STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

THEORIA MEDICAL, PLLC,

Plaintiff,

Case No. 21-185819-CB

v.

Hon. Martha D. Anderson

VICTORIA VOROS,

Defendant.
_____/

OPINION AND ORDER GRANTING IN PART & DENYING IN PART
DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

This matter is before the Court on Defendant's Motion for Summary Disposition under MCR 2.116(C)(5) and (8). The Court, having reviewed the parties' respective submissions and pleadings, dispenses with oral argument under MCR 2.119(E)(3).

I.

Plaintiff Theoria Medical, PLLC ("Theoria") provides medical services at post-acute care facilities in Michigan and other states. Patient services are provided through a telehealth platform and traditional in-person visits. Theoria uses nurse practitioners and physician assistants to perform duties such as evaluating the medical needs of patients, providing medical care to patients and preparing medical records.

In May 2020, Defendant Victoria Voros ("Voros") was hired by Theoria to work as a Physician's Assistant ("PA"). The parties entered into a "Medical Provider Employment Agreement" (the "Employment Agreement") with a term of two years, effective June 1, 2020.[1] Pursuant to the Employment Agreement:

> This Agreement and Medical Provider's employment hereunder shall be terminated during the first two years upon the breach of any of the provisions herein without the necessity of delivery of any notice of termination or any other action. Thereafter, either party may terminate this Agreement upon giving six (6) months written notice to the other party.[2]

[1] First Amended Complaint, Exh A, Employment Agreement, Art IV § 1.
[2] *Id.* Art IV § 2.

On or about October 28, 2020, Plaintiff reimbursed Defendant for about $1,000.00 in costs associated Defendant's PA license in Michigan and Ohio.[3] On or around November 2, 2020, Defendant informed Plaintiff that she was leaving her employment effective November 16, 2020.[4] On November 16, 2020, Defendant officially ended her employment with Plaintiff.[5] According to Plaintiff, as of the date of the filing of the Complaint, it has been unable to hire a replacement for Defendant.[6] Plaintiff's First Amended Complaint alleges Breach of Contract against Defendant based upon her failure to give six months written notice as required by the Employment Agreement (Count I). Plaintiff also alleges claims of Business Defamation (Count II) and Fraud in the Inducement (Count III). Defendant now moves for summary disposition under MCR 2.116(C)(5) and (C)(8).

II.

Summary disposition is appropriate under MCR 2.116(C)(5) when "[t]he party asserting the claim lacks the legal capacity to sue." In reviewing a (C)(5) motion, a court considers the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties. *Wortelboer v Benzie Co,* 212 Mich App 208, 213; 537 NW2d 603 (1995). Whether a party has the legal capacity to sue is a question of law. *Id.*

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). "[A]ll well-pleaded factual allegations in a complaint are taken as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations." *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). "The motion must be granted if no factual development could justify the [plaintiff's] claim for relief." *Spiek v Michigan Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). In an action based on a written agreement, it is generally necessary to attach a copy of the agreement to the complaint. MCR 2.113(C)(1). A written agreement attached to a complaint "becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8)." *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007). See also MCR 2.113(C)(2).

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[3] First Amended Complaint, ¶¶ 30-32.
[4] *Id.* at ¶ 37.
[5] *Id.* at ¶ 42.
[6] *Id.* at ¶ 51.

III.

Count I – Breach of Contract

To support a claim for breach of contract a plaintiff must establish (1) the existence of a valid contract, (2) defendant breached the contract, and (3) the breach resulted in damages to the party claiming breach. *Bank of America, NA v First Amer Title Ins Co*, 499 Mich 74, 100; 878 NW2d 816 (2016). The issue before the Court is the third element – damages.

In a claim based upon breach of contract only damages that are the "direct, natural, and proximate result" of the breach may be recovered. *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 550; 904 NW2d 192 (2017). Damages "must not be conjectural or speculative in their nature, or dependent on the chances of business or other contingencies. . . ." *Doe v Henry Ford Health Sys*, 308 Mich App 592, 602; 865 NW2d 915 (2014) (quotation marks and citation omitted).

Defendant argues that the breach of contract claim should be dismissed because Plaintiff cannot sue Defendant on behalf of patients who may have been damaged by Defendant's breach of the Employment Agreement and because Plaintiff has failed to plead that it was damaged by any breach of the Employment Agreement.

