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

MSY CAPITAL PARTNERS, LLC, and MICHIGAN REAL ESTATE DEVELOPMENT, LLC,
Plaintiffs,

v.

Case No. 19-178037-CB
Hon. James M. Alexander

LIV WELLNESS CENTER, LLC, ET AL,
Defendants.

_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

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

According to Plaintiffs' First Amended Complaint, Plaintiffs and Defendants are equal partners in a medical marijuana provisioning center in Ferndale, Michigan. Defendants executed a lease for the purpose of operating the Provisioning Center, however, Defendants were not prequalified by the State to operate the same. Plaintiffs, on the other hand, had a prequalified applicant, CLDD, LLC. Since Defendants had an interest in the real property and Plaintiffs were a prequalified applicant, the parties formed and operated the Joint Venture.

On June 12, 2018, the parties executed a letter of intent detailing the terms and conditions of the partnership. That same day, Plaintiffs applied to the City of Ferndale for the Provisioning Center license, which was ultimately approved. Pursuant to the letter of intent, the parties were to own fifty percent of the Joint Venture. Further, the letter of intent provided that if the parties were to receive approval, Plaintiffs would pay $300,000 to Defendants and the parties would operate the Joint

Venture as equal partners.

On June 20. 2018, Plaintiffs received approval to operate and paid Defendants $300,000 pursuant to the Letter of Intent. Further, Plaintiff paid $806,098.44 for a buildout of the Joint Venture premises and spent over $1,000,000 in furtherance of the Joint Venture. On or about May 15, 2019, prior to the Joint Venture opening for business, the parties received an offer to purchase the Joint Venture for $11,000,000. Plaintiffs wanted to accept the offer. Defendants, however, refused to accept the same.

Due to the disagreement, Defendants offered to buy out Plaintiffs' share of the Joint Venture for $5,500,000. One June 3, 2019, the terms and conditions were reduced to a written Buyout Agreement. Pursuant to the Buyout Agreement, Plaintiffs transferred their municipal approval to Defendants. Defendants, however, did not comply with the Buyout Agreement. Plaintiffs allege that Defendants engaged in fraudulent conduct when executing the Buyout Agreement to induce Plaintiffs to transfer the municipal approve.

Additionally, Plaintiffs allege that Defendants are using the Joint Venture's assets and funds for their personal benefit at the expense of Plaintiffs. Plaintiffs allege, among other things, that Defendants are mismanaging the Joint Venture, paying themselves unjustified salaries, and have locked Plaintiffs out of the premises and have refused to provide corporation information including an accounting.

On these general allegations, Plaintiffs filed their First Amended Complaint on claims titled (Count I) receiver; (Count II) breach of fiduciary duties and aiding and abetting breaches of fiduciary duties; (Count III) action by members pursuant to MCL 450.4515; (Count IV) breach of partnership; (Count V) violation of the Michigan Uniform Partnership Act; (Count VI) breach of agency; (Count

VII) breach of contract; (Count VIII) unjust enrichment and/or quantum meruit; (Count IX) fraudulent misrepresentation; (Count X) injunctive relief; (Count XI) statutory conversion; (Count XII) accounting and removal; (Count XIII) promissory estoppel; (Count XIV) breach of implied contract; (Count XV) silent fraud; and (Count XVI) civil conspiracy.

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).[1] And a (C)(10) motion tests the factual support for a plaintiff's claims. *Maiden*, 461 Mich at 120.[2]

I. Count II – Breach of Fiduciary Duty

Defendants argue that they are entitled to summary disposition of Plaintiffs' breach of fiduciary duty claim because the Complaint fails to state a claim for the same. Specifically, Defendants argue that Plaintiffs' fiduciary duty claim makes conclusory statements not supported by factual allegations, fails to differentiate between the Defendants, and fails to identify what entities Defendants are officers, directors, partners, or shareholders of.

In response, Plaintiffs argue that they have plead specific factual allegations in the 224

1 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).

2 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

paragraphs of their Complaint. Further, Plaintiff argues that there are questions of fact, and as such, Defendants' motion should be denied. The Court will, however, note that Plaintiffs do not directly address Defendants arguments as it relates to Plaintiffs' breach of fiduciary duty claim.

"To establish a breach of fiduciary duty, the plaintiff must demonstrate a fiduciary relationship between himself and defendants." *Holland v Jobete Music Co.*, 1999 WL 33446487. "A fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one upon the judgment and advice of another. Relief is granted when such position of influence has been acquired and abused, or when confidence has been reposed and betrayed." *Vicencio v Ramirez,* 211 Mich App 501, 508; 536 NW2d 280 (1995). Further, as a general rule, "[t]here must be some breach of duty distinct from breach of contract. *Rinaldo's Const Corp v Mich Bell Telephone Co,* 454 Mich 65, 83; 559 NW2d 647 (1997).

