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

MEDIGAP HEALTHCARE INSURANCE AGENCY, LLC, a Delaware limited liability company, **Plaintiff/Counter-Defendant,** **v.** **UNITED INSURANCE GROUP AGENCY, INC.** a Michigan corporation; **and LTC GLOBAL, INC.,** a Nevada corporation, **Defendants/Counter-Plaintiffs**	**Case No. 2023-202375-CB** **The Honorable Victoria Valentine**

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OPINION GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court held on the
day of February 28, 2024, in the County of
Oakland, State of Michigan

PRESENT: HON. VICTORIA A. VALENTINE

This matter is before the Court on Defendants United Insurance Group Agency, Inc ("United") and LTC Global, Inc ("LTC")'s motion summary disposition under MCR 2.116(C)(8) relative to the tort claims (Counts II-VIII) alleged in Plaintiff, Medigap Healthcare Insurance

Agency LLC ("Medigap")'s amended complaint. The Court, after reviewing the briefs, hearing oral argument on February 21, 2024, and being fully advised in the premises, respectfully GRANTS Defendant's Motion under MCR 2.116(C)(8) for the reasons below.

FACTS

Defendant United Insurance Group Agency is a Managing General Agent (MGA), which has authority delegated by insurance carriers to contract with independent insurance agencies to sell the carrier's policies. (Am Complaint ¶17). United, in turn, had a Managing General Agency Agreement (MGA Agreement) with Non-Party Medigap Healthcare Insurance Co LLC ("Company"),[1] which allowed the Company to sell carrier's policies. (Am Complaint ¶21). United would pay a commission to the Company, which was funded by United's parent company, Defendant LTC. (Am Complaint ¶22). These commissions were subject to charge-backs that would be debited against future commission payments or that would be billed to the Company. (Am Complaint ¶22). A chargeback would occur if a Company customer cancelled their insurance policy, or it otherwise lapsed, within three months of the date it became effective. When this happens, the chargeback is debited against a future commission payment or billed to the Company to remit the commission previously received back to United and LTC. (Am Complaint ¶23).

Non-Party Reliance Global Group wanted to purchase the Company and through its due diligence learned that the Company had an MGA Agreement with United. (Am Complaint ¶28). Reliance eventually purchased the Company's business and substantially all of its

[1] "Plaintiff, Medigap Healthcare Insurance *Agency,* LLC, has a similar name to the name of non-party, Medigap Healthcare Insurance *Company*, LLC. They are, however, two distinct entities." Plaintiff's Complaint, p 5 n1.

assets for twenty million dollars. (Am Complaint ¶30). It then formed a new company, Plaintiff, Medigap Healthcare Insurance Agency LLC ("Medigap") to which Reliance transferred its assets. (Am Complaint ¶31).

Plaintiff alleges that the Company needed United's consent to assign the MGA Agreement to Medigap and held discussions with Defendants United and LTC. (Am Complaint ¶33 & 34). Plaintiff further alleges that during these communications, Defendants United and LTC assured Plaintiff Medigap that they would adhere to the terms of the MGA Agreement. (Am Complaint ¶37). After the closing, United provided written consent of the assignment of the MGA Agreement from Company to Medigap. (Am Complaint ¶38; exhibit 3).

It is further alleged that after the acquisition and assignment, Plaintiff Medigap's internal review uncovered that its own CEO, Kyle Perrin, received commission statements from Defendant for both Plaintiff Medigap and another company called T65 Healthcare Solutions. (Am Complaint ¶42). Plaintiff alleges that its analysis of these statements uncovered that Defendants had been assessing chargebacks against Plaintiff for policies Plaintiff never sold, some of which related to T65 polices that were sold by T65 years ago. (Am Complaint ¶47). Plaintiff claims $5,330,050 were charged back to Plaintiff by Defendant from 1/4/22-5/2/23. (Am Complaint ¶56). Plaintiff also claims Defendants were diverting Plaintiff's own customers to T65 (Am Complaint ¶58); that T65 had a debt with Defendant in the form of old chargebacks (Am Complaint ¶67); and that Kyle Perrin and others, on behalf of Defendants, worked to levy chargebacks against Plaintiff for T65's chargebacks and to divert customers away from Medigap to T65. (Am Complaint ¶69).

