UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

WILLIAM HOWARD, et al,
Plaintiffs,

v.

UBP BAY CITY, LLC, et al
Defendants
_____/

Case No.: 25-cv-10926
Hon. Mark A. Goldsmith

RESPONSE

**** CLASS ACTION ****

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RESPONSE IN PARTIAL OPPOSITION OF DEFENDANT BRIDGE COMPANY'S PREANSWER MOTION TO DISMISS

ISSUE(S) PRESENTED

I. Whether Plaintiffs plausibly allege breaches of the public trust, third-party beneficiary rights, express/implied contracts, and unjust enrichment arising from premature tolling and unreliable bridge access under the Concession Agreement.

II. Whether dismissal is warranted under Rule 12(b)(6) where Defendant's arguments repeatedly require resolving disputed facts about "Completion" and contradict the well-pleaded allegations.

III. Whether the MCPA claim should be dismissed without prejudice pending resolution of *Attorney General v. Eli Lilly & Co.*, No. 165961.

MOST CONTROLLING AUTHORITY

FRCP 12(b)(6)

BRIEF IN OPPOSITION

Defendant UBP BAY CITY, LLC ("BCBP") sold the drivers of Michigan's Bay region a promise. It averred, to those who rely on the Independence Bridge, that tolling would not begin until the bridge reached "Completion," i.e., open twenty-four hours a day for thirty uninterrupted days. It also told them that the transition to tolling at the promised time would be transparent, fair, and grounded in the very structure the City of Bay City, Michigan negotiated on their behalf regarding their bridge. Those promises were not abstract ambitions or marketing fluff. **Exhibit B at 2** ("Non-Bay City residents will begin paying tolls *upon construction completion* as follows…). There were specific commitments, made in writing, signed by bridge company and City officials in agreements, to induce reliance by the very people who would bear the cost of river crossing operations. *Then BCBP broke them.* **ECF No. 26, PageID.574**.

Plaintiffs and putative class—all bridge-using nonresidents of Bay City—were tolled before the bridge was at Completion. BCBP shut the bridge repeatedly—overnight, on weekdays, on weekends—during the very period it claimed counted as being "completed." It doubled the price of the unlimited-use plan and then eliminated the promised plan entirely. And it did all of this while assuring that everything was "on schedule" and "completed," even as

residents were stranded on the opposite side of the river and commuters were rerouted for days and weeks on end. Having pocketed the toll money, BCBP now insists it does not owe anything for those it illegally tolled—that its promises and representations were totally meaningless, that motorists are "incidental beneficiaries" and that even the most basic condition precedents can be ignored because the public lacks the power to object.

Legally appalling, BCBP's motion then asks this Court to do something that Rule 12(b)(6) simply does not allow. It invites the Court to disregard Plaintiffs' well-pleaded allegations, rewrite the Concession Agreement, assume facts contrary to the Complaint, and accept a narrative that flatly contradicts Plaintiffs' version of events. BCBP's motion does not merely dispute Plaintiffs' allegations—it disputes the facts outright. At this posture, Plaintiffs' allegations are binding, and a dismissal cannot be granted on facts BCBP insists are true but Plaintiffs directly deny. Most fundamentally, the motion depends on a premise the Complaint expressly rejects: that the Independence Bridge was "completed" under the Concession Agreement. A Rule 12(b)(6) motion cannot succeed where a defendant's argument requires the Court to disbelieve, ignore, or contradict the operative complaint. So with the correct posture, Plaintiffs' allegations must be accepted as true and BCBP's motion should be denied.

FACTS

Bay City Bridge Partners ("BCBP") arrived as a self-described partner—an entity that would protect a community asset, relieve a struggling municipality, and ensure that residents, commuters, and local businesses would not bear the crushing cost of infrastructure that was starting to fail. In return, BCBP would receive something extraordinary: a 75-year tolling concession on a bridge owned by the public. The arrangement carried the weight of trust. The City negotiated on behalf of its people[1]; BCBP accepted control over a public artery that thousands rely on each day. And throughout that process, one foundational representation echoed through billboards, public meetings, media releases, and the four corners of the Concession Agreement itself—that tolling would not begin until the Independence Bridge reached "Completion," a defined event.

"Completion" under Section 16 required BCBP to "cause the Independence Bridge to be continuously open and operational for use by the public… 24 hours a day… for thirty consecutive days." **ECF No. 1-1, PageID.28, ¶74**. Section 18 then made the obligation unmistakable: "no tolls shall be charged… until after the Completion has occurred." ***Id.*, ¶73.** And

[1] BCBP repeatedly frames the Independence Bridge as "owned by the City." That is inaccurate. See Argument, *Part I*, *infra*.

Plaintiffs aver "the Completion" pursuant to these sections "ha[ve] not yet been effectuated" at the time of filing the suit. ***Id.*, ¶75.**

These terms were the backbone of the assurances BCBP made to bridge users as the ones responsible to pay the tolls. They were repeated in public campaigns that promised affordable access, predictable pricing, and an unlimited-use plan designed to maintain fairness for ordinary drivers. Plaintiffs responded to those representations. They purchased transponders. They opened accounts. They crossed the bridge in reliance on the truth of what they had been told.