With respect to the first argument, Defendant states that Plaintiff does not have standing to sue because it is not a real party in interest regarding damages suffered by third parties.[7] Defendant bases this argument on certain allegations in the First Amended Complaint. For example, the First Amended Complaint alleges that "Defendant's breach has caused the patients Defendant abandoned substantial harm and has caused Theoria to suffer substantial damages."[8] Additionally, it is alleged that "Voros breached her Employment Agreement when she failed to provide the requisite notice before leaving her position and abandoning patients under her care."[9]

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[7] To the extent Defendant's motion under MCR 2.116(C)(5) is based upon this lack of standing argument, it is denied. As previously stated, a dispositive motion under MCR 2.116(C)(5) is appropriate where a party lacks the legal capacity to sue. "[T]he doctrine of standing is distinct from the capacity to sue, although the concepts are frequently conflated by parties." *Le Gassick v University of Mich Regents*, 330 Mich App 487, 494 n 2; 948 NW2d 452 (2019) citing *Flint Cold Storage v Dep't of Treasury*, 285 Mich App 483, 502; 776 NW2d 387 (2009). A motion for summary disposition premised on the doctrine of standing may be proper pursuant to MCR 2.116(C)(8) or (10). *Id.* Here, in addition to seeking summary disposition under MCR 2.116(C)(5), Defendant seeks summary disposition under MCR 2.116(C)(8), and this Court will review the motion on that ground.

[8] First Amended Complaint, ¶ 52.

[9] *Id.* at ¶ 58.

These allegations do not support the conclusion that Plaintiff seeks to recover for damages incurred by others. In fact, the First Amended Complaint alleges, regarding the breach of contract claim, that:

> Defendant's refusal to honor her obligations under the Agreement has caused substantial damages to Theoria including, but not limited to, unanticipated and otherwise unnecessary expedited recruitment costs, licensing fees, ancillary fees and premiums associated with replacement medical care coverage of Voros' abandoned shifts and patients.[10]

"A litigant has standing whenever there is a legal cause of action." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). As stated above, a party asserting a cause of action for breach of contract must establish that there was a breach resulting in damages to the party claiming breach. See *Bank of America, NA*, 499 Mich at 100.

Accepting the well-pleaded factual allegations in the Complaint as true, as required when considering a motion under MCR 2.116(C)(8), the Court finds Plaintiff sufficiently alleged it suffered damages as a result of the breach of the Employment Agreement and, thus, the Court denies Defendant's motion under MCR 2.116(C)(8) based upon lack of standing.

Defendant also argues summary disposition is proper because the damages alleged are unrecoverable because they do not arise naturally from Defendant providing two weeks' notice and were never contemplated by the parties at the time of contract. Defendant asserts that the damages alleged are in fact business expenses incurred in the normal operation of the business and the Complaint fails to include any specifics regarding lost shifts, the cost of recruiting a replacement for Defendant, and other costs.

As noted above, only damages that are the "direct, natural, and proximate result" of the breach are compensable in a breach of contract claim. *Van Buren Charter Twp v Visteon Corp*, 319 Mich App at 550. In this case, Plaintiff has alleged that it suffered damages, including recruitment costs and replacement costs, due to Defendant's breach of the Employment Agreement.[11] The question of whether damages were actually incurred, and if so, the amount of such damages, are not issues to be determined when reviewing a (C)(8) motion. See *McManamon v Redford Twp*, 273 Mich App 131, 141; 730 NW2d 757 (2006).

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[10] *Id.* at ¶ 59.

[11] Defendant fails to cite any authority for the assertion that certain damages "are not identified as recoverable in the parties' written contract and are thus not recoverable." Def's Motion, p 8.

However, the Court does agree with Defendant that, to the extent Plaintiff seeks to recover amounts it expended to reimburse Defendant for fees and/or expense associated with Defendant's professional license(s), those amounts are not recoverable as a matter of law. These amounts were paid in conjunction with Plaintiff's employment and prior to the alleged breach of contract. Plaintiff's First Amended Complaint is devoid of any allegation that the payment of the licensing fees and/or expenses was a "direct, natural, and proximate result" of Defendant's failure to give six months' notice to Plaintiff.

Consequently, the Court denies Defendant's motion under MCR 2.116(C)(5), grants Defendant's motion under MCR 2.116(C)(8) as to Count I regarding any licensing fees paid before November 16, 2020 (i.e., the date Defendant terminated her employment with Plaintiff), and denies Defendant's motion under MCR 2.116(C)(8) in all other respects.

Count II – Business Defamation

> To support a claim for defamation, a plaintiff must prove the following:
>
> (1) A false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of a special harm caused by the publication (defamation per quod). [*Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 726; 613 NW2d 378 (2000).]

"These elements must be specifically pleaded, including the allegations with respect to the defamatory words, the connection between the plaintiff and the defamatory words, and the publication of the alleged defamatory words." *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74, 77; 480 NW2d 297 (1991).

