STATE OF MICHIGAN

IN THE 20th CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET
414 Washington Avenue
Grand Haven, Michigan 49417
616-846-8320
* * * * *

TOP PRACTICES, LLC,

Plaintiff/Counter-Defendant,

v

VMD SERVICES, LLC, CREATIVE PATH SOLUTIONS, LLC, LORI HIBMA, KEVIN HIBMA, and **TYLER CADY,**

Defendants/Counter-Plaintiffs.
_____/

OPINION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

File No. 20-6237-CB
Hon. Jon A. Van Allsburg

In this case, plaintiff Top Practices, LLC alleges that defendant VMD Services, LLC (VMD) unilaterally terminated a six-year business relationship between the parties in which the parties worked jointly to provide a Virtual Marketing Director program (the program) to podiatrist medical practices. In June 2020 defendants Lori and Kevin Hibma (the Hibma defendants) sold VMD to their employee, Tyler Cady, owner of Creative Path Solutions, LLC (CPS). Thereafter, CPS operated the business and plaintiff was "frozen out" of the venture and no longer received the customary percentage of revenues it had received from client subscriptions to the program.

Plaintiff asserts its business relationship with VMD was a *de facto* joint venture, with all the fiduciary, contractual and legal principles that generally apply to joint ventures. It objects to VMD's unilateral termination of the relationship and sale of the entire venture, including plaintiff's interest, to CPS. Plaintiff also asserts the program was a trade secret that it developed, and objects to VMD's and CPS's misappropriation of the trade secret without compensation. VMD denies the existence of a joint venture, or any verbal agreement or course of conduct that constituted a joint venture. VMD characterizes its relationship with plaintiff as two independent companies sharing, at most, a simple unwritten referral agreement. VMD also asserts plaintiff's program was an easily reproducible marketing concept that did not constitute a trade secret.

On August 19, 2020, plaintiff filed a Complaint alleging 13 counts against defendants. Defendants VMD, CPS and Tyler Cady (the Cady defendants) filed a Counter-Complaint against plaintiff, with which the Hibma defendants concurred, for tortious interference with a contract or advantageous business relationship or expectancy, alleging that plaintiff has contacted customers

and encouraged them not to renew contracts with defendants. The Cady defendants now move for summary disposition of plaintiff's claims against them pursuant to MCR 2.116(C)(8). The Hibma defendants concur, and also move for summary disposition of plaintiff's claims against them pursuant to MCR 2.116(C)(8). The court heard oral argument on defendants' motions on February 1, 2021.

Plaintiff alleges claims separately or jointly against the various defendants, as indicated below. Defendants assert that plaintiff's Complaint pleads illusory, conclusory claims devoid of the requisite allegations of fact.

Standard of Review

A motion brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the pleadings alone, to determine whether the plaintiff has stated a claim on which relief may be granted. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013); *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Any well-pleaded factual allegations in the complaint, together with any inferences that can reasonably be drawn from them, must be accepted as true and construed in a light most favorable to the non-moving party. *Maiden, supra*, citing *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). A motion under MCR 2.116(C)(8) 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." *Maiden, supra*, citing *Wade* at 163. A mere statement of conclusion, unsupported by allegations of fact, will not suffice to state a cause of action. *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003).

Count I - Breach of Contract (against VMD)

Plaintiff alleges VMD breached the parties' verbal joint venture agreement, which was an unwritten agreement confirmed by the parties' course of conduct over several years. Breach of contract consists of three elements: (1) the existence of a contract, (2) which the other party breached, (3) thereby resulting in damages to the party claiming the breach. *Miller-Davis Co v Ahrens Const, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014).

A contract requires (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Innovation Ventures v Liquid Manufacturing*, 499 Mich 491, 508; 885 NW2d 861 (2016). Plaintiff alleges VMD's breach of a contract to engage in a joint venture. Whether the parties intended a joint venture agreement bears on contract element (4) – mutuality of agreement to engage in a joint venture. The parties' intention to form a joint venture agreement is determined in accord with general rules governing the interpretation and construction of contracts. *Goodwin v SA Healy Co*, 383 Mich 300, 309; 174 NW2d 755 (1970). It is a general rule of contract law that mutuality of agreement is judged by an objective standard, looking to the express words of the parties and their visible acts, not to their

subjective states of mind. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 454; 733 NW2d 766 (2006) (quotation marks and citation omitted).

The court finds plaintiff has pleaded facts sufficient to allege the 5 elements of a contract between the parties, including facts sufficient to allege mutual agreement to engage in a joint venture under element (4). The Complaint states facts alleging:

(1) The parties' capacity as legally formed entities.[1]

(2) The subject matter of the contract was the parties' joint provision of the program to podiatric medical practices for mutual profit.[2]

(3) VMD received consideration in the form of client referrals and the use of a program that plaintiff developed and owns, while plaintiff received consideration in the form of 18% of the revenue generated by sales of the program.[3]

(4) The parties' objective actions demonstrated their mutual agreement to engage in the six elements comprising a joint venture:[4]

> (a) *an agreement indicating an intention to undertake a joint venture* – the verbal contract as described;[5]
> (b) *a joint undertaking of*
> (c) *a single project for profit* - the parties jointly provided the program to podiatric medical practices and jointly profited from it from April 2014 to June 2020;[6]
> (d) *a sharing of profits as well as losses* – VMD and plaintiff received their respective percentages of revenue from the joint undertaking, and the parties agreed to reduce plaintiff's revenue percentage by 50% in March and April 2020 due to losses associated with COVID-19;[7]

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[1] August 19, 2020 Complaint, ¶¶ 3-4.