But the promise was breached.[2] BCBP began tolling before fulfilling "Completion." The Complaint outlines how the first two months of tolling had a pattern of nightly closures, multi-day shutdowns, and sustained periods in which the bridge existed only in name. On January 15, 2025, a mere fifteen days after tolling began, Independence Bridge was closed from 7 p.m. to 7 a.m. The next night, it closed again. Then came the five-day closure from January 27 through January 31. The pattern grew: February 3- 6, 11-14, 17-20, and 24-27—twenty-three closures across forty-four days, depriving the

[2] Throughout BCBP's brief, it repeatedly violates the Rule 12(b)(6) standards when making assertions directly opposite of what is pled in or inferred via the complaint. E.g. **ECF No. 20, PageID.365** ("On January 1, 2025, with Completion having occurred the previous year…"). Counsel of this caliber do not make such rookie errors unintentionally.

traveling public of access for more than half that period. Each scheduled closure resultingly reset the required 30-day clock and rendered 'Completion' unaccomplished. Remarkably, BCBP insists the bridge was "completed" even during the very period in which the City's public safety and traffic-alert systems were announcing closures of long duration. **ECF No. 1-1, PageID.26-27**. And as the Complaint further notes, more closures were already scheduled for early March when this lawsuit was first filed. In truth, the bridge was *not* complete and *not* open, yet was tolled anyway.

While the Independence Bridge remained unfinished, BCBP intentionally began requiring and capturing toll revenue on the strength of its pre-tolling advertisements. Those advertisements promised a $15 "unlimited" plan for cars, trucks, SUVs, and motorcycles with transponders. They encouraged residents to sign up early. Many did. **ECF No. 26, PageID.582** (even Judge Ludington "purchased an unlimited pass from BCBP"). They were displayed on billboards, online platforms, and printed materials throughout the Bay region. Then, with tolling underway, BCBP abruptly doubled the cost of the plan to $30 and announced it would eliminate the plan entirely by July. Customers who had relied on the unlimited option found the floor shifted beneath them—even as the bridge they were paying to cross was repeatedly closed. On February 3, 2025, BCBP announced its

price increase and the termination of the unlimited-use plan, notwithstanding the absence of a completed bridge and the contractual limitations on changing toll structures.

In short, the case is not about whether BCBP could ultimately begin collecting tolls – it demanded toll payments long before it legally could.

STANDARD OF REVIEW

This Court must deny any request for dismissal when the operative pleading contains sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A court reviewing a Rule 12(b)(6) motion must assume the truth of every factual allegation, draw all reasonable inferences in favor of the plaintiff, and may only dismiss when no set of facts consistent with the pleadings could entitle the plaintiff to relief. *Taylor v. City of Saginaw*, 922 F.3d 328, 331 (6th Cir. 2019). The Court may not consider competing facts asserted by a defendant; cannot weigh credibility; and cannot accept the defendant's interpretation or spin.

OBJECTION RE JURISDICTION

Before turning to the substance of BCBP's motion, Plaintiffs renew their objection that this Court lacks subject-matter jurisdiction to adjudicate any aspect of this motion. BCBP's removal was accomplished solely under

the Class Action Fairness Act. But CAFA's jurisdiction is neither plenary nor presumed. Congress imposed strict, fact-dependent exceptions—including the home-state, local-controversy, discretionary, and state-action exceptions—that divest a federal court of power when the dispute is fundamentally local in nature. **ECF No. 12**. That is precisely the case here: a toll dispute on a single municipal bridge, affecting local commuters, administered by a municipal concessionaire, and involving injuries occurring exclusively in Bay City. Plaintiffs have already demonstrated that jurisdiction turns on facts uniquely held by BCBP—namely, the citizenship, location, and tolling data of putative class members—and that without that discovery, Plaintiffs cannot carry the burden that CAFA places on them. ***Id.*** The Sixth Circuit has made clear that federal courts must address these jurisdictional issues *before* deciding any merits question. When a district court requires merits briefing while withholding or ignoring jurisdictional discovery necessary to test removal, it commits reversible error. *Cooper v Glen Oaks Healthcare LLC*, No. 22-5570, 2023 WL 165961 (6th Cir Jan. 12, 2023). Because jurisdiction remains unresolved, and because the necessary facts remain solely in BCBP's possession, Plaintiffs object to any resolution of BCBP's Rule 12(b)(6) arguments until the Court determines whether CAFA's exceptions require remand. 28 U.S.C. § 1447(c). A federal court must satisfy

its jurisdiction before it reaches any merits issue, including a Rule 12(b)(6) motion. Plaintiffs expressly continue objecting to subject-matter jurisdiction.