Further,

> The courts universally recognize the fiduciary relationship of partners and impose on them obligations of the utmost good faith and integrity in their dealings with one another in partnership affairs. Partners are held to a standard stricter than the morals of the marketplace and their fiduciary duties should be broadly construed . . . The fiduciary duty among partners is generally one of full and frank disclosure of all relevant information. Each partner has the right to know all that the others know, and each is required to make full disclosure of all material facts within his knowledge in any way relating to the partnership affairs. *Band v Livonia Assocs,* 176 Mich App 95, 113-14; 439 NW2d 285 (1989).

As it relates to Plaintiffs' breach of fiduciary duty claim, a review of the Complaint does show that Plaintiffs rely heavily on conclusory statements. Specifically, Plaintiffs state that "[a]t all relevant times, Defendants as officers, directors, partners and/or shareholders, owed fiduciary duties to Plaintiffs." (FAC, ¶142). Plaintiffs go on to list statutory and common law fiduciary duties in

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

general but fail to identify specific breaches of duties attributed to the Defendants.

As Plaintiffs argue, their 224 paragraph First Amended Complaint does specifically allege that Defendants breached fiduciary duties by freezing Plaintiffs out of the Joint Venture's management, withholding and refusing to produce material information, using Joint Venture assets for their own use, paying themselves unjustified salaries, and by putting Plaintiffs' business interest at risk. (FAC, ¶¶3, 75, 86). However, Plaintiff does fail to specifically allege which Defendant breached the fiduciary duties.

Further, the Letter of Intent (LOI) that Plaintiffs rely on to support their position that a partnership was formed identifies the partners as MSY and Liv Wellness Center. (FAC Exhibit A). Although the LOI is signed by Duane Karmo, he signed for and on behalf of Liv Wellness Center. *Id.* Plaintiffs have failed to allege (or provide support) how third parties can be held liable for breach of fiduciary duties to a partnership in which they are not a named partner.

The Supreme Court has held that a defendant may not know exactly what the proofs will establish throughout the case. *Jean v Hall*, 364 Mich 434, 437; 111 NW2d 111 (1961). However, the Supreme Court reasoned:

> What is required of pleadings in modern times is no more than reasonable notice of the claims made, in sufficient detail only that there be no misleading of either party nor a denial to him of information necessary to a fair preparation and presentation of his case. The pleader, in other words, need only 'apprize plainly the opposite party of the cause of action and the claim of plaintiff.' Our court rules put it succinctly in stating that the burden upon the plaintiff is merely to plead such allegations 'as will reasonably inform the defendant of the nature of the casue (sic) he is called upon to defend. *Id.*

Further, MCR 2.111(B) provides that a complaint, counterclaim, cross-claim, or third-party complaint must contain:

> (1) A statement of facts, without repetition, on which the pleader relies in stated the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called upon to defend.

After a review of Plaintiffs' FAC, the Court cannot conclude that Defendants have reasonable notice of Plaintiffs' breach of fiduciary duty claim. As stated, Plaintiffs have failed to allege which Defendants breached fiduciary duties. Plaintiffs have not made any specific allegations as to how Defendant Liv Wellness, Plaintiffs' purported partner, breached any fiduciary duties it may have owed. Further, aside from the jurisdictional allegations, Plaintiffs' FAC only specifically references Defendant Dennis Zoma. The other individual Defendants are not mentioned in the FAC. As such, those Defendants certainly do not have notice of any breaches of fiduciary duties they may have engaged in. And as stated, Plaintiffs have failed to allege how the individual Defendants owed Plaintiffs fiduciary duties when Plaintiffs' alleged partner is Defendant Liv Wellness.

Based on the foregoing, Plaintiffs' have failed to state claim for breach of fiduciary duty with the required specificity so that Defendants are reasonably informed of the nature of the claim. As such, Defendants' motion pursuant to (C)(8) of Plaintiffs' breach of fiduciary duty claim (Count II) is GRANTED, and the same is DISMISSED.

II. Count III – Action by Member Pursuant to MCL 450.4515

Next, Defendants argue that Plaintiffs' claim against Defendants for violation of the Michigan Limited Liability Act (LLC Act) (MCL 450.4515) should be dismissed because Plaintiffs are not members of any limited liability company with any of the Defendants.