[2] *Id.*, ¶¶ 1, 13-14.

[3] *Id.*, ¶¶ 12-14, 18.

[4] *Berger v Mead*, 127 Mich App 209, 214-215; 338 NW2d 919 (1983), quoting *Meyers v Robb*, 82 Mich App 549, 557; 267 NW2d 450 (1978).

[5] August 19, 2020 Complaint, ¶¶ 1, 13-16.

[6] *Id.*, ¶¶ 1, 13-18, 21-22.

[7] *Id.*, ¶¶ 17-18.

(e) *contribution of skills or property by the parties* - plaintiff contributed the program and client referrals, proprietary licensing, marketing, payment processing and client intervention and VMD contributed staffing and operational support;[8]
(f) *community interest and control over the subject matter of the enterprise*– plaintiff provided nearly all of the subscribers to the program in exchange for a percentage of revenue, VMD used the program to earn revenue, plaintiff provided the program and processed payments and received a percentage of the revenue, the parties exchanged marketing materials, VMD held itself out as a service of plaintiff at a trade show in February 2020, Lori Hibma identified herself as Director of VMD Services for plaintiff, and Lori Hibma publicly referred to the parties' relationship as a partnership;[9]

(5) Mutuality of obligation – VMD sold a business it did not solely own and thereby deprived plaintiff of its interest in the joint venture and misappropriated plaintiff's proprietary program.[10] This gives rise to a reasonable inference that plaintiff was obligated to provide VMD use of the program only as long as VMD was obligated to pay plaintiff a percentage of the revenue generated from that use.

The Complaint also sufficiently alleges VMD's breach of the alleged verbal joint venture agreement, and resulting damage to plaintiff.[11] Plaintiff alleges the fact that VMD unilaterally sold the entire joint venture to CPS when VMD did not own the entire interest, which allowed CPS to subsequently operate the joint venture to the exclusion of plaintiff and contrary to the terms of the joint venture agreement. Plaintiff alleges that its damages consist of deprivation of its interest in the joint venture, misappropriation of its proprietary program, and deprivation of its revenue percentage for use of the program.

The Cady defendants, without conceding that a verbal joint venture agreement exists, asserted at the February 1, 2021 hearing that the joint venture agreement was an agreement not to be performed within one year, and thus violated the statute of frauds, MCL 566.132(1)(a).[12]

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[8] *Id.*, ¶¶ 13-14, 16.

[9] *Id.*, ¶¶ 12-16.

[10] *Id.*, ¶¶ 17-18, 20.

[11] *Id.*, ¶¶ 1-2, 17-26.

[12] MCL 566.132(1)(a) provides:

> In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise, is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:

Plaintiff's Complaint alleged that the parties operated in a consistent manner according to the terms of their verbal joint venture agreement for several years, from April 2014 to June 2020. The agreement was not completed in one year. However, to determine whether an agreement not to be performed within one year comes within the statute of frauds, the proper inquiry is whether the contract is at all possible of performance within one year of the agreement. *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 533; 437 NW2d 652 (1991). Neither party has alleged facts indicating that the verbal agreement included a time frame or, by its very terms, was not able to be performed within one year. Therefore, the court does not conclude that the alleged verbal joint venture agreement violated the statute of frauds.

Plaintiff's Count I sufficiently states a claim of Breach of Contract against VMD, specifically the breach of a verbal joint venture agreement.

Count II – Breach of Implied Warranty of Good Faith and Fair Dealing (against VMD)

Michigan does not recognize a separate claim for breach of an implied covenant of good faith and fair dealing. *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 476; 666 NW2d 271 (2003). Rather, the obligation of good faith and fair dealing arises only in relation to a contractual obligation or statutory duty and is not independently actionable. *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 135; 839 NW2d 223 (2013). Plaintiff pleads the existence of a joint venture agreement and operation of a *de facto* joint venture. Therefore, VMD's obligation to act fairly and in good faith arises directly from the fiduciary obligation inherent in the parties' undertaking of a joint venture. "Joint venturers owe a fiduciary duty to each other." *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 583-584; 458 NW2d 659 (1990), citing *Van Stee v Ransford*, 346 Mich 116, 125–126, 77 NW2d 346 (1956). The fiduciary obligation does not arise independently and does not constitute a separate cause of action.

As a matter of law, plaintiff's Count II fails to state a claim upon which relief can be granted.

