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

KNIGHT DRUGS, INC, ET AL,
Plaintiffs,

v. **Case No. 18-164431-CB**
Hon. James M. Alexander

JEFFERSON RX, LLC, ET AL,
Defendants.

Consolidated with

CHESANING RX, ET AL
Plaintiffs,

v. **Case No. 19-171014-CB**

KNIGHT DRUGS – LANSING, INC., ET AL,
Defendants.
____/

<u>OPINION AND ORDER RE: SUMMARY DISPOSITION</u>

This matter is before the Court on Defendants' Motion for Summary Disposition.[1]

The Knight Drugs entities (Defendants) initially filed suit against Jefferson RX, LLC and the related Chesaning entities (Plaintiffs). Knight Drugs' action was assigned case number 18-164431-CB. The Court previously described Knight Drugs' case as follows:

> [Knight Drugs] paints this case as "a simple breach of contract matter involving the sale/purchase of the assets of nine pharmacies based on nine separate promissory notes and nine separate and corresponding guaranty agreements."

1 Plaintiffs refer to the Chesaning RX, LLC and related purchasing entities that are the listed Plaintiffs in Case No. 19-171014-CB. Conversely, Defendants are the Knight Drug entities and Gerald Boursand individually.

> According to their Complaint, [Knight Drugs] sold nine pharmacies under Asset Purchase Agreements to the nine corporate [Jefferson RX entities] – with the corporate [Jefferson RX] executing Promissory Notes and the individual [Jefferson RX], Raad and Moroch Kouza, each executing personal guarantees guaranteeing the amounts owed under the Notes. Said Guaranty Agreements also require the individual [Jefferson RX] to pay all expenses that [Knight Drugs] incur in connection with the collection of the amounts due – including reasonable attorney fees.
>
> [Knight Drugs] claim that [Jefferson RX] defaulted on their payment obligations by failing to make the required payments since October 2017. Based on the same, [Knight Drugs] accelerated the payments and filed the present suit to recover the outstanding amounts due ($465,298.47), plus $54,661.24 in attorney fees and expenses, and $1,250 for fees and expenses of [Knight Drugs'] CPA.

In response, Plaintiffs filed suit against Defendants for claims arising from the above-mentioned Purchase Agreements and corresponding Bills of Sale and Side Letter Agreements. In their Complaint (assigned case no. 19-171014-CB), allege that Defendants breached the Agreements failed to disclose DEA concerns regarding pharmacies other than the Knight Drugs – Grand Blanc, Inc., refused to cooperate with Plaintiffs when Plaintiffs attempted to port phone numbers to a new provider, and charged Plaintiffs for leased computer equipment. Further, Plaintiffs allege that Defendants failed to remit funds that belonged to Plaintiff and execute renewals of the Powers of Attorney when requested.

Additionally, Plaintiffs allege that Defendants made false representations regarding certain disclosures required under the Purchase Agreements. Plaintiffs also allege that Defendants failed to make certain disclosures entirely as required. Plaintiffs claim that the false representations or failure to make certain disclosures were done by Defendants to induce Plaintiffs into entering into the contract.

On these general allegations, Plaintiffs filed their Complaint on claims titled (Count I) breach of Purchase Agreements; (Count II) breach of Side Letter Agreements; (Count III) breach of June 2017 Agreement; (Count IV) conversion; (Count V) fraud and misrepresentation; (Count VI) silent fraud; (Count VII) innocent misrepresentation; and (Count VIII) unjust enrichment.

As stated, Defendants now move for summary disposition under MCR 2.116(C)(8) and (C)(10). A (C)(8) motion tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).[2] And a (C)(10) motion tests the factual support for a plaintiff's claims. *Maiden*, 461 Mich at 120.[3]

I. Count I – Breach of Purchase Agreements

A. Borsand Individually

First, Borsand argues that Plaintiffs' breach of purchase agreement claim against him individually should be dismissed because he was not a party to the contract, rather, he signed the agreements as "Owner" on behalf of the corporate Defendants. And, Borsand argues that Plaintiffs have not plead that they should be entitled to pierce the corporate veil.

2 Such a motion 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." *Wade v Dept of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). When considering such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade*, 439 Mich at 162-163. Additionally, when considering such motions, the court considers only the pleadings. MCR 2.116(G)(5).
Further, "[w]hen an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8)." *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); citing MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

3 In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden, 461 Mich* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the

> A corporation—or other artificial entity—is a legal fiction. It is an artificial being, invisible, intangible, and existing only in contemplation of law. Absent sent some abuse of corporate form, courts honor this fiction by indulging a presumption—often referred to as the corporate veil—that the entity is separate and distinct from its owner or owners. Courts will honor this presumption even when a single individual owns and operates the entity. However, the fiction of a distinct corporate entity separate from the stockholders is a convenience introduced in the law to subserve the ends of justice. When this fiction is invoked to subvert justice, it is ignored by the courts. As such, a court sitting in equity may look through the veil of corporate structure—that is, pierce the corporate veil—to avoid fraud or injustice. *Green v Ziegelman*, 310 Mich App 436, 450-51; 873 NW2d 794 (2015).

