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

AIROFY, LLC,
Plaintiff,

v.

Case No. 19-177979-CB
Hon. James M. Alexander

ORIA COLLAPSIBLES, LLC,
MIGUEL A. LINARES, and
MICHAEL J. CAVANAUGH,
Defendants.

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OPINION AND ORDER RE: SUMMARY DISPOSITION

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

According to Plaintiff's Complaint, prior to being dissolved in 2019, Global was in the business of purchasing, developing, and licensing technology for the spraying or coating of goods with a focus on wooden pallets. Plaintiff is the assignee and owner of certain Global assets, and as assignee, is entitled to bring the current action.

Defendant Oria, formed by Defendants Linares and Cavanaugh, is in the business of developing products, materials, and manufacturing processes for products. Defendants met with Global to discuss a proprietary chemical spray ("Oria Spray") to treat wooden pallets they had developed. Defendants claimed that the spray met Global's specifications. Despite Global's request, Defendants never shared the chemical formula for the spray.

After additional meetings, Global and Oria signed an exclusive licensing agreement on

November 26, 2013. Thereafter, the parties executed two amendments, the most recent was entered into on June 2, 2015. These agreements gave Global the exclusive right to use and market the Oria Spray.

Plaintiff claims that before entering into any written agreement, Defendants made false representations regarding the Oria Spray. Further, Plaintiff claims that the Oria Spray did not meet Global's requirements, and as such, Global did not receive the benefit of its bargain.

Additionally, Plaintiff claims that in 2017, Defendants began making demands for price increases and to solicit third-party investors. In 2018, the parties attempted to negotiate a mutually acceptable amendment, but were not successful. Then on November 21, 2018, Oria sent Global a latter terminating the Agreement and claiming that Global owed additional royalty fees. Plaintiff claims Oria's termination was improper and constituted a material breach of the Agreement.

On these general allegations, Plaintiff filed its Complaint on claims titled (Count I) breach of contract (Oria); (Count II) fraudulent misrepresentation; (Count III) fraud in the inducement; (Count IV) innocent misrepresentation; (Count V) negligent misrepresentation; and (Count VI) unjust enrichment (Oria).

As stated, Defendants now move for summary disposition under MCR 2.116(C)(8), which tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). 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) (emphasis added).[1]

I. Count I – Breach of Contract

First, Defendants argue that Plaintiff's breach of contract claim must be dismissed because the Agreement contains a merger clause, so Plaintiff cannot rely on statements or promises that were not included in the Agreement. Further, since the Agreement contained a merger clause, Defendants argue that Plaintiff cannot rely on parol evidence.

In response, Plaintiff argues that its breach of contract claim is based on violations of the parties Agreement, not false representations that were made prior to executing the contract. Further, Plaintiff argues that the existence of a merger clause does not bar a breach of contract action. The Court agrees.

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).

Further, where the contract includes an express integration or merger clause within the agreement, "it is conclusive and parol evidence is not admissible to show that the agreement is not

1 "When 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

integrated except in cases of fraud that invalidate the integration clause or where an agreement is obviously incomplete 'on its face' and, therefore, parol evidence is necessary for the 'filling of gaps.'" *UAW-GM Human Res Ctr v KSL Recreation Corp*, 228 Mich App 486, 502; 579 NW2d 411 (1998).

According to Plaintiff's Complaint, Global and Oria entered into the Agreement whereby Oria agreed to exclusively license the Oria Spray to Global. (Complaint, ¶65). Plaintiff claims that Defendants breached the Agreement by (1) providing a spray that was not usable and did not meet Global's specifications, (2) failing to provide a viable replacement, (3) violating the exclusivity provision by marketing and selling the Oria Spray to third parties, and (4) wrongfully terminating the Agreement on November 21, 2018. (Complaint, ¶¶66, 67). As a result of Defendants breaches, Plaintiff claims it has been damaged. (Complaint, ¶70).

Here, Plaintiff's breach of contract claim is not based on any alleged misrepresentations, nor does Plaintiff attempt to plead its claim with parol evidence. Rather, Plaintiff alleges that (1) the parties entered into a valid contract, (2) Defendants breached the contract by failing to provide a usable product, by violating the exclusivity provision, and by wrongfully terminating the contract, and (3) Plaintiff suffered damages as a result.