Count III – Breach of Contract (against Lori Hibma)

Plaintiff asserts that Lori Hibma breached a written, signed September 2010 confidentiality agreement. Plaintiff has not attached the confidentiality agreement to the Complaint as mandated by MCR 2.113(C)(1),[13] nor has it alleged in the Complaint an exception to that requirement.

(a) An agreement that, by its terms, is not to be performed within 1 year from the making of the agreement.

[13] MCR 2.113(C) provides:

Plaintiff's Complaint alleges phrases from the confidentiality agreement as factual support for its claim, but the court rule makes attachment of the written instrument upon which a claim is based mandatory and renders the instrument part of the pleading. MCR 2.113(C)(1) and (2).

Absent attachment of the entire confidentiality agreement to the Complaint, plaintiff's Count III fails to state a claim of Breach of Contract against Lori Hibma.

Pursuant to MCR 2.116(I)(5) the court grants plaintiff's request[14] to amend its Complaint. Amendment is limited to referencing the attachment in the amended pleading and attaching the confidentiality agreement.

Count IV -Breach of Implied Warranty of Good Faith and Fair Dealing (against Lori Hibma)

As stated in discussion of Count II, above, Michigan does not recognize a separate claim for breach of an implied covenant of good faith and fair dealing. *Belle Isle,* 256 Mich App at 476. The obligation of good faith and fair dealing arises only in relation to a contractual obligation or a statutory duty and is not independently actionable. *Gorman*, 302 Mich App at 135. Any covenant of good faith and fair dealing to which Lori Hibma may be subject arises only under the alleged confidentiality agreement. It does not constitute a separate cause of action.

As a matter of law, plaintiff's Count IV fails to state a claim upon which relief can be granted.

Count V – Tortious Interference with a Contract (Tyler Cady and Kevin Hibma)

Plaintiff asserts that Tyler Cady and Kevin Hibma tortiously interfered with both the verbal joint venture agreement between plaintiff and VMD, and the confidentiality agreement between plaintiff and Lori Hibma. Plaintiff consents to dismissal without prejudice of this claim against Kevin Hibma, subject to continued discovery.[15] Therefore, the court analyzes this claim only as to

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(I) If a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleading and labeled according to standards established by the State Court Administrative Office unless the instrument is

(a) a matter of public record in the county in which the action is commenced and its location in the record is stated in the pleading;

(b) in the possession of the adverse party and the pleading so states;

(c) inaccessible to the pleader and the pleading so states, giving the reason; or

(d) of a nature that attaching the instrument would be unnecessary or impractical and the pleading so states, giving the reason.

[14] Plaintiff's Consolidated Brief in Opposition to Defendants' Motion for Summary Disposition, p 19-20.

[15] Plaintiff's Consolidated Brief in Opposition to Defendants' Motion for Summary Disposition, p 10, n 7.

Cady. Also, plaintiff did not attach the confidentiality agreement to its Complaint, so the court analyzes this claim only as to breach of the alleged verbal joint venture agreement.

The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant. *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 90; 706 NW2d 843 (2005). Tortious interference with a contract is an intentional tort. The plaintiff must allege that instigation of the breach was an intentional doing of a per se wrongful act, or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationships of another. *Knight Enterprises v RPF Oil Co*, 299 Mich App 275, 280; 829 NW2d 345 (2013) (quotation marks and citations omitted).

The court found in its discussion of Count I, above, that plaintiff has stated facts sufficient to allege the existence and breach of a verbal joint venture agreement. As alleged, plaintiff describes the breach as VMD's unilateral sale of the entire joint venture, including plaintiff's interest, to CPS and CPS's subsequent operation of the venture to the exclusion of plaintiff and contrary to the terms of the joint venture agreement. Plaintiff's Complaint alleges as to Cady:[16] Cady was an employee of VMD before June 2020; Lori Hibma's May 29, 2020 email stated the Hibmas were selling VMD to Cady (sale date not stated); following Lori Hibma's May 29, 2020 email plaintiff was frozen out of the joint venture; VMD took over payment processing from plaintiff on June 1, 2020; CPS began processing financial transactions on behalf of the joint venture and comingling joint venture funds with defendants' funds; Lori Hibma's May 29, 2020 email terminated all agreements between VMD and plaintiff as of June 30, 2020; Cady is owner and CEO of both VMD and CPS; and the "concerted conduct" of all defendants caused plaintiff's damages.

The court finds plaintiff has failed to state facts sufficient to allege facts showing Cady, as an individual, instigated VMD's breach. CPS and Cady are separate entities, and plaintiff has failed to state facts sufficient to allege that Cady was an alter ego of CPS. Plaintiff alleges no facts as to Cady leading up to or concurrent with VMD's breach, other than that Cady was an employee of VMD, that VMD was sold to Cady, that CPS began processing client payments on June 1, 2020, and plaintiff was frozen out of revenue payments effective June 30, 2020. A reasonable inference may possibly be made that Cady, as a VMD employee who was active in operation of the venture, was aware of the relationship between plaintiff and VMD, and that Cady understood that offering to purchase, or accepting an offer to purchase, the entire interest in the joint venture would freeze out plaintiff. However, making or accepting an offer is not an unlawful act per se. As stated in *Hutton v Roberts*, 182 Mich App 153, 159; 451 NW2d 536 (1989):

[16] August 19, 2020 Complaint, ¶¶ 5, 8, 16-17, 19-20.