According to Plaintiffs' Complaint, Plaintiffs allege that Defendants' liability arises out of their control of an interest in the Joint Venture. (FAC, ¶157) Further, Plaintiffs allege that

Defendants have violated their responsivities "as actual and/or de facto officers or managers" "by acting illegally, fraudulently, in a willfully unfair and oppressive manner, and/or in their own self-interests to the detriment of Plaintiffs as equal partners of the Joint Venture." (FAC, ¶¶157, 160).

MCL 450.4515(1) permits, "[a] member of a limited liability company may bring an action in the circuit court of the county in which the limited liability company's principal place of business or registered office is located to establish that acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member."

The LLC Act outlines how an individual may become a member in a limited liability company. *See* MCL 450.4501.

MCL 450.4501 provides:

> (1) A person may be admitted as a member of a limited liability company in connection with the formation of the limited liability company in any of the following ways:
>
> (a) If an operating agreement includes requirements for admission, by complying with those requirements.
>
> (b) If an operating agreement does not include requirements for admission, if either of the following are met:
>
> (*i*) The person signs the initial operating agreement.
>
> (*ii*) The person's status as a member is reflected in tax filings, or other written statements of the limited liability company.
>
> (c) In any manner established in a written agreement of the members.

Although Plaintiffs do allege that the parties formed Ferndale Pro Center, LLC to operate Liv Wellness, there is no allegation or evidence that Plaintiffs were members of any limited

liability company with Defendants. (FAC, ¶37). In the present case, there is no evidence of an operating agreement. Plaintiffs are not named on the Articles of Organization as an organizer. (Defendants' Exhibit H). And, there is no is evidence of Plaintiffs' member status on tax filings or other written statements of a limited liability. Notably, within their claim pursuant to MCL 450.4515, Plaintiffs allege that Defendants violated their duties to Plaintiffs "as equal partners of the Joint Venture," not as member of a limited liability company as required by statute. (FAC ¶160).

Plaintiffs rely on an unexecuted Purchase Agreement to establish that they have a 50% membership interest in LIV Ferndale, LLC. (Plaintiffs' Exhibit I). This document, however, does not comport with the requirements of MCL 450.4501. Further, the unsigned Purchase Agreement purports to give MSY a membership interest in LIV Ferndale and was to be signed by Andy Hruska. *Id.* Aside from the fact that the Purchase Agreement was never executed, the identified limited liability company is not an action to the instant matter. Further, there is no allegation or evidence that any of the Defendants are members of LIV Ferndale.

Based on the foregoing, Plaintiffs have failed to state a claim or present evidence creating a genuine issue of fact as to their status as members of a limited liability company with Defendants. As such, Plaintiffs cannot maintain its claim for an action by members pursuant to MCL 450.4515. Therefore, the Court GRANTS Defendants' motion as to count III of Plaintiffs' First Amended Complaint pursuant to (C)(8) and (C)(10) and DISMISSES the same.

III. Counts IV – V – Partnership Claims

Next, Defendants argue that Plaintiffs breach of partnership and violation of the Michigan

Uniform Partnership Act should be dismissed because (1) Plaintiffs have not alleged facts to establish the existence of a partnership between Plaintiffs and the Individual Defendants, and (2) Defendants admissions contradict their claim that they have a partnership. Specifically, Defendants argue the Plaintiffs' demand for a partnership accounting was only addressed to Liv Wellness. (Defendants' Exhibit L). Further, Defendants argue that Plaintiffs sent a draft Business Service Agreement to various third parties which indicated that no partnership was formed pursuant to the LOI. (Defendants' Exhibit J).

In response, Plaintiffs argue that the Court has already remarked that the existence of a partnership is a factual issue, and therefore, Defendants' motion should be denied. Plaintiffs argue that the LOI is the executed partnership agreement. Further, Plaintiffs argue that the LOI identified the parties as partners and the requirements of the partners. (Plaintiffs' Exhibit A). Despite the LOI identifying only MSY and Liv Wellness as partners, Plaintiffs argue that the Individual Defendants can be liable for the acts of another partner. Although arguing that the determination of a partnership is a factual issue, Plaintiffs request the Court grant summary disposition in their favor on the issue of the formation of the partnership under MCR 2.116(I)(2).

MCL 449.6(1) defines a partnership as "an association of 2 or more persons . . . to carry on as co-owners of a business for profit." "The determination of whether a partnership exists is a question of fact." *Miller v City Bank & Trust Co*, 82 Mich App 120, 123; 266 NW2d 687 (1978). In the absence of an express agreement, the test to be used in determining if a partnership exists are the acts and conduct in relation to the business. *Van Stee v Ransford*, 346 Mich 116, 133; 77 NW2d 346 (1956).

