. *Quality Prods. & Concepts Co. v. Nagel Precision, Inc.,* 469 Mich. 362, 375, 666 N.W.2d 251 (2003). To do so, the reviewing court must "read[ ] the agreement as a whole and attempt[ ] to apply the plain language of the contract itself." *Old Kent Bank v. Sobczak,* 243 Mich.App. 57, 63, 620 N.W.2d 663 (2000).

As a matter of law, "[a]n unambiguous contractual provision is reflective of the parties' intent" and must be construed and enforced as written. *Id.* (citation omitted). However, when the wording of the contract is ambiguous, "th [e] Court may construe the agreement in an effort to find and enforce the parties' intent. 'In interpreting contracts capable of two different constructions, we prefer a reasonable and fair construction over a less just and less reasonable construction.' " *Id.* (*quoting Schroeder v. Terra Energy, Ltd.,* 223 Mich.App. 176, 188, 565 N.W.2d 887 (1997)) (citation omitted).

There is no evidence that TradeWinds and the Funds intended the Watkins Defendants to be parties to the Credit Agreement. Watkins' names do not appear on the title page, they are not mentioned in the recitation of parties to the contract, and their signatures do not appear on the last page. Section § 11.2(a), which identifies the parties upon whom the Credit Agreement has a binding effect, and to whose benefit it inures, does not cite Mr. Watkins or Watkins Aviation. The unambiguous wording of the Credit Agreement does not support Watkins' claim.

The Watkins Defendants argue that, although they are not formally named as parties, they are included in the term "Loan Parties," which appears several times in the Credit Agreement. Loan Parties are defined as "Borrower [TradeWinds] and each Guarantor." (Am. Compl. Ex. A [hereinafter Credit Agreement] at 14, § 1.1.) Since they are both guarantors of TradeWinds' debt, the Watkins Defendants meet the definition of Loan Parties. However, there is no language stating that all Loan Parties are also parties to the Credit Agreement. In fact, the wording of the agreement suggests there are several "Loan Documents," each of which is binding upon certain Loan Parties, to the exclusion of others. (*See, e.g.,* Credit Agreement 36 at § 4.2(a) ("The execution ... by each Loan Party of the Loan Documents ... *to which it is a party* ...") (emphasis added); 59 at § 9.1(g) ("any provision of any Loan Document shall ... fail to be valid and binding on ... *any Loan Party thereto,* ...") (emphasis added).)

The Watkins Defendants emphasize that their Guaranties are defined as "Loan Documents," along with the Credit Agreement itself. The Credit Agreement also contains an integration clause, which states: "The Loan Documents embody the entire agreement of the parties and supersede all prior agreements ...". (Credit Agreement 76 at § 11.18.) The Watkins Defendants argue that, under § 11.18, they are parties to the "entire agreement," including the Credit Agreement. There is no legal support for construing an integration clause in this way, and for good reason: if it were possible, every Loan Party would automatically become party to every Loan Document. The result would be a chaotic situation in which a Loan Party could sue any other party for breach of any Loan Document.

***5** Finally, the Watkins Defendants seek to avail themselves of the rule that "to determine the intention of the parties, separate instruments executed at about the same time, in relation to the same matter and between the same parties and made as elements of one transaction may be examined together and construed as one instrument ." *W. Madison Inv. Co. v. Fileccia,* 58 Mich.App. 100, 106, 226 N.W.2d 857 (1975). *See also Bed v. Fallon,* 307 Mich. 466, 471–72, 12 N.W.2d 396 (1943). However, by its plain language, this rule applies only when the *same* individuals or entities are parties to separate contracts. That is not the case here.

The Court finds the language of the Credit Agreement is unambiguous, and does not reflect an intent to include the Watkins Defendants among the contracting parties.

2. Whether the Watkins Defendants are Third–Party Beneficiaries

Even if they are not formal parties to the Credit Agreement, the Watkins Defendants contend they are third-party beneficiaries of the contract, and, therefore, entitled to seek redress for its breach.

While a non-party to a contract cannot assert a claim for breach of that agreement, the Michigan legislature made an exception to this general rule for third-party beneficiaries:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.
>
> (2) (a) The rights of a person for whose benefit a promise has been made, as defined in (1), shall be deemed to have become vested ... without any act or knowledge on his part, the moment the promise becomes legally binding on the promisor ....
>
> ...

Mich. Comp. Laws ("M.C.L.") § 600.1405.

But the Michigan Supreme Court holds that, under § 600.1405, "only intended, not incidental, third-party beneficiaries may sue for a breach of a contractual promise in their favor." *Schmalfeldt v. N. Pointe Ins. Co.,* 469 Mich. 422, 427, 670 N.W.2d 651 (2003) (per curiam) (*citing Brunsell v. Zeeland,* 467 Mich. 293, 296, 651 N.W.2d 388 (2002)). Furthermore,

> [M.C.L. § 600.1405] states that a person is a third-party beneficiary of a contract *only when the promisor undertakes an obligation "directly" to or for the person.* This language indicates the Legislature's intent to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract.

Koenig v. City of S. Haven, 460 Mich. 667, 677, 597 N.W.2d 99 (1999) (emphasis added). The question becomes, are the Watkins Defendants third parties within the meaning of M.C.L. § 600.1405, rather than incidental third parties as described in case law.

***6** When performing the third-party analysis, Michigan courts apply "an objective standard" under which they may "look no further than the 'form and meaning' of the contract itself to determine whether a party is an intended third-party beneficiary within the meaning of [§ 600.]1405." *Schmalfeldt,* 469 Mich. at 428, 670 N.W.2d 651 *(citing Brunsell; Koenig; Kammer Asphalt v. E. China Twp.,* 443 Mich. 176, 189, 504 N.W.2d 635 (1993)).

The Watkins Defendants cite the recitals section of their Guaranties as evidence that they are third-party beneficiaries of the Credit Agreement. (*See* Am. Compl. Exs. D & E, at 1 ("Guarantor will derive substantial direct and indirect benefits from the extensions of credit under the Credit Agreement.").) However, the Guaranties are not integrated into the Credit Agreement; the Court cannot consider this statement, because it is outside the four corners of the contract.

There is nothing in the form and meaning of the Credit Agreement to suggest the Watkins Defendants' are intended third-party beneficiaries. The agreement does not mandate any obligation to be undertaken directly in Watkins' favor. Nor does their condition as guarantors make them more than incidental beneficiaries of the agreement between the Funds and TradeWinds. Lastly, the fact that Watkins Aviation is TradeWinds' primary shareholder does not confer upon it the status of a third-party beneficiary. *See Edwards v. Walter Jones Constr. Co.,* No. 98–4366, 2000 U.S.App. LEXIS 4888, at *4–5 (6th Cir. Mar. 17, 2000) (unpublished) (refusing to fashion a thirdparty-beneficiary exception to the rule that "a shareholder is not entitled, merely by virtue of being a shareholder, to sue for alleged wrongs done to a corporation.") *(citing Weissman v. Weener,* 12 F.3d 84, 87 (7th Cir.1993)).

The Watkins Defendants repeatedly invoke the circumstances which led to the signing of the Credit Agreement as evidence that they are third-party beneficiaries. However, Michigan law is clear that courts may look "no further than the 'form and meaning' of the contract itself" to establish whether a party has third-party standing. *Compare Schmalfeldt,* 469 Mich. at 428, 670 N.W.2d 651, *with Fin. Auth. v. L.L. Knickerbocker Co.,* 106 F.Supp.2d 44, 48 (D.Me.1999) (in Massachusetts, "[w]hen evaluating the intent of the parties, a court must consider both the language of the contract as well as the surrounding facts and circumstances.").

The form and meaning of the Credit Agreement preclude finding the Watkins Defendants were intended third-party beneficiaries. Accordingly, the Court GRANTS the Funds' Motion to Dismiss the First Amended Counter Complaint (Dkt. # 50).

B. The Funds' Motion for Judgment on the Pleadings

The Funds also seek a judgment on the pleadings, on grounds that the Watkins Defendants cannot escape liability for the Loan. The Funds argue there is no question that, if TradeWinds files for bankruptcy, Mr. Watkins and Watkins Aviation must repay the Loan in their capacity as guarantors. Since TradeWinds is currently in Chapter 11 proceedings, the Funds contend Watkins' liability is undeniable, and any claim or defense relating to events prior to TradeWinds' bankruptcy is moot.

***7** The Watkins Defendants contend the Funds were the first to breach the Loan Documents, and did so with the intent of forcing TradeWinds into bankruptcy. They claim that, between April and June 2008, certain trustees and representatives of the Funds approached Mr. Watkins to request various improper financial favors, which he declined. The Watkins Defendants allege the Funds retaliated by challenging the adequacy of Watkins Aviation's $15 million contribution, declaring TradeWinds in default and accelerating the Loan. According to Watkins, these actions caused TradeWinds to seek bankruptcy protection and prevented other parties, including Mr. Watkins and Watkins Aviation, from fulfilling their obligations under the deal. Mr. Watkins claims he testified about this alleged "pay-to-play" scheme before a grand jury investigating allegations of corruption in Detroit.

Construing the pleadings in the light most favorable to Watkins, the Court cannot grant the Funds' motion. Watkins' allegations of improper solicitation and retaliation are well-pled, raise material issues of fact, and preclude judgment as a matter of law in favor of the Funds. *Barany–Snyder,* 539 F.3d at 332. Moreover, the Watkins Defendants argue that, under Michigan's doctrines of first material breach and prevention, if the Funds really forced TradeWinds into bankruptcy, Watkins cannot be liable for failing to repay the Loan. The Funds' response is not sufficient for the Court to conclusively rule out these theories of defense.

The Funds' Motion for Judgment on the Pleadings is DENIED (Dkt.# 51).

C. North Point's Motion to Dismiss the Third–Party Complaint

The final motion the Court considers is North Point's motion to dismiss Watkins' third-party complaint, on grounds that it fails to state a claim for fraudulent misrepresentation.

To state a fraudulent misrepresentation claim under Michigan law, a plaintiff must allege that:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury.

Roberts v. Saffell, 280 Mich.App. 397, 403, 760 N.W.2d 715 (2008); *Hord v. Envtl. Research Inst. of Mich.,* 463 Mich. 399, 404, 617 N.W.2d 543 (2000).

The third-party complaint states sufficient facts from which to reasonably infer North Point's liability for the alleged offense. Watkins allege they relied on a representation by Mr. Anderson that Watkins Aviation's conveyance to TradeWinds satisfied the requirements of the Stockholders' Agreement. Assuming it was made, this representation was material to Watkins Aviation's fulfillment of its obligations; in fact, the Funds initially sued Watkins Aviation for breaching the Stockholders Agreement, alleging the capital contribution was improper. Watkins also state that, as the Funds' business advisor, North Point knew or should have known if the form of the contribution was inadequate, and that Watkins would rely on Mr. Anderson's assessment. Together, these allegations satisfy the pleading requirements for a fraudulent misrepresentation claim.

***8** North Point's arguments raise multiple legal and factual issues that are beyond the scope of a motion to dismiss. For instance, North Point contends it is not formally authorized to approve the form of the capital contribution. This may be true, but the fact that it is the Funds' financial advisor is enough to draw a reasonable inference that Watkins relies upon its assessments on such matters.

The amended third-party complaint does more than recite the elements of a fraudulent misrepresentation claim and meets its burden to articulate a plausible claim for relief. Therefore, North Point's Amended Motion to Dismiss is DENIED (Dkt.# 31).

IV. CONCLUSION

The Watkins Defendants do not have standing to assert claims for breach of the Credit Agreement; they are neither parties nor third-party beneficiaries. Therefore, the Court **GRANTS** the Funds' motion and **DISMISSES** the Watkins Defendants' First Amended Counter Complaint.

However, the Funds are not entitled to judgment as a matter of law, and their Motion for Judgment on the Pleadings as to Liability is **DENIED.**

Lastly, the Court **DENIES** North Point's Amended Motion to Dismiss Watkins' Third–Party Complaint.

IT IS ORDERED.

All Citations

Not Reported in F.Supp.2d, 2009 WL 3210922

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Only the Westlaw citation is currently available.

UNPUBLISHED
Court of Appeals of Michigan.

RALPH ROBERTS REALTY, LLC,
Plaintiff-Appellant,
v.
Neil TYSON and Tyson Properties, LLC,
Defendants-Appellees.

No. 345230
|
November 21, 2019

Oakland Circuit Court, LC No. 2017-160093-CB

Before: Jansen, P.J., and Boonstra and Letica, JJ.

Opinion

Per Curiam.

***1** In this breach of contract action, plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(7) and (C)(8). We affirm.

I. RELEVANT FACTUAL BACKGROUND

In March 2011, plaintiff and defendant Neil Tyson entered into discussions for Tyson to participate in a real estate investment program run by plaintiff. The terms of the investment program were outlined in a written acquisition agreement, but plaintiff and Tyson failed to sign the agreement. Under the terms of the agreement, plaintiff would identify properties for Tyson to purchase as investment properties. If Tyson chose to purchase a property, plaintiff would purchase the property on Tyson's behalf, and would title the property in either Tyson's name, or in the name of Tyson's designated entity. Plaintiff would receive $5,000 for this service. The agreement went on to provide that plaintiff retained an exclusive right to sell any property obtained for Tyson, and would receive a "commission" of 7% of the gross sale of any property sold. The remaining proceeds of the sale, after deducting costs incurred by Tyson, would be split evenly between plaintiff and Tyson. If the property were sold for a profit of less than $1,000, the proceeds would not be split. In the event that any property acquired by plaintiff for Tyson was not sold within five years of the agreement, plaintiff would be entitled to 50% of the property's gross sale price premised on a valuation of the property.

Plaintiff purchased two properties for Tyson under the agreement at a sheriff's sale on March 22, 2011: 195 Eagle Way, South Lyon, Michigan (the Eagle Way property) for $24,989, and 21395 Westview, Ferndale, Michigan (the Westview property), for $101.55. Plaintiff had the properties deeded to Tyson Properties, LLC. Five years later, the properties had not been sold, and defendants refused to pay plaintiff under the agreement.

Plaintiff filed a complaint in August 2017, alleging breach of contract and unjust enrichment, and sought 50% of the equity in the properties under the agreement.[1] Defendants moved for summary disposition under MCR 2.116(C)(7) and (8), arguing that the agreement was unenforceable under the statute of frauds because the agreement granted a conveyance of land to plaintiff, it could not be completed within one year, and plaintiff sought a commission for the sale of real estate. The trial court agreed that the statute of frauds barred plaintiff's claim, and granted summary disposition in favor of defendants. This appeal followed.

1 Plaintiff's unjust-enrichment claim is not the subject of this appeal, and is not discussed herein.

II. STANDARDS OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dawoud v. State Farm Mut. Auto Ins. Co.*, 317 Mich. App. 517, 520; 895 N.W.2d 188 (2016). A motion for summary disposition brought under MCR 2.116(C)(7) asserts that a claim is barred by "release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate or to litigate in a different forum, infancy or other disability of the moving party, or

assignment or other disposition of the claim before commencement of the action." MCR 2.116(C)(7). In reviewing a motion for summary disposition brought under MCR 2.116(C)(7), we accept the contents of the complaint as true, unless documentation submitted by the moving party contradicts the contents of the complaint. *McLean v. McElhaney*, 289 Mich. App. 592, 597; 798 N.W.2d 29 (2010). We also consider any affidavits, depositions, admissions, or other documentary evidence submitted. *Id.*

***2** "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Dell v. Citizens Ins. Co. of America*, 312 Mich. App. 734, 739; 880 N.W.2d 280 (2015).

Finally, "[w]hether a statute of frauds bars enforcement of a contract is a question of law that we review de novo." *Kloian v. Domino's Pizza, LLC*, 273 Mich. App. 449, 458; 733 N.W.2d 766 (2006).

III. ANALYSIS

Plaintiff argues that the trial court erred by finding the agreement was unenforceable under the statute of frauds because the agreement established that plaintiff would be paid a commission for a real estate transaction and the contract could not have been completed within one year. We agree that the statute of frauds precluded plaintiff from enforcing the agreement, but not for the reasons articulated by the trial court. Rather, we conclude that the agreement was unenforceable under the statute of frauds because it granted plaintiff an interest in land.[2]

[2] Because the trial court reached the correct result, albeit for the wrong reasons, reversal is not warranted. *Lewis v. Farmers Ins. Exch.*, 315 Mich. App. 202, 217; 888 N.W.2d 916 (2016).