Plaintiff originally filed a 4-count complaint alleging breach of contract, fraud in the inducement, civil conspiracy and aiding and abetting. Defendants filed their first motion for summary disposition to which Plaintiff responded. The parties then stipulated to allow Plaintiff to amend the complaint to address deficiencies in the complaint and to add the cause of action of good faith and fair dealing based on a recent published case of *Kircher v Boyne USA, Inc* __Mich App___ (11/2/2023). Plaintiff then amended its complaint to add the following causes of action *in addition* to breach of good faith and fair dealing: tortious interference with business relationship; statutory conversion; and larceny by conversion.[2]

Defendants now file this (C)(8), seeking dismissal of Plaintiff's tort claims.[3]

STANDARD OF REVIEW

Summary disposition under MCR 2.116(C)(8) may be granted where "[t]he opposing party has failed to state a claim on which relief can be granted." When deciding a motion on this ground, a court may consider only the parties' pleadings. MCR 2.116(G)(5). "[A]ll well-pleaded allegations are accepted as true and construed most favorably to the non-moving party." *Wade v Dep't of Corrections*, 439 Mich 158, 162-163 (1992). "A mere statement of a pleader's conclusions and statements of law, unsupported by allegations of fact, will not suffice to state a cause of action." *Varela v Spanski,* 329 Mich App 58, 79 (2019) (plaintiff failed to plead facts in support of his claim but instead made conclusory statements and

[2] As Defendant argues, these three additional causes of action exceed the scope of the Stipulated Order. See *Holland v Jobete Music Co*, 1999 WL 33446487, lv den, 461 Mich 1014 (2000), where the Court of Appeals affirmed the trial court striking allegations that introduced extraneous matters. Plaintiff does not address this in its Response, and neither will the Court because it is granting Defendants' motion.

[3] The Court notes that at oral argument Defendant requested the dismissal of Defendant LTC Global as well as Plaintiff's tort claims. Defendants filed written motion, however, did not address the dismissal of Defendant LTC Global. Therefore, the Court will not address that request at this time as the issue has not been briefed.

conclusions of law). Further, "[a] motion for summary disposition is not a responsive pleading under MCR 2.110(A)." *Village of Dimondale v Grable*, 240 Mich App 553, 565; 618 NW2d 23 (2000).

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." *Wade*, 439 Mich at 163. Because Michigan is a notice-pleading jurisdiction, a complaint is required to contain only enough information "reasonably to inform the defendant of the nature of the claim against which he must defend." *Veritas Auto Machinery, LLC v FCA Int'l Operations, LLC*, 335 Mich App 602, 615 (2021); MCR 2.111(B)(1).

ANALYSIS

I. COUNT II-BREACH OF GOOD FAITH AND FAIR DEALING

The Court dismisses this Count as it is not a recognized *independent cause of action* separate from a breach of contract claim under established Michigan case law. See *Gorman v Am Honda Motor, Co,* 302 Mich App 113, 133 (2013); *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 476 (2003). Even in the recent published opinion of *Kircher v Boyne USA, Inc*, ___Mich App __(2023), upon which Plaintiff relies, the Court of Appeals did not recognize this as an independent cause of action separate from a breach of contract claim; rather it found that "[b]ased on the above caselaw, we conclude that when a contract confers discretion on a party, *a breach-of-contract action will lie for an alleged bad-faith exercise of that discretion*." (emphasis added). Here, Plaintiff alleges a breach of contract claim as well as a separate claim for breach of good faith and fair dealing. Therefore, Count II is dismissed.