Here, both parties rely on documentary evidence to support their respective positions, some

of which are either not executed or the final execution is debated. First, Defendants rely on a letter sent to Defendants on behalf of Plaintiffs demanding a formal accounting of the partnership affairs of Liv Wellness. (Defendants' Exhibit L). The demand, sent on MSY Capital Partners letter head states, "MSY Capital Partners, LLC ("MSY") and Liv Wellness Center, LLC ("LWC") entered into a Partnership Agreement on June 12, 2019." *Id.* The demand corresponds with the LOI which states that MSY and Liv Wellness "will enter into a Partnership whereby each party will each own 50% of the Provisioning Center." (Defendants' Exhibit D).

Defendants' also argue that a draft Business Services Agreement contradicts Plaintiffs' claims that a partnership exists. (Defendants' Exhibit J). Specifically, Defendants argue that Plaintiffs made changes to the draft which included language that states that the "partnership never materialized pursuant to the terms of the Letter of Intent." *Id.* There is, however, no evidence to indicate that this document was ever executed by the parties.

Conversely, Plaintiffs argue that the LOI and their contributions unequivocally establish that a partnership was formed. Further, Plaintiffs' support their position with an affidavit from Mike Bahoura, MSY's attorney who drafted the LOI. (Plaintiffs' Exhibit C). In his affidavit, Bahoura states that while on the phone with a representative from MSY and Liv Wellness, he drafted the LOI based on the parties' agreement that each would be 50% partners in the venture. *Id.* at ¶8. Plaintiffs also attach text messages from Jeff Yatooma in which he refers to the Individual Defendants as partners. (Plaintiffs' Exhibit G).

Here, there is certainly evidence that MSY and Liv Wellness may have entered into a partnership agreement. Specifically, the LOI states that MSY and Liv Wellness would enter into a partnership agreement whereby each would own 50% of the Provisioning Center. Further, it is

undisputed that MSY made contribution on behalf of Liv Wellness. Although the parties dispute who the recipient of the funds was, they do agree that Plaintiff made contributions to the improvements at the Provisioning Center. As such, there is a question of fact as to whether a partnership was formed between MSY and Liv Wellness.

Although circumstantial, there may be evidence that MSY was in a partnership with the Individual Defendants, specifically the text messages in which Yatooma refers to the Individual Defendants as partners. As stated, the determination of whether a partnership exists is a question of fact, which is based on the acts and conduct in relation to the business. To determine if a partnership exists, the Court will have to weigh the evidence and credibility of affidavits to determine if the acts and conduct of the parties rise to the level of a partnership. This factual determination is inappropriate on a motion for summary disposition.

Based on the foregoing, there are questions of fact as to whether a partnership exists between Plaintiff MSY and Defendants. As such, Defendants' motion to dismiss Plaintiffs' breach of partnership and violation of the Michigan Uniform Partnership Act is DENIED. Plaintiffs' motion for the same under (I)(2) is also DENIED.

The Court can, however, determine that there is no evidence to support a partnership between Plaintiff Michigan Real Estate Development, LLC (MRED) and any of the Defendants. As such, there is no question of fact that a partnership was not formed between MRED and the Defendants. Based on the same, MRED's breach of partnership and violation of the Michigan Uniform Partnership Act are DISMISSED pursuant to MCR 2.116(C)(10).

IV. Count VI – Breach of Agency

Next, Defendants argue that Plaintiffs' breach of agency claim should be dismissed because it is based on conclusory statements and alleges no facts to support the same.3 Further, Defendants argue that Plaintiffs do not allege what actions were taken by why Defendant as agents an agent that damaged Plaintiffs. The Court agrees.

An agent is "[s]omeone who is authorized to act for or in place of another; a representative." Black's Law Dictionary (11th ed.). Here, Plaintiffs have failed to support the conclusion that Defendants were agents of Plaintiffs or their "various companies" with any factual allegations. Indeed, the crux of Plaintiffs' First Amended Complaint is that Defendants acted in their own best interest in violation of the partnership agreement. Plaintiffs do not allege that Defendants acted for or in place of Plaintiffs.

Further, "[i]t is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691-692; 822 NW2d 254 (2012). Upon review of Plaintiffs' First Amended Complaint, it is clear that Plaintiffs' breach of agency claim is merely a misstatement of their breach of fiduciary duty claim.

