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

BIOTECH CLINICAL LABORATORIES, INC., a Michigan corporation,

Plaintiff/Counter-Defendant,

Case No. 24-205547-CB
Hon. Victoria A. Valentine

v

RSL MEDICAL MARKETING, LLC, a Michigan limited liability company,

Defendant/Counter-Plaintiff.

~~and~~

~~RSL MEDICAL MARKETING, LLC, a Michigan limited liability company,~~

~~*Third Party Plaintiff,*~~

~~v~~

~~GIOVANNI KHALIFEH and JOSEPH KHALIFEH, jointly and severally,~~

~~*Third Party Defendants.*~~

OPINION AND ORDER REGARDING
RSL MEDICAL MARKETING, INC.'S RENEWED MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)
AND
PLAINTIFF/COUNTER-DEFENDANT BIOTECH CLINICAL LABORATORIES, INC.'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

At a session of said Court, held in the
County of Oakland, State of Michigan
June 4, 2025

HONORABLE VICTORIA A. VALENTINE

This matter is before the Court on RSL Medical Marketing, Inc.'s Renewed Motion for Summary Disposition Pursuant to MCR 2.116(C)(10) and Plaintiff/Counter-Defendant Biotech Clinical Laboratories, Inc.'s Motion for Summary Disposition Pursuant to MCR 2.116(C)(10). This Court has reviewed the pleadings filed by the parties and the motions, responses, and reply briefs. Oral argument was held on the above-entitled motions on June 4, 2025.

OPINION

I.

Overview

Plaintiff Biotech Clinical Laboratories, Inc. ("Biotech") is a Michigan corporation with its principal place of business in Novi, Michigan.[1] Biotech is a provider of certain clinical diagnostic and laboratory services, including diagnostic evaluations of tissue samples and cellular specimens and comprehensive toxicology testing services.[2]

Defendant RSL Marketing Services, LLC ("RSL") is a Michigan limited liability company with its principal place of business in Farmington Hills, Michigan.[3] In August 2016, RSL and Biotech entered into a Marketing Agreement.[4] Under the Marketing Agreement, RSL agreed to market Biotech's laboratory services in exchange for compensation of $35.00 per specimen for the

[1] Complaint ¶ 1.
[2] *Id.* ¶¶ 5-7.
[3] *Id.* ¶ 2.
[4] RSL Medical Marketing, Inc.'s Renewed Motion for Summary Disposition Pursuant to MCR 2.116(C)(10), Exhibit 1.

initial 12 months of the Agreement.[5] In November 2018, the parties signed a written Amendment to Marketing Services Agreement (the "Amendment") which changed RSL's compensation to $475,000 per month.[6] The Agreement also provided that "The parties shall mutually agree by October 31 of each year on the fee for the following twelve (12) month period. In the event the parties do not agree on a new fee for the next twelve (12) month period by October 31 of the then current year the then current fee shall remain in place until the parties mutually agree otherwise."[7]

RSL alleges that Biotech breached the Marketing Agreement and Amendment by paying less than the contractually required $475,000 per month beginning in April 2020.[8] RSL further alleges that it is owed a total of $4,707,000 for Biotech's deficient monthly payments until the parties terminated the Marketing Agreement in February 2024.[9] Additionally, after the parties terminated the Marketing Agreement, RSL alleges that Biotech violated the agreement's restrictive covenant by contacting RSL's customers.[10]

Biotech alleges that it was RSL that breached the Marketing Agreement by "withholding information, directing illegality, diverting the business of Plaintiff Biotech, exceeding its authorities in controlling and terminating employees, and otherwise acting for its own benefit to the detriment of Plaintiff Biotech in violation of the express terms of the agreement between the Parties."[11]

Biotech filed the instant lawsuit in February 2024 alleging Breach of Contract (Count I) and Tortious Interference with Contract (Count II). In April 2024, RSL filed an Amended

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[5] *Id.* at Exhibit A.
[6] RSL Medical Marketing, Inc.'s Renewed Motion for Summary Disposition Pursuant to MCR 2.116(C)(10), Exhibit 2.
[7] *Id.*
[8] Amended Counterclaim ¶ 12.
[9] *Id.*
[10] *Id.* ¶ 34.
[11] Complaint ¶ 12.

Counterclaim alleging Breach of Contract—Failure to Pay (Count I), Unjust Enrichment (Count II), Breach of Contract—Restrictive Covenant—Liquidated Damages (Count III), Breach of Contract—Restrictive Covenant—Injunctive Relief (Count IV), Tortious Interference with Advantageous Business Relationship and/or Contractual Relationship (Count V),[12] Civil Conspiracy (Count VI),[13] and Business Defamation (Count VII).[14]

RSL now moves for summary disposition in its favor of Counts I-IV of its Amended Counterclaim. Biotech also moves for summary disposition of Counts I-IV of the Amended Counterclaim and summary disposition in its favor of Counts I-II of the Complaint. Both motions were filed pursuant to MCR 2.116(C)(10).