II. FRAUD IN THE INDUCEMENT, CONVERSION, CIVIL CONSPIRACY, AIDING AND ABETTING

Preface

A "tort" is understood to be "a civil wrong that arises from the breach of a legal duty other than the breach of a contractual duty." *In re Bradley Estate*, 494 Mich 367, 381 (2013). "[T]he threshold inquiry is whether the plaintiff alleges a violation of a legal duty separate and distinct from the contractual obligation." *Rinaldo's Constr Corp v Mich Bell Tel Co*, 454 Mich 65, 85 (1997). Where the plaintiff's allegations are that a defendant failed to perform according to the terms of its promise, plaintiff has no cause of action in tort. *Id*. at 85.

In *Ulrich v Federal Land Bank*, 192 Mich App 194 (1991) the Michigan Court of Appeals noted that contract and tort obligations may be distinguished by applying the following rule: "[I]f a relation exists that would give rise to a legal duty without enforcing the contract promise itself, the tort action will lie, otherwise it will not." *Id*. at 199, citing *Hart v Ludwig,* 347 Mich 559, 565 (1956); *Nelson v Northwestern Savings & Loan Ass'n,* 146 Mich App 505 (1985); *Brewster v Martin Marietta Aluminum Sales, Inc,* 145 Mich App 641, 667–668 (1985). *See also Ferrett v GMC*, 438 Mich 235, 245 (1991), where the Court stated the following:

> Cases recognizing a right to maintain an action in tort arising out of a breach of contract by the defendant, generally involve a separate and distinct duty imposed by law for the benefit of the plaintiff that provides a right to maintain an action without regard to whether there was a contractual relationship between the plaintiff and the defendant.

A. Count VI-Fraud in the Inducement

Fraud in the inducement is established by proving that:

> (1) The defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage.

Custom Data Solutions, Inc v Preferred Capital, Inc, 274 Mich App 239, 243(2006) (quoting *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 477 (2003)).

The Court dismisses this Count. Based upon the above cited law, the Court agrees with Defendant that Plaintiff's tort claim of fraudulent inducement is predicated on Defendants' alleged misrepresentations relating to its continued performance under the MGA Agreement. Plaintiff alleges in part:

> 37. Throughout these meetings, United and LTC assured Medigap that they would adhere to the terms of the MGA Agreement as it related to, selected, and computed the chargebacks.
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> 109. During the several meetings and email exchanges prior to closing on the asset purchase, Defendants United and LTC made material representations about administering chargebacks consistent with the terms of the MGA Agreement.

Plaintiff's brief acknowledges that "while *the misrepresentations at issue relate to the terms of the subsequently breached MGA agreement*, the claim nevertheless stands because the action Defendants sought to induce-through fraud-was Medigap's execution of the Company's assets." (Plaintiff's Br p 7) (emphasis added). As Defendant argues, Plaintiff fails to allege any breach of a legal duty Defendants owed to Plaintiff separate from its

alleged breach of the MGA Agreement. Absent the MGA Agreement, Plaintiff fails to allege a separate and distinct duty owed regarding the chargebacks. "[I]f a relation exists that would give rise to a legal duty without enforcing the contract promise itself, the tort action will lie, otherwise it will not." *Ulrich v Federal Land Bank*, 192 Mich App at 199. Accordingly, Count VI for Fraud in the Inducement is dismissed.

B. Count IV-Statutory Conversion

Statutory conversion consists of knowingly buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property. MCL § 600.2919a; *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 592-93 (2004). Statutory conversion under MCL 600. 2919a(1)(a) adds the additional requirement that "someone alleging conversion to the defendant's 'own use' ... must show that the defendant employed the converted property for some purpose personal to the defendant's interests, even if that purpose is not the object's ordinarily intended purpose. " *Aroma Wines & Equipment, v Columbian Distribution Service*s, 497 Mich 337, 359 (2015).