> It is necessary to show some active solicitation or encouragement of a breach of an already existing contract, accompanied by and corroborative of a malicious, unjustified purpose to inflict injury. The act of making an offer or of accepting an offer of another in violation of the other's contractual obligation is, by itself, not enough.

As plaintiff has failed to state facts sufficient to allege Cady's instigation of VMD's breach, plaintiff's Count V fails to state a claim of Tortious Interference with a Contract against Cady.

Count VI – Conversion of Funds (against CPS)

Plaintiff's Complaint does not state whether it claims common law conversion, or statutory conversion. They are not the same. *Aroma Wines & Equipment, Inc* v *Columbian Distribution Services*, Inc, 497 Mich 337, 361; 871 NW2d 136 (2015).

Common-law conversion is "any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." *Aroma Wines* 497 Mich at 351-352. The elements of common-law conversion are: (1) the plaintiff owns or has a qualified interest in identifiable personal property; (2) the plaintiff has possession of the property or the right to immediate possession; (3) the defendant wrongfully exerted dominion over the property in denial of or inconsistent with the plaintiff's rights; and (4) the plaintiff suffered actual damages. Brown, Miller, and Philo, *Michigan Causes of Action Formbook* (2d ed) (ICLE), § 2.17, p 41).

The elements of statutory conversion are: (1) the defendant stole or embezzled personal property or converted personal property as defined under the common law; and (2) the defendant put the converted property to his or her own use. Brown, Miller, and Philo, *Michigan Causes of Action Formbook* (2d ed) (ICLE), § 2.17, p 41-42. See also MCL 600.2919a. In the alternative, the elements are: (1) the defendant bought, received, possessed, concealed, or aided the concealment of stolen, embezzled, or converted personal property; and (2) the defendant knew that the personal property was stolen, embezzled, or converted when he or she did so. *Id.*

Plaintiff nominates this count "Conversion of Funds." To 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. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111–112; 593 NW2d 595 (1999). "Though the tort is an intentional tort because the converter's acts are willful, one can also commit this tort while being unaware of the plaintiff's property interest." *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004), citing *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).

Plaintiff's Complaint alleges:[17] plaintiff was receiving an 18% revenue split under the joint venture agreement; Lori Hibma's May 29, 2020 email stated VMD would take over client payment processing as of June 1, 2020, and all revenue splits to plaintiff would cease as of June 30, 2020; when Lori Hibma froze plaintiff out of the joint venture, CPS began receiving payments from clients of the joint venture, including the portion payable to plaintiff under the terms of the joint venture agreement; in doing so, CPS wrongfully exercised dominion and control over monies due and owing to plaintiff; CPS has taken amounts due and owing to plaintiff without authorization to the exclusion of plaintiff's right to those amounts; CPS is using that property in ways not permitted by the joint venture, outside the bounds of CPS's permitted scope of use, without making payment to plaintiff.

Plaintiff's Complaint fails to allege facts pleading conversion of plaintiff's specific funds, i.e., that plaintiff entrusted money that was already plaintiff's personal property to CPS's care to the creation of a debtor-creditor relationship, and that CPS had an obligation to return the specific money entrusted to its care. Plaintiff alleges CPS received the funds from clients, not from plaintiff.

Plaintiff's Complaint also fails to state facts alleging element (1) of either common law or statutory conversion, which is plaintiff's ownership interest in, or right to, the funds CPS withheld from plaintiff. Plaintiff alleges the withholding of its revenue share as of June 30, 2020. Plaintiff also alleges VMD unilaterally terminated the joint venture agreement on June 30, 2020 and conveyed the entire venture to CPS. Absent a specific contractual term, a joint venture does not extend for a longer period than that to which the parties consent and is terminable by either party at any time. *Posner v Miller*, 356 Mich 6, 9; 96 NW2d 110 (1959). As pleaded by plaintiff, the joint venture terminated on June 30, 2020. The joint venture agreement between VMD and plaintiff may have extended past June 30, 2020 to allow for an accounting, but the paying clients were no longer clients of the joint venture; they were CPS's clients. There existed no agreement requiring CPS to pay plaintiff a percentage of funds received from CPS's own clients.

Plaintiff's Count VI fails to state a claim for Conversion of Funds.

Count VII – Promissory Estoppel (against VMD)

In claiming promissory estoppel plaintiff asserts it provided its proprietary information to VMD in reliance on VMD's promises.[18] Promissory estoppel substitutes for consideration in a case where there are no mutual promises, enabling the promisee to assert a separate claim against the promisor. *Huhtala v Travelers Ins Co*, 401 Mich 118, 133; 257 NW2d 640 (1977). A contract will be implied only if there is no express contract. *Martin v East Lansing School Dist*, 193 Mich

[17] *Id.*, ¶¶ 17-18, 46-49.