II.

Standard of Review

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim or defense. See, e.g., MCR 2.116(G)(3)(b); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Accordingly, "[i]n evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999); *Quinto*, 451 Mich at 358.

The moving party "must specifically identify the issues" as to which it "believes there is no genuine issue" of material fact and support its position as provided in MCR 2.116. MCR 2.116(G)(4). Under Michigan law, the moving party may satisfy its burden of production under

[12] This claim was dismissed pursuant to the agreement of the parties. See Order issued April 17, 2025.
[13] This claim was dismissed pursuant to the agreement of the parties. See Order issued June 21, 2024.
[14] This claim was dismissed pursuant to the agreement of the parties. See Order issued April 17, 2025.

MCR 2.116(C)(10) by demonstrating to the court that the non-moving party's evidence is insufficient to establish an essential element of the non-moving party's claim. *Quinto*, 451 Mich at 361. If the moving party properly supports its motion, the burden "then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Id.* at 362. If the moving party fails to properly support its motion for summary disposition, the non-moving party has no duty to respond and the trial court should deny the motion. MCR 2.116(G)(4). See also *Meyer v City of Center Line*, 242 Mich App 560, 575; 619 NW2d 182 (2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116(C)(10)).

In all cases, MCR 2.116(G)(4) squarely places the burden on the parties, not the trial court, to support their positions. A reviewing court may not employ a standard citing mere possibility or promise in granting or denying the motion. *Maiden*, 461 Mich at 120-121 (citations omitted), and may not weigh credibility or resolve a material factual dispute in deciding the motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Rather, summary disposition pursuant to MCR 2.116(C)(10) is appropriate if, and only if, the evidence, viewed most favorably to the non-moving party fails to establish any genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362, citing MCR 2.116(C)(10) and (G)(4); *Maiden*, 461 Mich at 119-120. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160; 934 NW2d 665 (2019) (citation omitted). Granting a motion for summary disposition under MCR 2.116(C)(10) is warranted if the substantively admissible evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362-363.

III.

Counterclaim Count I (Breach of Contract—Failure to Pay)

Both RSL and Biotech argue that they are entitled to summary disposition of RSL's Counterclaim for Breach of Contract for failure to pay. RSL argues that the Amendment is unambiguous in its requirement that Biotech pay $475,000 per month, and that the absence of a signed writing modifying this compensation term means that Biotech's failure to pay $475,000 was a clear breach of the Marketing Agreement and Amendment. Biotech argues that the parties mutually agreed to modify the compensation due under the Amendment, that the negotiations were not required to be reduced to writing, and that RSL cannot bring a claim to enforce the Marketing Agreement and Amendment because it was the first breaching party.

A. The Law of Contract Interpretation

Under Michigan law "[a] party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). A court's "goal in contract interpretation is to give effect to the intent of the parties, to be determined first and foremost by the plain and unambiguous language of the contract itself." *Wyandotte Elec Supply Co v Electrical Technology Sys, Inc*, 499 Mich 127, 143-144; 881 NW2d 95 (2016). "[I]t has long been the law in this state that courts are not to rewrite the express terms of contracts." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199-200; 747 NW2d 811 (2008). See also *Kendzierski v Macomb County*, 503 Mich 296, 311-312; 931 NW2d 604 (2019) (emphasis in original) ("A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*" and a court "will not create ambiguity where the terms of the contract are clear").

"The rights and duties of parties to a contract are derived from the terms of the agreement." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62; 664 NW2d 776 (2003). "A party's expectations do not supersede the language of an unambiguous contract." *Zwiker v Lake Superior State Univ*, 340 Mich App 448, 478; 986 NW2d 427 (2022), appeal denied, 10 NW3d 456 (Mich 2024). Accordingly, courts will "enforce only those obligations actually assented to by the parties." *Wilkie,* 469 Mich at 63.

Under Michigan law, contracts are subject to the parol evidence rule which prohibits the use of extrinsic evidence to interpret unambiguous language within the contract. *Shay v Aldrich*, 487 Mich 648, 667; 790 NW2d 629 (2010). See also *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998) (quotation marks and citation omitted) ("[p]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous.")

The question of whether contract language is ambiguous is a question of law. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). A contract is ambiguous if there is an irreconcilable conflict between provisions in the contract or "when a term is equally susceptible to more than a single meaning." *Bodnar v St John Providence, Inc*, 327 Mich App 203, 220; 933 NW2d 363 (2019). Under such circumstances the ambiguous contract language presents a question of fact. *Klapp*, 468 Mich at 469. "[I]f a contract is ambiguous, then extrinsic evidence is admissible to determine the actual intent of the parties." *Shay*, 487 Mich at 667 (quotation marks and citation omitted). See also *Klapp*, 468 Mich at 469 ("In resolving such a question of fact, i.e., the interpretation of a contract whose language is ambiguous, [trier of fact] is to consider relevant extrinsic evidence").