This Court finds the unpublished opinion of *JL Lewis & Associates, Inc v Magna Mirrors of America, Inc*, 2020 WL 1968665 * 10-11, vacated on other grounds, 507 Mich. 934 (2021) instructive.[4] There the Court of Appeals found that:

> Michigan Courts have employed the rule that, if a relationship does not exist that would give rise to a legal duty separate from enforcement of a contractual promise itself, a cause of action arising in tort cannot be maintained. *Brewster v. Martin Marietta Alum Sales, Inc*, 145 Mich App. 641, 668; 378 NW2d 558 (1985). Thus, to determine whether plaintiff's

[4] Unpublished decisions of this Court are not binding, MCR 7.215(C)(1), but they can be "instructive or persuasive," *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136 n 3, 783 NW2d 133 (2010). "

> statutory conversion claim is actionable, "the threshold inquiry is whether the plaintiff alleges violation of a legal duty separate and distinct from the contractual obligation." *Rinaldo's Const Corp v Michigan Bell Tel Co*, 454 Mich 65, 84; 559 NW2d 647, 658 (1997).
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> * * *
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> Fundamentally, plaintiff's statutory conversion claim stems from the same failure by Magna that is the basis of his breach-of-contract claim: Magna's failure to abide paragraph 5 of the license agreement by informing plaintiff of improvements made to plaintiff's mirror and assist plaintiff in obtaining patent protection related to those improvements. And, while plaintiff suggests in his complaint that Magna "wrongfully converted the improvements to [Magna's] own use," in that same sentence, plaintiff premises the "wrongful conversion" on the fact that Magna "refused to pay royalties to Plaintiff." That is, plaintiff alleged that conversion occurred after Magna failed to pay royalties *under the contract.*
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> * * *
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> We conclude that plaintiff's statutory conversion claim was plaintiff's breach-of-contract claim by another name. Both claims are premised on Magna's failure to pay royalties under the contract, and accordingly, the trial court was correct to dismiss the statutory conversion claim under MCR 2.116(C)(8). Moreover, plaintiff's argument that MCL 600.2919a(2) dispenses of the requirement that conversion claims—statutory or otherwise—be supported by independent duties arising in tort is without merit. MCL 600.2919a(2) applies to the remedy available for a valid claim of statutory conversion, and where no such claim is made, the provision does not apply.

Similarly, here Plaintiff's statutory conversion claim is based on an alleged breach of the MGA Agreement. Plaintiff's amended complaint alleges in part:

> 40. After the asset acquisition and assignment of the MGA Agreement, Medigap began operations, selling insurance policies.

41. A few months after Medigap began operating, Medigap noticed that the chargebacks tallied on its commission statements were significantly greater than expected. According to the Due Diligence Report, chargebacks had never exceeded more than around 30% of policies sold. Now, chargebacks had doubled, reaching around 60%.

79. The MGA Agreement provided "MGA [United] shall pay Agency a commission per Medicare Supplement policy Placed with the applicable Insurance Company." **Exhibit 1.1,** Ex. B; **Exhibit 1.2**, Ex. B.

80. It further provided "[s]uch commissions shall be subject to chargebacks in full if the applicable insurance policy lapses or is otherwise terminated within the first three (3) months following the issue date for such policy." **Exhibit 1.1,** Ex. B; **Exhibit 1.2**, Ex. B.

96. LTC and United have improperly and knowingly taken over $5 million in Medigap's monies. Indeed, not only have Defendants improperly assessed chargebacks on policies sold by T65, Defendants likewise retained and/or diverted commission monies that should have been paid to Medigap.

Again, absent the MGA Agreement there is no duty regarding the chargebacks. Under Plaintiff's allegations, its statutory conversion claim stems from the same failure by Defendants that is the basis of the breach-of-contract claim: Defendants' improper assessment of chargebacks. Based on the allegations in the amended complaint, Plaintiff has not alleged Defendants violated a duty separate and distinct from the obligations under the MGA Agreement. Therefore, the statutory conversion count is dismissed.