In order to successfully pierce the corporate veil, a Plaintiff must establish:

> (1) the entity was the mere instrumentality of the owner, (2) the owner exercised his or her control in such a manner as to defraud or wrong the complainant in some way, and (3) the complainant would suffer an unjust loss or injury unless the court disregards the existence of the entity as separate from its owner. *Id.* at 454.

Despite the contractual language identifying the parties, Plaintiffs argue that Borsand had certain obligations under the Purchase Agreement, which made him a party to the agreement. Notably, Plaintiffs do not argue, or respond to, Defendant's argument regarding piercing the corporate veil. Additionally, Plaintiffs do not provide law to support their position that Defendant, as owner, is a party to the contract.

The Purchase Agreement provides (in relevant part):

> This Asset Purchase Agreement ("Agreement") is made and entered into effective as of September ___, 2015 (the "Effective Date") by and among Knight Prescriptions, LTD., a Michigan corporation (the "Seller") and E. Davidson RX, LLC, a Michigan limited liability company (the "Buyer"). The Buyer and Seller are hereinafter collectedly referred to pas the "Parties" and individually as a "Party." (Plaintiffs' Count I Response, Exhibit A).

Borsand signed the Purchase Agreement for Seller as the President and as Owner.

The Purchase Agreement, however, further provided:

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moving party is entitled to judgment as a matter of law. *Id.* at 120.

> The parties acknowledge and agree that the Owner is executing this Agreement for the sole purpose of agreeing to sign and delivery the Noncompetition Agreements described in Section 1.1 herein at the Closing. *Id.*

In order to prove breach of contract, a plaintiff must establish: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from that breach. *Stoken v JET Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988).

Michigan law is also well-established that "a court must construe and apply unambiguous contract provisions as written." *Rory v Cont'l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, "[a] contract must be interpreted according to its plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008).

As it relates to Borsand, Plaintiffs have failed to establish that he, individually, was a party to the Purchase Agreement. As stated, the Court must interpret a contract "according to its plain and ordinary meaning." *Id.* The Purchase Agreements clearly provide that the parties to the Agreement are the selling and purchasing entities, not Borsard individually. Further, the Agreement further provides that Borsand, as owner, is only signing the Agreement for the sole purpose of signing and delivery noncompetition agreements. The Agreement does not establish or provide for personal liability on Borsand.

Further, as stated, Plaintiffs do not provide any law to establish that by signing the Agreement as Owner of the selling entities, Borsand became a party to the Agreement, and therefore, would be personally liable under the same. It is well established that "[t]rial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute." *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008).

Based on the foregoing, the Court finds that, as a matter of law, Borsand was not party to the Purchase Agreement. As such, Plaintiffs' have failed to state a claim for breach of the Purchase Agreement, and Borsand's motion for summary of the same is GRANTED. Plaintiffs' breach of Purchase Agreement claim against Borsand is DISMISSED.

B. Corporate Defendants

Next, the Corporate Defendants argue Plaintiffs cannot prove that Defendants breached the Purchase Agreements in any of the matters raised in Count I of Plaintiffs' Complaint.

i. DEA Concerns

Specifically, the Corporate Defendants argue that Plaintiffs have no evidence of a specific concern the DEA that Defendants failed to disclose. Further, Defendants argue that Plaintiffs used Defendants' license until the DEA approved theirs, so there was no interruption in Plaintiffs' business despite the DEA's approval in issuing their license. As such, Defendants argue that, even if there was a breach, Plaintiffs cannot establish that they were damaged as a result of a delayed DEA investigation.

In response, Plaintiffs argue that despite the assurances that Defendant fully disclosed any DEA issues, the DEA did not process Plaintiffs' application in its normal 4-6 weeks. Instead, Plaintiffs argue it took the DEA over 18 months to approve their application. In the interim, Plaintiffs admit that they used Defendants license until they received their own. Plaintiffs argue that they were told there were some concerns regarding Defendants but were not told any specific concerns due to confidentiality purposes.

The Purchase Agreement provides that:

> Notwithstanding anything contained in this Agreement to the contrary, except as set forth on Disclosure Schedule 8.4, to the Seller's knowledge, Seller has no known material liabilities or obligations other than obligations incurred in the ordinary course of business. Seller represents that except as set forth on Disclosure Schedule 8.4 and except for obligations that arise in the ordinary course of business, Seller does not know or have reasonable grounds to known of any basis for the assertion against Seller of any material liability of any nature or in any material amount not described in Disclosure Schedule 8.4. (Defendants' Count I Motion, Exhibit A, at §8.4).