Additionally, parties are free to "mutually waive or modify their contract notwithstanding a written modification or anti-waiver clause because of the freedom to contract." *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364; 666 NW2d 251 (2003). This mutuality requirement is "satisfied where a waiver or modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to modify or waive the particular original contract." *Id.* at 364-365. If a contract contains a written modification requirement or an anti-waiver provision, "[a]ny clear and convincing evidence of conduct must overcome not only the substantive portions of the previous contract allegedly amended, but also the parties' express statements regarding their own ground rules for modification or waiver as reflected in any restrictive amendment clauses." *Id.* at 374-375.

B. Analysis

a. Does the Marketing Agreement and Amendment Require that the Results of Annual Compensation Negotiations be Reduced to a Signed Writing?

The Marketing Agreement entered into between Biotech and RSL in August 2016 provided that Biotech would compensate RSL a fee equal to $35 per specimen tested for the initial 12 months of the Agreement.[15] The Amendment, effective November 2018, provided that Biotech would pay RSL $475,000 per month.[16] The Amendment further provided that the "parties shall mutually agree by October 31 of each year on the fee for the following twelve (12) month period," and that if they could not agree, the fee for the current year would remain in place until the parties mutually agreed otherwise.[17] The original Marketing Agreement also provided that "No attempted

[15] RSL Medical Marketing, Inc.'s Renewed Motion for Summary Disposition Pursuant to MCR 2.116(C)(10), Exhibit 1.
[16] *Id.*, Exhibit 2.
[17] *Id.*

modification, amendment or waiver of any of the provisions of this Agreement shall be binding on either party unless made in writing and signed by both Contractor and Provider."[18]

As an initial matter, the parties have very different views on whether the annually negotiated compensation under the Amendment was required to be memorialized in a signed writing. According to RSL, the requirement in the original Marketing Agreement that modifications be made in writing and signed by both parties would apply to the annual compensation negotiations, and so the revised compensation would not take effect unless reduced to a signed writing. However, Biotech maintains that the Amendment itself is the signed writing that amends the terms of the Marketing Agreement. Biotech also argues that to require a signed writing each year after the annual compensation negotiations would render the Amendment nugatory and meaningless because the parties always had the power under the Marketing Agreement to renegotiate compensation *if it were reduced to a signed written amendment*. The Amendment itself does not specify whether the results of the compensation negotiations needed to be memorialized in a signed writing, and the parties have offered two equally plausible interpretations of the legal effect of the Amendment on the Marketing Agreement's signed writing requirement. Accordingly, the Court finds that the provision is ambiguous and must be decided by a trier of fact. Summary disposition, in either party's favor, is therefore unwarranted.

b. Did the Parties Waive the Signed Writing Requirement and Orally Agree to Modify RSL's Compensation?

Even if the Marketing Agreement and Amendment did require any agreement to modify RSL's compensation to be reduced to a signed writing in order to be effective, Biotech argues that the parties mutually agreed to modify RSL's compensation through their annual negotiations and

[18] *Id.*, Exhibit 1 § 10.

waived the Marketing Agreement's signed writing requirement expressly and through their course of conduct.

As noted above, parties to a contract that contains a written modification or anti-waiver clause are free to modify their contract because of the freedom to contract, but "a party alleging waiver or modification must establish a mutual intention of the parties to waive or modify the original contract." *Quality Prod*, 469 Mich at 364. "Mere knowing silence generally cannot constitute waiver." *Id.* at 365. Rather, there must be some evidence that the party affirmatively accepted the activities as a modification of the original contract. *Id.* at 379-380. However, "when a course of conduct establishes by clear and convincing evidence that a contracting party, relying on the terms of the prior contract, knowingly waived enforcement of those terms, the requirement of mutual agreement has been satisfied." *Id.* at 374.

Here, the parties have submitted conflicting evidence as to whether they mutually agreed to waive the signed writing requirement in the Marketing Agreement and verbally agreed to modify RSL's compensation. Specifically, Biotech points to the following as evidence that the parties did agree to reduce RSL's compensation and that they did not require the modification to be in writing:

- RSL's unconditional acceptance of over forty monthly payments received from Biotech over a period of almost four years without objection.[19]

- Ryan Lash's December 2021 email to Giovanni Khalifeh in which he sent a revised Amendment with updated compensation that was "the same one we used last year" but with "the new numbers."[20]

- Giovanni Khalifeh's testimony that the parties negotiated and mutually agreed on updated compensation at different points in their

[19] Plaintiff/Counter-Defendant Biotech Clinical Laboratories, Inc.'s Response Brief in Opposition to Defendant/Counter-Plaintiff RSL Marketing, LLC's Renewed Motion for Summary Disposition Pursuant to MCR 2.116(C)(10), Exhibit 3 Dep. of Giovanni Khalifeh, p 250.
[20] *Id.*, Exhibit 5.

