STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

JOHN D. and BARBARA O'HAIR, JOHN DENNIS O'HAIR, RALPH RUGAN III, and MARILY N. RUGAN FLOTTE,

Plaintiffs,

v

File No. 11-8645-CK
HON. PHILIP E. RODGERS, JR.

OIL NIAGARAN LLC, a Michigan limited liability company; NORTHERN MICHIGAN EXPLORATION COMPANY, LLC, a Michigan limited liability company; REDSKY LAND, LLC, an Oklahoma limited liability company; SILVER LAKE ENERGY, LLC, a Michigan limited liability company; and CHESAPEAKE ENERGY CORP., an Oklahoma Corporation,

Defendants.
_____/

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DECISION AND ORDER
GRANTING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION
PURSUANT TO MCR 2.116(C)(10) REGARDING NON-CONTRACT COUNTS

I. FACTS

Plaintiffs own 140 acres of real property, located in Antrim County, as tenants in common.[1] Plaintiffs John D. O'Hair, Barbara O'Hair and John Dennis O'Hair entered into an oil and gas lease (hereinafter "Lease") with Defendant OIL Niagaran, LLC (hereinafter "OILN") on June 2, 2010. An Order for Payment ("OFP") was executed contemporaneously and stated that OILN would pay $42,000 within 90 days as a signing bonus.[2] Additionally, Marilyn Rugan Flotte, on behalf of Plaintiff Ralph Rugan III, and as an individual, entered into independent Leases and OFPs with OILN.[3] The OFPs executed by Plaintiffs Rugan and Flotte stated each Plaintiff, respectively, would receive a signing bonus of $21,000 within 90 days. Payment was not made and the Plaintiffs initiated this litigation against Defendants.[4]

The relevant procedural history of this case began when the Plaintiffs filed a Motion for Partial Summary Disposition pertaining to Count I of the Amended Complaint.[5] Defendants opposed and requested that summary disposition be granted in their favor. Subsequently, the Court issued an order finding that the condition precedent established by the OFPs gave the Defendants complete discretion to approve or reject title for whatever reason.[6] The Court denied Plaintiffs' Partial Motion for Summary Disposition Pursuant to MCR 2.116(C)(10) and 2.116(C)(9) and granted the Defendants' Request for Summary Disposition.[7] Plaintiffs then filed a Motion for Reconsideration or Rehearing Pursuant to MCR 2.119(F)(3), which the Court

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[1] "Plaintiffs" collectively refers to John D. O'Hair, Barbara O'Hair, John Dennis O'Hair, Ralph Rugan III and Marilyn Rugan Flotte.

[2] "Contract" or "Contracts" shall hereinafter refer to the Lease/s and OFP/s jointly, pursuant to the integration clause set forth in paragraph ¶17 of the Leases. *Infra*, at FN 26. The Contracts were acquired by OILN on behalf of NMEC.

[3] Ralph Rugan, Jr. is the legal Power of Attorney for Plaintiff Ralph Rugan III, with Marilyn Flotte listed as the alternate attorney-in-fact.

[4] "Defendants" collectively refers to OILN, Northern Michigan Exploration Company LLC (hereinafter "NMEC"), Redsky Land LLC (hereinafter "Redsky"), Silver Lake Energy LLC (hereinafter "SLE") and Chesapeake Energy Corporation (hereinafter "Chesapeake Energy"). Chesapeake Energy is a holding company and NMEC and Chesapeake Exploration, L.L.C. ("Chesapeake Exploration") are both wholly-owned subsidiaries of Chesapeake Energy. On May 4, 2010, Chesapeake Exploration and OILN executed a Joint Lease Acquisition Agreement, wherein OILN agreed to perform services and duties customarily associated with acquiring land for oil and gas exploration "for the benefit of Chesapeake or its designated entity." The Guaranty, executed on behalf of Chesapeake Energy and dated May 20, 2012, explicitly states that OILN "shall act as an undisclosed agent of [NMEC and/or Chesapeake Exploration] in connection with (i) certain agreements for purchasing oil and gas interests from existing operators and/or leasehold working interest owners; and (ii) open mineral interest leases; and (iii) land services agreements with contract broker parties, all as an undisclosed agent."

[5] The Amended Complaint asserts eight causes of action. Count I asserts a claim for breach of contract.

[6] See Decision and Order Granting Defendants' Request for Summary Disposition and Motion to Strike Plaintiffs' Supplemental Brief and Denying Plaintiffs' Partial Motion for Summary Disposition, dated January 12, 2012.