The parties do not dispute that Defendants disclosed specific DEA concerns regarding Knight Drugs Grand Blanc, Inc., in Disclosure Schedule 8.4. Rather, Plaintiffs argue that the only logical conclusion for the delay in their application process was due to some undisclosed concerns the DEA had regarding other locations. To support their position, Plaintiffs indicate that their representative Raad Kouza was told by an "agent working at the DEA office" that the delay was due "more on the seller side". (Plaintiffs' Count I Response, Exhibit D, at 32). Further, Plaintiffs attach affidavits of two attorneys they hired to investigate their application with the DEA. Both attorneys, Douglas Swatosh and Jamele Hage indicated that they were told by a DEA agent that the delay in issuing Plaintiffs' license was "related to issues that the DEA had with the business practices of the prior ownership." (Plaintiffs' Count I Response, Exhibits F-G).[4]

As Defendants appropriately state, a party opposing a motion for summary disposition pursuant to (C)(10) must support their motion with admissible evidence. MCR 2.116(G)(6) provides:

> Affidavits, depositions, admission and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.

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4 The Court notes that Douglas Swatosh has appeared as Co-Counsel for Plaintiffs in the current action.

Here, the only evidence Plaintiffs use to support their claim are hearsay statements contained in their depositions and affidavits. Black's Law Dictionary (11th ed.) defines hearsay as "testimony that is given by a witness who relates not to what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness. Such testimony is generally inadmissible under the rules of evidence." Indeed, Michigan Rules of Evidence 802 provides that "[h]earsay is not admissible except as provided by these rules."

Plaintiffs' witnesses have not provided testimony of facts they have personal knowledge of, rather, they testify as to what others told them. As such, Plaintiffs evidence is inadmissible under MRE 802, and the same cannot be used to create a question of fact in opposition to Defendants' motion pursuant to (C)(10). Notably, Plaintiffs did not depose or secure affidavits from any agent at the DEA who had personal knowledge of any alleged issues in regarding Plaintiffs' approval process. As such, Plaintiffs' have failed to create a question of fact regarding any alleged DEA concerns.

Assuming Plaintiffs had properly supported their claim regarding the DEA concerns, Plaintiffs were able to continuously operate under a Power of Attorney for Defendants' DEA license until Plaintiffs received their own license. As a result, Plaintiffs were not damaged by any alleged undisclosed concerns or a delay in the DEA approval process, and, as a result, their claim would fail.

ii. Phone Porting

Next, Defendants argue that there is no evidence that Defendants refused to cooperate in the "porting" of the phone numbers from one network provider to the other. Defendants argues that, pursuant to the Purchase Agreement, Plaintiffs purchased the rights to continue to use the existing phone numbers. Some months after closing, Plaintiffs opted to switch service providers. At that

point, Defendants argue that Plaintiffs did not want to pay a required termination fee, so the phone numbers were not released from the current provider.

With regards to the porting the phone numbers, Plaintiffs argue that pursuant to the Purchase Agreement, the numbers were to be owned by Plaintiffs without any further liability or obligations. Plaintiffs allege that it was always their intent to change service providers, and this was known to Defendants. Plaintiffs allege that the numbers could not be ported without paying a termination fee that Defendants failed to disclose. Plaintiffs argue that eventually, they were forced to terminate the phone lines and were not able to retain the phone numbers as the Purchase Agreement provided for. Plaintiffs argue that the loss of the phone numbers impacted the business.

The Purchase Agreement provides that Plaintiffs were to receive:

> The goodwill of the Business, including all the right, title and interest to the "Knight Prescriptions" name (the "Name") and the telephone and facsimile numbers associated with the Pharmacy, and all related names and derivations, including the Business Internet address(es), if any. (Defendants' Count I Motion, Exhibit A, at §1D).

Plaintiffs' admit that upon closing on March 7, 2016, they were in possession and using Defendants' phone and facsimile numbers through Defendants' provider, Clear Rate Communications. (Complaint, at ¶59). Plaintiffs used Clear Rate Communications through May 2016, at such time Plaintiffs' desired to switch providers. (Complaint, at ¶62). In order to maintain the phone numbers, Clear Rate Communications had to release the same. (Complaint, at ¶¶63-64). In addition, Clear Rate Communications required at least $30,000 to terminate the contract early. (Plaintiffs' Count I Response, Exhibit C, at 57-58). Plaintiffs' agent believed that Defendants were responsible for the early termination fee since the Purchase Agreement included the right to the existing telephone numbers. *Id.*

First, Plaintiffs argument that it was always their intention to switch providers and the same was known to Defendants fails. The Purchase Agreement contained an integration clause, which provided:

> This Agreement along with Related Documents constitutes the entire agreement of the Parties and supersedes all other prior agreements, oral or written, with respect to this transaction. This Agreement may not be modified or otherwise amended, unless in writing and duly authorized by Buyer and Seller. (Defendants' Exhibit A, at §15B).

The Purchase Agreement does not state that Plaintiffs would be switching service providers. Nor does it state that Defendants would be liable for any early termination fees. The undisputed facts are that Plaintiffs did, in fact, receive and utilize Defendants' telephone and facsimile numbers. Further, Defendants executed SRS Phone Number Porting Authorization Forms releasing and allowing SRS to port the existing phone numbers. (Defendants' Count I Reply, Exhibit 4).