Based on the foregoing, Plaintiffs' have failed to state a claim for breach of agency. As such, Defendants' motion to dismiss under (C)(8) is GRANTED, and the same is DISMISSED.

V. Count VII – Breach of Contract

Next, Defendants argue that the only contract Plaintiffs allege was breached by Defendants

3 "Conclusory statements, unsupported by factual allegations, are insufficient to state a cause of action." *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003).

was the Buyout Agreement. Aside from the fact that the Buyout Agreement was not executed, the Agreement is only between MRED and Live Wellness. As such, Defendants argue that Plaintiffs cannot maintain a breach of contract claim against the Individual Defendants. 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).

Plaintiffs' First Amended Complaint alleges that Defendants breached the Buyout Agreement by failing to perform the duties pursuant to the same. However, the purported "Buyout Agreement" is an unexecuted Letter of Intent between MRED and Liv Wellness. The Individual Defendants were not parties to the alleged Buyout Agreement.

Based on the foregoing, the Court finds that, as a matter of law, the Individual Defendants are not parties to the Buyout Agreement. As such, Plaintiffs' have failed to state a claim for breach of contract against the Individual Defendants, and Defendants' motion for summary of the same is GRANTED pursuant to (C)(8). Plaintiffs' breach of contract claim is DISMISSED as to the Individual Defendants only.

VI. Count VIII – Unjust Enrichment

Next, Defendants argue that Plaintiffs' unjust enrichment claim should be dismissed because Plaintiffs have failed to plead any facts to support is claim. Further, Defendants argue that there is no evidence that the Individual Defendants received a benefit from Plaintiffs.

As it relates to their unjust enrichment claim, Plaintiffs allege that "due to their fraudulent

and oppressive conduct, including rampant self-dealing, Defendants have been unjustly enriched to Plaintiffs' detriment." (FAC, ¶183). And in response to Defendants' motion, Plaintiffs argue that the Individual Defendants have been unjustly enriched by virtue of receiving compensation from the Joint Venture.

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.

Plaintiffs do allege that they paid $806,098.44 for the buildout of the Provisioning Center and over $1,000,000 in furtherance of the Joint Venture. (FAC, ¶43). Plaintiffs also allege that on or about July 2, 2019, Plaintiffs' transferred their Municipal Approval to Defendants. (FAC, ¶61). Plaintiffs have not plead any facts that the Individual Defendants received any benefits from Plaintiffs. Rather, Plaintiffs only argue that the Individual Defendants were unjustly enriched through their compensation from Liv Wellness or the Joint Venture. This argument is not enough to maintain a claim for unjust enrichment against the Individual Defendants.

As it relates to Defendant Liv Wellness, Plaintiffs do allege there is an express contract that governs the subject matter. The contract is, however, disputed by Defendants. As such, Plaintiffs

are not required to elect to proceed under one theory or the other but may only seek recovery on the basis of a contract or an implied contract.

Based on the foregoing and accepting all well-pled allegations as true, Plaintiffs cannot maintain an action for unjust enrichment against the Individual Defendants. As such, Defendants' motion for summary is GRANTED as to the Individual Defendants, and the Plaintiffs' unjust enrichment claim is DIMISSED as to the Individual Defendants only.

VII. Counts IX and XV – Fraudulent Misrepresentation and Silent Fraud

According to Plaintiffs' First Amended Complaint, their fraudulent misrepresentation and silent fraud claims are predicated on their belief that Defendants failed to make, or intentionally made certain disclosures regarding their intent to honor the partnership and Buyout Agreement. Specifically, Plaintiffs allege that (1) Defendants never intended to pay the buyout amount; (2) Defendants made fraudulent misrepresentations with the intent that Plaintiffs would transfer the Municipal Approval ; and (3) that Defendants had a duty to disclose that they never intended to honor the partnership and Buyout Agreement or engage in good faith. (FAC, ¶¶186, 187, 218). Plaintiffs argue that to their detriment, they relied on Defendants misrepresentations and suffered damages as a result.

In their motion, Defendants argue that Plaintiffs have failed to state their fraud claim with the requisite particularity as required to maintain a claim for fraud. Specifically, Defendants argue that Plaintiffs fail to identify with particularity which Defendant made the alleged misrepresentations, to whom the representations were made, or when they were made. Further, Defendants argue that Plaintiffs' fraud claims relate to a future, contractual promise, which is not actionable. And,

Defendants argue that Plaintiffs' fraud claims are a restatement of their breach of contract claim.