COUNTER ARGUMENT

Despite the Rule 12(b)(6) standard, BCBP now seeks dismissal of claims that arise from its own choices: charging tolls ***before*** the Indy reached "Completion;" shutting the bridge repeatedly during the period in which the Agreement required continuous operation; collecting unauthorized fees; and inducing motorists to rely on assurances that proved untrue. BCBP offers a scattershot of non-viable excuses to have this Court improperly dismiss this case. They fail and the motion must be denied.

I. The Public May Enforce the Breached Trust

Count I pleads a violation of public trust. The public trust doctrine is based on the fundamental principle that certain essential public resources must remain accessible and beneficial to the public. As outlined in Plaintiffs' response to the City of Bay's motion to dismiss, the public trust doctrine protects the "public right" of passage and access—what Michigan calls 'common highways.' *Glass v. Goeckel*, 473 Mich. 667, 696 (2005) ("we must protect the Great Lakes *as common highways*").[3] The Complaint alleges that

[3] The trust over public ways does not arise from riparian sovereignty (as with submerged lands) but from public-way law. Both doctrines simply

public infrastructure, including roads and bridges crossing large bodies of water like the Saginaw River, serves a similar critical function in ensuring public access and economic stability in a town split in half by a major river.[4] Such are considered a public right because the government "acquires no beneficial ownership" to public resources. See *Kalkaska v. Shell Oil Co*., 433 Mich. 348, 357 (1989). When land is devoted to public ways, the governmental unit holds control "only in trust to secure to the public those rights of a public nature that exist in public ways of that kind." *Detroit v Detroit City R Co*, 76 Mich 421, 425 (1889) (as quoted in *2000 Baum Family Trust v. Babel*, 485 Mich. 305, 325 (2010)).

Here, unreasonable tolling and its disproportionate impact violate the principles of public trust and fair access to essential infrastructure. The actions of BCBP undermine the public's traversing interest by restricting access, increasing costs, and creating hardships that conflict with principles of public infrastructure management. **ECF No. 34, PageID.627-631**.

BCBP seeks pre-answer dismissal of this claim because, in its view,

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share the same essential structure: public rights, public beneficiaries, and governmental control held *in trust* for those rights.

[4] Michigan's public-trust doctrine protects public rights of travel in public ways no less than access to waters; the City holds the bridge corridor in a travel-trust for the public, and BCBP—as delegatee—cannot exercise powers the City itself could not.

there is no private right of action under the public trust doctrine. That fails as a matter of law. See *Obrecht v. Nat'l Gypsum Co*., 361 Mich. 399 (1960) (private plaintiffs sued corporation impairing navigation, invoking public trust to protect navigation); *Thompson v. Enz*, 379 Mich. 667 (1967) (enjoining private development impairing public rights in navigable waters); *Bott v. Nat. Res. Comm'n*, 415 Mich. 45 (1982) (judicial oversight ensures no impairment of public trust in wetlands and waters). As beneficiaries, the public has standing to challenge breaches by the state (City) or its delegates. Case law like *Collins*, *Obrecht*, and *Bott* each involved private plaintiffs suing to enforce alleged breaches of the public trust. Nothing in Michigan law confines such actions to the State or its Attorney General. Public-trust suits have been pressed against private actors exercising delegated public authority. *Obrecht* was a suit against a private corporation; *Thompson* implicated private developers; *Bott* involved private entities. The public-trust doctrine protects the public, not government; it doesn't immunize violators from judicial review.

One final correction: BCBP's argument depends on a quiet but critical mischaracterization that the Independence Bridge is "owned by the City" in some ordinary proprietary sense, as if it were a private warehouse the City can lease, monetize, and encumber however it wishes. That is not how Michigan law treats public travel corridors. When land or improvements are

dedicated or used for streets, roads, or similar public ways, the municipality's interest is not a private estate held for its own benefit; it is a limited public estate held in trust for the traveling public. The Michigan Supreme Court has repeatedly recognized that statutory road dedications vest title "to be held in trust for the public," not as general-purpose municipal property. For example, in *Kalkaska*, our Supreme Court explained that streets dedicated under the plat acts vest, at most, a limited "base fee" or determinable fee in the governmental unit. 433 Mich. at 354-355. A public bridge is merely a continuation of the roadway from each bank as part of the same public-travel corridor governed by the same public-trust limitations.

Viewed against that backdrop, BCBP's role is not that of an ordinary private landlord operating a private facility. BCBP is a delegatee of the City's unique interest in public travel infrastructure. The City could not itself operate the bridge in a manner inconsistent with its public travel purpose or convert it into a private asset stripped of public protections; it therefore cannot confer any such power on a concessionaire. When the City contracted with BCBP to rehabilitate, operate, and toll the Independence Bridge, it did so as a contracting agent for a "public works" and a public travel corridor, not as a private owner disposing of a commercial asset. The Concession Agreement accordingly binds BCBP to the same structural limitation that binds the City:

the bridge exists for the public's use and benefit, and all tolling and operational authority must be exercised within that public-trust framework. BCBP cannot accept the benefit of stepping into the City's shoes for 75 years and then disclaim the public obligations that come with those shoes.