Here, Plaintiffs received what was bargained for under the Purchase Agreement, the existing telephone and facsimile numbers. The liability for the same was disclosed on Defendants' financial statements that Plaintiffs received throughout the due diligence period of the sale. (Defendants' Count I Motion, Exhibit B). Further, as stated, Defendants' disclosures of liabilities were made based on what was known to Defendants at the time of closing. Here, the early termination fee was not known to Defendants at the time of closing as Plaintiffs' continued to use Defendants' service provider for months after the closing.

Based on the forgoing, Plaintiffs received what they bargained for under the contract, as such, there is not question of fact regarding any alleged breach of the Purchase Agreement. Based on the same, Defendants' are entitled to summary disposition regarding Plaintiffs' claim regarding porting the phones.

iii. Leased Computers

Finally, Defendants argue that Plaintiffs cannot support their claim that Defendants charged for leased computer equipment. Defendants argue that under the terms of the Purchase Agreement, Plaintiffs agreed to purchase all assets Defendants had an interest in. Defendants claim that the computers located in the pharmacies were leased by Defendants, and therefore, Defendants could not transfer ownership to Plaintiffs. Further, Defendants argue that Plaintiffs knew that the computers were leased and made payments on the leases after closing. As such, Defendants argue that Plaintiffs cannot show that Defendants breached the Purchase Agreement as to the leased computers.

And finally, Plaintiffs argue that Defendants never disclosed that certain computer equipment was leased, and not owed, by Defendants. Plaintiffs claim that they did not receive invoices for the leases until after closing. Plaintiffs do, however, admit that they made "a few questionable lease payments only in error." (Plaintiffs' Count I Response, at 6).

Plaintiffs also admit that they received and reviewed financial statement that included a line item for "leased equipment." (Defendants' Count I Reply, Exhibit 7, at ¶¶2-3). Plaintiffs further admit that they were in possession of "invoices sent by the Defendants for the 'leased' computer equipment," but maintain that since they were included in a stack of other documents, and "were from a company other than the Defendants," Plaintiffs did not immediately recognize what the invoices were. (Complaint, at ¶52).

Despite alleged that Defendants breached the Purchase Agreement by "charging the Plaintiff's for 'leased' computer equipment," Plaintiffs admit that the invoices "were from a company other than Defendants." (Complaint, at ¶¶62, 132). Since Plaintiffs admit that Defendants did not charge Plaintiffs for the leased computers, Defendants, necessarily, did not breach the

Purchase Agreement for the same. As such, Plaintiffs have failed to create a question of fact that Defendants charged for the leased computers as alleged in their Complaint.

Based on the foregoing, Defendants' are entitled to summary of Plaintiffs' claim regarding the leased computers.

C. Conclusion – Count I

Based on the foregoing, Defendant Borsard and the Corporate Defendants' motions for summary disposition pursuant to (C)(8) and (10) of Plaintiffs' Count I are GRANTED, and the same is DISMISSED.

II. Count II – Breach of Side Letter Agreements

A. Borsand Individually

Again, Borsand argues that Plaintiffs' claim for breach of the Side Letter Agreements should be dismissed because he is not a party to the Agreement, rather he signed on behalf of Defendants as its President. And again, Plaintiffs have failed to establish that Borsand, individually, was a party to the Side Letter Agreements.

The Side Letter Agreements reference the Purchase Agreement and provide (in relevant part) that the Agreements:

> between Knight Drugs, Inc., a Michigan corporation (the "Seller") and Jefferson RX, LLC, a Michigan limited liability company (the "Buyer" and hereinafter collectively referred to along with the Seller [as] the "Parties" and each individually referred to as a "Party." (Borsand's Motion Exhibit B).

And again, Borsand signed the Side Letter Agreements on behalf of Defendants as its President. *Id.*

For the same reasons as more fully discussed above, the Court finds that, as a matter of law, Borsand was not party to the Side Letter Agreements. As such, Plaintiffs' have failed to state a claim for breach of the Side Letter Agreements, and Borsand's motion for summary of the same is GRANTED. Plaintiffs' breach of Side Letter Agreements claim against Borsand is DISMISSED.[5]

B. Corporate Defendants

Next, the Corporate Defendants argue that there is no question of fact regarding any alleged breach of the Side Letter Agreements. Defendants argue that the Side Letter Agreements provided that Defendants "shall not revoke the Owner of Attorney granted to [Plaintiffs]" until Plaintiffs received its own DEA Registration Equipment." Defendants argue that there was no obligation to renew Powers of Attorney when requested by Plaintiffs.

According to Plaintiffs' Complaint, Plaintiffs allege that Defendants breached the Side Letter Agreements by (a) failing to remit funds that belonged to Plaintiffs within two days of receipt, and (2) failing to execute renewals of the Powers of Attorney when requested. (Complaint, at ¶139).

The Side Letter Agreements provide (in relevant part), "[Defendants] shall not revoke the Power of Attorney granted to [Plaintiffs] of even date herein until such time that [Plaintiffs] receives its own DEA Registration Certificate. (Defendants' Count II Motion, Exhibit B).

Since Defendants argue that the Side Letter Agreements did not created an obligation to renew Powers of Attorney, Defendants argue that Plaintiffs have failed to state a claim for breach of the same.