[18] *Id.*, ¶¶ 50-54.

App 166, 177-178; 483 NW2d 656 (1992), citing *Campbell v City of Troy*, 42 Mich App 534, 537; 2020 NW2d 547 (1972).

Plaintiff's Complaint does not allege facts sufficient to state VMD's promise. Therefore, the court need not address whether plaintiff may plead promissory estoppel in the alternative to breach of contract where the existence of an express contract is in dispute.

The elements of promissory estoppel are: (1) a promise (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 686-687; 599 NW2d 546 (1999). "The promise giving rise to an actionable claim must be 'clear and definite.'" *Bodnar v St John Providence, Inc*, 327 Mich App 203, 226; 933 NW2 363 (2019), quoting *State Bank of Standish v Curry*, 442 Mich 76, 96; 500 NW2d 104 (1993). "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." *State Bank, supra*, at 85, quoting 1 Restatement Contracts, 2d, § 2, p 8. "To determine whether a promise exists, the court must objectively evaluate the circumstances of the transaction, including the parties' words, actions and relationship. *Bodnar, supra*, at 227, citing *Novak*, 235 Mich App at 687.

Plaintiff's Complaint states no facts to clearly identify VMD's promise. The Complaint cursorily alleges plaintiff provided "intellectual property and services" to VMD in reliance on VMDs "promises."[19] These allegations are too vague and conclusory. Even when all previous paragraphs of the Complaint are incorporated, VMD's "promises" may, at most, consist of some aspects of consideration expressly given by VMD under the verbal joint venture agreement. Should the verbal joint venture agreement be found non-existent, then VMD's "promises" are also non-existent and there would exist no basis for plaintiff's claim of promissory estoppel. The Complaint fails to state element (1) of a claim of promissory estoppel – a clear and definite promise relied on by plaintiff in providing use of its proprietary information to VMD.

Plaintiff's Count VII fails to state a claim of Promissory Estoppel against VMD.

Count VIII – Promissory Estoppel (against Lori Hibma)

The elements of promissory estoppel are as stated above. Under this count, plaintiff conflates VMD and Lori Hibma. They are separate entities. Plaintiff fails to state facts sufficient to allege that Lori Hibma and VMD are alter egos. Plaintiff first alleges VMD made promises upon

[19] *Id.*, ¶¶ 51, 53.

which plaintiff relied in providing Lori Hibma access to plaintiff's intellectual property, and then alleges that it is Lori Hibma's promise that must be enforced to avoid injustice.[20] Plaintiff pleads no facts sufficient to allege Hibma's individual liability for a promise VMD allegedly made as a limited liability company. Also, as noted above in discussion of Count VII, plaintiff also fails to sufficiently allege VMD's promise.

Lastly, plaintiff alleges Lori Hibma signed a written confidentiality agreement governing the terms under which it provided her access to certain intellectual property. A contract will be implied only if there is no express contract. *Martin v East Lansing School Dist*, 193 Mich App at 177-178.

Plaintiff's Count VIII fails to state a claim of Promissory Estoppel against Lori Hibma.

Count IX – Unjust Enrichment (against all defendants)

Plaintiff generally asserts all defendants have received a benefit from the use, disclosure and retention of plaintiff's proprietary branding and processes without compensating plaintiff.

To show unjust enrichment a plaintiff must demonstrate (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to plaintiff from defendant's retention of the benefit. If shown, a contract will be implied by law to prevent unjust enrichment. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 137; 676 NW2d 633 (2003). The doctrine of unjust enrichment must be employed with caution because it "vitiates normal contract principles." *Kammer Asphalt Paving Co v East China Twp Schools*, 443 Mich 176; 504 NW2d 635 (1993).

A contract may not be implied under the doctrine of unjust enrichment where there is an express contract covering the same subject matter. *Liggett,* 260 Mich App at 137. *Belle Isle*, 256 Mich App 478. Plaintiff alleges an express written and signed confidentiality agreement between plaintiff and Lori Hibma, and thus may not pursue a claim of unjust enrichment against Lori Hibma. Plaintiff has sufficiently alleged the existence of an express verbal joint venture agreement between plaintiff and VMD, pursuant to which VMD freely used plaintiff's alleged proprietary information in the parties' operation of the venture. However, VMD denies the existence of an express agreement, and plaintiff may bring a claim for unjust enrichment as an alternative to a claim for breach of contract where there is a question whether an express contract actually existed. *Keywell and Rosenfeld v Bithell*, 254 Mich App 300, 328; 657 NW2d 759 (2002). Plaintiff alleges no express contracts with the remaining defendants.

[20] *Id.*, ¶¶ 56-59.