C. Count VII-Civil Conspiracy

"A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by

criminal or unlawful means." See *Swain v Morse,* 332 Mich App 510, 530 (2020), lv den, 507 Mich 927 (2021). "Liability does not arise from a civil conspiracy alone; rather, it is necessary to prove a separate, actionable tort." *Swain v Morse,* 332 Mich App at 530 n 13. "A claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384 (2003) (quotation marks and citation omitted), aff'd 472 Mich 91 (2005). Thus, if all of the tort claims cannot succeed, the civil conspiracy and concert-of-action claims must also be dismissed. *Advocacy Org for Patients & Providers, v Auto Club Ins Assoc,* 257 Mich App 365, 384 (2002).

Here Plaintiff's Count for Civil Conspiracy alleges:

Count VII: Civil Conspiracy

As to all Defendants

117. Plaintiff hereby re-alleges Paragraphs 1 through 116 as if fully restated herein.

118. Defendants United and LTC are a combination of two persons as defined under Michigan law.

119. Defendants United and LTC jointly maintained exclusive possession, access, and control over all accounting and information related to the payment of revenues due Plaintiff Medigap. More importantly, Defendants jointly controlled calculation of chargebacks levied against Medigap.

120. Defendants attempted to accomplish, and did actually accomplish, defrauding Medigap by making false representations about administering chargebacks only to later improperly assess Medigap chargebacks owed to Defendants by T65.

121. Defendants not only worked with each other, but also conspired with former Medigap CEO, Kyle Perrin, to effectuate their scheme.

122. Defendants concerted conduct constitutes a civil conspiracy that directly and proximately caused Plaintiff, Medigap direct, consequential, and special damages, as allege herein.

The Court finds that there can be no actionable civil conspiracy claim because the Court has dismissed the alleged separate tort claim of fraudulent inducement, upon which the civil conspiracy claim is predicated. Count VII is dismissed.

D. Count VIII-Aiding and Abetting

Regardless of whether Plaintiff's claim of aiding and abetting fraud is a recognized claim in Michigan,[5] Plaintiff predicates this claim on fraud. Plaintiff in fact acknowledges that "an independent wrong occurred when Defendants and Perrin worked to fraudulently induce Medigap. [FAC ¶ 124-126]." (Plaintiff's Br, p 19). The Court finds, however, that there can be no actionable aiding and abetting claim because the Court has dismissed the alleged independent claim of fraudulent inducement. *See Advocacy Org for Patients & Providers v Auto Club Ins. Ass'n,* 257 Mich App 365, 384-85 (2003) (affirming summary disposition of civil conspiracy claim where plaintiffs failed to establish an actionable tortious interference). Therefore, Count VIII is dismissed.

[5] See *Genesee Intermediate Sch Dist v City of Flint Sch Dist*, 2020 WL 4915430; *Franks v Franks*, 330 Mich App 69 (2019); *Roche Diagnostics Corp v Shaya*, 2021 WL 3202071 (ED Mich 2021) (the Michigan Court of Appeals in *Genesee* recognized that the Michigan Supreme Court has not expressly recognized aiding and abetting fraud, and declined to consider "expanding the common law to create such a cause of action," because the parties had not adequately briefed the issue. [2020 WL 491530 at *12]).

III. Count III- Tortious Interference with a Business Relationship.

To establish a prima facie claim of tortious interference with a business relationship or expectancy, a plaintiff must establish the following elements:

> (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the defendant, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the plaintiff.

Hope Network Rehab Servs v Mich Catastrophic Claims Ass'n, 342 Mich App 236, 245-246 (2022) (quotation marks and citations omitted).

The Court of Appeals recently explained the third required element:

> With respect to the third element, interference alone will not support a claim under this theory. [T]o satisfy the third element, the plaintiff must establish that the defendant acted both intentionally and either improperly or without justification. A tortious-interference-with-a-business-relationship claim requires an allegation 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 relationship of another. If the defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference.