[7] *Id*.

denied in an order dated March 9, 2012.[8] On July 23, 2012, the Defendants filed a Motion for Summary Disposition Pursuant to MCR 2.116(C)(10) Regarding Non-Contract Counts.[9]

After reviewing the arguments presented by the parties, the Court now issues this written decision and order granting the Defendants' Motion for Summary Disposition on Counts II through VIII of the Amended Complaint.

II. STANDARD OF REVIEW

A motion filed under MCR 2.116(C)(10) tests the factual support for a claim.[10] When there is no genuine issue of material fact the moving party is entitled to judgment as a matter of law.[11] Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[12] The nonmovant then has the burden of showing that a genuine issue of disputed fact exists and producing admissible evidence to establish those disputed facts.[13] Conjecture, speculation, conclusions, mere allegations or denials, and inadmissible hearsay are not sufficient to create a question of fact for the jury.[14] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[15] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[16]

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[8] See Order Denying Plaintiffs' Motion for Reconsideration or Rehearing Pursuant to MCR 2.119(F)(3), dated March 9, 2012.

[9] Counts II through VIII of the Amended Complaint were not addressed in the January 12, 2012 Order. These remaining claims include: Count II, Quantum Meruit/Unjust Enrichment; Count III, Promissory Estoppel; Count IV, Fraudulent Misrepresentation and Fraud in the Inducement; Count V, Innocent Misrepresentation; Count VI, Breach of Guarantee/Third-Party Beneficiary; Count VII, Tortious Interference with Business Relationship; and Count VIII, Conspiracy.

[10] *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

[11] *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).

[12] MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[13] *Meagher v Wayne State Univ*, 222 Mich App 700, 719; 565 NW2d 401 (1997); *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

[14] *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995); *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995); *Neubacher*, *supra* at 420; *SSC Assoc Ltd Partnership v Detroit Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

[15] MCR 2.116(G)(4); *Maiden*, *supra* at 120.

[16] *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

III. ARGUMENTS AND ANALYSIS

The Defendants claim they are entitled to summary disposition on the seven remaining counts of the Amended Complaint because approval of Plaintiffs' title was a condition precedent to the enforceability of the Contracts and title was never approved. Defendants argue that the remaining counts are based on contract-related issues pertaining to whether non-approval of title and non-payment of the OFPs was wrongful, therefore, as the Court has already dismissed the breach of contract claim, the Contracts are void and all other claims must fail. [17]

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[17] The Court addressed the issue of rejection of title in its Decision and Order Granting Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(10) in *Talbott v OIL Niagaran LLC et al*, File No. 11-8669-CK, dated August 29, 2012. The Court stated:

A marketable title is free from reasonable doubt such that a prudent person, with knowledge of all salient facts and circumstances and their legal significance, would be willing to accept it. Shade, *Petroleum Land Titles: Title Examination & Title Opinion*, 46 Baylor L. Rev. 1007 (1994). To meet the standard of marketability, title must be unencumbered. *Id*. An encumbrance is anything that constitutes a burden on property title, such as a right of way, a condition that may work a forfeiture of the estate, a right to remove timber or a dower interest. *Madhaven v Sucher*, 105 Mich App 284, 288; 306 NW2d 481 (1981). While the [Contract] does not contemplate or require marketable title, title may be regarded as "unmarketable" if a reasonably careful and prudent person, familiar with the facts, would refuse to accept title in the ordinary course of business. *Deane v Rex Oil & Gas Co*, 325 Mich 625; 39 NW2d 204 (1949).

Title does not actually need to be bad to render it unmarketable, there only needs to be a doubt or uncertainty as might reasonably form the basis of litigation. *Id*. Defects to title… include, but are not limited to, lack of ownership, mortgages, uncertain boundaries, easements, attachment of property, tax liens, sale of property to another, miscellaneous acts or omissions of vendors, judgments against seller, limiting restrictions, fraud, forgery, defective deeds, capacity of parties, clerical errors, unreleased oil and gas leases and name discrepancies. See generally 13 ALR4 927 §3-7; *Shade, supra*.

Marketable title is based on objective standard for purposes of title examination. However, '[T]itle approval requires a different standard. Marketable title merely establishes the basis for rendering title opinions, not the type of title which must exist before accepting a lease or drilling a well. The degree of risk considered acceptable varies with the examination's purpose and the company management's business judgment…Company management then makes the business decision of whether to accept title. That decision is usually based on the more practical standard of business risk, rather than marketability.' *Shad*e, *supra*.