"The starting point in analyzing oral statements for contractual implications is to determine the meaning that reasonable persons might have attached to the language, given the circumstances presented." *Rowe v. Montgomery Ward & Co., Inc.*, 437 Mich. 627, 640; 473 N.W.2d 268 (1991). Furthermore, "[t]he 'overreaching principle of contract interpretation is that the court looks to all the relevant circumstances surrounding the transaction, including all writings, oral statements, and other conduct by which the parties manifested their intent." *Id.* at 641. Plaintiff alleges that the terms of the written and unsigned acquisition agreement represent the terms of the agreement at issue in this case. Contracts attached to a pleading are considered part of the pleading. *Liggett Restaurant Group, Inc. v. City of Pontiac*, 260 Mich. App. 127, 133; 676 N.W.2d 633 (2003). To ascertain the terms of the agreement, we will rely on traditional contractual interpretation rules used for written contracts.

"In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory v. Continental Ins. Co.*, 473 Mich. 457, 464; 703 N.W.2d 23 (2005). "A dictionary may be consulted to ascertain the plain and ordinary meaning of words or phrases used in the contract." *Auto Owners Ins. Co. v. Seils*, 310 Mich. App. 132, 145; 871 N.W.2d 530 (2015). "[C]ontracts must be read as a whole," *Kyocera Corp. v. Hemlock Semiconductor, LLC*, 313 Mich. App. 437, 447; 886 N.W.2d 445 (2015), giving "effect to every word, phrase, and clause," while taking pains to "avoid an interpretation that would render any part of the contract surplusage or nugatory," *Klapp v. United Ins. Group Agency, Inc.*, 468 Mich. 459, 468; 663 N.W.2d 447 (2003).

"The statute of frauds exists for the purpose of preventing fraud or the opportunity for fraud, and not as an instrumentality to be used in the aid of fraud or prevention of justice." *Lakeside Oakland Dev., LC v. H & J Beef Co.*, 249 Mich. App. 517, 526-527; 644 N.W.2d 765 (2002). In relevant part, MCL 566.132 states:

> ***3** (1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:
>
> (a) An agreement that, by its terms, is not to be performed within 1 year from the making of the agreement.
>
> * * *
>
> (e) An agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate.

Similarly, MCL 566.106 requires contracts establishing an interest in land to be in writing:

> No estate or interest in lands, other than leases for a

> term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

Contracts that fall within any portion of the statute of frauds are unenforceable. See, e.g., *Kelly-Stehney & Assoc., Inc. v. MacDonald's Indus Products, Inc.*, 265 Mich. App. 105, 110-114; 693 N.W.2d 394 (2005) (holding that an oral contract was unenforceable because it fell within one portion of the statute of frauds). The writing requirement of the statute of frauds, however, "may be satisfied by several writings made at different times" and can also be satisfied by a series of writings, rather than one single writing establishing all the terms of the contract in question. *Id.* at 111-114.

Plaintiff and defendants agree that there was no writing in this case. Thus, the agreement's terms determine whether it falls within the statute of frauds. Three types of contracts that fall within the statute of frauds are relevant in this case: (1) contracts that cannot be completed within one year of formation, MCL 566.132(1)(a), (2) contracts paying a commission for the sale of land, MCL 566.132(1)(e), and (3) contracts creating an interest in land, MCL 566.106. If the agreement falls within any of these areas then it falls within the statute of frauds and is unenforceable. See MCL 566.106; MCL 566.132; *Kelly-Stehney & Assoc., Inc.*, 265 Mich. App. at 110-114.

Generally, "agreements to share profits and losses arising from the purchase and sale of real estate are not contracts for the sale or transfer of interests in land and need not be in writing." *In re Handelsman*, 266 Mich. App. 433, 440; 702 N.W.2d 641 (2005) (citation and quotation marks omitted). However, the properties in this case have not been sold, and plaintiff is not attempting to collect a share of profits generated by the sale of a property. Instead, plaintiff is attempting to collect 50% of the properties' equity values.

When used in terms of real property, Black's Law Dictionary defines "equity" as "[t]he amount by which the value of or an interest in property exceeds secured claims or liens; the difference between the value of the property and all encumbrances on it." *Black's Law Dictionary* (11th ed); see also *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining equity as "the money value of a property or of an interest in a property in excess of claims or liens against it."). As explained by our Supreme Court in *Lookholder v. Ziegler*, 354 Mich. 28, 36 n. 7; 91 N.W.2d 834 (1958):

> ***4** The general rule is, that the word "interest" is broader and more comprehensive than the word "title." It embraces both legal and equitable rights. It covers rights in property less than title thereto, rights different from title, rights which may be enforced, legal rights.
>
> Interest, in common speech in connection with land, includes all varieties of titles and rights. When given its plain and natural meaning it comprehends estates in fee, for life and for years, mortgages, liens, easements, attachments, and every kind of claim to land which can form the basis of a property right. [Citations and quotation marks omitted.]

The agreement here purportedly established that plaintiff was entitled to 50% of the properties' equity values at the expiration of the agreement's five-year term, even if the properties were not sold. The agreement additionally established that plaintiff could record a claim of interest in the properties to "provide notice to third parties of [plaintiff's] interest in the [properties]." On the basis of the foregoing, the alleged agreement granted plaintiff an interest in the properties, and indeed, plaintiff is seeking 50% of the properties' equity. Thus, plaintiff's claim is premised on an interest in land, and falls within the statute of frauds. Accordingly, the trial court did not err by granting summary disposition to defendants because the statute of frauds rendered the agreement unenforceable.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2019 WL 6248354

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United States District Court,
E.D. Michigan,
Southern Division.

Angela RILEY–JACKSON, Plaintiff, v. OCWEN LOAN SERVICING, LLC, and Deutsche Bank National Trust Company as Trustee for Argent Securities, Inc., Asset–Backed Passthrough Certificates, Series 2004–W1, Defendants.

No. 13–cv–12538.
|
Oct. 18, 2013.

Attorneys and Law Firms

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Paul Poles, Potestivo & Associates, P.C., Rochester Hills, MI, for Defendants.

OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

GERALD E. ROSEN, Chief Judge.

I. *INTRODUCTION*

***1** This mortgage foreclosure case is presently before the Court on the Fed.R.Civ.P. 12(b)(6) Motion to Dismiss filed by Defendants Deutsche Bank National Trust Company, as Trustee for Argent Securities, Inc., Asset–Backed Pass–Through Certificates, Series 2004–W1 ("Deutsche Bank") and Ocwen Loan Servicing, L.L.C. ("Ocwen"). Plaintiff Angela Riley–Jackson, through counsel, responded to Defendants' motion, and Defendants have replied. Having reviewed and considered the parties' briefs and supporting exhibits, the Court has determined that the pertinent allegations and legal arguments are sufficiently addressed in these materials and that oral argument would not assist in the resolution of this motion. Accordingly, the Court will decide Defendants' motion "on the briefs." See L.R. 7.1(f)(2). This Opinion and Order sets forth the Court's ruling.

II. *FACTUAL BACKGROUND*

On March 27, 2002, Plaintiff Angela Riley–Jackson purchased a condominium located at 25083 Constitution Avenue in Warren, Michigan. A warranty deed evidencing Riley–Jackson's interest in the property was recorded with the Macomb County Register of Deeds on June 5, 2002. Thereafter, on November 18, 2003, Plaintiff executed an Adjustable Rate Note in the amount of $223,250.00 and as security for the note, she executed a mortgage encumbering the Constitution Avenue property, which was recorded on January 14, 2004.[1] Both the Note and the Mortgage were executed in favor of the lender, Argent Mortgage Company, LLC ("Argent").

[1] Plaintiff did not attach the Note as an exhibit to her Complaint. However, a document not formally incorporated by reference or attached to a complaint may be provided by the defendant and properly considered part of the pleadings when the document is referred to in the complaint and is central to the plaintiff's claim. *Weiner v. Klais & Co., Inc.*, 108 F.3d 86, 89 (6th Cir.1997); *see also Greenberg v. Life Ins. Co. of Virginia*, 177 F.3d 507, 514 (6th Cir.1999). Thus, "a defendant may introduce certain pertinent documents if the plaintiff fails to do so." *Weiner, supra; QQC, Inc. v. HewlettPackard Co.*, 258 F.Supp.2d 718, 721 (E.D.Mich.2003) ("[I]f the plaintiff fails to attach the written instrument upon which he relies, the defendant may introduce the pertinent exhibit.") The court may also take judicial notice of publicly filed documents. Fed.R.Evid. 201.

Pursuant to a February 1, 2004 Pooling and Servicing Agreement, on February 11, 2009, Argent assigned Plaintiff's mortgage to Deutsche Bank–Santa Ana, CA. Subsequently, on April 19, 2012, Deutsche Bank Santa Ana, CA re-assigned the mortgage to Deutsche Bank–Irving, TX. Both assignments were duly recorded

with the Macomb County Register of Deeds.

Plaintiff defaulted on the Note when there was still $236,457.22 due and owing. On January 15, 2013, pursuant to M.C.L. § 600.3205a(1), she was notified that foreclosure proceedings would commence unless within 30 days of the date of the notice, she contacted either Deutsche Bank's designated agent (Potestivo & Associates, P.C.-Home Retention Department) or an approved housing counselor and requested a meeting to negotiate a loan modification. *See* Defendants' Ex. 5. Along with this notice, Plaintiff was provided with a Michigan State Housing Development Authority list of approved housing counselors. *See id.*

The notice further advised Plaintiff:

> If you request a meeting with the Designated Agent, then within 10 days of the request, we will send you a list of documents that will need to be returned so that the meeting can be conducted. If all documents requested are executed, completed and returned to the Designated Agent with[in] 60 days from the date of this notice, then foreclosure proceedings will not be commenced until at least 90 days from the date of this notice. If requested documents are not returned within 60 days from the date of this notice, then foreclosure may proceed. If an agreement to modify the mortgage loan is reached and you abide by the terms of the agreement, the mortgage will not be foreclosed. If an agreement to modify the mortgage loan is not reached and it is determined that you meet the criteria for modification under MCL 600.3205c(1) and foreclosure is not allowed under MCL 600.3205c(7), the foreclosure of the mortgage will proceed before a judge instead of by advertisement.

***2** *Id.*[2]

[2] These notice provisions track the provisions of M.C.L. § 600.3205a.

However, neither Plaintiff nor anyone acting on her behalf ever requested a meeting to negotiate a possible loan modification within the 30–day period specified for doing so. [*See* Defendants' Ex. 7, April 10, 2013 Proof of Service of Pre–Foreclosure Notice and Affidavit of Thomas A. Ford of Potestivo & Associates, P.C.][3] Therefore, Deutsche Bank proceeded with foreclosure by advertisement.

[3] In her brief, "Plaintiff disputes that she did not contact Defendants and make an effort to save her home." [*See* Plaintiff's Brief at p. 8]. However, other than this bare assertion, Plaintiff has failed to come forward with any evidence showing that she complied with the statutory requirements for requesting a mortgage loan modification.

The Notice of Foreclosure was published for four consecutive weeks in *The Macomb Daily,* beginning on April 11, 2013. The final publication of the foreclosure notice occurred on May 2, 2013. The notice was also posted on the property beginning on April 17, 2013.

A Sheriff's Sale was originally scheduled for May 10, 2013. However, at the eleventh hour, Plaintiff obtained a Temporary Restraining Order from the Macomb County Circuit Court. *See* Defendants' Ex. 6. This TRO, however, did not require Defendants to halt the Sheriff's Sale; rather it merely enjoined Defendants from "... altering, concealing or destroying any books and records ..." *See id.* Nonetheless, when the Deputy Sheriff who was to conduct the sale was presented with the TRO, the sale was adjourned. Ultimately, after being advised that the TRO did not enjoin Defendants from moving forward with the sale, it was rescheduled and held on May 17, 2013. Deutsche Bank was the high bidder at the sale and purchased the property for $242,913.23. A Sheriff's Deed was issued that same day. *See* Defendants' Ex. 7. The Sheriff's Affidavit of sale noted that the six-month redemption period provided under M.C.L. § 600.3240(8) would end on November 17, 2013. *See id.*

Meanwhile, on May 10, 2013, Plaintiff filed a three-count Complaint in the Macomb County Circuit Court. Count I of the Complaint alleges a claim of Quiet Title; Count II alleges a claim of violation of M.C.L. § 600.3205; and Count III alleges a claim for injunctive relief. Defendants timely removed the case to this Court on June 10, 2013, and now move to dismiss Plaintiff's Complaint in its entirety pursuant to Fed.R.Civ.P. 12(b)(6).

III. *DISCUSSION*

A. *APPLICABLE STANDARDS*

Fed.R.Civ.P. 12(b)(6) authorizes the Court to dismiss a complaint if it "fail[s] to state a claim upon which relief can be granted...." In deciding a motion brought under Rule 12(b)(6), the Court must construe the complaint in the light most favorable to the plaintiff and accept all well-pled factual allegations as true. *League of United*

Latin American Citizens v. Bredesen, 500 F.3d 523, 527 (6th Cir.2007). Yet, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). Moreover, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 1964–65, 167 L.Ed.2d 929 (2007) (internal quotation marks, alteration, and citations omitted). Rather, to withstand a motion to dismiss, the complaint's factual allegations, accepted as true, "must be enough to raise a right to relief above the speculative level," and "state a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 555, 570, 127 S.Ct. at 1965, 1974. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678, 129 S.Ct. at 1949. The plausibility standard, however, "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.' " *Id.* (quoting *Twombly,* 550 U.S. at 557, 127 S.Ct. 1955, 167 L.Ed.2d 929). Applying the foregoing standards, the Court concludes that Defendants' Motion to Dismiss in this case should be granted.

B. *PLAINTIFF HAS FAILED TO DEMONSTRATE THAT DEFENDANTS FAILED TO COMPLY WITH THE REQUIREMENTS OF THE FORECLOSURE–BY–ADVERTISEMENT STATUTE*

***3** The basis of both Plaintiff's quiet title claim (Count I) and her claim of breach of M.C.L. § 600.3205 (Count II) is Defendants' alleged failure to comply with the loan modification procedures set forth in M.C.L. § 600.3205. The specific violations complained of are that Defendants allegedly

- failed to complete the Loan Modification process and subsequently and apparently denied Plaintiff a Loan Modification; and

- failed to send Plaintiff a denial letter with the calculation

[Complaint ¶ 32(b), (c)].

Plaintiff does not dispute that she timely received the January 15, 2013 PreForeclosure Notice. In order to obtain a loan modification to avoid foreclosure, both the Pre–Foreclosure Notice Plaintiff received and the Michigan foreclosure-by-advertisement statute, M.C.L. § 600.3205a, required that Plaintiff request a meeting within thirty days, either with Defendants' designated agent (Potestivo & Associates–Home Retention Department) or with one of the approved housing counselors on the Michigan State Housing Development Authority list that was provided to her along with the Notice. Although Plaintiff states generally that she "contacted the Defendants in order to obtain a Loan Modification," [Complaint ¶ 32(a)], nowhere does she state that she contacted the mortgage lender's specified "designated agent" or one of the approved housing counselors as required under the statute, or that she did so before February 15, 2013. Plaintiff's bare assertion that she "contacted the Defendants," without more, does not provide sufficient "factual content that allows the court to draw the reasonable inference that [Defendants are] liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678.

Having failed to show that she satisfied the statutory preconditions for consideration for a loan modification, Plaintiff's Complaint claims fail as a matter of law.

Moreover, even if Plaintiff had demonstrated that she timely complied with the statute's requirements and timely requested a meeting with the lender's agent or an approved counselor, Michigan law does not require that a lender *ipso facto* modify a loan. All that the statute requires is that if a borrower timely requests a meeting, the lender is required to *meet* with the borrower *to attempt* to work out a modification.