As Defendants argue, since there the Agreement contains a merger clause, parol evidence cannot be used to show that the Agreement is not fully integrated or to vary the Agreements terms. However, Plaintiff does not allege that the Agreement is not integrated or attempt to introduce parol evidence. As such, the existence of a merger clause does not bar Plaintiff's breach of contract claim.

Based on the foregoing, the Court finds that Plaintiff has properly stated a claim for breach

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(2003).

contract. As a result, Defendants' motion for summary of the same is DENIED.

II. Counts II-V – Fraudulent Misrepresentation, Fraud in the Inducement, Innocent Misrepresentation, and Negligence Misrepresentation

Next, Defendant argue that Plaintiff's fraud claims should be dismissed because (1) the contract contains a merger clause, to Plaintiff cannot rely on statements that were not included in the Agreement, (2) the economic loss doctrine bars tort actions, (3) claims for fraud are not assignable, (4) Plaintiff failed to plead its fraud claims with particularity, and (5) Plaintiff's claims are based on future promises, which do not support a claim for fraud.

According to Plaintiff's Complaint, its claims for fraudulent misrepresentation, fraud in the inducement, innocent misrepresentation, and negligent misrepresentation are all predicated on the allegations that Defendants made or material misrepresentations regarding the Oria Spray. Specifically, Plaintiff alleges that prior to entering into the Agreement, Defendants made material misrepresentation that (1) the Oria Spray could be used for Global's business needs, (2) a secret additive in the Oria Spray provided protective coating and was highly fire-retardant, (3) the Oria Spray could be used in high or low production environments, (4) the Oria Spray met cure time requirements, (5) manufacture costs would be around $2 per pound, and (6) Global's use of the Oria Spray would not be restricted. (Complaint, at ¶¶72, 78, 85, 95).

Further, Plaintiff alleges these representations were made to induce Global to enter into the Agreement with Oria. (Complaint, at ¶¶73, 79, 86, 92). Global relied on the representations. (Complaint, at ¶¶74, 80, 87, 93). The representations were false. (Complaint, at ¶¶75, 81, 88, 94). And Global was damaged as a result. (Complaint, at ¶¶76, 83, 89, 96).

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).

When distinguishing between fraud in the inducement and other kinds of fraud, the *Huron Tool* Court reasoned:

> The distinction between fraud in the inducement and other kinds of fraud is the same as the distinction drawn by a New Jersey federal district court between fraud extraneous to the contract and fraud interwoven with the breach of contract. *Public Service Enterprise Group, Inc v Philadelphia Elec Co*, 722 F. Supp 184, 201 (D NJ, 1989). With respect to the latter kind of fraud, the misrepresentations relate to the breaching party's performance of the contract and do not give rise to an independent cause of action in tort. *Huron Tool & Eng'g Co v Precision Consulting Servs*, 209 Mich App 365, 373; 532 NW2d 541 (1995).

> Such fraud is not extraneous to the contractual dispute among the parties, but is instead but another thread in the fabric of [the] plaintiffs' contract claim. . . . [It] is undergirded by factual allegations identical to those supporting their breach of contract counts. . . . This fraud did not induce the plaintiffs to enter into the original agreement nor did it induce them to enter into additional undertakings. It did not cause harm to the plaintiffs distinct from those caused by the breach of contract . . . . [Id.] *Id.*

> . . . [T]he 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).

And, "[a] claim for negligent misrepresentation requires plaintiff to prove that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Alfieri v Bertorelli*, 295 Mich App 189, 193; 813 NW2d 772 (2012).

First, Defendants argue that Plaintiff's fraud claims should be dismissed because the Agreement includes a merger clause, which nullifies all antecedent claims. Defendants argue that since the Agreement is fully integrated, Plaintiff cannot rely on statements, promises, or

representation not included in the parties' contract to support its fraud claims.