With respect to Count II, Plaintiff's First Amended Complaint alleges:

> On or around November 2-8, 2020, Defendant told Jennifer Underwood that Plaintiff's practices were "unsafe" for patients and that the Plaintiff did not provide "quality care."
>
> On or before November 16, 2020, Defendant told others that Plaintiff engaged "strange and likely improper approaches to patient care" and accused Plaintiff of unethical and unlawful behavior.[12]

[12] First Amended Complaint, ¶¶ 61-62.

Defendant argues that the defamation claim fails because Plaintiff does not allege defamatory statements made to a third party and fails to plead defamation with specificity.

First, the Court finds that, to the extent the defamation claim is based upon the allegation that Defendant made a defamatory statement to Jennifer Underwood, it fails as a matter of law. In addition to the above-cited allegation, the First Amended Complaint alleges:

> On or around November 1 or 2, 2020, approximately four days after having her licensure fee reimbursed by Theoria, Defendant informed Jennifer Underwood that she was going to need time off in order to attend to a medical need or procedure.
>
> Ms. Underwood in turn, began making the appropriate arrangements so that Voros could attend to her purported medical concern.
>
> On or around November 2, 2020, after Ms. Underwood had informed Voros of her eligibility for medical leave, Voros abruptly announced that she was instead leaving Theoria's employ effective November 16, 2020.
>
> On or around November 2, 2020, Ms. Underwood reminded Voros of her contractual notice obligations to Theoria. In response, Voros indicated to Ms. Underwood that she was aware of the binding notice obligations and expressed her view that they were irrelevant since Defendant did not believe the notice requirement was "enforceable" and therefore, she had no intention of adhering to her contractual notice commitment.
>
> On or around November 2-8, 2020, Voros further disparaged Theoria when she announced to Ms. Underwood on the phone that Plaintiff's practices were "unsafe" for patients and that the Plaintiff did not provide "quality care."
>
> On information and belief, Voros repeated this sentiment to others, however due to Defendant's failure to respond to Plaintiff after November 8, 2020 (other than through counsel) Plaintiff's efforts to discover the extent of Defendant's comments were purposefully frustrated.[13]

Defendant asserts that Ms. Underwood is Plaintiff's employee and any alleged statements to her cannot be the basis for a defamation claim as they were not made to a third party. Although Plaintiff's First Amended Complaint does not identify Ms. Underwood as its employee, it is undisputed by Plaintiff. Moreover, a reasonable inference from the above-quoted paragraphs of the First Amended Complaint is that Ms. Underwood was acting in

[13] First Amended Complaint, ¶¶ 35-40.

some representative capacity on Plaintiff's behalf as to Defendant's employment. Thus, publication to Ms. Underwood equates to publication to Plaintiff, and thus, the requirement of publication to a third party has not been satisfied. See *Peterson Fin, LLC v Twin Creeks, LLC*, 318 Mich App 48, 53; 896 NW2d 63 (2016) (publication to a plaintiff's agent is equivalent to publication to the plaintiff itself.) See also *McMillian v Nowicki*, unpublished per curiam opinion of the Court of Appeals, issued March 22, 2005 (Docket No. 253917), p 2.

The defamation claim also fails to the extent it is based on statements made on or around November 16, 2020 where "Defendant told others that Plaintiff engaged 'strange and likely improper approaches to patient care' and accused Plaintiff of unethical and unlawful behavior." This allegation fails to plead with specificity the publication as it does not identify the person(s) to whom the statement was made. See *Gonyea,* 192 Mich App at 77.

Finally, if the allegation refers or relates to a letter received by Plaintiff from Defendant's attorney, it is not actionable as it is alleged only to have been sent to Plaintiff, establishing no publication to a third party.[14] Moreover, if Plaintiff is implying that the attorney's letter was based on statements made by Defendant to the attorney, the claim fails as well. Statements made by Defendant to her counsel are protected by the attorney-client privilege. See *Augustine v Allstate Ins Co*, 292 Mich App 408, 420; 807 NW2d 7 (2011).

Based upon the foregoing, the Court concludes that Plaintiff failed to state a claim for defamation compelling summary disposition as to Count II under MCR 2.116(C)(8).[15]

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[14] See First Amended Complaint, ¶ 44.