Plaintiff's Complaint states:[21] VMD and plaintiff operated a de facto joint venture providing the program to podiatrists, and profited from client subscriptions; VMD breached the joint venture agreement with plaintiff; VMD sold the entire venture to Cady or CPS although VMD did not own the entire interest; CPS began receiving payments for client subscriptions to the program and commingled its funds with those of the joint venture and the individual defendants; revenue splits to plaintiff would cease as of June 30, 2020 unless plaintiff worked out a new deal with Cady; plaintiff has been frozen out entirely from the joint venture; defendants received a significant benefit from the unauthorized use, disclosure and retention of plaintiff's proprietary branding and processes; defendants did not compensate plaintiff for its trade secrets and services; defendant's were unjustly enriched; and it would be unjust for defendants to retain the benefits of the trade secrets and services without compensating plaintiff for the value received.

Plaintiff does not state facts sufficient to allege VMD's retention of a benefit from plaintiff. VMD terminated the joint venture and did not retain use of plaintiff's interest in the venture or plaintiff's alleged proprietary information. Plaintiff's claim as pleaded in the Complaint stems from VMD's sale of plaintiff's interest in the venture (breach of contract), not a retention of a benefit from plaintiff. Plaintiff fails to state a claim of unjust enrichment against VMD.

Plaintiff does not state facts sufficient to allege that CPS received a benefit from plaintiff. CPS received from VMD the benefit of using plaintiff's alleged proprietary information by purchasing VMD. Unjust enrichment does not apply to imply a contract between plaintiff and CPS.

Plaintiff may not plead unjust enrichment against Lori Hibma due to the existence of an express confidentiality agreement. Plaintiff does not plead facts sufficient to allege that individual defendants Kevin Hibma and Tyler Cady received a benefit from plaintiff. As pleaded, CPS, not the individual defendants, received a benefit – and not from plaintiff. The Complaint does not state facts sufficient to allege that individuals Kevin Hibma or Tyler Cady were alter egos of CPS.

Plaintiff's Count IX fails to state a claim of Unjust Enrichment.

Count X – Breach of Fiduciary Duties (against all defendants)

Breach of fiduciary duty sounds in tort. *Miller v Magline, Inc*, 76 Mich App 284, 313; 256 NW2d 761 (1977). To establish a claim for breach of fiduciary duty, a plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty, and (3) damages caused by the breach of that duty. *Highfield Beach at Lake Michigan v Sanderson*, ___ Mich App ___; ___ NW2d ___ (2020) (Docket Nos. 343968, 345177), slip op at 11. "[A] fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one on the judgment and advice of

[21] *Id.*, ¶¶ 1, 5, 13, 17-19, 61-62.

another." *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 580-581, 603 NW2d 816 (1999). A breach of fiduciary duty arises when a person holding a position of influence and confidence abuses the influence and betrays the confidence. *Id.*, at 581. "A person in a fiduciary relation to another is under a duty to act for the benefit of the other with regard to matters within the scope of the relation." *Id.*

Plaintiff has pleaded facts sufficient to allege a verbal joint venture agreement between plaintiff and VMD. Joint venturers owe a fiduciary duty to one another. *Schmude Oil,* 184 Mich App at 583-584. Thus, plaintiff sufficiently alleges a relationship giving rise to VMD's fiduciary duty to plaintiff.

Plaintiff's Complaint alleges with regard to breach of that fiduciary duty:[22] plaintiff and VMD operated a de facto joint venture; the joint venture placed plaintiff in a position to "repose its faith, confidence and trust in Defendants;" VMD unilaterally sold the entire interest in the joint venture, including plaintiff's interest, to the exclusion of plaintiff; the concerted action of all defendants (except Kevin Hibma) deprived plaintiff of its interest in the joint venture, misappropriated plaintiff's proprietary information, and caused plaintiff loss of its revenue split; and defendants' actions have caused plaintiff significant monetary damage.

"The law requires that the highest degree of integrity, full disclosure and fairness be maintained among coadventurers." *Latimer v Piper*, 261 Mich 123, 134; 246 NW2d 65 (1933). That obligation "begins with the opening of negotiations for the formation of the syndicate, applies to every phase of the business which is undertaken, and continues until the enterprise has been completely wound up and terminated." *Lane v Wood*, 259 Mich 266, 269; 242 NW2d 909 (1932). The relations and obligations fixed by the joint venture agreement may not be changed or departed from except by unanimous consent. *Polk v Chandler*, 276 Mich 527, 535; 268 NW2d 732 (1936); *VanStee*, 346 Mich 129.

VMD's alleged unilateral sale of plaintiff's interest in the joint venture, resulting in plaintiff's deprivation of its interest in and benefit from the joint venture, sufficiently states a breach of the fiduciary duty owed by VMD. It also sufficiently states plaintiff's damage.

Plaintiff fails to state facts sufficient to allege a relationship that gives rise to a fiduciary duty owed to plaintiff by any other defendants.

Plaintiff's Count X states a claim of Breach of Fiduciary Duty against VMD.

Count XI – Misappropriation of Trade Secrets under the Michigan Uniform Trade Secrets Act (against all defendants)

[22] *Id.*, ¶¶ 1, 17-20, 64-67.