In response, Plaintiffs argue that they have sufficiently plead their claims for fraud. As an example of fraudulent conduct, Plaintiffs cite to paragraph 65 of their First Amended Complaint, which states (in relevant part), "Zoma acknowledged the Agreement and provided multiple assurances that the executed agreement was going to be sent forthwith, thereby fraudulently inducing Plaintiffs to transfer the Municipal Approval." Plaintiffs also argue that their fraudulent misrepresentation claim was intended to state a claim for fraud in the inducement relative to Plaintiffs' transfer of the Municipal Approval.

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)

As it relates to Plaintiffs' fraudulent misrepresentation claim, much of Plaintiffs argument, seems to be a restatement of their argument for their breach of contract claim. Plaintiffs allege that Defendants fraudulently represented their intent to comply with the terms of the Buyout Agreement. (FAC, ¶¶185, 187). Further, as it related to their damages, Plaintiffs claim that they were damaged by Defendants' breach of the Buyout Agreement. (FAC, ¶188). These allegations are not predicated upon a statement relating to a past or an existing fact, rather they were based on a future promise, which is contractual in nature, and does not constitute fraud.

As it relates to Plaintiffs' silent fraud claim, Plaintiffs have failed to "show some type of representation by words or action that was false or misleading." *Lucas, supra* at 363-64. Plaintiffs' Frist Amended Complaint merely alleges that Defendants had a duty to disclose and suppressed material fact. (FAC, ¶¶218, 219). To sustain an action for silent fraud, Plaintiffs cannot merely prove that Defendants failed to disclose something.

Further, Plaintiffs' damages do not flow from any misrepresentations, failure to disclose, or other fraudulent conduct. Rather, these damages arise from and are a result of Plaintiffs' breach of

contract claim Plaintiffs against Defendants.

Based on the foregoing, Plaintiffs have failed to state a claim for fraudulent misrepresentation and silent fraud. As such, Defendants' motion for summary disposition pursuant to (C)(8) of Plaintiffs' claims for fraudulent misrepresentation and silent fraud are GRANTED, and the same are DISMISSED.

VIII. Count XI – Conversion

Next, Defendants argue that Plaintiffs' conversion claim fails because Michigan, generally, does not recognize a cause of action for conversion of money. Defendants also argue that since Plaintiffs allege that Defendants converted the Joint Venture assets, Plaintiff is not the proper party to maintain a conversion action. Further, Defendants argue to the extent that Plaintiffs' conversion claim is based on the allegation that Defendants are in possession of a permit issued by the City of Ferndale, Defendants argue that it is undisputed that the permit was issued to CLDD, LLC and then transferred to Liv Wellness. Therefore, Defendants argue that Plaintiffs cannot maintain their conversion claim.

In response, Plaintiffs argue that they have certainly stated a claim for conversion. Plaintiffs argue that by denying the existence of a partnership, Defendants admit that they have simply taken goods, services, and property from Plaintiffs' $806,000 contribution, as well as the municipal permit provided by Plaintiff. As such, Plaintiffs argue that Defendants have converted their property. Plaintiff also argue that they are able to maintain an action for conversion of money.

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).

Additionally, "a conversion claim cannot be brought where the property right alleged to have been converted arises entirely from the plaintiff's contractual rights." *Llewellyn-Jones v Metro Prop Group, LLC*, 22 F Supp 3d 760, 788 (ED Mich 2014) (internal citations and quotations omitted). It is, however, "possible for a party's conduct to result in both a breach of contract and a tort for common law conversion, so long as the defendant's conduct constituted a breach of duty separate and distinct from the breach of contract." *Id.*

According to Plaintiffs' First Amended Complaint,

> Plaintiffs have been significantly damaged as a direct and proximate result of . . . , Defendants stealing, embezzling and/or converting the Joint Venture, Plaintiffs' municipal license, any profits generated by the Joint Venture, Plaintiffs' capital and proprietary contributions to the Joint Venture, and other real and personal property to Defendants' own use where Defendants have opened and are operating the Joint Venture to the total exclusion and detriment of Plaintiffs' property rights in the Joint Venture. (FAC, ¶201).

First, much of Plaintiffs' conversion claim accuses Defendants of converting Joint Venture assets, not Plaintiffs. As such, Plaintiffs are not the proper party to maintain an action for conversion of any Joint Venture.[4] Further, as a member of the alleged Joint Venture, Defendant Liv Wellness would have an ownership right in the Joint Venture assets. And indeed, "a person cannot convert his own property." *Foremost Ins Co v. Allstate Ins Co*, 463 Mich 378, 391; 486 NW2d 600 (1992).