The statute also provides that the lender has 10 days from being contacted by the borrower to request the borrower to provide any documents it deems necessary to determine whether the borrower is eligible for a loan modification. M.C.L. ¶ 600.3205b(2). The borrower is allowed 60 days from the date of the Pre–Foreclosure Notice to provide any requested documents. *Id.* If the borrower does not timely provide the requested documents, or if no agreement is reached, unless the borrower can establish that she meets the statutory criteria for loan modification set forth in M.C.L. § 600.3205c,[4] the only relief afforded the borrower is that foreclosure proceedings are delayed and may not be commenced until 90 days after the date the Pre–Foreclosure Notice was mailed to the borrower. M.C.L. §§ 600.3205a(e); 600.3205b(2).

[4] M.C.L. § 600.3205c requires that in making the determination as to whether a borrower qualifies for a

> loan modification, the lender use a loan modification program or process that includes all of the following features:
>
> (a) A target ratio of the borrower's housing-related debt to the borrower's gross income of 38% or less, on an aggregate basis. Housing-related debt under this subdivision includes mortgage principal and interest, property taxes, insurance, and homeowner's fees.
>
> (b) To reach the 38% target specified in subdivision (a), 1 or more of the following features:
>
> (i) An interest rate reduction, as needed, subject to a floor of 3%, for a fixed term of at least 5 years.
>
> (ii) An extension of the amortization period for the loan term, to 40 years or less from the date of the loan modification.
>
> (iii) Deferral of some portion of the amount of the unpaid principal balance of 20% or less, until maturity, refinancing of the loan, or sale of the property.
>
> (iv) Reduction or elimination of late fees.
>
> M.C.L. § 600.3205c.

***4** Plaintiff here has not shown nor even alleged that she meets the Section 3205c statutory criteria. Therefore, as Defendants did not commence foreclosure-byadvertisement until April 11, 2013—i.e., 90 days after the date of her Pre–Foreclosure Notice—no statutory violation has been shown. Simply stated, Plaintiff has been afforded all of the relief available to her under the statute.

Moreover, even if Plaintiff had demonstrated that Defendants failed to comply with the provisions of the statute, the only relief to which she would be entitled under Michigan law is to convert the foreclosure by advertisement to a judicial foreclosure. *See* M.C.L. § 600.3205c(8):

> If a mortgage holder or mortgage servicer begins foreclosure proceedings under this chapter in violation of this section, the borrower may file an action in the circuit court for the county where the mortgaged property is situated to convert the foreclosure proceeding to a judicial foreclosure. If a borrower files an action under this section and the court determines that the borrower participated in the process under section 3205b, a modification agreement was not reached, and the borrower is eligible for modification under subsection (1) ..., the court shall enjoin foreclosure of the mortgage by advertisement and order that the foreclosure proceed under chapter 31 [as a judicial foreclosure].

Id.

The statute does not provide a plaintiff with a cause of action to quiet title, enable her to avoid foreclosure, or permit the recovery of damages or any other relief. Courts have examined this issue on multiple occasions and have concluded that a borrower's sole relief for a purported violation of the loan modification statutes is to seek to convert the foreclosure sale to a judicial foreclosure. *See e.g., Stein v. U.S. Bancorp,* 2011 WL 740537 at *9–10 (E.D.Mich. Feb.14, 2011) (Cook, J.) (the sole remedy available to plaintiff is that "the mortgagee is not permitted to [ ] foreclosure by advertisement, and must instead proceed via judicial foreclosure."); *Adams v. Wells Fargo Bank, N.A.,* 2011 WL 3500990 at *4 (E.D.Mich. Aug.10, 2011) (Battani, J.) ("Even if Plaintiff is correct about Defendant's failure to agree to a modification, he failed to show that he is entitled to the requested relief. The plain language of § 600.3205c(8) limits his relief. It does not authorize the Court to set aside the foreclosure."); *Ellison v. JPMorgan Chase, N.A.,* 2012 WL 4513799 at *5 (E.D.Mich. Oct.2, 2012) (Cohn, J.) (the statute "does not require Chase to modify any specific loan, and it does not provide any basis for unwinding the foreclosure .... the borrower's sole relief for an alleged violation of the loan modification statutes is to seek the conversion of the foreclosure sale to a judicial foreclosure, prior to the sale."); *see also Benford v. CitiMortgage, Inc.,* 2011 WL 5525942 at *5 (E.D.Mich. Nov.14, 2011) (Duggan, J.) ("To the extent that Plaintiff has asserted a violation of [the loan modification statutes], his claim fails because the statute does not permit the Court to set aside a completed foreclosure sale.... The statute plainly requires the borrower to seek his remedy prior to the completion of the foreclosure sale, as it merely converts the proceeding into one of judicial foreclosure. A borrower may not challenge a completed foreclosure sale under this statute.")

***5** In support of her opposition to Defendants' motion, Plaintiff relies upon *Mitan v. Federal Home Loan Mtg. Corp.,* 703 F.3d 949 (6th Cir.2012), in which the Sixth Circuit held that a lender's failure to follow the loan modification procedures set forth in the Michigan foreclosure-by-advertisement statutes was a structural defect rendering the foreclosure on the plaintiff's property void. Plaintiff, however, overlooks the fact that the holding in *Mitan* was abrogated by the Michigan Supreme Court's ruling nine days later in *Kim v. JPMorgan Chase Bank, N.A.,* 493 Mich. 98, 825 N.W.2d 329 (2012). The Sixth Circuit has since recognized that *Kim* abrogated *Mitan. See Mourad v. Homeward Residential, Inc.,* 517 F. App'x 360, 367 (6th Cir.2013).

Plaintiff's attempt to challenge Defendants' authority to foreclose based on the alleged invalid assignment of the

mortgage also is without merit. As a non-party to the assignment, Plaintiff's claims concerning the invalidity of the assignment are barred. *Estate of Jerry Malloy v. PNC Bank,* 2012 WL 176143, *5 (Jan. 23, 2012) (citing *Livonia Props. Holdings, LLC v. 12840–12976 Farmington Road Holdings, LLC,* 399 F. App'x 97, 102 (6th Cir.2010), *cert. denied,* —— U.S. ——, 131 S.Ct. 1696, 179 L.Ed.2d 645 (2011)). Moreover, even if she did have standing to challenge the assignment generally, Plaintiff is not a party to or a third-party beneficiary of the pooling and servicing agreement and thus lacks standing to assert a claim that any breach of the PSA rendered the assignment null and void. *See id.; see also Moss v. Wells Fargo Bank, N.A.,* 2012 WL 1050069 at *6 (E.D.Mich.Mar.28, 2012); *Kapila v. Bank of N.Y. Mellon,* 2012 WL 4450816 at *2 (E.D.Mich. Sept.25, 2012).

In sum, the Court finds that Counts I and II of Plaintiff's Complaint fail to state a claim upon which relief may be granted.

C. *PLAINTIFF'S CLAIM FOR AN INJUNCTION AND OTHER RELIEF FAILS TO STATE A CLAIM BECAUSE INJUNCTIVE RELIEF IS A REMEDY, NOT A CAUSE OF ACTION*

Plaintiff's request for injunctive relief in Count III also must be denied because injunctive relief is a remedy and not an independent cause of action. *Terlecki v. Stewart,* 278 Mich.App. 644, 663, 754 N.W.2d 899 (2008) ("It is well settled that an injunction is an equitable remedy, not an independent cause of action.") "It is not the remedy that supports the cause of action, but rather the cause of action that supports a remedy." *Henry v. Dow Chem. Co.,* 473 Mich. 63, 96–97, 701 N.W.2d 684, 701 (2005). Therefore, a plaintiff cannot advance a request for an injunction without a legally cognizable underlying substantive cause of action. *Terlecki, supra.* Plaintiff's Count III in this case purports to state a separate request for injunctive relief, and, thus, fails to state a claim. To the extent injunctive relief is requested as a remedy, as Plaintiff has failed to state a legally cognizable claim to quiet title or for breach of M.C.L. § 600.3205, she has no underlying cause of action upon which a request for injunctive relief may be based. As such, Plaintiff's Count III must be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief may be granted.[5]

[5] It is this Court's general practice to provide a plaintiff with an opportunity to amend his Complaint when faced with a dismissal that is readily curable because slight defects should not condemn an otherwise viable complaint. This practice need not be followed here, however, because amendment of Plaintiff's Complaint would be futile. *See, e.g., Rose v. Hartford Underwriters Ins. Co.,* 203 F.3d 417, 420–21 (6th Cir.2000). Moreover, although Plaintiff submitted a lengthy response to Defendants' motion, she never requested an opportunity to amend her Complaint, nor did she hint at any additional facts she would incorporate in an amended complaint that would cure her deficiencies. Accordingly, this Court declines to provide Plaintiff with an opportunity to amend. *See, e.g., Winget v. JP Morgan Chase Bank, N.A.,* 537 F.3d 565, 572 (6th Cir.2008) ("The district court does not abuse its discretion in failing to grant a party leave to amend where such leave is not sought.") (internal quotation marks and citations omitted); *Lewis v. Wheatley,* —— F. App'x ——, 2013 WL 2450634, at *3 (6th Cir. June 7, 2013) (amendment is futile when, among other things, a plaintiff does not "provide[ ] any additional factual allegations that [she] would submit in an amended complaint").

CONCLUSION

***6** For all of the reasons stated above in this Opinion and Order,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss **[Dkt. # 4]** is GRANTED. Accordingly,

IT IS FURTHER ORDERED that Plaintiff's Complaint be DISMISSED, in its entirety, with prejudice.

Let Judgment be entered accordingly.

All Citations

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United States District Court, E.D. Michigan, Southern Division.

Richard ROSENBAUM, Plaintiff,
v.
TOYOTA MOTOR SALES, USA, INC., Defendant.

Civil Action No. 16-CV-12645
|
Signed 10/21/2016

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OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

BERNARD A. FRIEDMAN, SENIOR UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

***1** This matter is before the Court on the motion of defendant Toyota Motor Sales, USA, Inc. ("Toyota") to dismiss the amended complaint [docket entry 13]. Plaintiff Richard Rosenbaum ("Rosenbaum") has filed a response. Toyota has filed a reply. Pursuant to E.D. Mich. LR 7.1(f)(2), the Court shall decide this motion on the briefs.

In 2012, Rosenbaum purchased a Prius Plug-In from Page Toyota, a dealership in Southfield, Michigan. Pl.'s Am. Compl., ¶¶ 12–13, Ex. A; Def.'s Mot., p. 2. The Prius could operate in either a hybrid mode or electric-only mode. Pl.'s Compl., ¶ 18. Rosenbaum believed that the Prius had a 13-mile range in electric-only mode. *Id.* at ¶¶ 11, 14. However, when Rosenbaum bought the Prius it had an 8-mile range, and shortly after the Prius was taken to Toyota for an inspection, it had a 10-mile range. *Id.* at ¶ 16. Additionally, the Prius allegedly would not operate in electric-only mode in temperatures below 55 degrees, and this setting could not be changed. *Id.* at ¶ 17; Pl.'s Resp., p. 6.

On July 15, 2016, Rosenbaum commenced the instant action in which he asserts claims against Toyota for breach of contract, for breach of express and implied warranties, and for a violation of the Michigan Consumer Protection Act. 7. Rosenbaum amended his complaint on August 1, 2016. Toyota then filed the instant motion.

II. DISCUSSION

A. Legal Standard

While 12(b)(6) does not require

> detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations and quotation marks omitted). Further,

> [t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citations and quotation marks omitted).

B. Analysis

Toyota seeks dismissal of all three counts. The counts will be addressed in turn.

1. *Count I—Breach of Contract*

Rosenbaum alleges that Toyota breached the parties' contract. Pl.'s Am. Compl., ¶¶ 28–34. Toyota argues that it never contracted with Rosenbaum. Def.'s Br., p. 24. Rosenbaum alleges that he purchased his Prius from Page Toyota. Pl.'s Compl., ¶ 13. Page Toyota is an independent dealer. Def.'s Mot., p. 2. Therefore, Toyota argues, there was no breach of contract because Toyota cannot breach a contract to which it was not a party. *Id.* at 24. Rosenbaum's only response is that the "duty of good faith is implied in every contract." Pl.'s Resp., p. 17. Accepting the facts alleged in the complaint as true, Count I is dismissed because Rosenbaum does not allege that there is a contract between Toyota and Rosenbaum. Thus, Toyota cannot be liable for breach of contract.

2. *Count II—Breach of Express and Implied Warranties*

***2** Rosenbaum alleges that Toyota breached express and implied warranties. Pl.'s Am. Compl., ¶¶ 35–43. Toyota argues that there is no express warranty and that it did not breach the implied warranty of merchantability. Def.'s Br., pp. 17–23.

Regarding express warranties, under Michigan law, an express warranty can be created "only between a seller and a buyer." *Heritage Res., Inc. v. Caterpillar Fin. Servs. Corp.*, 284 Mich. App. 617, 634 (2009). Privity is necessary to create an express warranty. *Id.* at 638 n.12. According to the amended complaint, Rosenbaum did not contract for the Prius with Toyota, but rather with Page Toyota, an independent dealer. Pl.'s Compl., Ex. A; Pl.'s Am. Compl., ¶ 13; Def.'s Br., p. 2 (explaining Page Toyota's relationship to Toyota). Because Toyota and Rosenbaum did not contract, they are not in privity and Toyota cannot have created an express warranty. Further, Rosenbaum does not disagree with this conclusion and, indeed, does not respond to Toyota's express warranty argument. Thus, the Court considers Rosenbaum to have conceded Toyota's express warranty argument. *See Stanley v. Carrier Mills-Stonefront Sch. Dist.*, 459 F. Supp. 2d 766, 773 (S.D. Ill. 2006) (holding that plaintiffs' failure to respond to defendant's argument regarding one of several counts was "an admission of the merits of [defendant's] claim").

Regarding the implied warranty of merchantability, Rosenbaum argues that he "cannot reasonably rely on the vehicle for its ordinary purpose of efficient, electric, and safe transportation." Pl.'s Am. Compl., ¶ 43. Mich. Comp. Laws ("MCL") § 440.2314(2)(c) (2016) provides that goods are merchantable if they "are fit for the ordinary purposes for which such goods are used." "Merchantable is not a synonym for perfect. The warranty of merchantability is that goods are of average quality in the industry." *Computer Network, Inc. v. AM Gen. Corp.*, 265 Mich. App. 309, 316–17 (2005) (quoting *Guaranteed Constr. Co. v. Gold Bond Prods.*, 153 Mich. App. 385 (1986)).

Rosenbaum alleges that Toyota breached the implied warranty of merchantability because when the Prius was in electric mode, its range was below 13 miles and it did not operate in temperatures below 55 degrees. Pl.'s Compl., ¶ 42. But, Rosenbaum does not allege that the Prius is below average quality because of these two limitations, nor does he allege what average quality is. Rosenbaum admits that the Prius has no temperature threshold in the hybrid setting. And while the Prius's electric-only range and temperature threshold might surprise and inconvenience Rosenbaum, this does not mean that the Prius is below average quality.

The complaint offers the formulaic assertion that the Prius is not fit for ordinary use. However, the complaint does not contain facts showing that the vehicle is not fit for the ordinary purpose of safe, comfortable transportation. The complaint only asserts the facts that the Prius is unfit to go 13 miles in electric-only mode and will not operate in electric-only mode in temperatures under 55 degrees. In other words, Rosenbaum does not claim that the Prius was operationally flawed, but only that the Prius did not go as far as he wished in electric mode when he wished it to. Thus, Rosenbaum fails to allege facts sufficient to show that it has a plausible claim that Toyota has breached the implied warranty of merchantability.

***3** Consequently, accepting the facts alleged in the complaint as true, Count II fails to state a claim upon which relief can be granted and is dismissed.

3. *Michigan Consumer Protection Act*

Rosenbaum alleges that Toyota violated the Michigan Consumer Protection Act ("MCPA") by "engaging in

unfair, unconscionable, or deceptive acts, ... specifically [by] advertising the ability [of the Prius to] travel at least thirteen (13) miles" on electric-only mode and by failing to mention the 55-degrees minimum temperature requirement. Pl.'s Compl., ¶¶ 49–50.