II. Plaintiffs Are Sufficiently Described Intended Beneficiaries

Count II alleges a breach of contract claim premised on a third-party beneficiary theory. **ECF No. 1-1, PageID.32-34**. A contract creates enforceable rights in a third party when the contract reveals an undertaking "directly to or for" that party. See MCL 600.1405. That said, the statute does not require naming individuals; it requires that the class of intended beneficiaries can be "sufficiently described." *Koenig v. South Haven*, 460 Mich. 667, 680 (1999). The contract must "reflect the express or implied intention of the parties to the contract to benefit the third party." *Ahmad v. Wells Fargo Bank, NA*, 861 F. Supp. 2d 818, 828 (E.D. Mich. 2012).

Here, the Concession Agreement fits squarely within this rule. Commuters are expressly and repeatedly described as the direct users the Concession Agreement was designed to protect—the key being identifiers like "bridge users" or "toll-paying motorists." Tellingly, tolling restrictions, completion requirements, 30-day continuous-access rule, public-comment limitations on pricing, and protections for regular bridge users are not aimed

at benefitting the City qua City. They exist to ensure fair, predictable, and continuous use ***by bridge users***. Plaintiffs, as expressly defined commuters and bridge users, fall squarely within that sufficiently described class. The benefits promised under the Concession Agreement run directly to them; the harms alleged arise directly from the breach of those promises.

BCBP insists bridge users who have been short-changed are merely incidental beneficiaries. That fails. The Concession Agreement is not a private commercial contract between two private entities allocating rights solely for their own personal advantages. It is a contract executed by a municipal government acting in its representative capacity, concerning a public bridge historically operated for regular users, and it contains obligations expressly directed toward protecting and benefiting the people who rely on that infrastructure every day. A specific class of persons—not the world at large—is meant to receive the benefit of the promises made by BCBP. The Concession Agreement allocates tolling rights, sets conditions for tolling commencement, mandates continuous access, requires specific pricing structures for particular groups of users, and establishes operational duties all aimed at ensuring predictable, affordable, and safe travel across a public bridge. These undertakings exist for one reason: to protect and serve the "sufficiently described" group of people who cross the Independence

Bridge. The Concession Agreement's text clearly reinforces this purpose at every turn.[5] **ECF No. 1-1, PageID.42-213**. Plaintiffs, as bridge users and members of the very class the Agreement was designed to safeguard, fall squarely within the beneficiary category recognized under MCL 600.1405 and *Koenig*.

Accordingly, the Complaint, when read together with the Concession Agreement, plausibly alleges that Plaintiffs are intended third-party beneficiaries with enforceable rights under the Agreement. **ECF No. 1-1, PageID.33, ¶14.** At the pleading stage, nothing more is required.

III. A Different Contract

Count III alleges a breach of contract when BCBP "induc[ed] Plaintiffs and similarly situated individuals to purchase the pass under the reasonable expectation that they would receive unlimited crossings at a fixed cost" and there was "fail[ure] to deliver the promised benefits of the unlimited pass as

[5] It requires BCBP to complete the rehabilitation in a manner that ensures the public's uninterrupted use; it prohibits tolling until completion occurs; it mandates certain tolling practices designed to protect residents and regular users; and it constrains the concessionaire's pricing decisions through public-comment and city-approval mechanisms. These provisions are not aimed at conferring a benefit on the City as a private landlord—they are promises made to safeguard the travelling public from precisely the harms alleged in the Complaint. They mirror the promises repeatedly made in BCBP's own public-facing marketing campaign, which touted affordability, accessibility, and fairness as the cornerstones of the transition to tolling.

well as improperly imposing tolls in direct violation of the Concession and Lease Agreement prior to completion of the Independence Bridge."

Count III's contractual breach differs from Count II's contractual breach. Count III alleges a direct contract exists between Plaintiffs and BCBP when the former paid for monthly passes. **ECF No. 26, PageID.582.** "By virtue of this offer and Plaintiffs' acceptance, an express contract was formed between BCBP and its customers." **ECF No. 1-1, PageID.35, ¶124**. "BCBP's conduct constitutes a material breach of the express contract, as it failed to deliver the promised benefits of the unlimited pass[6] as well as improperly imposing tolls in direct violation of the Concession and Lease Agreement prior to completion of the Independence Bridge." ***Id.*, ¶128.**

BCBP misstates the crux of the claim when it frames it as a breach of an advertisement. Plaintiffs never allege that a slogan ***alone*** created a contract or was a contract. They allege that BCBP made a concrete offer—a monthly unlimited-use pass at a fixed price—Plaintiffs accepted that offer by purchasing the pass, and BCBP breached the bargain by doubling the price, eliminating the plan, and charging tolls during periods when the bridge was not contractually "complete." BCBP advertised a specific plan within the

[6] One day after this lawsuit was filed in state court, BCBP suspended its actions. See https://radio.wcmu.org/local-regional-news/2025-03-04/bay-city-bridge-partners-suspend-toll-increase.

framework under the Concession Agreement with defined pricing and features; Plaintiffs accepted; and BCBP later withdrew the essential terms. That sounds in breach of contract, i.e., the offer was the unlimited-use subscription for a fixed monthly price; the acceptance was Plaintiffs' purchase; the consideration was the fee paid; the breach was restricting access. The damages flow directly from the breach: Plaintiffs paid for access they did not receive.