relationship and accepted that it would be done with "no paperwork."[21]

RSL, however, argues that there was no mutual agreement to reduce RSL's compensation, and that it is owed compensation of $475,000 per month for the entire duration of the contract, citing:

- Ryan Lash's testimony that, although discussions regarding compensation did occur, nothing came from those discussions and RSL never agreed to reduce its compensation.[22]

- Giovanni Khalifeh's text message with his brother, Julio Khalifeh, in December 2020 in which he told his brother that he spoke to Ryan Lash and that Lash had "no choice" regarding a monthly payment of $375,000 because Giovanni knew "how to talk to him."[23]

In short, the parties have submitted conflicting evidence regarding whether the parties verbally agreed to change RSL's compensation despite the absence of a signed writing reflecting the purported agreement. In deciding a motion for summary disposition pursuant to MCR 2.116(C)(10), this Court may not weigh credibility or resolve a material factual dispute. *Skinner*, 445 Mich at 161. Accordingly, summary disposition is not warranted.

c. Was RSL the First Breaching Party?

Finally, Biotech argues that RSL cannot maintain a claim for breach of the Marketing Agreement and/or Amendment because RSL committed the first material breach. "[O]ne who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 613; 792 NW2d 344 (2010) (quotation marks and citation omitted). See also *Flamm v Scherer*, 40 Mich App 1, 8-9; 198 NW2d 702 (1972), citing 5 Callaghan's Michigan Civil Jurisprudence, Sec. 249,

[21] *Id.*, Exhibit 3 Dep. of Giovanni Khalifeh, p 62.
[22] RSL Medical Marketing, Inc.'s Renewed Motion for Summary Disposition Pursuant to MCR 2.116(C)(10), Exhibit 8, Dep. of Ryan Lash, pp 73-74.
[23] *Id.*, Exhibit 7.

pp 820-821 ("one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform"); *Verran v Blacklock*, 60 Mich App 763, 768; 231 NW2d 544 (1975). But this rule only applies if the initial breach was substantial, which requires the trial court to consider whether the nonbreaching party received the expected benefit. *Able Demolition v Pontiac*, 275 Mich App 577, 585; 739 NW2d 696 (2007). See also *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). Other authorities characterize a substantial breach as occurring "where the breach has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible, such as the causing of a complete failure of consideration." *McCarty v Mercury Metal Co*, 372 Mich 567, 574; 127 NW2d 340 (1964).

In the instant matter, Biotech alleges that RSL committed the first material breach when it (1) directed Biotech's employee to illegally alter a physician's order and subsequently fired that employee, which violated its agreement to conform with and observe "all laws, customers and standards of professional ethics and practice," and (2) began working with a direct competitor (North West) and diverting business away from Biotech to North West while still under contract with Biotech. As to the allegations that RSL directed a Biotech employee (Stephanie Soter) to illegally alter a physician's orders and then subsequently removed her from her position, the parties have submitted conflicting evidence as to the truth of these allegations, including:

- Stephanie Soter's deposition testimony that Jerry from RSL instructed her to add diagnosis codes to patient orders without the doctor's consent.[24]

[24] Plaintiff/Counter-Defendant Biotech Clinical Laboratories, Inc.'s Response Brief in Opposition to Defendant/Counter-Plaintiff RSL Marketing, LLC's Renewed Motion for Summary Disposition Pursuant to MCR 2.116(C)(10), Exhibit 6 Dep. of Stephanie Soter, pp 29-30.

- Ms. Soter's testimony that she believed she was terminated as a result: "Because my job disappeared out of nowhere. And it felt like retaliation."[25]

- A Hegira Health officer manager's letter that Ms. Soter was terminated due to "multiple complaints from our clients and staff members regarding her attitude and behavior."[26]

- Ryan Lash's deposition testimony that RSL did not direct Biotech's employees to add diagnosis codes to orders without the physician's consent ("No, that's what would happen with Stephanie and it didn't—it didn't happen that way, but no, that's not what—that's not—I'm not aware of that at all, we wouldn't do that").[27]

Consequently, because the parties have submitted conflicting evidence as to whether RSL committed the first material breach by directing an employee to illegally alter a physician's orders in violation of Biotech's Code of Ethics which were included in the Marketing Agreement, summary disposition is not warranted on this basis.

Additionally, Biotech argues that RSL committed the first material breach when it entered into a competing Marketing Agreement with North West and began diverting business away from Biotech to North West. The Marketing Agreement between Biotech and RSL does not contain an exclusivity clause, but it did limit RSL's competing activities:

> Outside Work and Activity. Provider acknowledges that Contractor may have duties and interests with other parties outside of this Agreement. Subject to paragraph 6 below, Contractor shall remain free to engage in outside work and activity and be engaged by other entities as long *as it does not conflict or interfere with Contractor's duties and obligations under this Agreement or with the business of Provider*.[28]

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[25] *Id.*, Exhibit 6 at p 37.
[26] RSL Medical Marketing, LLC's Response and Brief in Support to Plaintiff/Counter-Defendant Biotech Clinical Laboratories, Inc.'s Renewed Motion for Summary Disposition Pursuant to MCR 2.116(C)(10), Exhibit 5.
[27] RSL Medical Marketing, Inc.'s Renewed Motion for Summary Disposition Pursuant to MCR 2.116(C)(10), Exhibit 8, Dep. of Ryan Lash, pp 133-134.
[28] *Id.*, Exhibit 1 Marketing Agreement § 5 (emphasis added).