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5 Borsand has also moved for summary disposition of Plaintiffs' Count III. Again, Borsand signed the June 22, 2017 Agreement "on behalf of and as an authorized representative of the Borsand Entities." (Borsand's Motion, Exhibit C). For the same reasons as Counts I and II, Plaintiffs have failed to stated a claim as to Count III against Borsand individually. As such, Borsand's motion for summary as to the Count III is GRANTED, and the same is

In response, Plaintiffs argue that the Side Letter Agreements also provide that the "Parties agree that each will execute and deliver to the other Party or Parties any and all additional documents, instruments and/or agreements that may be necessary to effectuate the provisions of this Side Letter Agreement, whether before, on, or after the date of the execution of this Side Letter Agreement." *Id.*

Plaintiffs argue that the plain language of the Side Letter Agreements required Defendants to renew any Powers of Attorney. The Court disagrees. The only provision in the Side Letter Agreement that mentions the Powers of Attorney is that Defendants shall not revoke the same until Plaintiffs receive their own DEA Registration Certificate. As such, Defendants would only have to execute any additional documents, instruments, and/or agreements to ensure that the Powers of Attorney were not revoked.

Based on the same, the Side Letter Agreements did not require or created an obligation of Defendants to renew the Powers of Attorney. As such, Plaintiffs have failed to state a claim that Defendants breached the Side Letter Agreements by failing to renew the Powers of Attorney.

Additionally, the Side Letter Agreements provide that "[t]he Parties will remit all funds that they receive that should be allocate and paid to the other Party pursuant to the provisions of paragraph 2 above to the applicable party within two days of receipt." *Id.* Plaintiffs, however, have failed to support their claim regarding the funds with any evidence. Rather, Plaintiffs argue "[u]pon information and belief" that Defendants did not comply with the above-referenced provision."

Since Plaintiffs have failed to support their claim that Defendants breached the Side Letter Agreements by withholding funds, they have failed to create a question of fact regarding the same.

DISMISSED.

C. Conclusion – Count II

Based on the foregoing, Defendant Borsard and the Corporate Defendants' motions for summary disposition pursuant to (C)(8) and (10) of Plaintiffs' Count II are GRANTED, and the same is DISMISSED.

III. Count IV – Conversion

Next, Defendants argue that Plaintiffs' conversion claim fails because Michigan, generally, does not recognize a cause of action for conversion of money, and the money at issue is subject to an ongoing reconciliation process.[6] Defendants argue that until the reconciliation process is complete, it is not clear how much money either party is entitled to. As such, Defendants argue that funds cannot be specifically identified as required for conversion of money, and any conversion claim would be premature until the reconciliation process is complete.

In response, Plaintiffs argue that there is no question that they have sufficiently stated a claim for conversion. Plaintiffs argue that there is a clear contractual obligation that Defendants turn over funds belonging to Plaintiffs following a complete reconciliation. Plaintiffs, however, admit that the reconciliation process is not complete. Plaintiffs further admit that "the exact amount is still in the works." (Plaintiffs' Counts IV and VIII Response, at p. 13).

Plaintiffs further argue that Defendants have wrongfully asserted dominion over the missing reconciliation funds. As further evidence of their claims, Plaintiffs argue that Defendants converted certain funds paid to Clear Rate Communications (for telephone services) and funds paid to EBG

6 The Court's analysis applies to both Borsand's individual motion and the Corporate Defendants' motions. Parentetically, the Court will note that the disputed funds are entrusted to the Corporate Defendants as proceeds from the Agreements, not Borsand individually. Therefore, Plaintiffs further cannot maintain their claim for conversion against Borsand individually.

Properties (for leased computers). (Plaintiffs' Counts IV and VIII Response, at p. 14).

Michigan law provides that "[t]he tort of conversion is 'any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.'" *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).

"Statutory conversion, by contrast, consists of knowingly "buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property." *Head*, 234 Mich App at 111; quoting MCL 600.2919a.

In *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004), the Court of Appeals reasoned, "[t]o support an action for conversion of money, the defendant must have obtained the money without the owner's consent to the creation of a debtor-creditor relationship and must have had an obligation to return the specific money entrusted to his care." *Lawsuit Fin*, 261 Mich App at 591 (internal quotations and citations omitted).

Based on Plaintiffs' own admissions, the reconciliation to identify any funds that may be owed to a party has not been completed. Therefore, Plaintiffs do not, currently, know if any funds are being wrongfully held by Defendants. Certainly, Plaintiffs, by their own admissions, cannot identify specific funds that they allege were converted.

Additionally, Plaintiffs attempt to bolster their conversion claim by arguing that Defendants converted monies Plaintiffs paid to Clear Rate Communications and EBG Properties. As admitted by Plaintiffs, those monies were paid directly to third-party entities, not Defendants. Therefore, Defendants could not have exerted any wrongful act of dominion over those funds.

Based on the foregoing, Plaintiffs cannot maintain their claim for conversion based on their admissions that they do not know what if any funds were converted and have not identified any specific funds to which they are owed. As such Defendants' motions for summary of Plaintiffs' claim for conversion is GRANTED, and the same is DISMISSED.