In response, Plaintiff argues that it can maintain its fraud claims because the allegations involve pre-contractual statements of existing fact, and the parol evidence rule does not bar introduction of the representations. Further, Plaintiff argues that its fraud claims would invalidate the Agreement in its entirety, including the merger clause.

The *UAW-GM* Court reasoned that:

> . . . a contract with a merger clause nullifies all antecedent claims. In our view, this includes any collateral agreements that were allegedly an inducement for entering into the contract. In the context of a contract that included a merger clause, parol evidence regarding false representations in a collateral agreement that induced the plaintiff to enter into the contract would vary the terms of the contract. *UAW-GM*, 288 Mich App at 502 (internal citations omitted).

Here, as stated, the parties' Agreement contained a merger clause that provides:

> Entire Agreement; Modifications. This Agreement constitutes the entire agreement and understanding between the parties with respect to the subject matter hereof and supersedes all prior proposals, negotiations, communications, representation, written or oral agreements and understandings between the parties with respect to the subject matter hereof. No modifications of any term or provision of this Agreement shall be enforceable unless embodied in a written document executed by all parties to this Agreement. (Complaint Exhibit 2, §8.4).

Defendants argue that Plaintiff is premising is fraud claims on statements that were made before the parties entered into the Agreement. *See* Complaint, at ¶¶72, 78, 85, 95. Defendants argue that since the Agreement is fully integrated, Plaintiff cannot introduce prior statements or parol evidence that modify the terms of the contract. To support its position, Defendants cite to *Hamade v Sunoco, Inc* (R&M), 271 Mich App 145; 721 NW2d 333 (2006).

In *Hamade,* plaintiff and defendant entered into a franchise agreement under which plaintiff operated a Sunoco gas station. *Id.* at 149. After a period of years, the parties renegotiated the terms

of their agreement. *Id.* During the negotiations, plaintiff requested that defendant include a provision in the agreement that it would not approve a second Sunoco within a certain distance of plaintiff's gas station. *Id.* at 149-150. The Sunoco representative stated that the plaintiff didn't need to worry because Sunoco would not do that. *Id.* at 150. Ultimately, the parties did not include the requested provision in the contract. *Id.* And, Sunoco eventually approved a new gas station approximately one mile from plaintiff's station. *Id.*

The *Hamade* plaintiff sued for (among other things) claims based on fraud. *Id.* at 151. The trial court granted defendant's motion for summary disposition finding that because the agreement contained an integration clause, parol evidence could not be used to present evidence that contracts the written agreement. *Id.* at 152. Therefore, the trial court concluded that plaintiff's fraud claims must fail. *Id.*

On appeal, the *Hamade* Court affirmed the trial court and found that, by including a merger clause, the parties agreed that the agreement constituted the parties' entire agreement and superseded any prior understandings or representations. *Id.* at 168-69. The *Hamade* Court explains that:

> extrinsic evidence may be presented to attack the validity of the contract as a whole. Thus, extrinsic evidence may be presented to show (1) that the writing was a sham, not intended to create legal relations, (2) that the contract has no efficacy or effect because of fraud, illegality, or mistake, (3) that the parties did not integrate their agreement or assent to it as the final embodiment of their understanding, or (4) that the agreement was only partially integrated because essential elements were not reduced to writing. *Id.* at 167-68.

Additionally, the *Hamade* Court reasoned:

> while parol evidence is generally admissible to prove fraud, fraud that relates solely to an oral agreement that was nullified by a valid merger clause would have no effect on the validity of the contract. Thus, when a contract contains a valid merger clause, the only fraud that could vitiate the contract is fraud that would invalidate the merger clause itself, i.e., fraud relating to the merger clause or fraud that invalidates the entire contract including the merger clause. *Id.* at 169-170.

The *Hamade* Court found that plaintiff's fraud claims were based solely on representations that Sunoco would not approve a location within a certain distance of plaintiff's station. *Id.* at 170. Further, the *Hamade* Court found that the representations were expressly nullified by the integration clause. *Id.* Additionally, the plaintiff did not show that the fraud invalidated the integration clause or the contract itself. Ultimately, the *Hamade* Court held that since plaintiff's fraud claims which were based on misrepresentations, the claims must fail. *Id.* at 172.