Biotech argues that RSL violated this provision at least six months before its agreement with Biotech was terminated by moving a customer from Biotech to North West in October or November of 2023.[29] However, Ryan Lash's testimony indicates that Biotech told RSL it did not want the customer (IVPS) and directed Lash to take the account elsewhere:

> Q. So you're not answering the question? When's the first time that RSL was under contract with Northwest Labs and was it during the contract term with Biotech?
>
> A. The first time RSL did anything with Northwest Labs was because *one of our accounts that they did not want, IVPS, we needed to put somewhere else and they were telling us to take your account elsewhere*. That is the first account we gave to Northwest Laboratories.
>
> * * *
>
> Q. And how did that relationship begin?
>
> A. It started about seven or eight years ago. They've always wanted to work with us, I've always had a relationship with them, and then I had to -- I had to move IVPS because, you know, we've always talked about doing business together, they've always wanted to work with us, and *Biotech did not want the account anymore*, they told me to take my business, their -- I'm pretty sure they thought that they would get them, because they still have Tao (ph) at IVPS. So we said, you know what, things are going -- you know, it might be a good idea, because I have to do something. Again, it's hard moving that kind of business. So we moved IVPS to start the relationship. [30]

Accordingly, Biotech's argument that RSL interfered with its business by moving one of its customers (IVPS) to North West is not persuasive if Biotech *directed RSL to move the customer* because Biotech no longer wanted IVPS as a customer.

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[29] RSL Medical Marketing, Inc.'s Renewed Motion for Summary Disposition Pursuant to MCR 2.116(C)(10), Exhibit 8, Dep. of Ryan Lash, p 45.
[30] *Id.* at pp 45, 137 (emphasis added).

Biotech also attaches a number of exhibits that it alleges show that RSL began diverting business away from Biotech and to North West in January 2024, which is before RSL terminated its contract with Biotech on February 6, 2024. For example, Dr. Kuldip Deogun (of Chronic Pain Institute) executed a lease for Biotech to provide laboratory services in July 2023 for two locations (43145 Schoenherr and 43193 Schoenherr Rd. in Sterling Heights, Michigan).[31] On January 8, 2024, Jeff Lazor of RSL sent an updated lease to Chronic Pain for 43145 Schoenherr Rd. that switched to North West as the provider of clinical laboratory services.[32] On February 1, 2024, Dr. Deogun executed a lease with North West for the 43145 Schoenherr Rd. location.[33] This evidence certainly creates a material issue fact as to whether RSL was funneling business from Biotech to North West in January 2024. However, this would only be the *first* material breach if Biotech's failure to pay RSL $475,000 per month was *not* a breach. As indicated above, this determination will require the trier of fact to interpret an ambiguous provision in the Marketing Agreement and also decide whether the parties' conduct indicates a waiver of the contractual requirements.

In sum, liability for Counterclaim Count I hinges on a number of issues of fact as outlined above. Summary disposition in favor of either party is not warranted.

IV.

Counterclaim Count II (Unjust Enrichment)

Both RSL and Biotech also argue that they are entitled to summary disposition of RSL's Counterclaim for Unjust Enrichment (Count II).

A. The Law of Unjust Enrichment

[31] Plaintiff/Counter-Defendant Biotech Clinical Laboratories, Inc.'s Motion for Summary Disposition Pursuant to MCR 2.116(C)(10), Exhibit 11.
[32] *Id.*, Exhibit 15 (submitted under seal).
[33] *Id.*, Exhibit 16.

Under the equitable doctrine of unjust enrichment, the law "indulges in the fiction of a quasi or constructive contract, with an implied obligation to pay for benefits received to ensure that exact justice is obtained." *Kammer v Asphalt Paving Co, Inc v East China Twp Schs*, 443 Mich 176, 185-186; 504 NW2d 635 (1993) (quotation marks and citations omitted). "Because this doctrine vitiates normal contract principles, the courts employ the fiction with caution. . . ." *Id.* at 186.

"A claim of unjust enrichment requires the complaining party to establish (1) the receipt of a benefit by the other party from the complaining party and (2) an inequity resulting to the complaining party because of the retention of the benefit by the other party." *Karaus v Bank of NY Mellon*, 300 Mich App 9, 22-23; 831 NW2d 897 (2012). "Courts may not imply a contract under an unjust-enrichment theory if there is an express agreement covering the same subject matter." *Zwiker v Lake Superior State Univ,* 340 Mich App 448, 482; 986 NW2d 427 (2022), citing *Belle Isle Grill Corp v Detroit*, 256 Mich App 463 478; 666 NW2d 271 (2003).