The MCPA is codified at MCL 445.903 and prohibits 38 methods of conducting trade or commerce. MCL 445.903(1)(a)–(*ll*). MCL 445.904(1) exempts some business from the MCPA, stating: "(1) This act does not apply to ... [a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States."

The Michigan Supreme Court has given MCL 445.904(1) a broad reading, finding "that the relevant inquiry is ... whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited." *Smith v. Globe Life Ins. Co.*, 460 Mich. 446, 465 (1999). The Michigan Supreme Court later clarified this standard, stating that "the exception requires a general transaction that is 'explicitly sanctioned' " by federal or state law. *Liss v. Lewiston-Richards, Inc.*, 478 Mich. 203, 213 (2007).

Thus, the question in the present case is whether Toyota's miles-per-gallon advertising is explicitly sanctioned by federal or state law. The federal government regulates the advertising of miles-per-gallon estimates. *See* 16 C.F.R. § 259.2. Additionally, Michigan regulates how car wholesalers like Toyota advertise automobiles, *see* MCL 257.248d, and it regulates the content of general automobile advertisements. *See* MCL 445.315.

In light of these laws and regulation, the Court finds that both Toyota's advertising of the Prius and its miles-per-gallon estimate were explicitly sanctioned by federal and state law. *See Lauderdale v. Wells Fargo Home Mortgage*, 552 Fed.Appx. 566, 573 (6th Cir. 2014) (holding that because "Wells Fargo is a national banking association, and national banking associations are authorized to provide mortgages" under federal law, Wells Fargo was exempted from the MCPA under MCL 445.904(1)). Therefore, accepting the facts alleged in the complaint as true, under MCL 445.904(1), Toyota's conduct is exempted from MCL 445.903 and Count III fails to state a claim upon which relief can be granted and, thus, is dismissed.

III. CONCLUSION

For the foregoing reasons, Toyota's motion is granted, and Rosenbaum's complaint is dismissed.

SO ORDERED.

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United States District Court, S.D. Ohio, Western Division.

Chandra TATE, et al., Plaintiffs,
v.
EYEMED VISION CARE, LLC,
Defendant.

Case Nos. 1:21-cv-36
|
Signed September 29, 2023

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OPINION AND ORDER

DOUGLAS R. COLE, UNITED STATES DISTRICT JUDGE

***1** Plaintiffs Chandra Tate, Barbara Whittom, and Alexus Wynn bring this putative class action lawsuit alleging that defendant EyeMed Vision Care, LLC (EyeMed) negligently maintained lax security protocols and failed to protect Plaintiffs' personally identifiable information (PII) from cybertheft. (Am. Compl., Doc. 19, ¶¶ 1–3, #221–22). As a result of this purported lax security, Plaintiffs alleged cybercriminals hacked an EyeMed email account and obtained the PII of EyeMed members (including Plaintiffs'), thereby increasing the likelihood of identity theft and financial fraud. (*Id.* at ¶¶ 3, 15, #222, #224). Plaintiffs seek class certification and damages[1] for their tort, contract, and state law claims. (*Id.* at #252–70). Defendant EyeMed now moves to dismiss arguing that Plaintiffs lack standing because they fail to assert a cognizable injury in fact traceable to either the data breach or EyeMed's actions and that Plaintiffs fail to allege a plausible claim for relief. (Doc. 21). The Court

finds that Plaintiffs have standing and allege facts that plausibly support at least some of their claims. The Court therefore **GRANTS IN PART** and **DENIES IN PART** EyeMed's Motion to Dismiss (Doc. 21).

[1] Plaintiffs also request "declaratory, injunctive and other equitable relief as is necessary to protect the interests of Plaintiffs and other Class members." (Doc. 19, #270). But beyond this boilerplate language, Plaintiffs do not explain anywhere in the Complaint how forward-looking equitable relief should be fashioned. The Court will therefore construe their Complaint as a complaint for damages—the true heart of their claim.

BACKGROUND

EyeMed is one of the largest vision benefits companies in the country, boasting over 60 million benefit members. (Doc. 19, ¶ 2, #222). EyeMed is organized in Delaware and maintains its principal place of business in Ohio. (*Id.* at ¶ 24, #227). As part of its business, EyeMed collects members' PII including their names, emails, addresses, health savings account information, and medical history. (*Id.* at ¶ 29, #228). If a member uses health insurance to obtain benefits, EyeMed also, through those insurance plans, collects that member's birthday and social security number. (*Id.* at ¶ 31, #228).

According to Plaintiffs,[2] EyeMed failed to take basic security measures to protect its members' data, such as adequate personnel training and routine system testing. (*Id.* at ¶ 44, #231). This failure is perhaps best exemplified by EyeMed's delayed response to the data breach that sparked this lawsuit.

[2] For purposes of this motion to dismiss, the Court accepts as true all of Plaintiffs' well-pleaded factual allegations. *In re Equifax, Inc., Customer Data Sec. Breach Litig.*, 362 F. Supp. 3d 1295, 1311 (N.D. Ga. 2019).

On June 24, 2020, cybercriminals hacked an EyeMed email account and sent numerous phishing emails to addressees in the account's address book. (*Id.* at ¶ 48, #232). While it is unknown what information the cybercriminals accessed from the account, a subsequent investigation revealed that emails in the hacked email account contained the names, contact information, dates of birth, vision insurance account numbers, and, for some members, the Social Security numbers of several EyeMed members. (*Id.* at ¶ 46, #231). EyeMed did not discover the data breach for a full week. (*Id.* at ¶ 48, #232). After EyeMed discovered the breach on July 1, 2020, it conducted its own investigation of the account to determine what information may have been compromised. (*Id.*).

***2** But allegedly EyeMed was not entirely forthcoming either as to its discovery of the data breach or the results of its subsequent investigation. EyeMed did not disclose the security breach to anyone until September 28, 2020. (*Id.* at ¶ 47, #231–32). Even then, it disclosed the breach only to its insurance company affiliates. (*Id.*). Not until December 7, 2020, did EyeMed mail a notice to its members that alerted them that their personal data was exposed. (*Id.* at ¶ 48, #232). In the notice, EyeMed offered to provide no-cost identity monitoring services to all compromised members. (*See, e.g.*, Doc. 19–1, #275–76).[3]

[3] EyeMed used the name "Chandra Price" in the notice letter it sent to Plaintiff Tate as that was Plaintiff Tate's name at the time. She has since married. (Doc. 1, #5).

A. Plaintiff Tate

Plaintiff Tate, a South Carolina resident, used EyeMed for her vision benefits from 2016–2019. (Doc. 19, ¶ 54, #233). Along with many other EyeMed members, Tate received a notice from EyeMed that her information was exposed in the June 24 data breach. (*Id.* at ¶ 56, #234). The notice stated that Tate's name, address, date of birth, phone number, email address, and vision insurance account number might have been accessed. (*Id.*). Before the data breach, Tate maintained her own credit monitoring policy, for around $53 a month. (*Id.* at ¶ 57, #234). Tate alleges that she planned to cancel the policy to reduce her monthly expenses but delayed doing so after the data breach. (*Id.*). She also began reviewing her credit reports, financial statements, and medical records for any indications of fraud. (*Id.*). Tate estimates that she spends about an hour a day monitoring her bank statements and credit card accounts for irregularities. (*Id.*).

After the data breach, Tate also received notice that her private information was found on the dark web. (*Id.* at ¶ 59, #235). In addition, she claims she began receiving a significantly increased number of suspicious and unsolicited telephone calls, text messages, and email messages. (*Id.*). She has received scam calls nearly every day since the data breach. (*Id.*). She spends around 12 hours per month responding to incidents related to the data breach and claims she now experiences emotional

distress stemming from her fear of identity theft and fraud. (*Id.* at ¶¶ 60–61, #235).

B. Plaintiff Whittom

Plaintiff Whittom, a California resident, used EyeMed for her vision benefits from 2012–2015 and reupped her membership in 2019. (*Id.* at ¶ 63, #236). She received a notice from EyeMed that her name, address, and birthdate were compromised in the data breach. (*Id.* at ¶ 65, #236). Unlike the other plaintiffs, Whittom's Social Security number and health insurance ID number were also allegedly exposed. (*Id.*). When EyeMed offered free credit monitoring, Whittom enrolled. (*Id.* at ¶ 66, #236–37). Since the data breach, Whittom has spent about 30 hours monitoring her bank statements and financial accounts for fraud. (*Id.*).

Whittom claims that, after the data breach, she received a significantly increased amount of scam and phishing calls, texts, and emails. (*Id.* at ¶ 68, #237). She says she receives such calls daily. (*Id.*). She also alleges that she has suffered emotional distress stemming from anxiety and fear of identity theft and fraud. (*Id.* at ¶ 70, #237–38).

C. Plaintiff Wynn

Plaintiff Wynn, a South Carolina resident, utilized EyeMed for vision benefits from 2016–2019. (*Id.* at ¶ 73, #238). She received a notice from EyeMed that her name, address, birthdate, phone number, email address, and vision insurance account number were allegedly exposed in the data breach. (*Id.* at ¶ 75, #239). Wynn, like Tate (who happens to be Wynn's mother), used credit monitoring services before the breach and maintained those services afterward. (*Id.* at ¶ 76, #239). Since the breach, Wynn has spent about 35 hours reviewing bank statements and financial accounts for fraud. (*Id.*).

***3** After the data breach, Wynn discovered fraudulent charges on her credit card, which prevented her from using the credit card benefits program. (*Id.* at ¶ 78, #239–40). The inaccessibility of the credit card benefits program required her to borrow money from relatives for college tuition. (*Id.*). In a separate incident, Wynn received a letter from the IRS notifying her the IRS was withholding her 2020 tax refund until it could properly identify Wynn. (*Id.*). The IRS cited potential fraud as the reason for the withholding. (*Id.*). On top of these fraud incidents, Wynn also received a significantly increased number of scam and phishing calls, texts, and emails. (*Id.*). Wynn claims she has suffered emotional distress stemming from fear of identity theft and fraud. (*Id.* at ¶ 80, #240).

D. The Plaintiffs' Claims

Based on these allegations, Plaintiffs bring tort, contract, and California state law claims (on behalf of the California plaintiff), alleging that EyeMed's failure to protect Plaintiffs' PII damaged them. Specifically, Plaintiffs allege: (1) EyeMed was negligent in maintaining their PII under both a traditional and negligence per se theory (Claims 1-2); (2) EyeMed breached an implied contract with Plaintiffs to adequately protect their PII (Claim 3); (3) EyeMed was unjustly enriched by Plaintiffs' membership premiums because it failed to protect their PII (Claim 4); and (4) and EyeMed violated several California consumer protection and medical regulation statutes (Claims 5-7). (*See generally* Doc. 19).

E. EyeMed's Motion to Dismiss

EyeMed has now moved to dismiss the action. Its arguments fall into two categories. First, it claims Plaintiffs lack standing, which, if true, means the Court lacks jurisdiction. On this front, EyeMed presses two primary arguments: (1) Plaintiffs' injuries (such as their fear of future identity theft, the increase in scam calls, and their alleged emotional distress) are too speculative or abstract to satisfy Article III's standing requirements, and (2) Plaintiffs' injuries are not traceable to the data breach because the type of data exposed (names, phone numbers, and non-sensitive PII) could not plausibly cause identity theft or any other injury. Second, EyeMed says that even if Plaintiffs have standing, they have failed to allege any plausible claim for relief. Here, EyeMed says that any injuries Plaintiffs alleged (whether in contract or in tort) were not caused by the data breach because none of Plaintiffs injuries could have been caused by the release of non-sensitive PII. As to the California state law claims, EyeMed posits that the statutes are inapplicable.

LAW AND ANALYSIS

This Court has jurisdiction over this action under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2), (5), because the parties are at least minimally diverse,[4] the putative class exceeds 100 members, and the amount in controversy purportedly exceeds $5,000,000. Venue is proper because a substantial part of the events giving rise to the claims occurred in this district (EyeMed's headquarters are in Mason, Ohio). 28 U.S.C. § 1391(b)(2).

4 Minimal diversity requires that at least one plaintiff is diverse from at least one defendant. *Life of the S. Ins. Co. v. Carzell*, 851 F.3d 1341, 1344 (11th Cir. 2017) (citing 28 U.S.C. § 1332(d)(2)(A)). Plaintiffs are citizens of South Carolina and California. The Complaint alleges that EyeMed LLC is a wholly owned subsidiary of Luxottica of America, Inc., which has its principal place of business in Mason, Ohio. (Doc. 19, ¶ 24, #227). Because the Complaint did not specify Luxottica's place of incorporation nor whether EyeMed had any other members, the Court ordered EyeMed to file a Citizenship Disclosure, which EyeMed did on September 29, 2023. That disclosure states that EyeMed is a single member LLC and that it is a citizen of Ohio. (Doc. 39). Considering the two together, the Court is satisfied that Luxottica is EyeMed's only member and that it is a citizen of Ohio, which in turn means EyeMed is a citizen of Ohio. Minimal diversity is therefore met in this case.

***4** To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(1) or 12(b)(6), Plaintiffs must allege "sufficient factual matter ... to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) ("A plaintiff must demonstrate standing with the manner and degree of evidence required at the successive stages of the litigation." (cleaned up)). While a "plausible" claim for relief does not require a showing of *probable* liability, it requires more than "a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citation omitted). The complaint must allege sufficient facts that allows the Court to "draw the reasonable inference that the defendant is liable." *Id.*

At the motion-to-dismiss stage, the Court accepts the facts of the Complaint as true. *Id.* But that does not mean the Court must take everything Plaintiffs allege as gospel, no matter how far-fetched. The Court may disregard "naked assertions" of fact or "formulaic recitations of the elements of a cause of action." *Id.* (cleaned up).

As noted, Plaintiffs have asserted tort, contract, and California state law claims (on behalf of the California plaintiff), based on their allegations that EyeMed's failure to protect Plaintiffs' PII harmed them. EyeMed moves to dismiss the entire Complaint arguing that Plaintiffs lack standing and fail to state a claim for relief.

A. Standing

Article III § 2 of the Constitution limits a federal court's jurisdiction to "cases" and "controversies." A plaintiff's standing to sue is one element of this constitutional requirement. *TransUnion*, 141 S. Ct. at 2203. To demonstrate standing, a plaintiff must show: (1) that she suffered a concrete, particularized, and actual or imminent injury; (2) that the injury is traceable to the defendant's conduct; and (3) that a favorable ruling would redress that injury. *Id.* An injury is "concrete," and therefore cognizable under Article III, when the type of injury bears a "close relationship" to a harm traditionally recognized at common law. *Id.* at 2204.

A future injury satisfies Article III only when it is "certainly impending" or there is a "substantial risk" that it will occur. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 414 n.5 (2013); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Anything lower, even an "objectively reasonable likelihood" of such harm, is insufficient. *Clapper*, 568 U.S. at 410.[5] And when a party takes costly steps to mitigate the risk of future harm, those costs do not create standing where the future harm is not "certainly impending." *Id.* at 416. Lastly, "standing is not dispensed in gross." *TransUnion*, 141 S. Ct. at 2208. As a result, every plaintiff must demonstrate standing for each claim and form of relief. *Id.*

5 The Supreme Court's precedent is unclear as to what work the "substantial risk" standard performs apart from the "certainly imminent" standard for future injury. As a matter of etymology, proving an injury is "certainly imminent" seems like a heavier burden. But then again the Court's holding in *Clapper* implies the "substantial risk" standard is more burdensome than it may first appear. According to the *Clapper* Court, proof of an "objectively reasonable likelihood" was *insufficient* to confer standing, but proof of a "substantial risk" of that same harm *would* be sufficient to confer standing. 568 U.S. at 410, 414 n.5. So whatever "substantial" means, it appears it is something well in excess of "likely."

Plaintiffs allege several theories of injury—almost all are inadequate to confer standing. To start, precedent forecloses many of them. For example, alleged injuries arising from the risk of future identity theft,[6] or the time spent monitoring financial accounts,[7] or emotional

distress,[8] or an intangible violation of privacy,[9] all rely on arguments the Supreme Court has rejected.