Plaintiff, however, argues that this Court should not follow *Hamade* because the misrepresentations were essential to the inducement to enter into the contract. Instead, Plaintiff asks the Court to follow unpublished and federal caselaw, which is not binding on this Court. The Court declines to do the same.

Here, like *Hamade*, Plaintiff's fraud claims are solely based on statements that were made before the contract was executed. And as stated, the parties' Agreement contained a merger clause. As such, and in holding consistent with *Hamade*, any oral agreement made prior to the contract is nullified. Therefore, the only fraud that could vitiate the contract is fraud that would invalidate the merger clause itself.

Again, like *Hamade*, Plaintiff has failed to plead fraud that would invalidate the merger clause. Plaintiff does not claim that the contract itself was a sham, that the contract has no effect (as evidenced by Plaintiff's breach of contract claim), or that the merger clause was not fully integrated. The only fraud Plaintiff alleges relates to oral misrepresentations that were nullified upon executing the Agreement that contained a merger clause.

Based on the foregoing, Plaintiff's fraud claims are barred by the Agreement's merger clause.

As a result, Defendant's motion for summary disposition of Plaintiff's fraud claims pursuant to MCR 2.116(C)(8) is GRANTED, and Plaintiff's Counts II-V are DISMISSED.

Assuming arguendo the Court did not dismiss Plaintiff's fraud claims based on the merger claim, claims of fraud are personal and not assignable under Michigan law. *In re Pazdzierz,*718 F3d 582, 586-87 (CA 6, 2013). *See Dickinson v. Seaver*, 44 Mich. 624, 7 N.W. 182, 185 (1880) ("A right to complain of fraud is not assignable[.]"). Based on the same, Plaintiff cannot maintain its fraud claims as Global's assignee, and the same would be dismissed.[2]

III. Unjust Enrichment

Next, Defendants argue that Plaintiff's unjust enrichment claim fails because there is an express contract between the parties governing the subject matter. Defendants argue that since the parties admit that there is an express contract governs any alleged right to relief, Plaintiff cannot seek relief based on an unjust enrichment theory.

In response, Plaintiff argues that it is not required to elect to proceed under a breach of contract or unjust enrichment theory but can only seek recover under one theory or the other. As such, Plaintiff argues that Defendants' motion to dismiss its unjust enrichment claim should be denied.

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

2 Based on the Court's ruling, the Court does not need to address Defendant's additional arguments.

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.

Here, Plaintiff has not alleged that a verbal contract exists between the parties that Defendants dispute. Rather, according to Plaintiff's Complaint, its unjust enrichment claim is based on the licensing of the Oria Spray (Complaint, at ¶98). The licensing of the Oria Spray was governed by the Agreement the parties executed on November 26, 2013. And, Defendants admit that the "case centers upon an Intellectual Property License Agreement" executed by Oria and Global.

Since an express contract exists between the parties, a contract cannot be implied in law covering the same subject matter. Here, the written Agreement between the parties covers the same subject matter that Plaintiff complains of in its unjust enrichment claim. Based on the same, a contract cannot be implied in law.

Based on the foregoing, Defendants' motion for summary disposition of Plaintiff's unjust enrichment claim is GRANTED, and the same is DISMISSED.

IV. Conclusion

Defendants' motion for summary disposition of Plaintiff's Complaint pursuant to (C)(8) is GRANTED as to Plaintiff's claims for fraudulent misrepresentation, fraud in the inducement, innocent misrepresentation, negligent misrepresentation, and unjust enrichment, and the same are

DISMISSED. Defendants' motion for summary disposition of Plaintiff's breach of contract claim is DENIED.

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, unless the evidence before the Court shows that an amendment would not be justified MCR 2.116(I)(5). Here, there is no evidence before the Court that would justify an amendment, and any such amendment would be futile. Although leave to amend should be freely given when justice so requires, the Court finds that no factual development could possibly justify recovery on Plaintiff's fraud or unjust enrichment claims.

IT IS SO ORDERED.

March 4, 2020_____ __/s/ James M. Alexander_____
Date Hon. James M. Alexander, Circuit Court Judge