Where BCBP goes astray is forgetting that the context in which the offer was made cannot be severed from the offer itself. Simply put, it cannot offer a pass while simultaneously detaching the pass from the very operational conditions it invoked to sell it. Michigan courts recognize that circumstances forming the framework of a transaction may be treated as incorporated into the contract where the parties' relationship depends on them. *Featherston v. Steinhoff,* 226 Mich. App. 584, 589 (1997) ("Where the parties do not explicitly manifest their intent to contract by words, their intent may be gathered by implication from their conduct, language, and other circumstances attending the transaction."). BCBP's unlimited-pass offer was made in a contextual environment it actively invoked: tolling would begin only after "Completion," defined as a continuous 30-day period of 24/7 operation. The Completion requirement was not an abstract municipal document; it was

part of the operational baseline for the product BCBP was selling. Plaintiffs reasonably understood their pass-purchase to include unlimited access to a completed (and reliably open) bridge, and Michigan law permits them to enforce those terms.

Michigan contract law also prohibits a seller from inducing a purchase with specific promises and then withdrawing those promises after acceptance. Under Michigan's basic formation rule—offer, acceptance, consideration, *Kamalnath v. Mercy Mem. Hosp.*, 194 Mich. App. 543, 548 (1992), Plaintiffs have stated a straightforward breach of contract claim. At the Rule 12(b)(6) stage, those allegations must be accepted as true, and competing factual narratives about what BCBP "really meant" cannot support dismissal.[7] Count III easily clears the plausibility threshold and should proceed.

[7] BCBP gestures toward a PDF recently posted on its website purporting to contain "Terms & Conditions" for a "BC Pass." That document cannot be considered. E.g. *McCarthy v. Dun & Bradstreet Corp*., 482 F.3d 184, 191 (2d Cir. 2007). And even if considered, it cannot be accomplished via a Rule 12(b)(6) motion. If "matters outside the pleadings are presented to *and not excluded by the Court*, the motion must be treated as one for summary judgment under Rule 56 and Plaintiff "must be given a reasonable opportunity to present all the material that is pertinent to the motion." *Id.* The Sixth Circuit has explained that Rule 12(d)'s text "give[s] district courts just two options — either "*expressly* exclude outside-the-complaint materials or convert the motion to one for summary judgment." *Cotterman v City of Cincinnati*, 2023 U.S. App. LEXIS 28781, at *11-12 (6th Cir. Oct. 30, 2023) (emphasis in original). And even if the Court ignored *Cotterman*, this web-

IV. An Implied Contract Stands, the Statute-of-Frauds Defense Does Not

Count IV alleges an implied contract. Michigan law does not confine contracts to written instruments; it also recognizes implied-in-fact contracts (actionable when breached) when the conduct of the parties demonstrates a mutual understanding, reasonable reliance, and the existence of enforceable obligations. "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 Mich. v. Michigan*, 303 Mich. App. 651, 660 (2014). Michigan enforces such contracts where, as here, the relationship between the parties includes reasonable dual expectations.[8] An implied-in-fact contract may be inferred from conduct even absent formal words of agreement; courts may look to conduct, language, and other circumstances. *Wrench LLC v. Taco Bell Corp.,* 51 F. Supp. 2d 840, 847 (W.D. Mich. 1999) (citing *Miller v. Stevens*, 224 Mich. 626, 632 (1923)).

based PDF establishes nothing at this stage. It is undated as to when it first existed, contains no indication it was ever provided to Plaintiffs before or at the time of purchase, and offers no evidence that any consumer—including Plaintiffs—assented to it. Post-hoc website materials cannot rewrite the terms of the contract actually formed.

[8] This is not to be confused with unjust enrichment, which is not a contract at all but an equitable restitution theory.

Plaintiffs' Complaint allege that BCBP offered a tolling system—and, for many, an unlimited-use plan—in exchange for bridge access of a minimum quality. That offer carried an implicit but unmistakable term: continuous, reliable access to the Independence Bridge, twenty-four hours a day, seven days a week. BCBP's tolling program was not marketed as discretionary, intermittent, or subject to ongoing regular shutdowns; it was offered as an alternative means of funding the bridge's operation, with the clear expectation that those paying the tolls would receive uninterrupted access, as BCBP repeatedly represented and promised. Plaintiffs allege they accepted that offer and paid for it, thereby forming an implied-in-fact contract. BCBP is alleged to have breached that implied agreement by repeatedly closing the bridge during the very period when tolls were being charged, including more than twenty closures in the first six weeks of tolling. At the Rule 12(b)(6) stage, those allegations are more than enough. Plaintiffs paid for access to a functioning, continuously open bridge. That was the essence of the bargain—both as BCBP marketed it and as the public reasonably understood it.