6 *See Clapper*, 568 U.S. at 410–15 (requiring a future injury to be "certainly impending"); *see also TransUnion*, 141 S. Ct. at 2210–11 (stating that risk of future harm rarely creates standing to sue for damages, unlike injunctive relief).
Wynn, unlike the other plaintiffs, has actually suffered from financial fraud since the data breach. (Doc. 19, ¶ 78, #239–40). But as EyeMed points out, none of Wynn's data maintained by EyeMed and exposed in the data breach could, alone, be used to commit financial fraud. (Doc. 21-1, #319).

7 *See Clapper*, 568 U.S. at 416 (holding that mitigation measures cannot support standing without a certainly impending harm).

8 *See Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 546–49 (1994) (describing the various common law tests for negligent infliction of emotional distress—none of which allowed for recovery based on pure emotional distress without an attendant physical impact or risk of physical harm).

9 *See TransUnion* 141 S. Ct. at 2210 (requiring defendant's publication of defamatory material to assert defamation-based injury); *see also Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236, 1240 (11th Cir. 2022) (en banc) (requiring evidence of publication to assert an injury based on a public disclosure tort analogue in a case dealing with a procedural violation under statute).

***5** Many of Plaintiffs' alternative novel theories of injury are implausible. Plaintiffs allege that their PII has intrinsic economic value, as shown by the booming corporate and black market for PII. (Doc. 19, ¶¶ 86–87, #242; Opp'n, Doc. 23, #357). They then allege that because their PII has a quantifiable market value and because cybercriminals allegedly stole their PII due to EyeMed's negligence, that this purported theft of personal property is itself an injury to Plaintiffs because it prevents Plaintiffs from capitalizing on the value of their PII. (Doc. 19, ¶ 87, #242; Doc. 23, #357–59). But Plaintiffs do not explain how they are injured by this. While businesses place a premium on the PII of potential customers for marketing purposes, individuals do not ordinarily reap financial gain from selling their information as a commodity. *Huynh v. Quora, Inc.*, No. 18-cv-7597, 2019 WL 11502875, at *7 (N.D. Cal. Dec. 19, 2019) ("Even if Quora may have gained money through its sharing or use of the Plaintiffs' information, that's different from saying the Plaintiffs lost money." (cleaned up)). And even if such a sale were possible, Plaintiffs do not allege that they planned to make such a sale in the future. True, collecting PII is sometimes part of the exchange an individual makes when signing up for a service (e.g., Facebook captures various PII from its users that it then monetizes), and in that sense it has a "value" to its owner (as the service provider is willing to exchange the service for the PII). But Plaintiffs have not alleged that the theft of their PII from one entity will interfere with their ability to conduct such exchanges down the road (e.g., Facebook will not deny them an account because their PII has been stolen and is thus less valuable than it otherwise might be).

Nor does it appear to the Court that Plaintiffs could claim harm based on interference with their "ownership" interest in their PII, akin to conversion or trespass to chattels. To start, Plaintiffs have not pointed the Court to any law, and the Court is not aware of any, that creates property rights in PII.[10] And, even if such law exists, Plaintiffs have not explained *how* the value of their PII was diminished in the data breach, beyond presumptively claiming that it must have been. (Doc. 19, ¶¶ 15, 18, 102, #224–25, 248).

10 For example, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) does not fit the bill. HIPAA is a regulatory statute, imposing obligations on medical providers and mandating certain procedures for the protection of medical information. *Acara v. Banks*, 470 F.3d 569, 571 (5th Cir. 2006). It does not explicitly confer a property interest in a patient's medical information and courts would be hard pressed to find an implicit property interest given the consensus of authority stating that HIPAA does not create a private right of action. *Id.* at 572; *Dodd v. Jones*, 623 F.3d 563, 569 (8th Cir. 2010); *Mayfield v. Presbyterian Hosp. Admin.*, 772 F. App'x 680, 686 (10th Cir. 2019).

In short, Plaintiffs fail to allege facts which plausibly support this theory of injury.

Plaintiffs also argue that money paid to EyeMed for vision benefits qualifies as an injury because "the monies or fees paid ... were supposed to be used by EyeMed, in part, to pay for the administrative and other costs of providing reasonable data security." (Doc. 19, ¶ 161, #261). Plaintiffs' retroactive attempt to characterize consideration for vision benefits as payment for data security is a stretch to say the least. Plaintiffs do not allege that data security ever formed part of the contractual bargain for vision benefits. While Plaintiffs do

allege they would not have used EyeMed if they had known of EyeMed's lax security protocols (*Id.* at ¶¶ 55, 64, 74, #234, 236, 238), those allegations in no way show that *EyeMed* contemplated data security as part of its commercial bargain. And of course, a meeting of the minds, at least as to essential terms, is a prerequisite to a binding contract—express or implied. *E.g.*, *Tocci v. Antioch Univ.*, 967 F. Supp. 2d 1176, 1195 (S.D. Ohio 2013). Because Plaintiffs fail to allege facts showing that data security was a condition of any bargain made between themselves and EyeMed—other than conclusory assertions to this effect, (Doc. 19, ¶ 155, #260)—this theory of injury is also unavailing.

But, while most of Plaintiffs' theories lack force, they do manage to find at least one needle in the standing haystack. Specifically, Plaintiffs claim that, after the data breach, they received a significantly increased number of scam and phishing calls, texts, and emails. (*Id.* at ¶¶ 59, 68, 78, #235, 237, 240). Such communications annoy, harass, and, in the case of phone calls, temporarily claim control over an individual's personal device. The Sixth Circuit has held that such unsolicited calls and messages constitute cognizable Article III injuries in fact. *See Dickson v. Direct Energy, LP*, 69 F.4th 338, 345 (6th Cir. 2023) (likening unsolicited calls and messages to the common law tort of intrusion-upon-seclusion). So Plaintiffs adequately allege a concrete and particularized injury—if barely.

***6** Of course, beyond injury, they must also allege causation. In other words, they must plausibly tie the claimed harm to the challenged conduct. On that score, Plaintiffs allege that such calls significantly increased directly after the data breach. (Doc. 19, ¶¶ 59, 68, 78, #235, 237, 240). While Plaintiffs do not explicitly allege that the data breach "caused" that increased call volume, their point is clear—the increase is traceable to the data breach. *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 715 (6th Cir. 2015). This allegation is plausible given the nature of the incident. EyeMed's email account was hacked by cybercriminals—individuals who presumably sought to profit from the cyberattack. (Doc. 19, ¶ 46, #231). And Plaintiffs allege that their names and addresses were compromised in addition to Tate's and Wynn's phone numbers. (*Id.* at ¶¶ 46, 56, 65, #231, 234, 236). Those allegations, coupled with the notification that Tate's contact information was found on the dark web, (*id.* at ¶ 59, #235), which is at least plausibly an information source for scam callers, create a "reasonable inference" that the data breach led to the increased number of scam calls. *Iqbal*, 556 U.S. at 678. Plaintiffs' injury is therefore sufficiently traceable to the data breach—and, by extension, EyeMed's conduct—for motion to dismiss purposes.

Lastly, a favorable ruling by this Court would redress Plaintiffs' injuries. Though hard to quantify, Plaintiffs' injuries sound in tort, and, like most traditional tort injuries, can be redressed by money damages.

EyeMed disagrees. It claims that the increase in scam calls is not traceable to the data breach and that Plaintiffs' allegations rest on the logically erroneous assumption (sometimes labeled post hoc ergo propter hoc) that anything occurring after an event necessarily must have resulted from that event. (Doc. 21-1, #320; Reply, Doc. 24, #385–86). While EyeMed correctly identifies this logical fallacy, it nonetheless ignores the commonsense principles and lax evidentiary standard that apply at the motion-to-dismiss stage. Plaintiffs need not *prove* that the data breach caused the increase in scam calls. They need only plausibly allege that that is the case. And because it is more than a "sheer possibility" that a data breach involving contact information would lead to an increased number of scam calls (indeed, Tate confirmed her information was on the dark web), Plaintiffs have adequately shown for present purposes that their injury is traceable to EyeMed's conduct. *Iqbal*, 556 U.S. at 678.

The Court finds that Plaintiffs have standing to bring their claims and therefore proceeds to the merits.

B. Merits

Plaintiffs allege negligence, negligence per se, breach of implied contract, unjust enrichment, and California state law claims. Before the Court considers these claims, a brief choice-of-law analysis is in order. When considering cases arising under a court's diversity jurisdiction, federal courts apply the choice-of-law rules of the forum state—in this case, Ohio. *Muncie Power Prods., Inc. v. United Tech. Auto., Inc.*, 328 F.3d 870, 873 (6th Cir. 2003). For tort actions, Ohio choice-of-law follows the Restatement of the Law of Conflicts, which turns on which state possesses the most significant relationship to the tort injury. *Morgan v. Biro Mfg. Co., Inc.*, 474 N.E.2d 286, 289 (Ohio 1984). Factors relevant to the significant relationship test include the place of injury, the residence of the parties, and the place where the relationship of the parties is centered. *Id.* For contract actions, the test is the same, where the factors bearing on the "most significant relationship" include the place of contracting and negotiation, the place of performance, the location of the subject matter, and the residence of the parties. *Ohayon v. Safeco Ins. Co. of Ill.*, 747 N.E.2d 206, 209 (Ohio 2001).

The Court finds based on the allegations in the Complaint that Ohio has the most significant relationship to this suit. EyeMed is headquartered in Ohio and presumably carries out its operations there. (Doc. 19, ¶ 24, #227). A data breach is difficult to "place" in any physical location because such events, by their nature, occur over computer networks with the various actors located wherever they may choose to be. So the place of injury factor provides little value. Plaintiffs allege that they entered into an implied contract with EyeMed to protect their PII. (*Id.* at ¶¶ 149–55). But Plaintiffs themselves label the purported contract "implied," meaning there was no place of explicit negotiation or acceptance, so this factor is similarly unhelpful. That leaves the residence of the parties. The named Plaintiffs are scattered across two states and seek to certify a nationwide class, which would presumedly increase that count significantly. The Court therefore finds the residence of the defendant determinative—at least for present purposes. The Court accordingly applies Ohio law in assessing the plausibility of the tort and contract actions raised here. For the California state law claims, the Court will of course apply California law.

1. Negligence and Negligence Per Se

***7** As every first-year law student learns, a plaintiff alleging negligence must show a duty the defendant owes to the plaintiff, a breach of that duty, and a resulting injury. *Rieger v. Giant Eagle, Inc.*, 128 N.E.3d 1121, 1125 (Ohio 2019). To demonstrate negligence per se, which is not a standalone claim but a theory of proof, a plaintiff must show that a defendant violated a statutorily defined standard of care and that the violation caused the plaintiff's injuries. *Sikora v. Wenzel*, 727 N.E.2d 1277, 1280 (Ohio 2000). Under a negligence per se theory, the statutory violation proves the breach element. *Id.*

Plaintiffs allege that EyeMed, by collecting and using Plaintiffs' PII in the course of its business, owed a duty of reasonable care to protect and to secure Plaintiffs' PII from the foreseeable harm of a data breach. (Doc. 19, ¶¶ 34–36, 118, #229, #252–53). They further allege that EyeMed breached this duty by failing to follow reasonable security standards, adequately train personnel, conduct routine system testing, and maintain adequate computer systems. (*Id.* at ¶¶ 44, 125, #231, #254–55). Lastly, Plaintiffs allege that EyeMed's failure proximately caused them the injuries they allege because (1) data breaches are foreseeable in the medical industry, and (2) so are the resulting injuries of the type claimed here. (*Id.* at ¶¶ 36, 128, #229, #255–56).

In its opposition, EyeMed does not address duty or breach, but instead places all its eggs in the injury and causation baskets. It argues that any injuries Plaintiffs sustained were not proximately caused by the data breach because the data breach did not expose sufficiently sensitive information to increase the risk of identity theft. (Doc. 21-1, #311–15, #324). But Plaintiffs' claimed injury stems from the significant increase in scam and phishing calls, not just the alleged identity theft. And EyeMed does not dispute that Plaintiffs' contact information was leaked in the breach—which is all that's required to initiate scam calls. While EyeMed does argue that the increase in scam calls is not traceable to the data breach, the Court rejects this argument for the same reasons that lead the Court to find that Plaintiffs have standing. That is to say, the allegations in the Complaint plausibly establish a causal nexus between the exposed PII and the resultant increase in scam calls: one reasonably follows from the other.

EyeMed next argues that Plaintiffs' claims fail because they allege only economic injuries which are not compensable in tort under the economic loss rule. (Doc. 21-1, #324–25). The Court is not persuaded. The economic loss rule bars recovery in tort for injuries sustained under a contract. *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 537 N.E.2d 624, 630–31 (Ohio 1989). The dividing line between a contract-based economic loss and a tort-based compensable injury lies in the source of the defendant's duty. *Id.* at 630. If a contract imposes the duty, the loss is not compensable; if the common law, then the injury is compensable in tort. *Id.* at 630–31. Plaintiffs alleged that EyeMed owed a common law duty of reasonable care to protect their PII from misappropriation. (Doc. 19, ¶ 119, #253). EyeMed did not dispute this point in its memorandum, so its economic loss argument falls flat.

Confined to the injury for which Plaintiffs have standing, *Price v. Medicaid Dir.*, 838 F.3d 739, 746 (6th Cir. 2016), the Court finds that Plaintiffs' negligence claim is plausible, which is the only question at this juncture, *Iqbal*, 556 U.S. at 678. They alleged that data breaches are foreseeable and therefore EyeMed owed a duty to take reasonable steps to prevent such breaches and the injuries flowing from them—citing data to support their argument. (Doc. 19, ¶ 36, #229) (noting that healthcare data breaches tripled from 2018 to 2019 and that 41 million patient records were compromised by data breaches in 2019 alone). They further alleged that EyeMed breached that duty by failing to implement commonsense security protocols, (*id.* at ¶ 43, #231)—an allegation that EyeMed does not dispute for motion to dismiss purposes. They finally claim that EyeMed caused their injury because of the foreseeable nexus among EyeMed's lax security, the

data breach, and the increased scam calls, (*id.* at ¶¶ 3, 59, 68, 78, #222, 235, 237, 240)—allegations the Court credits for reasons it cited to support a finding that Plaintiffs have standing: the causal nexus between Plaintiffs' injury and EyeMed's conduct is plausibly supported by reasonable inferences drawn from the allegations in the Complaint.

***8** Because the Court finds Plaintiffs' negligence claim plausible, it need not evaluate whether they can alternatively prove the very same claim via a negligence per se theory, which as noted above is not a separate, standalone claim.

2. Breach of Implied Contract

Under Ohio law, an implied contract[11] is a binding agreement based on mutual assent that, unlike an express contract, can be inferred from surrounding circumstances. *See Union Sav. Bank v. Lawyers Title Ins. Corp.*, 946 N.E.2d 835, 841 (Ohio Ct. App. 2010). An implied contract is still a contract requiring proof of a meeting of the minds; but the proof required may be shown by tacit understanding rather than an explicit offer and acceptance. *Id.*

11 It is also sometimes called an implied-in-fact contract, which differs from an implied-in-law contract. Despite the name, an implied-in-law contract is not actually a contract at all, but rather a form of substantive restitution law, which is designed to prevent unjust enrichment. *Spectrum Benefit Options, Inc. v. Med. Mut. Of Ohio*, 880 N.E.2d 926, 934 (Ohio Ct. App. 2007).

Plaintiffs allege that they and EyeMed entered into an implied contract "under which EyeMed agreed to safeguard and protect" Plaintiffs' PII. (Doc. 19, ¶ 149, #259). Beyond this threadbare allegation, Plaintiffs fail to allege any facts to support the claim that EyeMed agreed to provide data security as a condition of service—even tacitly. Simply stating that an implied contract existed is insufficient. *Iqbal*, 556 U.S. at 678. Thus, the Court finds the breach of implied contract claim implausible on its face.

3. Unjust Enrichment

Under Ohio law, an unjust enrichment claim requires the plaintiff to prove: (1) that she conferred a benefit upon the defendant, (2) the defendant knew about the benefit, and (3) it would be unjust for the defendant to retain the benefit without payment. *Padula v. Wagner*, 37 N.E.3d 799, 813 (Ohio Ct. App. 2015).