Companies, when contemplating title acceptance, apply a subjective standard. Whether title is "marketable" is not the sole factor considered before accepting an oil and gas lease. *Id*.

Here, objectively "marketable title" was not guaranteed approval. Instead, the plain language of the [Contract] permitted Defendants to subjectively assess title history before finding title defective.

Again, the Court believes the holding in *Harbor Park Market* is applicable here. There, the court held that the parties failed to include an express limitation in the language of the condition precedent that restricted approval authority, therefore, the contract language giving complete discretion to approve or disprove the agreement for whatever reason was clear and unambiguous and must be accepted and enforced as written. *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 133; 743 NW2d 585 (2007).

[T]he condition precedent set forth in the OFP established that the [Contract] was subject to "approval of title" without further elaboration. The parties' [Contract] did not include any express limitation language restricting approval authority, which provided the Defendants complete discretion to approve or reject title for whatever reason and eliminated any ability for Plaintiff to claim wrongful rejection.

[T]here is nothing in the contract that *requires* the Defendants to approve title to the property and the Defendants are under no affirmative duty to cause the condition precedent to be satisfied, thus, subsequently triggering payment pursuant to the OFP. *Id*.

QUANTUM MERUIT/UNJUST ENRICHMENT

The theory underlying quantum meruit recovery is that the law will imply a contract in order to prevent unjust enrichment when one party inequitably receives and retains a benefit from another.[18] In order to sustain a claim of quantum meruit or unjust enrichment, a plaintiff must establish the receipt of a benefit by defendant from plaintiff and an inequity resulting to plaintiff because of the retention of the benefit by defendant.[19] In such instances, the law operates to imply a contract in order to prevent unjust enrichment.[20] However, a contract will be implied **only** if there is no express contract covering the same subject matter.[21]

Conversely, in this case there were, in fact, express Contracts between the parties. As such, the Contracts executed by the parties foreclose the Plaintiffs' claim for quantum meruit/unjust enrichment as a matter of law, thus, Count II must be dismissed.

PROMISSORY ESTOPPEL

The elements of equitable or 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; (3) which in fact produced reliance or forbearance of that nature; and (4) in circumstances such that the promise must be enforced if injustice is to be avoided.[22] In determining whether a requisite promise existed, the court must objectively examine the words and actions surrounding the transaction in question as well as the nature of the relationship between the parties and the circumstances surrounding their actions.[23]

In *Novak*, the plaintiff sued for wrongful termination of his employment and claimed promissory estoppel because the defendants had told him that the at-will provision in the contract did not apply to him.[24] The court held:

> [A]ssuming arguendo that one of defendants' employees told plaintiff that the at-will provision in the written contract did not apply to him, the circumstances surrounding the statement precluded an objective finding of a clear and definite

[18] *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187; 729 NW2d 898 (2006).
[19] *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 546; 473 NW2d 652 (1991); *Fodale v Waste Mgmt of Mich, Inc*, 271 Mich App 11; 718 NW2d 827 (2006) citing *Belle Isle Grill Corp v Detroit*, 256 Mich App 463; 666 NW2d 271 (2003).
[20] *Martin v East Lansing School Dist*, 193 Mich App 166, 177; 483 NW2d 656 (1992).
[21] *Campbell v City of Troy*, 42 Mich App 534, 537; 202 NW2d 547 (1972); *Martin, supra*. (Emphasis added).
[22] *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438; 505 NW2d 275 (1993) citing *Schipani v Ford Motor Co*, 102 Mich App 606, 612-613; 302 NW2d 307 (1981).
[23] *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 686; 599 NW2d 546 (1999).
[24] *Id*.

> promise of just-cause employment, because the signed contract contained an at-will provision, along with an integration clause, that expressly contradicted the alleged oral representation.[25]

Here, Plaintiffs claim that NMEC promised to pay them certain monies as consideration for signing the Leases. However, paragraph 17 of each Lease indicated that the "entire agreement between Lessor and Lessee is embodied herein and in the associated Order of Payment (if any), which supersedes all prior negotiations, representations, agreements and understandings of the parties."[26] According to this integration clause, the "subject to" language of the OFPs was a condition precedent to approval of title. The obligation or "promise" to pay was conditioned on the approval of title by Defendants. Promissory estoppel will not be enforced where the alleged promise is at variance with the contract between the parties, therefore, the Plaintiffs could not reasonably rely on the alleged promise and Count III must be dismissed as a matter of law.[27]