BCBP's odd counter position—that customers paid simply for the right to encounter closures, shutdowns, and nighttime blockages while tolls continued to accrue—defies the understanding any reasonable commuter

would have had at the time of payment. Michigan law does not allow a service provider to accept payment while unilaterally redefining the service being purchased. A business that invites reliance, receives funds, and then fails to deliver the core of what was promised is answerable under an implied-contract theory.

Count IV thusly states a valid claim under settled Michigan law. Plaintiffs allege an implied-in-fact contract formed through payment and performance; they allege BCBP breached that contract by failing to provide continuous access; and they allege resulting harm. No more is required at the pleading stage.

As an alternative, BCBP argues that there has been a failure of the statute-of-frauds. BCBP is wrong. Michigan's statute-of-frauds applies only to agreements that by their terms cannot be performed within one year. MCL 566.132(1). The Michigan Supreme Court has been clear: the statute-of-frauds defense bars only contracts that are "*incapable of being performed within a year*," not those that simply *may* extend beyond a year or that the parties *expected* to continue indefinitely. *Dumas v. Auto Club Ins. Ass'n*, 437 Mich. 521, 533 (1991). "The rule is that if, by any possibility, it is capable of being completed within a year, it is not within the statute." *Id.* (quoting *Smalley v. Mitchell*, 110 Mich, 650, 652 (1896)). The inquiry is functional, not

formal: if full performance *could* have occurred within a year, the statute is no obstacle. If performance is possible within a year, the statute does not apply. *Opdyke Inv. Co. v. Norris Grain Co.*, 413 Mich. 354, 359-360 (1982).

The implied-in-fact contract alleged here easily satisfies that rule of because it is capable of being completed within a year. Plaintiffs allege that BCBP accepted payment in exchange for providing continuous, reliable bridge access. Nothing about that undertaking makes performance within a year impossible. Indeed, BCBP began performing immediately by opening accounts, charging tolls, and providing (albeit inconsistently) access to the bridge on a ***daily*** basis. Plaintiffs' claim concerns the ongoing exchange of money for as-needed bridge access—nothing more. Each day's performance could be completed within a single portion of each day; therefore the agreement is fully capable of being performed within one year.[9]

BCBP's argument collapses under that yardstick. Plaintiffs' implied contract required BCBP to do something simple and immediate: provide on-demand access in exchange for each toll collected (whether per crossing or per month). That obligation was not fixed to any specific duration, much less

[9] Michigan courts have consistently held that implied service contracts, subscription arrangements, and usage-based agreements fall outside the statute-of-frauds precisely because they are performable on a rolling basis. *Dumas*, 437 Mich. at 530.

a duration exceeding one year. It was performable the next day, the next week, or the next month. Michigan law squarely rejects stretching the statute-of-frauds to defeat short-term, transaction-based contracts. The implied-contract claim arises from the conduct of the parties—an intra-year exchange of payment for access—and that type of contract is precisely the kind that Michigan courts enforce without regard to the statute. As such, BCBP's argument fails.

V. Unjust Enrichment Is Properly Pleaded

Under Michigan law, a plaintiff states a claim for unjust enrichment by alleging that the defendant received a benefit and that it would be inequitable for the defendant to retain that benefit without paying for it. Michigan courts further hold that unjust enrichment is available when no express contract governs the subject matter of the dispute. The leading case law in Michigan is *Morris Pumps v. Centerline Piping, Inc.*, 273 Mich. App. 187 (2006), which provides the controlling framework: a contract implied-in-law—commonly referred to as unjust enrichment or quasi-contract—is an equitable remedy that may be imposed where a defendant has obtained and retained a benefit under circumstances where equity requires restitution. *Morris Pumps* emphasizes that such a claim is precluded only when an express contract between the same parties covers the same subject matter.

Here, BCBP repeatedly proclaims that the relationship between it and Plaintiffs did not arise from any express contract between them. Thus, its motion alleging no plausible claim therefore fails at the threshold. Plaintiffs allege that they conferred a measurable benefit on Defendant, that Defendant knowingly accepted and retained that benefit, and that equity requires restitution because the retention of that benefit—without compensation and in violation of Plaintiffs' reasonable expectations—would be unjust. **ECF No. 1-1, PageID.37, ¶¶44-52.** These pleaded facts fit squarely within the *Morris Pumps* framework and easily withstand dismissal.