Plaintiffs allege that they conferred a monetary benefit on EyeMed through payments for vision benefits. (Doc. 19, ¶ 160, #260). But a traditional exchange of payment for goods and services is not a circumstance in which it is "unjust" to allow the defendant to retain the benefit. Plaintiffs got what they paid for—vision benefits. *Gordon v. Chipotle Mexican Grill, Inc.*, 344 F. Supp. 3d 1231, 1249 (D. Colo. 2018) ("Plaintiffs paid for burritos; Plaintiffs received burritos."). Because EyeMed was not unjustly enriched by Plaintiffs' vision benefits premiums, this claim is implausible on its face.

4. California State Law Claims

Plaintiff Whittom brings several California state law claims on behalf of herself and putatively on behalf of the entire California subclass.

a. California Unfair Competition Law

Whittom alleges that EyeMed violated California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, et seq., which prohibits business practices that are "unlawful, unfair, or fraudulent." *Dugas v. Starwood Hotels & Resorts Worldwide, Inc.*, No. 3:16-cv-14, 2016 WL 6523428, at *11 (S.D. Cal. Nov. 3, 2016) (cleaned up). She details several ways EyeMed supposedly violated the law but none of them save her claim. (Doc. 19, ¶¶ 169–77, #262–65). California's unfair competition law imposes a heightened injury requirement for non-state actors bringing suit. *Dugas*, 2016 WL 6523428, at *11. On top of an Article III injury in fact, the statute requires plaintiffs to show they specifically suffered a deprivation of money or property as a prerequisite to suit. Cal. Bus. & Prof. Code § 17204.

***9** Whittom fails to allege facts showing that she has lost money or property as a direct result[12] of the data breach. Her conclusory allegation that she has lost money or property, without any supporting facts, cannot survive a motion to dismiss. (Doc. 19, ¶ 175, #265). She alleges she has suffered various intangible injuries including loss of time[13] and risk of future harm, but these are not sufficient

under the statute. *Dugas*, 2016 WL 6523428, at *11. Because she does not allege that she has lost money or property, Whittom fails to state a California Unfair Competition Law claim upon which relief can be granted.

12 As already stated, Plaintiffs claim that monies paid for vision benefits should count as an injury supporting standing. While Whittom does not use this argument in support of her unfair competition claim in the Complaint, she raises it in response to EyeMed's motion to dismiss. (Doc. 23, #370–71). But for the reasons already stated, this unjust enrichment argument does not satisfy the heightened injury requirement—it is facially implausible that fees for vision benefits formed part of a fictitious bargain for data security.

13 Whittom claims that "California courts have found [Unfair Competition Law] standing based on allegations of an increased risk of future harm coupled with a loss of time spent dealing with the fallout from a data breach," and cites three cases in support. (*See* Doc. 23, #372 (citing *Bass v. Facebook, Inc.*, 394 F. Supp. 3d 1024 (N.D. Cal. 2019); *Huynh*, 2019 WL 11502875; *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-2617, 2016 WL 3029783 (N.D. Cal. May 27, 2016))). Her reliance on these cases is misleading at best. While the cases cited did find loss of time sufficient to confer *Article III standing*, none found loss of time sufficient to bring a claim under Cal. Bus. & Prof. Code § 17204. *See Bass*, 394 F. Supp. 3d at 1035, 1039–40; *Huynh*, 2019 WL 11502875, at *4–6; *In re Anthem*, 2016 WL 3029783, at *30 (differentiating Article III standing and "UCL Standing" but finding plaintiff showed both because of loss of money). In fact, in two of the cases cited the district court *dismissed* the unfair competition claim because the plaintiff failed to allege loss of money or property. *See Bass*, 394 F. Supp. 3d at 1040–41; *Huynh*, 2019 WL 11502875, at *6 (dismissing because decline in value of PII and failure to realize full benefit of bargain with service provider were not losses of money or property). Whittom's argument fails to save her claim.

b. California Confidentiality of Medical Information Act

Whittom alleges that EyeMed violated Cal. Civ. Code § 56.101 by failing to "maintain and preserve the confidentiality of [her] medical information." (Doc. 19, ¶¶ 182–83, #266). But as EyeMed points out, the California statute covers only *medical information*, which is defined as "any individually identifiable information ... regarding a patient's medical history, mental health application information, mental or physical condition, or treatment." Cal. Civ. Code § 56.05. Whittom does not specifically allege that any of her medical information was compromised—only her personal and financial information.[14] (Doc. 19, ¶ 65, #236); *Eisenhower Med. Ctr. v. Sup. Ct.*, 172 Cal. Rptr. 3d 430, 434 (Cal. Ct. App. 2014) (distinguishing between "individually identifiable information" and "medical information"). Whittom's name, phone number, or Social Security number do not constitute "medical information" as the statute defines the term. She therefore fails to state a claim for relief under California's Confidentiality of Medical Information Act.

14 Once again, Whittom's blanket allegation that EyeMed negligently stored her medical information, without any supporting facts, fails *Iqbal's* pleading standard. 556 U.S. at 678.

c. California Consumer Privacy Act

***10** Lastly, Whittom alleges that EyeMed violated Cal. Civ. Code § 1798.100(e) by failing to implement reasonable security measures to protect its customers' personal information. (Doc. 19, ¶¶ 193–96, #268–69); *see also* Cal. Civ. Code § 1798.150(a). Once again, the statute does not cover EyeMed's conduct—this time because EyeMed is a covered entity subject to HIPAA. (*See* Doc. 19, ¶¶132–33, #256 (alleging that EyeMed is bound by HIPAA)); *see also* Cal. Civ. Code § 1798.145(c)(1)(A) (exempting entities covered by HIPAA).

Whittom counters that § 1798.145(c) exempts the exposure of *medical information* covered by HIPAA from the California statute's coverage but that exposed *non-medical information* still can trigger liability under the law. (Doc. 23, #375 (citing *Stasi v. Inmediata Health Grp. Corp.*, 501 F. Supp. 3d 898, 924 (S.D. Cal. 2020))). While it is true the *Stasi* court refused to dismiss a California Consumer Privacy Act claim based on this medical versus non-medical distinction,[15] this Court declines to follow *Stasi*'s lead. *Mid-Century Ins. Co. v. Fish*, 749 F. Supp. 2d 657, 667 (W.D. Mich. 2010) ("[A] federal court's interpretation of state law is not binding." (emphasis omitted)). *Stasi*'s analysis was perfunctory: it permitted the claim to go forward because the defendant had not addressed the non-medical information that was purportedly accessed. 501 F. Supp. 3d at 924. And *Stasi* failed to consider the fact that subparagraph (B) of § 1798.145(c)(1) exempts "*provider*[*s*]" of health care (who are subject to HIPAA) from the statute "to the extent the provider ... maintains *patient information* in the same manner as medical information." (emphasis added).

EyeMed cites the entirety of § 1798.145(c)(1) and asserts that it is exempt as a "covered entity." (Doc. 21-1, #328). Whittom does not challenge this and fails to provide specific allegations that EyeMed maintains non-medical patient information in a different manner than medical information—a fact required to establish the California statute covers EyeMed. Whittom therefore fails to state a claim for relief under California's Consumer Privacy Act.

15 *Stasi* involved medical information covered by the California Confidentiality of Medical Information Act (CMIA) and did not mention HIPAA. 501 F. Supp. 3d at 924. But the consumer protection act exempts medical information covered by both CMIA and HIPAA and treats the two statutes identically, so the logic is the same. Cal. Civ. Code § 1798.145(c).

CONCLUSION

For the reasons stated, EyeMed's motion to dismiss (Doc. 21) is **GRANTED IN PART AND DENIED IN PART.** The motion is **DENIED** with respect to EyeMed's 12(b)(1) ground seeking to dismiss for lack of jurisdiction and **DENIED** with respect to EyeMed's 12(b)(6) ground seeking to dismiss Plaintiffs' negligence claim. The motion is **GRANTED** as to Plaintiffs' remaining claims, and the Court **DISMISSES** those claims, but **WITHOUT PREJUDICE**.

SO ORDERED.

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UNPUBLISHED
Court of Appeals of Michigan.

Angela Renee WARE, Plaintiff–Appellee,
v.
BRONSON METHODIST HOSPITAL,
Defendant–Appellant,
and
Patricia Marie Wark, Defendant.

Docket No. 307886
|
Nov. 4, 2014.

Synopsis
Background: Patient filed complaint against nurse for invasion of privacy and intentional infliction of emotional distress and against hospital for vicarious liability, negligence, and breach of implied contract. The Circuit Court, Kalamazoo County, denied hospital's motion for summary disposition. Hospital appealed.

Holdings: The Court of Appeals held that:

nurse was acting outside the scope of her employment;

claim that hospital failed to adopt adequate patient confidentiality procedures sounded in medical malpractice;

claim that hospital failed to enforce existing patient confidentiality procedures did not sound in medical malpractice; and

claim that hospital breached implied contract was barred by statute of frauds.

Affirmed in part, reversed in part, and remanded.

Ronayne Krause, P.J., filed dissenting opinion.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Kalamazoo Circuit Court; LC No.2010–000635–NZ.

Before: RONAYNE KRAUSE, P.J., and HOEKSTRA and WHITBECK, JJ.

Opinion

PER CURIAM.

***1** Defendant, Bronson Methodist Hospital, appeals as on leave granted[1] the trial court's order denying its motion for summary disposition in favor of plaintiff, Angela Renee Ware, who is currently known as Angela Renee Kratzer (Kratzer). Kratzer sued the Hospital on vicarious liability, negligence, and breach of contract theories after the Hospital's employee, defendant Patricia Marie Wark, who is currently known as Patricia Marie Ware (Patricia Ware), accessed Kratzer's medical files and provided confidential patient information to Kratzer's ex-husband, Gregory Ware. We affirm in part, reverse in part, and remand.

[1] *Ware v. Bronson Methodist Hosp.*, 494 Mich. 880, 834 N.W.2d 497 (2013).

I. FACTS

A. BACKGROUND FACTS

In March 2009, Kratzer saw doctors at Bronson Neurological Services, and indicated on her privacy authorization form, in all capital letters and with two exclamation points, that the Hospital should not share information with her ex-husband's then girlfriend, Patricia Ware. Patricia Ware was a nurse in the Hospital's intensive care unit. Kratzer testified at her deposition that nurses told her that the Hospital had policies about patient records and received training in protecting patient confidentiality.

Kratzer was admitted to the Hospital in August 2009, to

deliver a child. Despite the nurses' assurances, Patricia Ware accessed Kratzer's medical records on four days in August 2009. Kratzer was admitted to the Hospital's Neuro Intensive Care Unit in November 2009. Kratzer testified that she told her nurses that she was concerned that Patricia Ware might try to access her records, and her nurses told her that it was not possible for Patricia Ware to do so because only doctors and the shift nurse can access a patient's records. However, Patricia Ware accessed Kratzer's medical records on three days in November. On the third day, a Hospital employee informed Kratzer that Patricia Ware had accessed her records.

The Hospital subsequently suspended and fired Patricia Ware. At deposition, Kratzer testified that Patricia Ware was not one of her nurses and that Patricia Ware's actions were not related to providing her with nursing care. According to Kratzer's complaint, Patricia Ware shared information from Kratzer's medical records with Gregory Ware. Gregory Ware then used the information in a custody dispute with Kratzer.

B. PROCEDURAL HISTORY

On November 17, 2010, Kratzer filed a complaint against the Hospital and Patricia Ware. In pertinent part, Kratzer asserted claims of invasion of privacy and intentional infliction of emotional distress against Patricia Ware, and asserted that the Hospital was vicariously liable for Patricia Ware's conduct. Kratzer also asserted that the Hospital was negligent and breached an implied contract to prohibit Patricia Ware from accessing her medical records.

The Hospital filed motions for summary disposition under MCR 2.116(C)(7), (8), and (10). The Hospital asserted that it was not liable for Patricia Ware's conduct, which was outside the scope of her employment. It also asserted that the statute of limitations barred Kratzer's negligence and breach of contract claims because they sounded in medical malpractice.

***2** The trial court denied the Hospital's motion regarding Kratzer's invasion of privacy and intentional infliction of emotional distress claims, reasoning that whether Patricia Ware acted within the scope of her employment was a question of fact because she "had access to the records through her employment...." The trial court denied the Hospital's motion regarding Kratzer's negligence and breach of contract claims, reasoning that the case did not sound in medical malpractice because it does not necessarily raise questions of medical judgment.

II. SCOPE OF EMPLOYMENT

A. STANDARD OF REVIEW

This Court reviews de novo the trial court's determination on a motion for summary disposition.[2] A party is entitled to summary disposition under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment ... as a matter of law." The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[3] A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue.[4]

2 *Maiden v. Rozwood,* 461 Mich. 109, 118, 597 N.W.2d 817 (1999); *Gorman v. American Honda Motor Co., Inc.,* 302 Mich.App. 113, 115, 839 N.W.2d 223 (2013).

3 MCR 2.116(G)(5); *Maiden,* 461 Mich. at 120, 597 N.W.2d 817.

4 *Gorman,* 302 Mich.App. at 116, 839 N.W.2d 223.

B. LEGAL STANDARDS

Under the doctrine of respondeat superior, an employer may be vicariously liable for an employee's torts committed within the scope of his or her employment.[5] But the employer is not generally liable for torts that are beyond the scope of the employer's business.[6] An act is outside the scope of employment if the employee acts for personal purposes that do not further the employer's interests,[7] such as from personal animosity.[8]

5 *Hamed v. Wayne Co.,* 490 Mich. 1, 11, 803 N.W.2d 237 (2011); *Helsel v. Morcom,* 219 Mich.App. 14, 21, 555 N.W.2d 852 (1996).

6 *Hamed,* 490 Mich. at 11, 803 N.W.2d 237; *Zsigo v.*

Hurley Med. Ctr., 475 Mich. 215, 221, 716 N.W.2d 220 (2006).

7 *Hamed,* 490 Mich. at 11, 803 N.W.2d 237.

8 *Martin v. Jones,* 302 Mich. 355, 358, 4 N.W.2d 686 (1942); *Bryant v. Brannen,* 180 Mich.App. 87, 98–100, 446 N.W.2d 847 (1989).

C. APPLYING THE STANDARDS

The Hospital contends that there is no question of fact concerning whether Patricia Ware acted outside the scope of her employment when she accessed Kratzer's medical files because Patricia Ware's tort was independent and did not further the Hospital's interests. We agree.

An action may further the employer's business even when it is contrary to the employer's instructions.[9] Here, there is no question that Patricia Ware acted against the Hospital's instructions when she accessed Kratzer's medical files. But reasonable minds could not conclude that Patricia Ware's action furthered the Hospital's interests. There is no evidence that the Hospital gained anything by Patricia Ware's action. Patricia Ware gained information for use in her then-boyfriend's custody dispute. Patricia Ware's personal motivations for accessing Kratzer's medical files were not merely *a* motivation for her actions, they were the *sole* motivation. Thus, there is no question of fact that Patricia Ware acted for personal reasons that did not further the Hospital's interests.

9 *Hamed,* 490 Mich. at 11, 803 N.W.2d 237.

Kratzer responds that Patricia Ware acted within the scope of her employment because her employment included accessing patients' medical files, and she could only access Kratzer's medical files at work. We disagree that these facts created genuine issues of material fact that precluded summary disposition.

***3** Michigan will not hold an employer liable for an employee's action merely because the existence of the employment relationship made it easier for the employee to accomplish a tort.[10] Here, it is undisputed that Patricia Ware was only able to access Kratzer's medical files because she was the Hospital's employee, and that she accessed the files by using her employee identification number in the manner in which she normally accessed patient files during her daily work. These facts do not establish vicarious liability. Though the existence of the employment relationship between the Hospital and Patricia Ware made it easier for Patricia Ware to invade Kratzer's privacy, under Michigan law, these facts do not establish that Patricia Ware's action was within the scope of her employment.

10 *Zsigo,* 475 Mich. at 226, 716 N.W.2d 220.