Michigan's Uniform Trade Secrets Act (MUTSA), MCL 445.1901, *et seq*, provides protection for trade secrets. The Act defines "trade secret" in § 1902(d) as:

> ...information, including a formula, pattern, compilation, program, device, method, technique, or process, that is both of the following:
>
> (i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

"Trade secret" has no precise definition, but as a matter of necessity it must be a secret. *Kubik, Inc v Hull*, 56 Mich App 335, 345, 347; 224 NW2d 80 (1974); *Dice Corp v Bold Technologies*, 913 F Supp 2d 389, 406 (ED Mich 2012).[23] A confidential or fiduciary relationship alone does not render information secret that has been disclosed by product marketing. *Kubik*, supra, at 358-359.

The Act defines "misappropriation" in § 1902(b) as "either of the following" (emphasis added):

> (i) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means.
>
> (ii) **Disclosure or use of a trade secret of another without express or implied consent by a person who did 1 or more of the following**:
>
> (A) Used improper means to acquire knowledge of the trade secret.
>
> (B) **At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was** derived from or through a person who had utilized improper means to acquire it, **acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or derived from or through a person who owed a duty to the person to maintain its secrecy or limit its use.**
>
> (C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

[23] The decisions of lower federal courts are not binding on this court, but the court may consider their analyses and conclusions persuasive. *Abela v General Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004).

To state a claim of misappropriation of a trade secret, plaintiff must state facts sufficient to allege (1) the existence of a trade secret, (2) the defendant's acquisition of the trade secret in confidence, and (3) defendant's unauthorized use of it. *Dice*, 913 F Supp 2d at 406.

Plaintiff's Complaint alleges:[24] plaintiff developed, owned and has the exclusive right to use the branding and processes associated with the joint venture; those processes possess the qualities of trade secrets as defined under § 1902(d) of the Act; the confidentiality agreement Lori Hibma signed required her and any companies under her control to assign plaintiff any remuneration from use of plaintiff's confidential information, which included plaintiff's "operations, interests, and plans;" the Hibma defendants formed VMD; plaintiff and VMD used the branding and processes in operating the joint venture; plaintiff provided most of the client subscribers to the joint venture; Cady was an employee of VMD prior to June 2020; VMD was sold to CPS; Cady is owner and CEO of CPS and VMD, of which the Hibma defendants may continue to be employees or officers; CPS continued to use plaintiff's branding and processes outside of the joint venture to the exclusion of plaintiff; defendants have misappropriated plaintiff's trade secrets by using and disclosing them to third parties without plaintiff's permission, which has caused plaintiff damages, including loss of the exclusive use of its trade secrets; and plaintiff is entitled to punitive damages, costs and attorney fees under the Act.

Plaintiff's Complaint alleges that its trade secrets consisted of "branding and processes."[25] It lists the elements of the statutory definition of trade secret and pleads the conclusion that the branding and processes constitute trade secrets. Plaintiff fails to state facts alleging what the branding and processes are, what feature makes others unable to readily ascertain or reproduce the information, what renders the branding and processes secret, or what efforts plaintiff made to keep them secret. At most, plaintiff incorporates the allegation in ¶ 12 that prior to forming VMD Lori Hibma executed a confidentiality agreement covering plaintiff's "operations, interests, and plans." However, the Complaint also alleges that plaintiff and VMD jointly marketed and provided the information to third party podiatrist medical practices. A confidential or fiduciary relationship alone does not render information secret that has been disclosed by product marketing. *Kubik*, 56 Mich App at 358-359. Plaintiff has failed to sufficiently plead element (1), the existence of a trade secret.

Plaintiff's Complaint also fails to state facts sufficient to allege element (2), defendants' acquisition of the trade secret in confidence and (3), defendants' unauthorized use. The Complaint states plaintiff and VMD jointly marketed and provided the program to third party podiatrist medical practices during operation of the alleged the joint venture. The Complaint fails to state

[24] *Id.*, ¶¶ 2, 8, 12-14, 16-17, 20, 69-72.

[25] *Id.*, ¶ 69.

facts alleging any defendants' knowledge or reason to know that the branding and processes were secret and that there existed a duty to limit their use, lack of permission to use or disclose the information to employees or clients, what entity disclosed the information to CPS, or that CPS knew or had reason to know at the time it used the information that there was a duty to maintain its secrecy or limit its use. At most, plaintiff's Complaint alleges that the confidentiality agreement required Lori Hibma or a company she controlled to assign plaintiff remuneration from use of plaintiff's confidential information. Plaintiff's allegations sound in breach of contract against VMD for use of the information without compensation rather than any of the defendants' misappropriation of a trade secret.

Plaintiff has failed to state a MUTSA claim. Therefore, the court need not address defendants' assertion that a MUSTA claim displaces plaintiff's other alleged tort actions for civil remedies for misappropriation of a trade secret. MCL 445.1908. However, the court cannot conclude that the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden, supra*, citing *Wade* at 163.

Plaintiff's Count XI fails to state a claim of Misappropriation of Trade Secrets. Pursuant to MCR 2.116(I)(5), the court grants plaintiff's request[26] to amend Count XI of its Complaint.

Count XII – Declaratory Relief (against all defendants)

Declaratory relief is a remedy, not a claim in itself. *Mettler Waloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008).