Beyond that, the only assets Plaintiffs' allege to have contributed to the partnership are $806,098.44 and the municipal license. As stated, to maintain an action for conversion of money, Defendants have an obligation to return the specific money entrusted to his care. Here, there is no obligation to return the specific $806,098.44. As such, Plaintiffs cannot maintain an action against Defendants for conversion of the money.

Plaintiffs argue that *Shiffman v Auto Source Wholesale, LLC*, unpublished per curiam opinion of the Court of Appeals, issued Aug. 14, 2018 (Docket No. 339291), allows for an action of conversion of money. Plaintiffs' reliance on *Shiffman* is misplaced. As the *Shiffman* Court noted, the plaintiff never made a claim for statutory conversion, instead the plaintiff asserted a claim for statutory stealing. *Id.* The *Shiffman* Court found that statutory stealing was a separate cause of action and allowed a statutory stealing claim of money to proceed. *Id.*

In the instant case, Plaintiff clearly brought a claim for statutory conversion, not statutory stealing. Further, *Shiffman* is not binding precedent on this Court. Based on the same, Plaintiffs'

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4 MCL 449.8 provides:

> (1) All property originally brought into the partnership stock or subsequently acquired, by purchase or otherwise, on account of the partnership is partnership property;
> (2) Unless the contrary intention appears, property acquired with partnership funds is partnership property;
> (3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name;
> (4) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears.

statutory conversion claim for the $806,098.44 fails.

Finally, Plaintiffs argue that Defendants converted the municipal license. However, the only evidence before the Court is that non-party CLDD, LLC held interest in the MMFLA permit for the subject premises. (Defendants' Exhibit N). Further, on June 17, 2019, CLDD transferred and conveyed its interest in the permit to Liv Wellness. *Id.* There is no evidence that Plaintiffs owned or held an interest in the municipal license, therefore, Plaintiffs cannot maintain an action for conversion of the same.

Based on the foregoing, Plaintiffs cannot maintain their claim for conversion. As such Defendants' motions for summary under (C)(8) and (C)(10) of Plaintiffs' conversion claim is GRANTED, and the same is DISMISSED.

IX. Count XII - Accounting and Removal

Next, Plaintiff seeks and accounting and removal pursuant to MCL 600.3605. MCL 600.3506 provides in (in relevant part) that the Court may "compel persons to account for their conduct in the management and disposition of the corporate funds and corporate property committed to their charge, or to remove any corporate trustee or officer from his office upon proof or conviction of gross misconduct." An action under MCL 600.3605 applies to "all directors, managers, trustees, and other officers of corporations, and over any person who has held any of these offices in any corporation against whom proceedings are commenced." MCL 600.3605(2).

As more fully discussed above, Plaintiffs are not members, directors, managers, trustees, or other officers of any corporation against whom the proceedings were commenced. Therefore, Plaintiffs cannot maintain an action for an accounting or removal pursuant to MCL 600.3605. As

such, Defendants' motion for summary disposition pursuant to (C)(10) is GRANTED, and Plaintiffs' accounting and removal claim is DISMISSED.

X. Counts XIII and XIV – Promissory Estoppel and Breach of Implied Contract

Next, Defendants argue that Plaintiffs claims for promissory estoppel and breach of implied contract should be dismissed against Danny Zoma and Duane Karmo because there are no factual allegations that either Danny Zoma or Karmo ever made any promises or engaged in conduct that would suggest an implied contract was created. The Court agrees.

After a careful review of Plaintiffs' First Amended Complaint, it is evident that Plaintiffs have not made any factual allegations to support their claims for promissory estoppel or breach of implied contract against either Danny Zoma or Duane Karmo. As such, Plaintiffs' have failed to state a claim for the same against Danny Zoma or Duane Karmo, and Plaintiffs' Counts XIII and XIV are DISMISSED against Danny Zoma and Duane Karmo.[5]

XI. Counts I, X, XVI – Receiver, Injunctive Relief, and Civil Conspiracy

And finally, Defendants argue that Plaintiffs' claims for a receiver, injunctive relief, and civil conspiracy claims should be dismissed. Plaintiffs did not address Defendants' arguments in their response.

The Michigan Court of Appeals has held that:

5 Plaintiffs' allege that Defendants' conduct created an implied contract that they would engage in a good faith partnership. (FAC, ¶214). If Plaintiffs are attempted to bring a claim for breach of the implied covenant of good faith, it is well-settled that "[u]nlike some other jurisdictions, 'Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing.'" *In re Leix Estate*, 289 Mich App 574, 591; 797 NW2d 673, 683 (2010); citing *Dykema Gossett PLLC v Ajluni*, 273 Mich App 1, 13; 730 NW2d 29 (2006).