We conclude that, viewing the evidence in the light most favorable to Kratzer, reasonable minds could not differ concerning whether Patricia Ware acted in furtherance of the Hospital's interests. Thus, the Hospital was entitled to summary disposition under MCR 2.116(C)(10) because Patricia Ware's actions were not within the scope of her employment.

III. MEDICAL MALPRACTICE

A. STANDARD OF REVIEW

This Court reviews under MCR 2.116(C)(7) whether the statute of limitations bars a claim of ordinary negligence because it sounds in medical malpractice.[11] We review de novo the trial court's determination.[12] This Court considers the contents of the plaintiff's complaint to be true, unless it is contradicted by the documentary evidence.[13]

11 *Bryant v. Oakpointe Villa Nursing Centre,* 471 Mich. 411, 419, 684 N.W.2d 864 (2004).

12 *Id.; Scherer v. Hellstrom,* 270 Mich.App. 458, 461, 716 N.W.2d 307 (2006).

13 *Bryant,* 471 Mich. at 419, 684 N.W.2d 864.

B. LEGAL STANDARDS

A claim sounds in medical malpractice if the claim (1) occurs within the course of a professional relationship and (2) raises questions involving medical judgment.[14] If the action occurred during the course of a professional relationship and raises questions of medical judgment, then "the action is subject to the procedural and substantive requirements that govern medical malpractice actions."[15] If the plaintiff's claim sounds in medical malpractice and he or she did not take the procedural steps necessary to preserve a medical malpractice claim, the statute of limitations bars the claim.[16]

14 *Id.* at 422, 684 N.W.2d 864.

15 *Id.*

16 *Lockwood v. Mobile Med. Response, Inc.,* 293 Mich.App. 17, 27, 809 N.W.2d 403 (2011).

To determine whether a claim raises questions of medical judgment, courts must consider the issue of duty.[17] A claim involves a medical judgment if it concerns "the failure of a member of the medical profession ... to fulfill the duty to exercise that degree of skill, care and diligence exercised by members in the same profession, practicing in the same or similar locality, in light of the present state of medical science."[18] If "the reasonableness of the action can be evaluated by the jury only after having been presented the standards of care pertaining to the medical issues ...," then the claim sounds in medical malpractice.[19] In contrast, if a claim "raise[s] issues that are within the common knowledge and experience" of the finder of fact, then the claim sounds in negligence.[20]

17 See *Bryant,* 471 Mich. at 423–424, 684 N.W.2d 864.

18 *Id.* at 424, 684 N.W.2d 864, quoting *Adkins v. Annapolis Hosp.,* 116 Mich.App. 558, 564, 323 N.W.2d 482 (1982) (quotation marks and additional citations omitted).

19 *Bryant,* 471 Mich. at 423, 684 N.W.2d 864.

20 *Id.,* quoting *Dorris v. Detroit Osteopathic Hosp. Corp.,* 460 Mich. 26, 46, 594 N.W.2d 455 (1999).

C. APPLYING THE STANDARDS

***4** The Hospital contends that Kratzer's claims sound in medical malpractice because the questions of who needs the ability to access medical records and how much access to those records can be restricted safely are questions of medical judgment. Kratzer contends that her claims do not concern medical judgment because they do not concern medical treatment. We conclude that some of Kratzer's claims concern medical judgment, and some do not.

There is no question that this case meets the first element, professional relationship. We are only concerned with whether Kratzer's claims concern medical judgment. In order to determine whether Kratzer's claims do concern medical judgment, we must consider the duties that she claims the Hospital owed to her.[21]

21 See *Bryant,* 471 Mich. at 425–432, 684 N.W.2d 864 (analyzing the plaintiff's claims individually).

In her complaint, Kratzer claimed that the Hospital owed her the following duties:

> a. To reasonably anticipate threats to the security of a patient's protected health information from unauthorized access and unauthorized or unlawful disclosure of such information.
>
> b. To adopt and enforce appropriate policies and procedures for safeguarding, protecting, and ensuring the confidentiality of a patient's protected health information from unauthorized access.
>
> c. To implement training programs for employees about how to safeguard, protect, and ensure the confidentiality of a patient's protected health information from unauthorized access.
>
> d. To adopt and enforce appropriate policies and procedures for limiting disclosures of a patient's protected health information to the minimum necessary to accomplish their intended purpose.
>
> e. To reasonably limit which members of its workforce may have access to a patient's protected health information for treatment, payment, and health care operations, based on those who need access to the information to do their jobs.

f. To adopt and enforce appropriate policies and procedures for monitoring and/or auditing unauthorized and unlawful access to (and disclosure of) a patient's protected health information.

g. To implement training programs for employees about how to monitor and/or audit unauthorized and unlawful access (and disclosure of) a patient's protected health information.

Kratzer alleges that the Hospital owed her two distinct duties to protect her confidential information from unauthorized disclosure: (1) the duty to *adopt* procedures to ensure the confidentiality of her health information (including by limiting the ability to access to her health information to only those employees who need the information to do their jobs), and (2) the duty to *enforce* the policies it had in place to keep her health information confidential.

1. ADOPTION OF PROCEDURES TO ENSURE CONFIDENTIALITY

We conclude that the issue of whether the Hospital adopted adequate procedures to ensure confidentiality, pursuant to various state and federal statutes, involves a question of medical judgment.

As an initial matter, we note that this Court's decision in *Saur v. Probes*[22] does not control here. In *Saur,* the Court considered whether a plaintiff could bring a malpractice action for a psychiatrist's breach of patient confidentiality.[23] This Court held that a cause of action existed because statutes, common law, and codes of professional conduct may create evidence of professional malpractice.[24] What this Court did *not* hold is that violations of statutes, common law, and professional conduct *necessarily* create issues of professional malpractice. Thus, *Saur* does not answer the question presented here.

22 *Saur v. Probes,* 190 Mich.App. 636, 476 N.W.2d 496 (1991).

23 *Id.* at 637, 476 N.W.2d 496.

24 *Id.* at 638–639, 476 N.W.2d 496.

***5** Therefore, we turn to the basic standard that the Michigan Supreme Court articulated in *Bryant:* does this claim involve the standards of care pertaining to medical issues?[25] We conclude that it does.

25 *Bryant,* 471 Mich. at 423, 684 N.W.2d 864.

Here, there is no question that the Hospital had policies and procedures in place to protect confidentiality. Kratzer asserts that those policies and procedures were not *appropriate* and that the Hospital's policies did not comply with various state and federal privacy statutes. To determine whether the Hospital's policies and procedures were appropriate, the jury would necessarily have to balance what information doctors, nurses, and medical staff require to make medical decisions against the patients' rights to confidentiality under various laws.

Kratzer's claim that the Hospital should have adopted procedures that limited access of her information to only those employees who need the information to do their jobs illustrates that these judgments are ultimately medical in nature. A jury cannot determine whether an employee will need health information to do his or her job without knowing and understanding what information several types of hospital employee—doctors, nurses, and other medical staff—reasonably require to make medical decisions. For the jury to be able to evaluate whether the Hospital appropriately balanced Kratzer's privacy rights as a patient with the need of doctors, nurses, and other employees to have quick access to her health information to provide her with medical treatment, the jury will need to understand *multiple* medical standards of care. These claims will require expert testimony on medical standards of care. Thus, they concern medical judgments.

Because the jury can only evaluate the appropriateness of the Hospital's actions if the parties present evidence on standards of care pertaining to the medical issues, we conclude that a claim that the Hospital failed to adopt appropriate procedures to protect patient confidentiality sounds in medical malpractice.[26] As a result of Kratzer's failure to comply with medical malpractice procedures, Kratzer's claims that the Hospital did not adopt appropriate procedures are time-barred.[27] Thus, the trial court should have granted summary disposition on Kratzer's negligence claims related to whether the Hospital adopted appropriate confidentiality procedures.

26 See *Id.*

27 See *Lockwood,* 293 Mich.App. at 27, 809 N.W.2d 403.

2. ENFORCEMENT OF POLICIES AGAINST UNAUTHORIZED ACCESS

The Hospital contends that whether the Hospital enforced its policies and protected against unauthorized access involves issues of medical judgment because issues of the supervision of medical staff always involve issues of medical judgment. We disagree with this blanket assertion, and conclude that the issue of whether the hospital enforced its own policies and protected Kratzer against unauthorized access of her protected health information does not sound in medical malpractice.

Courts routinely conclude that a patient's allegation that a hospital improperly trained or supervised hospital employees who provided medical care involves questions pertaining to medical issues.[28] Courts decide these cases on the basis of the basic question that the Michigan Supreme Court articulated in *Bryan:* does this claim involve the standards of care pertaining to medical issues?[29]

28 See, e.g., *Bryant,* 471 Mich. at 426–429, 684 N.W.2d 864 (failing to train nurses to recognize and protect against risk of asphyxiation); *Dorris,* 460 Mich. at 43, 594 N.W.2d 455 (negligent administration of medication and subsequent failure to monitor and supervise patient); *Bronson v. Sisters of Mercy Health Corp.,* 175 Mich.App. 647, 648–649, 652, 438 N.W.2d 276 (1989) (failure to supervise competency of physicians performing surgery).

29 *Bryant,* 471 Mich. at 423, 684 N.W.2d 864.

***6** Kratzer's claim that the Hospital negligently failed to enforce its own procedures does not involve medical standards of care. The claim presents the question of whether the Hospital negligently failed to enforce *its preexisting* policies and practices, and whether this failure led to Patricia Ware's ability to access Kratzer's private health information several times between August and November 2009 and to Patricia Ware's disclosure of that information. Whether the Hospital could have adopted *better* procedures (an issue that sounds in malpractice, for the reasons previously stated) is a distinct question from whether the Hospital enforced its *existing* procedures. The issue is not whether the Hospital negligently failed to train or supervise Patricia Ware's performance of her job as a nurse: it is undisputed that Patricia Ware was not providing Kratzer with medical care. Thus, the question is whether the Hospital negligently failed to follow its own procedures to prevent Patricia Ware from accessing Kratzer's confidential information, given Kratzer's warnings and Patricia Ware's lack of involvement in Kratzer's medical care. The resolution of this issue will not require expert testimony on medical standards of care.

Because the jury can evaluate Kratzer's claim that the Hospital negligently failed to enforce its existing policies without testimony on medical standards of care, we conclude that this claim does not sound in medical malpractice.[30] Thus, the trial court properly declined to grant summary disposition on this portion of Kratzer's negligence claims.

30 See *Id.*

IV. BREACH OF IMPLIED CONTRACT

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

This Court reviews de novo a trial court's ruling on a motion for summary disposition.[31] A party may move for summary disposition under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted. When a party moves the trial court for summary disposition under MCR 2.116(C)(8) and (10) and the trial court considered documents outside the pleadings, we review the trial court's decision under MCR 2.116(C)(10).[32] As stated above, a party is entitled to summary disposition under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment ... as a matter of law."

31 *Maiden,* 461 Mich. at 118, 597 N.W.2d 817.

32 *Hughes v. Region VII Area Agency on Aging,* 277 Mich.App. 268, 273, 744 N.W.2d 10 (2007).

"Generally, an issue is not properly preserved if it is not raised before, addressed, or decided by the circuit court or administrative tribunal."[33] But this Court should not punish a party for the omission of the trial court.[34]

[33] *Polkton Charter Twp. v. Pellegrom,* 265 Mich.App. 88, 95, 693 N.W.2d 170 (2005).

[34] *Peterman v. Dep't of Natural Resources,* 446 Mich. 177, 183, 521 N.W.2d 499 (1994).

Here, the Hospital contended below that it was entitled to summary disposition on Kratzer's claim of "breach of implied contract" on the basis that the statute of frauds required any contract for health care to be in writing. The trial court did not address this issue. However, we will not punish the Hospital for the trial court's failure to address the issue.

B. LEGAL STANDARDS

***7** The statute of frauds requires certain types of agreement to be in a writing signed by the party against whom it will be enforced.[35] This includes "[a]n agreement, promise, contract, or warranty of cure relating to medical care or treatment."[36]

[35] MCL 566.132; *Crown Technology Park v. D & N Bank, FSB,* 242 Mich.App. 538, 548, 619 N.W.2d 66 (2000).

[36] MCL 566.132(1)(g). See *Powers v. Peoples Community Hosp. Auth.,* 183 Mich.App. 550, 554, 455 N.W.2d 371 (1990).

C. APPLYING THE STANDARDS

The Hospital contends that the trial court improperly failed to grant its motion for summary disposition on Kratzer's implied contract claim. We agree.

Here, Kratzer asserts that the Hospital breached an *implied* contract with her: that is, there is no written contract at issue in this case. Kratzer's allegations regarding patient confidentiality relate to her medical care and treatment. Thus, because Kratzer's claims do not involve a signed writing, Kratzer may not enforce a contract in this instance.

We conclude that the trial court should have dismissed Kratzer's implied contract claim under MCR 2.116(C)(8) or (10). Kratzer failed to state a claim on which relief could be granted and did not show an issue of material fact that would prevent the Hospital from being entitled to judgment as a matter of law.

V. RESPONSE TO THE DISSENT

In this opinion, we have reached two conclusions. First, in Section III(C)(1), we conclude that for the jury to determine whether the Hospital should have *adopted* further procedures to ensure patient confidentiality will require the jury to understand medical standards of care. Second, in Section III(C)(2), we conclude that determining whether a hospital *enforced* its pre-existing procedures does not require the jury to understand medical standards of care. If we have read the dissent correctly, the dissent disagrees with our first conclusion but agrees with our second. As we understand the dissent, our dissenting colleague reasons that adequately safeguarding a patient's right to privacy does not concern medical standards of care and does not require the exercise of medical judgment.

If we read the dissent correctly, the dissent conflates two distinct issues (the *adoption* of procedures and the *enforcement* of procedures) into a single issue, patient privacy. The dissent states, accurately, that "... patients have a right to keep confidential the details of their medical care and treatment" and that "[p]rivate medical information must be kept private." Certainly this is so and nowhere do we state otherwise.

Thus, patient privacy is not the issue in this case; it is a given. At issue are Kratzer's claims regarding the privacy policies that the Hospital adopted and how the Hospital enforced these policies. Thus, we must closely consider and analyze these individual claims.[37] Doing so in this case rather plainly illustrates that Kratzer is asserting two distinct types of claims regarding her privacy: Kratzer contends not only that Patricia Ware actually invaded her privacy and that the Hospital negligently failed to *enforce* its privacy policies, but that the Hospital was also responsible for that invasion because it should have *adopted* stricter privacy policies.

[37] See *Bryant,* 471 Mich. at 425–432, 684 N.W.2d 864 (analyzing the plaintiff's claims individually).

***8** Again, we agree with the dissent's statement of the fundamental principle of patient confidentiality. To

borrow the dissent's example from *DeMay v. Roberts,* in which a doctor brought "an unprofessional young unmarried man" to the plaintiff's birthing bed and violated her right to privacy,[38] the jury could determine whether such an action shocked their senses of right, justice, and propriety without resort to the medical standards surrounding the doctor's professional relationship with the plaintiff. Similarly, here, the jury can determine without medical testimony whether the Hospital's negligent *enforcement* of its policies resulted in Patricia Ware's unauthorized and inappropriate accessing and disclosing Kratzer's records, and thus violated Kratzer's right to privacy, without resorting to medical testimony.

[38] *DeMay v. Roberts,* 46 Mich. 160, 165–166, 9 N.W. 146 (1881).

However, we simply do not believe that this example applies to Kratzer's claims that the Hospital itself violated Kratzer's right to privacy by failing to adopt stricter policies. Our reasoning is simple: Kratzer's claim that the Hospital should have adopted stricter privacy policies requires the jury to consider and answer several questions not raised in *DeMay.* To evaluate the sufficiency of the Hospital's confidentiality policies, the jury must consider not only whether the Hospital had privacy policies in place—it did—but it must also consider what additional privacy policies the Hospital reasonably should have had in place in order to protect Kratzer.