IV. Counts V-VII – Fraud and Misrepresentation, Silent Fraud, Innocent Misrepresentation

According to Plaintiffs' Complaint, their claims for fraud and misrepresentation, silent fraud, and innocent misrepresentation all predicated on their belief that Defendants failed to make, or intentionally made certain disclosures regarding alleged DEA concerns of the pharmacies. Specifically, Plaintiffs allege that (1) Defendants represented that they were not aware of any circumstances that would prevent the DEA from issuing Plaintiffs' DEA Certificate; (2) Defendants failed to inform Plaintiffs that the DEA had concerns or were investigating pharmacies other than the Grand Blanc location; and (3) the representations Defendants made in paragraphs 8.4, 8.5, and 8.10 of the Purchase Agreements were false. (Complaint, at ¶¶156, 164, 172). Plaintiffs argue that they relied, to their detriment, on Defendants misrepresentations, and suffered damages as a result.

In their motions, Defendants argue that Plaintiffs have failed to state their fraud claim with the requisite particularity as required to maintain a claim for fraud.[7] Specifically, Defendants argue that Plaintiffs offer vague statements alleged fraudulent conduct, but do not provide any degree of particularity with regard to the specific statements made, how the alleged statements were false, or the specific undisclosed liability Plaintiffs complain of. As such, Defendants argue that Plaintiffs

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7 The Court's analysis addressed both Borsard's motion and the Corporate Defendants' motion for summary disposition.

have failed to state a claim for fraud.

Additionally, Defendants argue that Plaintiffs have failed to offer evidence creating a question of fact regarding their fraud claims. Most critically, Defendants argue that Plaintiffs have not established any evidence that any representations made were false. And further, Defendants argue that Plaintiffs cannot prove an actual injury based on any alleged misrepresentations.

In response, Plaintiffs argue that they have sufficiently plead their claim for fraud and have supported the same with evidence. Plaintiffs again point to the affidavits of Swatosh and Hage who indicated that they were told that the DEA had unspecified concerns. (*See* Plaintiffs' Counts V, VI, VII Response, Exhibits D, E). Plaintiffs also argue that Defendants engaged in fraudulent conduct as it related to the lease computers and refusal to port the telephone numbers.

It is well-established that "fraud must be pleaded with particularity." *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008), citing MCR 2.112(B)(1).

The Michigan Court of Appeals has held:

> To establish a claim of fraudulent misrepresentation, plaintiff was required to prove that: (1) defendant made a material representation; (2) the representation was false; (3) defendant knew, or should have known, that the representation was false when making it; (4) defendant made the representation with the intent that plaintiff rely on it; (5) and plaintiff acted on the representation, incurring damages as a result. Plaintiff must also show that any reliance on defendant's representations was reasonable. *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005). *Hi-Way Motor Corp v Int'l Harvester Co*, 398 Mich. 330, 336; 247 N.W.2d 813 (1976), citing *Candler v Heigho*, 208 Mich. 115, 121; 175 N.W. 141 (1919).

Michigan law is also clear that "to sustain a fraud claim, the party claiming fraud must *reasonably* rely on the material misrepresentation." *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 39; 761 NW2d 151 (2008) (emphasis in original), citing *Foreman v Foreman*, 266

Mich App 132, 141-142; 701 NW2d 167 (2005); and *Bergen v Baker*, 264 Mich App 376, 389; 691 NW2d 770 (2004). Further, "an action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact. Future promises are contractual and do not constitute fraud." *Hi-Way Motor Corp v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

> To prove silent fraud, also known as fraudulent concealment, the plaintiff must show that the defendant suppressed the truth with the intent to defraud the plaintiff and that the defendant had a legal or equitable duty of disclosure. A plaintiff cannot merely prove that the defendant failed to disclose something; instead, "a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive." *Lucas v Awaad*, 299 Mich App 345, 363-364; 830 NW2d 141 (2013); quoting *Roberts v Saffell*, 280 Mich App 397, 404; 760 NW2d 715 (2008)

> In contrast to fraudulent misrepresentation and silent fraud, the essence of an innocent misrepresentation claim is that the plaintiff need not prove that the defendant knew or should have known that the representation was false. Likewise, contrary to fraudulent misrepresentation and silent fraud, a plaintiff asserting an innocent misrepresentation claim need not prove that the defendant intended to deceive the plaintiff into relying on the false or misleading representation. Indeed, under the theory of innocent misrepresentation, false statements the claimant relied on are actionable irrespective of whether the person making them acted in good faith in making them .... *Roberts v Saffell*, 280 Mich App 397, 405; 760 NWd2 715 (2008) (internal citations and quotations omitted).

To establish a claim for innocent misrepresentation, a plaintiff has the burden of proving (1) Defendant made a representation of a material fact; (2) the representation was made in connection with the making of a contract between plaintiff and defendant, (3) the representation was false when it was made; (4) plaintiff would not have entered into the contract if defendant had not made the representation; (5) plaintiff had a loss as a result of entering into the contract; and (6) plaintiff's loss benefited the defendant. (M Civ JI 128.04 Innocent Misrepresentation).