Hope Network Rehabilitation Services v. Michigan Catastrophic Claims Association, 342 Mich App at 246. (internal citations and quotations omitted)

Plaintiff alleges:

90. Plaintiff Medigap had existing business relationships with its customers. It would collect commissions from policies sold but could be assessed a chargeback if these customers cancelled their policy.

91. Defendants, as the individuals with access to all information and documentation from the insurance carriers, Medigap, and T65, knew of Medigap's existing relationships with these customers.

92. Defendants intentionally interfered with these relationships by diverting these customers to T65, ultimately causing the relationship between Medigap and its customer to terminate and result in a chargeback.

93. Defendants did this to both to reduce the debt T65 owed Defendants, as well as to help the principals of T65, with whom Defendants has a close relationship.

94. By diverting customers away from Medigap, Defendants damaged Medigap by causing it to be assessed chargebacks which would otherwise have never been assessed.

In this case, the conduct alleged was that Defendants diverted customers away from Plaintiff. The Court finds that these allegations fail to sufficiently allege 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 relationship of another. Count III is dismissed.

IV. Count V- Larceny by Conversion

Under MCL 750.362, larceny by conversion is proven by satisfying the following elements:

> (1) the property at issue must have some value, (2) the property belonged to someone other than the defendant, (3) someone delivered the property to the defendant, irrespective of whether that delivery was by legal or illegal means, (4) the defendant embezzled, converted to his own use, or hid the property with the intent to embezzle or fraudulently use it, and (5) at the time the property was embezzled, converted, or hidden, the defendant intended to defraud or cheat the owner permanently of that property.

In *Gardner v Woods*, 429 Mich 290, 301-302 (1987), the Michigan Supreme Court addressed whether a criminal statue could impose civil liability. There the Court found:

> Where a penal statute is silent concerning whether a violation of its provisions should give rise to a civil remedy, courts will infer a civil remedy for the violation "to further the ultimate policy for the protection of individuals which they find underlying the statute, and which they believe the legislature must have had in mind." Prosser & Keeton, Torts (5th ed), § 36, p 222. The civil remedy may be afforded through an existing tort action or a new cause of action analogous to an existing tort action. *If there is no common-law tort sufficiently analogous to fit the situation, a new tort may be created for the purpose*. Restatement Torts, 2d, § 874A, clause (f), p. 304. (emphasis added)

The Court agrees with Defendant that Plaintiff has failed to establish entitlement to civil relief under the criminal larceny statue and fails to cite governing law establishing that this criminal larceny statute was enacted to serve the "ultimate policy" of protecting companies from an alleged breach of contract. (Defendants' Reply Br, p 4).

And, even though the Court is dismissing the statutory conversion claim for the reasons stated above, Plaintiffs do have a "common-law tort sufficient analogous to fit the situation"—conversion. Thus, the criminal statute, which is silent concerning a civil remedy, should not be read to create one under these circumstances. Moreover, Plaintiff fails to allege the fifth element-that the time the property was embezzled, converted, or hidden, the defendant intended to defraud or cheat the owner permanently of that property. Count V is dismissed.

CONCLUSION

Based on the above Defendant's motion for summary disposition under MCR 2.116(8) is GRANTED as to Counts II-VIII.

The Court notes that when summary disposition motion is based on MCR 2.116(C)(8), it must give the parties an opportunity to amend their pleadings as provided in MCR 2.118,

unless evidence before the court shows that an amendment would be unjustified. MCR 2.116(I)(5). Where a party does not seek leave of the court or obtain the opposing party's consent to amend his or her pleading, "MCR 2.116(I)(5) [does] not require the court to sua sponte offer [the party] an opportunity to amend." *Kloian v Schwartz*, 272 Mich App 232, 242 (2006) (finding no plain error in these circumstances). Here, Plaintiff had previously filed an amended its complaint,[6] and does not seek leave to file a second amended complaint.

IT IS SO ORDERED.

This is not a final order and does not close the case.

DATED:2/28/24

[6] As previously noted, the Amended Complaint exceeded the scope of the Stipulated Order to Amend by alleging additional causes of action.