We cannot fathom how the Hospital—or any hospital—could formulate a privacy policy without substantial, direct input from doctors, nurses, and medical staff. Similarly, we cannot fathom how the jury would determine what more the Hospital should have reasonably done without understanding the medical standards of care under which these doctors, nurses, and medical staff operate. In order to do so, the jury must understand *what* information doctors and nurses need, *who* needs that information, *when* they need that information, and from *where* doctors and nurses need to access that information. A jury cannot answer these questions without an explanation of these concepts. And the only explanations can come from the testimony of doctors and nurses concerning what medical information they need in order to do their jobs properly. In other words, the testimony about the sufficiency of the Hospital's privacy policies would necessarily concern medical judgments and medical standards of care.

The dissent contends that the adoption of procedures is an administrative judgment. Certainly the *implementation and enforcement* of previously adopted policies is an administrative task. However, Kratzer's contention that the Hospital did not adopt policies is separate from her contention that it negligently implemented and enforced policies that it had already adopted. Programmers cannot implement a policy that has not been created. Again, we do not believe that any administrative team or information systems department could *adopt* privacy policies and enforcement procedures without consulting with doctors, nurses, and medical staff to answer the questions that so directly relate to medical judgments and decisions.

***9** Therefore, this issue directly involves the standard of care pertaining to medical issues. Neither programmers nor jurors can evaluate what information doctors need to do their jobs on the basis of common knowledge and experience. A jury cannot determine the answers to these important medical questions—*what* information doctors and nurses need, *who* needs that information, *when* they need that information, and from *where* doctors and nurses need to access that information—it would need to address without understanding medical standards of care related to doctors, nurses, and medical staff. Therefore, we cannot agree with the dissent's conclusion that Kratzer's claim regarding the Hospital's failure to *adopt* stricter privacy policies does not sound in medical malpractice. Simply put, it does.

VI. CONCLUSION

We conclude that the trial court improperly denied the Hospital's motion for summary disposition under MCR 2.116(C)(10) on Kratzer's claims of invasion of privacy and intentional infliction of emotional distress. The Hospital is not vicariously liable for Patricia Ware's actions because her private, vindictive actions did not advance the Hospital's interests and were not in the scope of her employment. We conclude that the trial court also erred when it failed to dismiss Kratzer's implied contract claim under MCR 2.116(C)(8) or (10).

We further conclude that the trial court improperly denied the Hospital's motion for summary disposition under MCR 2.116(C)(7) relating to Kratzer's claims that the Hospital negligently failed to *adopt* procedures or adopted inappropriate procedures related to patient confidentiality. These issues raise questions of medical judgment because the jury cannot evaluate the reasonableness of the Hospital's action without testimony on medical standards of care.

But we conclude that the trial court properly declined to grant the Hospital's motion for summary disposition on

Kratzer's claims that the Hospital negligently failed to *enforce* its existing procedures. These claims do not sound in medical malpractice because testimony on medical standards of care will not be necessary for the jury to understand and resolve the claim.

We affirm in part, reverse in part, and remand. We do not retain jurisdiction.

RONAYNE KRAUSE, P.J. (dissenting).

Defendant Patricia Wark, a nurse employed by defendant Bronson Methodist Hospital, repeatedly accessed the confidential medical record of plaintiff Angela Renee Kratzer (formerly Angela Renee Ware), a Bronson Hospital patient. The Hospital admits that Wark was not one of Kratzer's healthcare providers and should not have viewed Kratzer's records. The Hospital further concedes that when admitted to the Hospital, Kratzer feared Wark would attempt to read her medical record, warned the Hospital of this possibility, and specifically directed the Hospital not to "share" her health information with Wark.

When Wark disclosed the illegally accessed confidential information in a child custody proceeding, Kratzer sued Wark and the Hospital. As to the Hospital, Kratzer's complaint sets forth several liability theories. One theory focuses on the Hospital's policies and procedures addressing the confidentiality of medical information. Kratzer's complaint avers that the Hospital negligently failed to adopt "appropriate policies and procedures for safeguarding, protecting, and ensuring the confidentiality of a patient's protected health information from unauthorized access," and raised several other claims related to the Hospital's medical record access policies. One issue presented is whether Kratzer's policy and procedure claims sound in negligence or in medical malpractice.

***10** The majority holds that "[t]o determine whether the Hospital's policies and procedures were appropriate, the jury would necessarily have to balance what information doctors, nurses, and medical staff require to make medical decisions against the patients' rights to confidentiality under various laws." *Ante* at 10, 9 N.W. 146. According to the majority, "[a] jury cannot determine whether an employee will need health information to do his or her job without knowing and understanding what information several types of hospital employee—doctors, nurses, and other medical staff—reasonably require to make medical decision." *Id.* Thus, the majority concludes, Kratzer's claim concerning hospital policies sounds in medical malpractice rather than in negligence.

I respectfully dissent. In my view, designing policies and procedures that adequately safeguard a patient's right to confidentiality does not require an exercise of medical judgment. Contrary to the majority's view, no standards of medical care dictate the privacy rights of hospital patients. Rather, the questions presented are legal, technological, and administrative. Clearly, expert testimony is necessary. However, the expert testimony critical to Kratzer's case has nothing to do with the medical standards of care expected of health care professionals. Accordingly, I would hold that a jury should decide Kratzer's policy and procedure claims.

I would not have addressed the Hospital's statute of frauds argument regarding plaintiff's breach of implied contract claim for the first time on appeal, but the majority's recitation of MCL 566.132 is accurate. I respectfully disagree with the majority's conclusion that any of plaintiff's claims sound in medical malpractice.

In *Bryant v. Oakpointe Villa,* 471 Mich. 411, 422, 684 N.W.2d 864 (2004), our Supreme Court set forth the two "defining characteristics" of a medical malpractice clam:

> First, medical malpractice can occur only " 'within the course of a professional relationship.' " [*Dorris v. Detroit Osteopathic Hosp. Corp.,* 460 Mich. 26, 45, 594 N.W.2d 455 (1999) (internal quotation omitted)]. Second, claims of medical malpractice necessarily "raise questions involving medical judgment." *Id.* at 46, 594 N.W.2d 455. Claims of ordinary negligence, by contrast, "raise issues that are within the common knowledge and experience of the [fact-finder]." *Id.* Therefore, a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions.

Clearly and undisputedly, the relationship here was professional. However, protecting private client information is inherent in almost *any* professional relationship and a great many ordinary business relationships as well. The fact that the information happened to be medical in nature has no bearing on the essentially administrative judgment necessary to protect it, either in the abstract or, as here, from an anticipated and specific known threat. *Bryant* 's second inquiry directs us to examine "whether the claim raises questions of medical judgment requiring expert testimony or, on the

other hand, whether it alleges facts within the realm of a jury's common knowledge and experience." *Id.* at 423, 684 N.W.2d 864. "If the reasonableness of the health care professionals' action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence. If, on the other hand, the reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, a medical malpractice claim is involved." *Id.* Simply put, there is nothing medical about the protection of confidential client/patient information.

***11** The majority declares that "*multiple* medical standards of care" factor into the creation of confidentiality policies, *ante* at 10, 684 N.W.2d 864, emphasis in original, but supports this sweeping, conclusory statement with neither analysis nor examples. In my view, a single standard of care bears relevance to hospital confidentiality policies, and a lay jury can easily evaluate that standard without assistance from medical experts. In a nutshell, that standard provides that patients have a right to keep confidential the details of their medical care and treatment. Perhaps this right of confidentiality dates back to adoption of The Hippocratic Oath, a provision of which provides: "I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know." *Stedman's Medical Dictionary* (28th ed), pp 890–891.

The Michigan Supreme Court recognized this fundamental principle more than 130 years ago in *DeMay v. Roberts,* 46 Mich. 160, 9 N.W. 146 (1881). In that case, Dr. DeMay brought "an unprofessional young unmarried man" with him to "the childbed" of Mrs. Roberts. Dr. DeMay's companion "could hear at least, if not see all that was said and done" during the ensuing childbirth. *Id.* at 165, 9 N.W. 146. The Supreme Court found that a violation of Mrs. Robert's right to privacy permitting the recovery of "substantial damages," declaring:

> It would be shocking to our sense of right, justice and propriety to doubt even but that for such an act the law would afford an ample remedy. To the plaintiff the occasion was a most sacred one and no one had a right to intrude unless invited or because of some real and pressing necessity which it is not pretended existed in this case. The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and to abstain from its violation. *Id.* at 165–166, 9 N.W. 146.

The standard of care articulated in *DeMay* is easily understood by laypersons. It does not differ among obstetricians, anesthesiologists, or pediatricians. In fact, since this standard of care does not involve medical expertise but privacy concerns in general, it also applies to any other setting in which privacy rights are implicated, such as an attorney/client relationship.[1] For the present case it is important to note that just because the privacy issue arose in a medical setting over medical information does not mean medical experts are required. Private medical information must be kept private. Numerous statutes incorporate this basic axiom. See MCL 333.26261 et seq (The Medical Records Act), MCL 330.1748 (mental health records), MCL 333.20170 (Public Health Code, medical records access and compliance), MCL 333.20201 (Public Health Code, patient rights), MCL 333.21515 (Mental Health Code, confidentiality of records), Michigan Administrative Code 324.1028 (minimum standards for hospitals).

[1] The phrase 'standard of care' can apply to a variety of concepts. In this case, the majority refers to a medical standard of care. However, since this case involves not a medical issue but a privacy issue, the phrase 'standard of care' refers not to anything medical, but to the standard of care involving the duty to ensure the privacy of a patient's confidential information.

Legal necessities sometimes intrude on a patient's right to privacy. For example, a patient's receipt of insurance benefits may be conditioned on a waiver of some aspects of the physician-patient relationship. Similarly, a plaintiff in a personal injury case may be required to waive the patient/physician privilege to recover damages for injury. Such waivers are exceptions to the rule of confidentiality and must be taken into account in privacy policies. However, the relationships giving rise to waivers are of no moment here, because the standard of care owed to Kratzer does not implicate any waiver. That standard required the Hospital to maintain her records in a manner that prevented access to unprivileged parties, particularly Wark. How that standard should have been implemented implicates practical questions such as the design of a computer records system.[2] However, it has nothing to do with a standard of care regarding anything other than privacy.

[2] This Court's internal docketing and case management system locks certain users out of data available to other users. For example, judges cannot access portions of the system used by the clerk's office. Research attorneys cannot access aspects of the system available to judges. How the system creates its pathways and blockades is beyond my understanding. However, it most certainly does not involve a *legal* standard of care. This Court's *programmers* incorporated policy and decisions giving rise to the confidentiality rules with computer technology. Similarly, a hospital privacy policy should marry legal rules and regulations with

> technological know-how. Medical standards of care are not part of this mix.

***12** Nor does an analysis of medical record policies and procedures call for the exercise of medical judgment. The duty to protect medical records from prying eyes may have originated with Hippocrates, but it is now clearly elucidated in HIPAA regulations compelling a hospital to:

> (1) Ensure the confidentiality, integrity, and availability of all electronic protected health information the covered entity or business associate creates, receives, maintains, or transmits.
>
> (2) Protect against any reasonably anticipated threats or hazards to the security or integrity of such information.
>
> (3) Protect against any reasonably anticipated uses or disclosures of such information that are not permitted or required under subpart E of this part.
>
> (4) Ensure compliance with this subpart by its workforce. 45 CFR § 164.306.

Notably, the regulations contemplate that a hospital must protect against "reasonably anticipated threats" to the security of electronically stored health care information. HIPAA permits covered hospitals some leeway in designing their policies:

> (b) Flexibility of approach.
>
> (1) Covered entities and business associates may use any security measures that allow the covered entity or business associate to reasonably and appropriately implement the standards and implementation specifications as specified in this subpart.
>
> (2) In deciding which security measures to use, a covered entity or business associate must take into account the following factors:
>
> (i) The size, complexity, and capabilities of the covered entity or business associate.
>
> (ii) The covered entity's or the business associate's technical infrastructure, hardware, and software security capabilities.
>
> (iii) The costs of security measures.
>
> (iv) The probability and criticality of potential risks to electronic protected health information. 45 C.F.R. § 164.306.

I find nothing in these criteria related to the intricacies of medical practice or the exercise of medical judgment. Indeed, Hospital patients are informed when they consent to treatment that the Hospital's privacy policy attaches to their healthcare information, that "[a]ll Bronson affiliated providers ... are required by law to maintain the privacy of [patients'] health information," and that their information may only be provided to others to facilitate treatment or to pay insurance claims. Drawing on their common knowledge and experience, lay people readily understand these uncomplicated statements. Kratzer alleges that gaps in the Hospital's privacy policies permitted an unprivileged interloper to easily access confidential information. Unlike the majority, I believe that the resolution of this claim likely requires input from computer experts, lawyers, and/or hospital administrators. However, jurors have no need of expert testimony concerning standards of *medical* care to determine whether the Hospital's privacy policies adequately protected patients such as Kratzer. Indeed, the majority's failure to identify what medical specialist must sign the relevant affidavit of merit under MCL 600.2169(1) reveals the inadequacies of the majority's analysis.

***13** I would agree with the majority's observation that determining who has a need to view any given patient's medical information at any given time may entail some degree of medical judgment, if that necessity was assessed within the context of actual medical care or treatment. In context, however, that is a straw man argument. There is absolutely no dispute here that Wark had no need to view plaintiff's information and was in no way involved in plaintiff's care or treatment. The gravamen of plaintiff's complaint is not an assertion that the Hospital should have selected a different constellation of individuals who *should* have been authorized to view her medical information, but rather that the Hospital failed to ensure that those who were *actually* not authorized had no access. Indeed, five out of the seven duties plaintiff asserts were breached *explicitly* refer to access which was *unauthorized,* not merely inappropriate. The other two assert that the Hospital failed to limit disclosures to those who needed the information, which, again, Wark undisputedly did not.

Had Wark actually been involved in any way in plaintiff's care or treatment, and had plaintiff asserted that Wark was but should not have been authorized to view her records, the majority's logic would be entirely appropriate. It is obviously a matter of medical judgment whether an actual provider of care or treatment needs to know any particular information about a patient. However, there is no medical judgment necessary to determine that medical records are private. Likewise, there is no medical judgment necessary to know that someone totally uninvolved with a given patient does not need to know anything about that patient,

at least until such time as they become involved. By way of an analogy, a clerk hired by a lawyer has no need to pry into confidential client files being kept by another lawyer down the hall, and there is no particular legal training necessary to draw that conclusion. The concepts of privacy and the failure to maintain it are certainly "within the common knowledge and experience" of jurors.

The determination of what a care or treatment provider needs to know about a patient may be medical, but the implementation of excluding all others from access is simply administrative. Expert testimony may be required, but in this day and age the expert is more likely to be a computer expert, records auditor, or even a lawyer. The majority concludes that whether the Hospital failed to follow its own procedures requires no medical testimony; I agree, however by the same logic, whether those procedures were effective at accomplishing their purported goals also requires no medical testimony. It likewise requires no medical judgment to act on an advance warning of a known threat or to implement a training program in either privacy concepts in general or whatever access control system the Hospital has in place—or, indeed, whether to have training or an access control system at all.

***14** The majority complains that it "cannot fathom how the Hospital—or any hospital—could formulate a privacy policy without substantial, direct input from doctors, nurses and medical staff." Neither can I. But inviting "substantial, direct input" from medical professionals is a far cry from constructing a medical confidentiality policy predicated on medical standards of care. The medical record confidentiality standard of care is in the first instance dictated by the Health Insurance Portability and Accountability Act, and in the second instance by technological and practical considerations. Standards of care flowing from approaches to patient treatment simply have no bearing on the central principle animating confidentiality policies—a patient has a right to keep her private medical information private. Despite the majority's insistence that "the standard of care pertaining to medical issues" must inform a confidentiality policy, the majority has not provided even a single example of why this must be so. Nor has the majority elucidated how the steps involved in developing a confidentiality policy meeting legal requirements would fall outside the common understanding of lay jurors. Perhaps most tellingly, the majority offers no explanation of how a plethora of medical standards of care, involving judgments from anesthesia choices to x-ray protocols, could, should, or ever actually have factored into a single hospital privacy policy.

I would hold that none of plaintiff's claims, at least as they are presented in this matter, raise issues of medical judgment. To the extent the trial court denied summary disposition on the basis that the case does not sound in medical malpractice, I would affirm.

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