> A party opposing a motion brought under C(10) may not rest upon the mere allegations or denials in that party's pleadings, but must by affidavit, deposition, admission, or other documentary evidence set forth specific facts showing that there is a genuine issue for trial. . . . [W]here the opposing party fails to come forward with evidence, beyond allegations or denials in the pleadings, to establish the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993) (internal citations omitted).

Based on the same, Plaintiffs have failed to establish that a question of fact remains as to their claims for receiver, injunctive relief, or civil conspiracy. Therefore, Defendants' motion for summary disposition of Plaintiffs' Counts I, X, and XVI is GRANTED, and the same are DISMISSED.

XII. Conclusion[6]

Count I – Receiver – Defendants' motion for summary disposition of Plaintiffs' Count I is GRANTED, and the same is DISMISSED.

Count II – Breach of Fiduciary Duties and Aiding and Abetting Breaches of Fiduciary Duties - Defendants' motion for summary disposition of Plaintiffs' Count II is GRANTED pursuant to MCR 2.116(C)(8), and the same is DISMISSED. Plaintiffs have 14 days to amend Count II.[7]

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6 Plaintiffs' also argue that summary disposition should not be grated before discovery is complete, however, Plaintiffs' have failed to comply with MCR 2.116(H).

> Generally, summary disposition under MCR 2.116(C)(10) is premature if it is granted before discovery on a disputed issue is complete. However, the mere fact that the discovery period remains open does not automatically mean that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate. The question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position. In addition, a party opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence. The party opposing summary disposition must offer the required MCR 2.116(H) affidavits, with the probable testimony to support its contentions. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292-93; 769 NW2d 234 (2009).

7 Whenever the Court is inclined to grant a (C)(8) motion, the Court Rules require that a plaintiff be provided an

Count III – Action by Members Pursuant to MCL 450.4515 - Defendants' motion for summary disposition of Plaintiffs' Count III is GRANTED, and the same is DISMISSED.

Count IV – Breach of Partnership – Defendants' motion for summary disposition of Plaintiffs' Count IV is DENIED.

Count V – Violation of the Michigan Uniform Partnership Act - Defendants' motion for summary disposition of Plaintiffs' Count IV is DENIED.

Count VI – Breach of Agency - Defendants' motion for summary disposition of Plaintiffs' Count VI is GRANTED, and the same is DISMISSED.

Count VII – Breach of Contract – The Individual Defendants' motion for summary disposition of Plaintiffs' Count VII is GRANTED, and the same is DISMISSED as to the Individual Defendants only. Count VII remains as to Defendant Liv Wellness.

Count VIII – Unjust Enrichment and/or Quantum Meruit - The Individual Defendants' motion for summary disposition of Plaintiffs' Count VIII is GRANTED, and the same is DISMISSED as to the Individual Defendants only. Count VIII remains as to Defendant Liv Wellness.

Counts IX-XII – Fraudulent Misrepresentation, Injunctive Relief, Statutory Conversion, and Accounting - Defendants' motion for summary disposition of Plaintiffs' Counts IX-XII is GRANTED, and the same are DISMISSED.

Counts XIII-XIV – Promissory Estoppel, Breach of Implied Contract – Defendants Danny

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opportunity to amend to properly allege sufficient facts to support its claim if justice so requires. MCR 2.116(I)(5). The Court will provide such opportunity as to Plaintiffs' breach of fiduciary duties claim. As it relates to the remainder of Plaintiffs' First Amended Complaint, the Court finds that 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, the Court finds that, even if amended, no factual development could possibly justify recovery on Plaintiff's claims.

Zoma and Duane Karmo's motion for summary disposition of Plaintiffs' Counts XIII and XIV is GRANTED, and the same are DISMISSED as to Danny Zoma and Duane Karmo. Counts XIII and XIV remain as to Defendants Liv Wellness and Dennis Zoma.

Counts XV-XVI – Silent Fraud, Civil Conspiracy - Defendants' motion for summary disposition of Plaintiffs' Counts XV is GRANTED, and the same are DISMISSED.

Further, pursuant to MCR 1.102(E), Defendants John and Jane Does 1-5 are dismissed without prejudice.

IT IS SO ORDERED.

February 19, 2020_ __ /s/ James M. Alexander_____
Date Hon. James M. Alexander, Circuit Court Judge