MCR 2.605 grants discretion to the court to provide declaratory relief:

> In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

The essential requirement for declaratory relief is an actual controversy. *Shavers v Kelly*, 402 Mich 554, 588; 267 NW2d 72 (1978). An actual controversy exists where a judgment or decree is necessary to guide plaintiff's future conduct in order to preserve his legal rights. *Id.* Plaintiff must plead and prove facts which indicate an adverse interest necessitating a sharpening of the issues raised by the parties. *Id.*, at 589.

Plaintiff asserts an actual controversy exists regarding whether plaintiff owns the branding and processes associated with the joint venture. Plaintiff requests the court to judicially decree

[26] Plaintiff's Consolidated Brief in Opposition to Defendants' Motion for Summary Disposition, p 19-20.

plaintiff's ownership.[27] Plaintiff's Complaint describes the branding and processes as "the Virtual Marketing Director program" that plaintiff developed, branded, and launched along with its employee, Lori Hibma.[28] Plaintiff must not only plead, but also prove, facts indicating an adverse interest between the parties. *Shavers*, 402 Mich 588. No facts have yet been proven to allow the court to ascertain what the program is, whether it possesses proprietary attributes, to what extent plaintiff and Lori Hibma respectively contributed to its development, *et al.*

Plaintiff's Count XII fails to plead and prove facts sufficient to allow the court to grant a remedy of declaratory judgment.

Count XIII - Injunctive Relief (against all defendants)

Injunctive relief is a remedy, not a cause of action. *Redmond v Heller*, ___ Mich App ___; ___ NW2d ___ (2020) (Docket Nos. 347505, 347558); slip op *8, citing *Terlecki v Stewart*, 278 Mich App 644, 663; 754 NW2d 899 (2008). A remedy must be supported by an underlying cause of action. Plaintiff must first establish success on the merits of at least one claim that could support injunctive relief. *Redmond, supra*, at *8.

Plaintiff's Complaint states the basis for injunctive relief as defendants' misappropriation of its trade secrets.[29] As noted above in discussion of Count XI, plaintiff has not sufficiently alleged a claim for misappropriation of trade secrets against any defendant. Rather, plaintiff's claim sounds in breach of contract against VMD. Plaintiff has not established that its request for the remedy of injunction is supported by an underlying MUTSA claim upon which it plaintiff will prevail on the merits. Additionally, injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury. *Detroit Fire Fighters Ass'n, IAFF Local 344 v City of Detroit*, 482 Mich 1, 8; 753 NW2d 595 (2008) (citations omitted). Should plaintiff establish its Breach of Contract and/or Breach of Fiduciary duty claims, it possesses and adequate economic remedy at law.

Plaintiff's Count XIII fails to plead or establish facts allowing a remedy of injunctive relief.

Request for Security Bond under MCR 2.109.

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[27] *Id.*, ¶¶ 74-75.

[28] *Id.*, ¶ 11.

[29] *Id.*, ¶¶ 77-79.

All of the defendants request, pursuant to MCR 2.109, that the court order plaintiff to provide a surety bond for the costs and expenses defendants incur in litigation, in a minimum amount of $50,000.00. MCR 2.019(A) provides in part:

> On motion of a party against whom a claim has been asserted in a civil action, if it appears reasonable and proper, the court may order the opposing party to file with the court clerk a bond with surety as required by the court in an amount sufficient to cover all costs and other recoverable expenses that may be awarded by the trial court, or, if the claiming party appeals, by the trial and appellate courts. The court shall determine the amount in its discretion....

Security should not be required unless there is a substantial reason for doing so. *In re Surety Bond for Costs*, 226 Mich App 321, 331; 573 NW2d 300 (1997). A 'substantial reason' for requiring security may exist where there is a tenuous legal theory of liability, or good reason to believe that a party's allegations are groundless and unwarranted. *Id.*, 331-332 (quotation marks and citation omitted).

Plaintiff has stated claims against VMD. Discovery is in progress. At this stage of the action, the court lacks facts upon which to deem plaintiff's claims for Breach of Contract and Breach of Fiduciary Duty groundless or unwarranted, or plaintiff's success on those claims unlikely. Therefore, the court denies defendants' motion for surety bond.

Conclusion

Defendants' motion for summary disposition of plaintiff's claims pursuant to MCR 2.116(C)(8) is GRANTED as to Counts II, III, IV, V, VI, VII, VIII, IX, XI, XII and XIII.

Defendants' motion for summary disposition of plaintiff's claims pursuant to MCR 2.116(C)(8) is DENIED as to Count I (Breach of Contract against VMD), and Count X (Breach of Fiduciary Duty against VMD).

Defendants' motion to require plaintiff's surety bond is DENIED.

Plaintiff's motion to amend its Complaint to attach the confidentiality agreement, and to allege sufficient facts to support its claim for Misappropriation of Trade Secrets, is GRANTED.

IT IS SO ORDERED.

Dated: February 25, 2021

Hon. Jon A. Van Allsburg, Circuit Judge