B. Analysis

In its claim for unjust enrichment, RSL alleges:

> Notwithstanding the Agreement between RSL and Biotech, Biotech failed and refused to honor the Agreement that it entered into, and as described above, the aggregate of the compensation paid by Biotech, to RSL, was deficient by the amount of Four Million Seven Hundred Seven Thousand and 00/100 Dollars ($4,707,000.00), to the detriment of RSL and to the unjust enrichment of Biotech, as Biotech did, in fact, receive the full extent of the marketing services that RSL had agreed to, and was obligated to, provide.[34]

RSL alleges that the Marketing Services Agreement and the Amendment to Marketing Services Agreement are valid and binding express contracts.[35] Biotech also alleges that the

[34] Amended Counterclaim ¶ 26.
[35] Amended Counterclaim ¶¶ 20-21.

Marketing Services Agreement is a valid and enforceable agreement.[36] Consequently, because there is an express agreement covering the same subject matter as RSL's claim for unjust enrichment, summary disposition in favor of Biotech is warranted.

V.

Counterclaim Count III (Breach of Contract–Restrictive Covenant–Liquidated Damages)

Next, both sides argue that they are entitled to summary disposition of RSL's Counterclaim for Breach of Contract—Restrictive Covenant--Liquidated Damages (Count III).

The Court holds this issue in abeyance.

VI.

Counterclaim Count IV (Breach of Contract—Restrictive Covenant—Injunctive Relief)

Both sides argue that they are entitled to summary disposition of RSL's Counterclaim for Breach of Contract—Restrictive Covenant--Injunctive Relief (Count IV) based on Section 4(D) of the Marketing Agreement.

A. The Law of Injunctive Relief

An injunction represents "an extraordinary and drastic act of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *Senior Accts, Analysts & Appraisers Ass'n v City of Detroit*, 218 Mich App 263, 269–70; 553 NW2d 679 (1996), citing *Reed v Burton*, 344 Mich 126, 132; 73 NW2d 333 (1955).

The factors to consider for a permanent injunction are:

> (a) the nature of the interest to be protected, (b) the relative adequacy to the plaintiff of injunction and of other remedies, (c) any unreasonable delay by the plaintiff in bringing suit, (d) any related misconduct on the part of the plaintiff, (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied, (f) the interests of third persons and of the public, and

[36] Complaint ¶ 27.

> (g) the practicability of framing and enforcing the order or judgment.
>
> [*Wayne Cnty Ret Sys v Wayne Cnty*, 301 Mich App 1, 28; 836 NW2d 279, 296 (2013), rev'd in part on other grounds, 495 Mich 36 (2014) (citation and quotation marks omitted).]

Courts must balance the benefit of an injunction to a requesting plaintiff against the damage and inconvenience to the defendant and will grant an injunction if doing so is most consistent with justice and equity. *Janet Travis, Inc v Preka Holdings, LLC*, 306 Mich App 266, 274-275; 856 NW2d 206 (2014).

B. Application

In the instant action, RSL requests that the Court grant injunctive relief pursuant to Section 4(D) of the Marketing Agreement, which states:

> D. The confidential information and list of the Customers relate to matters which are of a special, unique and extraordinary importance to Contractor a violation of any of the terms hereof would cause irreparable injury to Contractor, the amount of which may be impossible to estimate or determine and which cannot be compensated adequately. Therefore, Provider agrees that, because the remedy at law for a breach or threatened breach of such covenants would be inadequate, Contractor shall be entitled, as a matter of course, to an injunction, restraining order, writ of mandamus, or other equitable relief from the Oakland County Circuit Court, restraining any violation or threatened violation of any such covenants by Provider and such other persons as the Court shall order. The rights and remedies provided for herein are cumulative and will be in addition to rights and remedies otherwise available to Contractor under any other agreement or applicable law.[37]

RSL requests that this Court undertake "an extraordinary and drastic act of judicial power" and enjoin Biotech from "(i) using RSL's information concerning RSL's customers, business or trade secrets, customer lists and pricing information or business associates in any manner not

[37] Complaint, Exhibit A Marketing Agreement § 4(D).

specifically permitted by the Agreement; (ii) further breaching the restrictive covenant provision of Agreement, whether through contacting and/or doing business with RSL's customers." However, RSL does not cite the relevant standard for permanent injunctive relief or present evidence and/or arguments as to why such relief would be appropriate in the instant case. "Trial courts are not the research assistants of the litigants; the parties have a duty to fully present legal arguments for its resolution of their dispute." *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008). "A party abandons a claim when it fails to make a meaningful argument in support of its position." *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008). Michigan jurisprudence is well-settled that this Court need not divine the intentions, search for arguments, or otherwise make conclusions on a party's behalf. *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("It is not enough . . . to simply announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and rationalize the basis for his arguments, and then search for authority either to sustain or reject his position"); *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) ("A mere statement without authority is insufficient to bring an issue before this Court"). In the end, RSL has failed to sufficiently support the relief sought, and summary disposition in its favor is not warranted.