After a careful review of Plaintiffs' Complaint, Plaintiffs have failed to plead its claims of fraud with particularity against Defendants. Based on the same, Plaintiffs have failed to state a claim for fraud against Defendants. Additionally, Plaintiffs have not supported their claim for fraud with evidence sufficient to create a genuine issue of material fact.

Specifically, as it related to their claim for innocent misrepresentation, Plaintiffs argue that the representations Defendants made pursuant to sections 8.4, 8.5, and 8.10 of the Purchase Agreement were false.

Section 8.4 of the Purchase Agreement provides:

> Notwithstanding anything contained in this Agreement to the contrary, except as set forth on Disclosure Schedule 8.4, to the Seller's knowledge, Seller has no known material liabilities or obligations other than obligations incurred in the ordinary course of business. Seller represents that except as set forth on Disclosure Schedule 8.4 and except for obligations that arise in the ordinary course of business, Seller does not know or have reasonable grounds to known of any basis for the assertion against Seller of any material liability of any nature or in any material amount not described in Disclosure Schedule 8.4. (Defendants' Counts V, VI, VII Motion, Exhibit A).

Section 8.5 provides:

> Seller has good and marketable title to all its properties and assets, including those reflected in the Financial Statements (except those since sold or otherwise disposed of in the ordinary course of business), subject to no mortgage, pledge, lien, encumbrance, security interest, or charge, other than unsecured obligations that occur in the ordinary course of the Seller's business and secured indebtedness to prescription inventory suppliers that will be paid-off at Closing. Further, to the Seller's knowledge, except as set forth in this Agreement, there are no imperfections of title that would affect the marketability of title of Seller's assets. *Id.*

And Section 8.10 provides (in relevant part):

> Except as set forth on Disclosure Schedule 8.10, there are no actions, suits, claims, investigations, or legal, administrative, or arbitration proceedings pending or, to the Seller's and Owner's knowledge, threatened by or against Seller or relating to the Purchased Assets, this Agreement, and/or the transactions contemplated, before any court, governmental agency, or other body, including any quasi-judicial or

> administrative forum, and no judgment, order, writ, injunction, decree, or other similar command of any court, governmental agency, or body has been entered or served on Seller or any individual Owner. *Id.*

Much of Plaintiffs argument, however, seems to be a restatement of their arguments for the breach of contracts claims. Specifically, as it related to their damages, Plaintiffs claim that they were damaged by (1) Defendants refusal to execute renewed Powers of Attorney; (2) loss of revenue due to DEA delays; (3) loss of revenue due to Defendants' refusal to port the phone numbers; (4) monies paid on the computer leases; and (4) monies still owing pursuant to the reconciliation. (*See* Plaintiffs' Counts V, VI, VII Response, at 19-20).

These damages do not flow from any misrepresentations, failure to disclose, or other fraudulent conduct. Rather, these damages arise from and are a result of any alleged breach of contract claims Plaintiffs brought against Defendants. The same claims the Court has already addressed and dismissed.

As it relates to any fraud stemming from alleged DEA concerns, the Court has already found that Plaintiffs had not supported their breach of contract claim with admissible evidence. The same is true in support of their fraud claims. Plaintiffs cannot rely on inadmissible evidence to support their fraud claim. As such, Plaintiffs have failed to create a question of fact as it relates to any fraudulent conduct regarding DEA concerns.

The Court also found that the Side Letter Agreements did not require or created an obligation of Defendants to renew the Powers of Attorney. As such, Plaintiffs have failed to state a claim that Defendants breached the Side Letter Agreements by failing to renew the Powers of Attorney. As

such, Defendants did not engage in any fraudulent conduct by refusing to renew Powers of Attorney pursuant to the Side Letter Agreements.

Regarding the leased computers and the telephone numbers, Plaintiffs, in their claim for breach of Purchase Agreement, argue that Defendants never disclosed that certain computer equipment was leased, and not owed, by Defendants and that Defendants did not disclose that there was a termination fee for switching service providers. These are essentially the same argument that Plaintiffs make to support their claims for fraud. The Court has sufficiently addressed Plaintiffs' claim regarding the leased computers and telephone numbers above. And as previously stated, Plaintiffs fraud claim based on Defendants failure to disclose appears to be a restatement of its breach of Purchase Agreement claims. For the same reasons as more fully discussed above, Plaintiffs fail to establish a question of fact as it relates to both claims.

Based on the foregoing, Plaintiffs have failed to state a claim for fraud and misrepresentation, silent fraud, and innocent misrepresentation, and have failed to establish that a question of fact exists as to the same. As such, Defendants' motions for summary disposition pursuant to (C)(8) and (C)(10) of Plaintiffs' claims for fraud and misrepresentation, silent fraud, and innocent misrepresentation are GRANTED, and the same are DISMISSED.

V. Count VIII – Unjust Enrichment

A. Borsand Individually

Borsand argues that Plaintiffs' claim for unjust enrichment should be dismissed against him individually because Plaintiffs have failed to establish that Borsand, as a third-party beneficiary, is liable for the same. Further, Defendant argues that any benefit he received under the contracts

between Plaintiffs and the Corporate Defendants was not unjust.