FRAUDULENT MISREPRESENTATION AND FRAUD IN THE INDUCEMENT

The elements of fraudulent misrepresentation are (1) the defendant made a material representation, (2) the representation was false, (3) when making the representation, the defendant knew or should have known it was false, (4) the defendant made the representation with the intention that the plaintiff would act upon it, and (5) the plaintiff acted upon it and suffered damages as a result.[28] Reliance upon the false statement must be reasonable and a person who unreasonably relies on false statements is not entitled to damages for misrepresentation.[29]

Fraud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon.[30] It presents a special situation where parties to a contract appear to negotiate freely, but where in fact the ability of one party to negotiate fair terms is undermined by the other

[25] *Id*. at 687.
[26] O'Hair Lease, Rugan Lease and Flotte Lease, page 4 at ¶17.
[27] *Id*.
[28] *M&D, Inc v WB McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998).
[29] *Novak*, *supra* at 690.
[30] *Kefuss v Whitley*, 220 Mich 67, 82-83; 189 ME 76 (1922); *Judd v Judd (On Remand)*, 192 Mich 198, 207; 160 NW 548 (1916).

party's fraudulent behavior.[31] Fraud in the inducement to enter a contract renders the contract voidable at the option of the defrauded party.[32]

This Court previously found there was a clear agency relationship between NMEC and OILN and thus, privity of contract or lack thereof was immaterial.[33] The Court held that the Defendants did not have a duty to disclose to Plaintiffs their multi-tiered agency system and the Plaintiffs' lack of knowledge of the various agency relationships between the Defendants does not serve to invalidate said relationships, nor nullify the scope and authority provided by the principals. Therefore, any "misrepresentations" pertaining to the true Lessee in the transactions is irrelevant. The alleged misrepresentations pertaining to title review and payment are governed by the Contracts themselves, therefore, Count IV must be dismissed.

In addition, the Plaintiffs have expressed a desire to amend the Complaint in this case. However, such an amendment would be futile as agency has previously been decided. Due to the written contract, there can be no claim of reasonable reliance.

INNOCENT MISREPRESENTATION

A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation.[34] The innocent misrepresentation rule represents a species of fraudulent misrepresentation but has, as its distinguishing characteristics, the elimination of the need to prove a fraudulent purpose or an intent on the part of the defendant that the misrepresentation be acted upon by the plaintiff, and has, as added elements, the necessity that it be shown that an unintendedly false representation was made in connection with the making of a contract and that the injury suffered as a consequence of the misrepresentation inure to the benefit of the party making the misrepresentation.[35] Thus, the party alleging

[31] *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 372-375; 532 NW2d 541 (1995).
[32] *Whitdraft v Wolfe*, 148 Mich App 40, 52; 383 NW2d 400 (1985).
[33] See Decision and Order Granting Defendants' Request for Summary Disposition and Motion to Strike Plaintiffs' Supplemental Brief and Denying Plaintiffs' Partial Motion for Summary Disposition, dated January 12, 2012; Order Denying Plaintiffs' Motion for Reconsideration or Rehearing Pursuant to MCR 2.119(F)(3). See generally, Decision and Order Granting Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(F), dated August 29, 2012, in *Talbott v Oil Niagaran LLC, et al*. File No. 11-8669-CK; Decision and Order Granting Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(10), dated April 12, 2012, in *Cook v Western Land Services, Inc*, et al. File No. 11-8654-CK.
[34] *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 118; 313 NW2d 77 (1981).
[35] *Id.* at 118.

innocent misrepresentation is not required to prove that the party making the misrepresentation intended to deceive or that the other party knew the representation was false.[36] Finally, in order to prevail on an innocent misrepresentation claim, a plaintiff must also show that the plaintiff and defendant were in privity of contract.[37]

Plaintiffs' innocent misrepresentation claim is based upon the same alleged misrepresentations as those identified in the fraudulent misrepresentation claim. Approval of title was a condition precedent to the payment obligations of the Contracts. Plaintiffs could not reasonably rely on any alleged misrepresentations other than those in the Contracts because of the Leases' integration clause. Furthermore, Defendants have no interest in Plaintiffs' mineral rights and Plaintiffs maintain the same interest in their property as prior to the voided transaction. For these reasons, Count V must be dismissed.

BREACH OF GUARANTY/THIRD-PARTY BENEFICIARY

A claim for breach of guaranty/third-party beneficiary requires liability on the part of a principal. Plaintiffs claim that OILN has materially and substantially breached its obligations to the Plaintiffs under the Contracts by failing to pay the monies due thereunder. According to Plaintiffs, this alleged breach entitled them to enforce the Guaranty.