Biotech argues that RSL has not established liability for breach of the Marketing Agreement with respect to its alleged misuse of confidential information and "Customer Lists." As Biotech notes, "Customers" is a term defined in the Marketing Agreement as the aggregate of the lists provided by RSL on a monthly basis of "medical providers that [RSL] has contacted on behalf of [Biotech]."[38] Biotech argues that because RSL did not send these monthly lists, there is no "Customer List" for the purposes of Section 4(D) of the Marketing Agreement. RSL counters

[38] RSL Medical Marketing, Inc.'s Renewed Motion for Summary Disposition Pursuant to MCR 2.116(C)(10), Exhibit 1, p 6 Section (g).

that Biotech created the "Salesman 12" classification in its internal database to track the "customers" that RSL brought in, so RSL's customers are easily identifiable.[39]

As an initial matter, Biotech is correct that "Customers" is a defined term in the Marketing Agreement, and that the "Customer Lists" at issue were meant to be the aggregate of the monthly lists provided by RSL. However, as noted above, parties to a contract are free to "mutually waive or modify their contract notwithstanding a written modification or anti-waiver clause because of the freedom to contract." *Quality Prods*, 469 Mich at 364. Here, RSL has raised a material issue of fact as to whether the parties agreed to waive the requirement that RSL send monthly customer lists because Biotech was maintaining a separate list of RSL's customers within its internal databases where RSL was designated as "Salesman 12." Accordingly, because liability for this claim must be determined by the trier of fact, summary disposition is not warranted.

VII.

Complaint Count I (Breach of Contract)

A. The Law of Breach of Contract

The law relevant to Biotech's breach of contract claim is discussed extensively in Section III *supra*.

B. Analysis

In its claim for breach of contract, Biotech alleges:

> 28. Defendant RSL has breached the Marketing Agreement by, *inter alia,* withholding information, directing illegality, diverting the business of Plaintiff Biotech, exceeding its authorities in controlling and terminating employees, and otherwise acting for its own benefit to the detriment of Plaintiff Biotech in violation of the express terms of the agreement between the Parties.[40]

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[39] RSL Medical Marketing, Inc.'s Renewed Motion for Summary Disposition Pursuant to MCR 2.116(C)(10), p 19 n 20.

[40] Complaint ¶ 28.

Biotech argues that RSL breached the Marketing Agreement when it instructed a Biotech employee (Stephanie Soter) to "perform an illegal act and then removed that employee from her office without the knowledge or consent of Biotech."[41] As noted above in Section III *supra*, there is conflicting testimony about whether Ms. Soter was, in fact, instructed to "perform an illegal act" and whether she was removed due to her refusal to do so or due to performance issues. Accordingly, because there are material issues of fact that will determine RSL's liability, summary disposition is not warranted on this basis.

Additionally, as discussed at length above, there are material issues of fact as to whether RSL breached the Marketing Agreement's prohibition on outside work that conflicts with or interferes with its work for Biotech, and whether this alleged breach was legally significant in light of Biotech's alleged failure to pay the compensation due under the Marketing Agreement and Amendment. In sum, because there are material issues of fact underlying Biotech's claim for breach of contract, summary disposition is not warranted.

VIII.

Complaint Count II (Tortious Interference with Contract)

A. The Law of Tortious Interference with Contract

The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, (3) an unjustified instigation of the breach by the defendant, and (4) resulting damages. *Health Call v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 88-89; 706 NW2d 843 (2005). The "unjustified interference" by a third party in an at will employment relationship will be actionable where the third party "intentionally do an act that is per se wrongful

[41] Plaintiff/Counter-Defendant Biotech Clinical Laboratories, Inc.'s Motion for Summary Disposition Pursuant to MCR 2.116(C)(10), p 6-7.

or do a lawful act with malice and that is unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Patillo v Equitable Life Assur Soc of US*, 199 Mich App 450, 457; 502 NW2d 696 (1992) (citations and quotations omitted). A "wrongful act per se" is an act that is "inherently wrongful or an act that can never be justified under any circumstances." *Id.*

B. Analysis

In Count II of the Complaint, Biotech alleges that:

> 32. As stated, Plaintiff Biotech was in valid contractual privity with 15 separate employees.
>
> 33. In furtherance of its unlawful scheme to divert assets, business and revenue away from Plaintiff Biotech, Defendant RSL interfered in the contractual relationships of those parties.
>
> 34. At all times, Defendant RSL possessed full knowledge of the existence of said contractual relationships.
>
> 35. Defendant RSL's knowledge is evidenced by the fact that they directed and coerced their resignation of employment, and consequent termination of the employment contracts between the employees and Plaintiff Biotech. In one instance, at least, Defendant RSL directed the content of the resignation letter.