Moreover, even if BCBP believes that some form of contract might eventually be established, dismissal is still improper because unjust enrichment may be pled in the alternative when the existence, scope, or applicability of a contract is disputed. Alternative pleading exists precisely to address situations like this one, where a defendant denies contractual obligations altogether but simultaneously seeks to bar equitable remedies. See *Jordan v. City of Cleveland*, 464 F.3d 584, 604 (6th Cir. 2006) ("Good lawyering as well as ethical compliance often requires lawyers to plead in the alternative"). At this stage, Plaintiffs are entitled to pursue unjust enrichment unless and until BCBP concedes the existence of an express contract that governs the exact subject of the dispute—something it has not done.

Because *Morris Pumps* confirms that unjust enrichment remains available absent a governing express contract, and because Plaintiffs have adequately pled the benefit, the retention, and the inequity via its complaint, the unjust-enrichment claim should not be dismissed.

VI. The MCPA Claim Might Live On (Soon)

BCBP argues that the MCPA claim fails under *Smith v. Globe Life Ins. Co.*, 460 Mich. 446 (1999), *Liss v. Lewiston-Richards, Inc.*, 478 Mich. 203 (2007), and M.C.L. § 455.904(1). Plaintiffs agree that such is the current law and requires dismissal without prejudice. However, the continued viability of the *Smith* and *Liss* decisions to bar to these types of MCPA claims is currently before the Michigan Supreme Court. **Exhibit A**. It is Plaintiffs' position that *Smith* and *Liss* and its interpretation of M.C.L. § 455.904 were wrongly decided. It may be overturned soon. ***Id.*** For purposes of this case, the issue has been raised for preservation purposes. However, BCBP is correct that dismissal is *currently* required. That may change during the pendency of this case.

VII. Injunctive Relief Remains but Cannot Be a Standalone Claim

Finally, Count VII pleads for injunctive relief for violations of Counts I through VI. BCBP asserts that demanding such relief as a standalone count is improperly pled. It is right. *HPIL Holding, Inc. v. Zhang*, 734 F. Supp. 3d

664, 689 (E.D. Mich. 2024). Dismissal of Count VII is appropriate, but the ultimate opportunity to provide such relief remains fully intact. FRCP 54(c).

CONCLUSION

This case does not challenge the legality of tolling; it challenges premature tolling in violation of legal and/or contractual obligations. At this early stage, the Complaint's well-pleaded allegations—accepted as true and construed in Plaintiffs' favor—plausibly state viable claims for breach of the public trust, third-party beneficiary breach of contract, express and implied contract breaches, and unjust enrichment. BCBP's motion, by contrast, impermissibly invites the Court to resolve factual disputes, rewrite the Concession Agreement, and disregard (without accountability) the very promises the bridge company made to prematurely pocket tolls payments.

RELIEF REQUESTED

WHEREFORE, the Court is requested to deny BCBP's motion.

Date: December 4, 2025

RESPECTFULLY SUBMITTED:

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LOCAL RULE CERTIFICATION

I, Philip L. Ellison, certify that this document complies with Local Rule 5.1(a), including: double-spaced (except for quoted materials and footnotes); at least one-inch margins on the top, sides, and bottom; consecutive page numbering; and type size of all text and footnotes that is no smaller than 10-1/2 characters per inch (for non-proportional fonts) or 14 point (for proportional fonts). I also certify that it is the appropriate length. Local Rule 7.1(d)(3).

CERTIFICATE OF SERVICE

I, the undersigned attorney of record, hereby certify that on the date stated below, I electronically filed the foregoing with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel or parties of record.

Date: December 4, 2025

RESPECTFULLY SUBMITTED:

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INDEX OF EXHIBITS

Order

Michig

April 4, 2025

165961

ATTORNEY GENERAL,
Plaintiff-Appellant,

v

SC: 165961
COA: 362272
Ingham CC: 22-000058-CZ

ELI LILLY AND COMPANY,
Defendant-Appellee.

_____/

By order of January 24, 2025, the parties were directed to file supplemental briefs. On order of the Court, the supplemental briefs having been received, the application for leave to appeal the June 22, 2023 judgment of the Court of Appeals is again considered, and it is GRANTED. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1). The parties shall address: (1) whether the plaintiff adequately pled a claim that the defendant violated the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*.; (2) whether it is necessary for the plaintiff to adequately plead a violation of the MCPA for a court to determine whether MCL 445.904(1)(a), an exemption to the MCPA, applies; (3) whether this Court's decisions in *Smith v Globe Life Ins Co*, 460 Mich 446 (1999), and *Liss v Lewiston-Richards, Inc*, 478 Mich 203 (2007), correctly interpreted MCL 445.904(1)(a); and (4) if they were incorrectly decided, whether they should nonetheless be retained under principles of stare decisis, *Robinson v City of Detroit*, 462 Mich 439, 463-468 (2000).