In response, Plaintiffs argue that the owner of Corporate Defendants, Borsard has been unjustly enriched because of the Corporate Defendants alleged misconduct. Although Plaintiffs make the conclusory statement that "there have been various misleading acts by Borsand," they do not support the same with admissible evidence. (Plaintiffs' Response to Borsand's Motion, at 19). Further, Plaintiffs do not provide any legal authority to hold Borsand liable on an unjust enrichment claim as a third party to the contracts between Plaintiffs and the Corporate Defendants.

> In general, a third party is not unjustly enriched when it receives a benefit from a contract between two other parties, where the party benefited has not requested the benefit or misled the other parties.... Otherwise stated, the mere fact that a third person benefits from a contract between two other persons does not make such third person liable in quasi-contract, unjust enrichment, or restitution. Moreover, where a third person benefits from a contract entered into between two other persons, in the absence of some misleading act by the third person, the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third person. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 196; 729 NW2d 898 (2006).

In the instant case, much of Plaintiffs complaints rise from the Corporate Defendants' failure to perform under the respective contracts between the parties. Plaintiffs have failed to establish that Borsand, in his individual capacity, mislead the parties. And as stated, Plaintiffs have provided no legal authority to support their position. As such, Plaintiffs do not have a right of restitution, and cannot maintain a claim for unjust enrichment against Borsand as a third party to the contract.

Based on the foregoing, Borsand's motion for summary as to Plaintiffs' claim for unjust enrichment is GRANTED, and the same is DISMISSED.

B. <u>Corporate Defendants</u>

The Corporate Defendants argue that Plaintiffs unjust enrichment claims fail because there are several express contracts between the parties covering the subject matter. Defendant argues that since the parties admit that the contracts are all binding and enforceable, Plaintiffs cannot maintain a claim for unjust enrichment.

Plaintiffs do not dispute that valid contracts exists between the parties. And, Plaintiffs do not seem to provide any evidence or argument that their unjust enrichment claim should proceed as to the Corporate Defendants, their argument centers around Borsand's unjust enrichment.

To establish a claim for unjust enrichment, a plaintiff must show: (1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to the plaintiff because of the defendant's retention of the benefit. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). Where an express contract exists between the parties, a contract cannot be implied in law which covers the same subject matter. *Cascade Elec Co v. Rice*, 70 Mich App 420, 426; 245 NW2d 774 (1976). However, if Plaintiff claims that there is a verbal agreement and that is disputed by Defendants, Plaintiff is "not required to elect to proceed under one theory or the other, but could seek recovery on the basis either of an express verbal contract, or an implied contract if the jury found the express verbal contract did not exist." *Id.* at 427.

According to Plaintiffs' Complaint, "Defendants have failed to fully and adequately compensate Plaintiffs for the benefits that were given to Defendants." (Complaint, at ¶139). In response to Defendants' motion, Plaintiffs elaborate and explain that Defendants were unjustly enriched based on breaches to the respective contracts the parties had. (Plaintiffs' Response to Counts IV and VIII, at p.15). As such, express contracts exists between the parties governing the

same subject matter, and the Court cannot imply a contract in law.

Based on the foregoing, the Corporate Defendants' motion for summary as to Plaintiffs' unjust enrichment claim is GRANTED, and the same is DISMISSED.

III. Conclusion

Count I – Breach of Purchase Agreements - Defendant Borsand and the Corporate Defendants motions for summary disposition of Plaintiffs' Count I are GRANTED in their entirety, and the same is DISMISSED.

Count II – Breach of Side Letter Agreements - Defendant Borsand and the Corporate Defendants motions for summary disposition of Plaintiffs' Count II are GRANTED in their entirety, and the same is DISMISSED.

Count III – Breach of June 2017 Agreement - Defendant Borsand's motion for summary disposition of Plaintiffs' Count III is GRANTED, and the same is DISMISSED as to Borsand, individually. Count III remains pending against the Corporate Defendants.

Count IV – Conversion - Borsand and the Corporate Defendants motions for summary disposition of Plaintiffs' Count IV are GRANTED in their entirety, and the same is DISMISSED.

Count V – Fraud and Misrepresentation - Borsand and the Corporate Defendants motions for summary disposition of Plaintiffs' Count V are GRANTED in their entirety, and the same is DISMISSED.

Count VI – Silent Fraud - Borsand and the Corporate Defendants motions for summary disposition of Plaintiffs' Count VI are GRANTED in their entirety, and the same is DISMISSED.

Count VII – Innocent Misrepresentation - Borsand and the Corporate Defendants motions for

summary disposition of Plaintiffs' Count VII are GRANTED in their entirety, and the same is DISMISSED.

Count VIII – Unjust Enrichment - Borsand and the Corporate Defendants motions for summary disposition of Plaintiffs' Count VIII are GRANTED in their entirety, and the same is DISMISSED.

IT IS SO ORDERED.

September 11, 2019__	__/s/ James M. Alexander_________________
Date	Hon. James M. Alexander, Circuit Court Judge