As RSL correctly points out, Count II of the Complaint alleges that RSL interfered with Biotech's contracts with its *employees*, not with providers. Consequently, the Court will not consider Biotech's arguments that RSL tortiously interfered with Biotech's relationships with providers since this was not pled as a part of Count II.

Additionally, a claim for intentional interference with contract requires a *breach of contract*. Although an at-will employment contract may be the subject of an intentional interference with contract claim, this does not eliminate the requirement that the plaintiff demonstrate a *breach of contract*. For example, in *Burger v Ford Motor Co*, the plaintiff was a

former employee of Ford Component Sales, LLC (FMC), a wholly owned subsidiary of Ford Motor Company (FMC). *Burger v Ford Motor Co*, unpublished per curiam opinion of the Court of Appeals, issued January 14, 2014 (Docket Nos. 307312 and 308764), p 1. The FCS board voted to terminate the plaintiff's at-will employment and appointed another individual (Weber) to fill his position. *Id.* The plaintiff sued FMC and Weber for tortious interference with his at-will employment contract and tortious interference with his advantageous business relationship/expectancy. *Id.* The Court of Appeals began by agreeing with the plaintiff that tortious interference with an at-will contract is actionable. *Id.* at 2-3. However, the Court noted that because "plaintiff did not allege, let alone present evidence, that FCS *breached* the at-will employment contract, we conclude that the standards for evaluating a claim for tortious interference with a business relationship or a business expectancy provide the sole framework for analyzing plaintiff's tort claims against defendants, notwithstanding that the claim is based on the existence of an enforceable contract between FCS and plaintiff." *Id.* at 3 (emphasis added). Here, however, Biotech has not alleged tortious interference with a business relationship or expectancy, and so it must demonstrate a *breach of contract* to prevail.

Biotech cites *Health Call* for the proposition that an employer can maintain a claim for tortious interference with an employment contract that is terminable at will. However, that case is factually distinguishable for two reasons. First, the employees at issue in *Health Call* were alleged to have *breached* their at-will employment contracts' noncompetition clauses when they began working for a competitor. Here, Biotech does not clarify what breach they are alleging the employees at issue committed. Additionally, in *Health Call*, the plaintiff employer brought a claim for both tortious interference with contract and tortious interference with a business relationship or expectancy. Tortious interference with business relationship and/or expectancy is a related

claim, but it has different elements and may be pursued where there is a "breach *or termination* of the relationship or expectancy." *Health Call*, 268 Mich App at 90. Here, as noted above, Biotech did not bring a claim for tortious interference with business relationship or expectancy.

In its Complaint, Biotech alleges that its employees *terminated* their at-will employment contracts with Biotech. However, in order to maintain a claim for tortious interference with contract, a plaintiff must allege and prove a *breach* of contract. Because Biotech has neither pled nor proven a breach of contract, summary disposition in Biotech's favor is not warranted.

ORDER

Based upon the foregoing Opinion:

IT IS HEREBY ORDERED that RSL's motion for summary disposition in its favor of Count I of its Amended Counterclaim (Breach of Contract—Failure to Pay) is DENIED. Biotech's motion for summary disposition of Count I of the Amended Counterclaim is also DENIED.

IT IS FURTHER ORDERED that RSL's motion for summary disposition in its favor of Count II of its Amended Counterclaim (Unjust Enrichment) is DENIED. Biotech's motion for summary disposition of Count II of the Amended Counterclaim is GRANTED and the claim is dismissed.

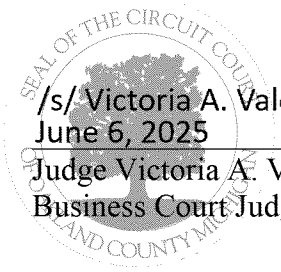
IT IS FURTHER ORDERED that RSL's motion for summary disposition in its favor of Count III of its Amended Counterclaim (Breach of Contract—Restrictive Covenant—Liquidated Damages) is held in abeyance. Biotech's motion for summary disposition of Count III of the Amended Counterclaim is held in abeyance.

IT IS FURTHER ORDERED that RSL's motion for summary disposition in its favor of Count IV of its Amended Counterclaim (Breach of Contract—Restrictive Covenant—Injunctive

Relief) is DENIED. Biotech's motion for summary disposition of Count IV of the Amended Counterclaim also DENIED.

IT IS HEREBY ORDERED that Biotech's motion for summary disposition of Count I of its Complaint (Breach of Contract) in its favor is DENIED.

IT IS FURTHER ORDERED that Biotech's motion for summary disposition of Count II of its Complaint (Tortious Interference with Contract) in its favor is DENIED.



/s/ Victoria A. Valentine
June 6, 2025
Judge Victoria A. Valentine
Business Court Judge

Date: 6/4/25