Amici who have appeared in this case are invited to file supplemental briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

THOMAS, J. Although I intend to participate in the forthcoming oral argument, I did not participate in the entry of this order because the Court considered the leave application before I assumed office.

t0401

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 4, 2025

Clerk

BAY CITY BRIDGE PARTNERS

INFORMATION SHEET October 2020

BACKGROUND

United Bridge Partners, doing business as "Bay City Bridge Partners" (BCBP), has entered into an acquisition and development agreement with the City of Bay City, MI. The agreement is the first step to convey the Liberty and Independence bridges to BCBP:

- Meanwhile, BCBP has assumed financial responsibility for operations & maintenance (O&M) of both bridges:
  - Using existing bridge tenders and local maintenance providers for seamless transition.
  - Initiating bascule O&M best practices to enhance reliability.
- BCBP provides 100% of project financing with no cost passed on to the City.
- This relieves Bay City of the financial burden of operating & maintaining both bridges, allowing reallocation of approximately $700,000 currently budgeted annually toward the aging bridges to other city needs.
- BCBP paid Bay City $2 million, the first installment of a larger $5 million development fee for both bridges.
- A second, $3 million payment will occur after development details are finalized and the property rights are transferred to BCBP.

BCBP'S PLANS FOR THE BRIDGES

- Rehabilitation and modernization of Liberty Bridge:
  - Rehabilitate footings and foundation, substructure, superstructure, bridge. deck/ roadway connections, scour protection and bascule electrical and mechanical systems.
  - Add bridge performance monitoring.
  - Upgrade warning gates and operator house.
  - Widen existing bike/pedestrian path.
  - Integrate architectural handrail and decorative lighting.
  - Rehabilitate tender house.
- Replacement of Independence Bridge:
  - A new 4-lane bridge with pedestrian and bike path will be built east of the existing bridge.
  - Existing bridge will remain in service until the new bridge is opened to traffic and then demolished.
  - Traffic will flow throughout the construction process.
  - Slightly taller to reduce the number of times the drawbridge has to be lifted for smaller watercraft.
  - 75-year minimum useful life.
- Before construction can begin, a design and permitting phase may take up a year or more.
- Overall construction forecast is two construction seasons.
- Goal to complete both structures in the most economical and shortest time frame with minimal impact to Bay City residents and business owners – projected completion is 2023.
- Plans call for sequencing and phasing the work to keep bridges open during construction.
- BCBP is committed to using local union contractors and workers, local material and equipment suppliers, local engineering/technical consultants and professional services.

ABOUT TOLLING

The goal is to get drivers to their destinations time efficiently and without the congestion of a traditional toll plaza, therefore:

- Liberty and Independence bridges will have "open road tolling" – no toll booths.
- Drivers install a transponder in vehicle and register it to a prepaid account or credit card. Electronic equipment stationed at one end of the bridge reads the transponder and records the trip – either deducting toll from prepaid amount or charging debit/credit card for payment.
- Transponders can vary from a small sticker to a small box mounted on a vehicle's windshield.
- The toll system will be designed to be compatible with as many other toll systems as possible, including EZ-Pass and the new MacPass stickers being rolled out for the Mackinac Bridge.
- No cost for the actual transponder. Users will create an account and pre-pay or pre-load for tolls or link to a credit card for payment.

BAY CITY BRIDGE PARTNERS

- There will be zero prepayment required to obtain a transponder for Bay City residents who meet low-income criteria.
- When a vehicle travels the bridge without a valid collection device, cameras will read its license plate number and invoice the vehicle's registered owner by mail.
- BCBP will offer community outreach events for customers to pick-up transponders and learn more about their use.
- A local BCBP office will provide customers with the opportunity to conduct business face-to-face with knowledgeable BCBP staff.

COMMUNITY OUTREACH

Before, during and after the renovation of Liberty Bridge and replacement of Independence Bridge, BCBP will conduct a robust public outreach program similar to what we have in place on our other projects around the nation.

BCBP will hire a local general manager and staff who live and work within the community and operate the BCBP office in the downtown business district east of the Saginaw River (location to be determined).

BCBP TEAM

To accomplish its goals, BCBP has assembled a team of specialists in finance, design, construction, and O&M with extensive bascule bridge experience:

- United Bridge Partners (finance, O&M)
- Kenny-Kraemer JV (construction)
- TranSystems (environmental permitting and engineering)
- Stafford Bandlow (movable bridge design)
- Flint-based Rowe Professional Services Company (design)
- Saginaw-based The Barckholtz Group (public information)

TOLL STRUCTURE

- Will not take affect for Bay City residents until 5 years after construction is complete. When they do take affect:
  - $15 per month for unlimited crossings for cars, trucks, SUVs, motorcycles with transponders. OR
  - $0.50 per crossing for Bay City residents with a transponder.
- No tolls ever for Bay City residents who meet low-income criteria, emergency vehicles/first responders, city-owned vehicles, school buses.
- Non-Bay City residents will begin paying tolls upon construction completion as follows:
  - $15 per month for unlimited crossings for cars, trucks, SUVs, motorcycles with transponders. OR
  - $2 per crossing for non-Bay City residents with a transponder.
  - Pay by Plate for those without a transponder.
- There is no cost to walk or bicycle across the bridges.