[15] Whenever the Court is inclined to grant a (C)(8) motion, the court rules require that a plaintiff be provided an opportunity to amend to properly allege sufficient facts to support its claim if justice so requires. MCR 2.116(I)(5). Plaintiff seeks leave to amend its First Amended Complaint claiming that other persons to whom Defendant made defamatory statements will be uncovered during discovery. Pl's Response, p 8. With respect to any alleged statements made by Defendant to Ms. Underwood or to Defendant's counsel, the Court finds that any amendment relative thereto would be futile for the reasons set forth herein. See *Gonyea v Motor Parts Fed Credit Union*, 152 Mich App 74, 78; 480 NW2d 297 (1991). The Court also denies Plaintiff's request to amend because additional third parties to whom defamatory statements may have been made *may be uncovered* during discovery. Leave to amend may be denied where there is "undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendment previously allowed undue prejudice to the opposing party or where the amendment would be futile. *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007) (quotation marks and citation omitted). Discovery in this matter is set to close on November 5, 2021, see Scheduling Order dated May 14, 2021, and to date, Plaintiff has been unable to identity any third parties to whom Defendant made defamatory statements. Allowing amendment at this time would be unduly prejudicial to Defendant, and it does not appear that Plaintiff is in any position to plead the defamation count regarding possible third parties with the required specificity.

Count III – Fraud in the Inducement

Plaintiff alleges Defendant signed the Employment Agreement promising to provide six months' notice before leaving her job, at the time she made the promise she had no intention to provide such notice, Plaintiff relied upon such promise in entering into the Employment Agreement, and Plaintiff would not have entered into the agreement if it had known that Defendant would not abide by the notice requirement.[16]

Fraud in the inducement may arise "where a party materially mispresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Custom Data Solutions, Inc v Preferred Capital, Inc,* 274 Mich App 239, 242-243; 733 NW2d 102 (2006). "Fraud in the inducement to enter a contract renders the contract voidable at the option of the defrauded party." *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 640; 534 NW2d 217 (1995).

Here, the Court finds that summary disposition is proper as to the claim of fraudulent inducement. Plaintiff is not seeking to void or rescind the Employment Agreement, but rather to enforce it and recover monetary damages.[17] "Fraud in the inducement is not an appropriate cause of action to achieve enforcement" of a contract. *Friendship Jackson, LLC v Friendship Forest Park Ltd Dividend Housing Ass'n*, unpublished per curiam opinion of the Court of Appeals, issued February 20, 2020 (Docket No. 345765), p 7 citing *Samuel D. Begola Servs*, 210 Mich App at 640. See also *Lennon v Lennon*, unpublished per curiam opinion of the Court of Appeals, issued April 19, 2016 (Docket No. 324803), p 3 ("[a] plaintiff's remedy to a claim of fraud in the inducement to enter a contract is to void the alleged contract"). In fact, it is questionable whether fraudulent inducement is a "claim" at all. In *Custom Data Solutions*, the Plaintiff asserted fraudulent inducement not as a claim but "in an attempt to protect itself from collection under [rental agreements]" and the trial court granted the plaintiff's motion for summary disposition on the basis that the agreements were voided by the defendant's fraudulent inducement. *Custom Data Solutions*, 274 Mich App at 240-241. See also *City of Flint v OK Indus, Inc*, unpublished per curiam opinion of the Court of Appeals, issued April 10,

[16] First Amended Complaint, ¶¶ 72-78.
[17] First Amended Complaint, pp 11-12.

2007 (Docket No. 271624), p 1 (fraud in the inducement is a defense to contract formation).[18]

The remedy for any alleged fraudulent inducement in this case would be to void the Employment Agreement. However, this is not the remedy that Plaintiff seeks. Plaintiffs seeks to enforce the agreement and recover damages for breach of the agreement. Therefore, summary disposition is granted as to Count III because no factual development could justify Plaintiff's claim for relief under a theory of fraudulent inducement. *Spiek*, 456 Mich at 337.

IV.

THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion for Summary Disposition under MCR 2.116(C)(5) is **DENIED.**

IT IS FURTHER ORDERED that Defendant's Motion for Summary Disposition under MCR 2.116(C)(8) is **GRANTED IN PART AND DENIED IN PART** as follows:

- **GRANTED** on Count I as to any licensing fees paid before November 16, 2020 and **DENIED** on Count I in all other respects;
- **GRANTED** as to Count II; and
- **GRANTED** as to Count III.

IT IS SO ORDERED.

This Order does NOT resolve the last pending matter and does NOT close the case.

/s/ Martha Anderson
October 21, 2021
HON. MARTHA D. ANDERSON
CIRCUIT COURT JUDGE

Dated: 10/21/2021.

[18] Fraudulent inducement has also been recognized as an exception to the "economic loss doctrine" applicable to claims covered by the Uniform Commercial Code. See *Huron Tool and Engineering Co. v Precision Consulting Serv, Inc.,* 209 Mich App 365, 368; 532 NW2d 541 (1995).