However, in this case the Guaranty only provides rights to Defendant OILN and there are no third-party rights to enforce it.[38] The Plaintiffs are not parties to the Guaranty, nor are they third-party beneficiaries. Pursuant to the Court's prior rulings, the Contracts were not breached, but reasonably voided. Therefore, Count VI must be dismissed as a matter of law.

TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIP

To prevail on a theory of tortious interference with a business relationship, the plaintiff must show that a contract existed, that it was breached, that defendant instigated the breach, and that it did so without justification.[39] One who alleges tortious interference with a contractual or business relationship must allege the 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

[36] *Id.* at 117.
[37] *Id*. at 118-119.
[38] *Supra*, at FN 4.
[39] *Jim-Bob, Inc v Mehling*, 178 Mich App 71; 443 NW2d 451 (1989); *Northern Plumbing & Heating, Inc v Henderson Bros, Inc*, 83 Mich App 84; 268 NW2d 296 (1978); *Mino v Clio School Dist*, 255 Mich App 60; 661 NW2d 586 (2003).

business relationship of another.[40] One is liable for the commission of this tort who interferes with business relations of another by inducing a third-party not to enter into or continue a business relation with another or by preventing a third-party from continuing a business relation with another.[41]

Count VII claims that Defendants interfered with an alleged business relationship between Plaintiffs and Atlas Oil and Gas. Plaintiffs argue that they were offered large bonus amounts by the Defendants, which prompted their decision to cease discussions with other oil and gas companies and sign the Contracts leasing their mineral interests to Defendants.

Competitive bidding for contracts is standard business practice in many industries, including the oil and gas industry. When a company or business outbids a competitor, a claim for tortious interference with a business relationship does not automatically arise. Furthermore, Plaintiffs do not argue that Defendants induced Atlas Oil & Gas, or any other oil and gas company, not to enter into or continue a business relationship with them, nor that Defendants prevented Atlas from continuing a business relationship with Plaintiffs. This particular tortious interference claim is made on the basis that Defendants' intercession pertained to *Plaintiffs'* own considerations. For this reason, Count VII is defective as a matter of law and must be dismissed.

CIVIL CONSPIRACY

A conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a purpose not unlawful by criminal or unlawful means.[42] In addition, at the core of an actionable civil conspiracy is a question of damages.[43] The law is well established that in a civil action for damages resulting from wrongful acts alleged to have been committed in pursuance of a conspiracy, the gist or gravamen of the action is not the conspiracy, but is the wrongful acts causing the damages.[44] The conspiracy standing alone without the commission of acts causing damage would not be actionable.[45] The cause of action does not result from the conspiracy but from the acts done.[46]

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[40] *Formall, Inc v Community Nat'l Bank of Pontiac*, 166 Mich App 772; 421 NW2d 289 (1988); *Christner v Anderson, Nietzke & C*o, PC, 156 Mich App 330; 401 NW2d 641 (1986).
[41] *Northern Plumbing, supra* citing 45 Am Jur 2d, Interference, §50, p 322.
[42] *Veriden v McLeod*, 180 Mich. 182; 146 NW 619 (1914).
[43] *Roche v Blair*, 305 Mich 608; 9 NW2d 861 (1943).
[44] *Id*. at 613-614.
[45] *Id*.
[46] *Id*.

The Plaintiffs assert that damages resulted from non-payment under the Contracts. However, this Court previously found that Defendants properly voided the Contracts based on their failure to approve title. Avoidance of the Contracts and non-payment of the bonus amounts was permissible pursuant to the Contracts' language, therefore, Plaintiffs fail to demonstrate any underlying wrongful acts committed by the Defendants. As a matter of law, Count VIII must be dismissed.

IV. CONCLUSION

Pursuant to the Contracts' language, bonus payments were to be made to Plaintiffs subject to inspection and approval of title. The Contracts failed to include express language limiting the grounds for disapproval of title. Thus, Defendants retained complete discretion to approve or reject title for whatever reason. The condition precedent established in the Contracts was not satisfied and Defendants reasonably voided the transactions. Defendants did not breach the Contracts, Plaintiffs have no legally cognizable damages and all derivative claims premised on an alleged breach of contract must fail.

For the reasons stated herein, the Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(10) Regarding Non-Contract Counts is granted. This is a final Order and resolves all remaining issues in this case.

IT IS SO ORDERED.

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HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge