

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

**LTC PSYCHIATRIC CARE, PC;
BIO-BEHAVIORAL CARE
SOLUTIONS, LLC; BEHAVIORAL CARE
SOLUTIONS FOR ADULTS AND
SENIORS, INC; and BCS OF
MICHIGAN, LLC,**

Plaintiffs,

v

**Case No. 24-208379-CB
Hon. Michael Warren**

**APRIL NEUWIRTH; TIFFANY
TUTTLE; SCOTT THOMPSON;
SUPPORTIVE CARE I, PC; and
SUPPORTIVE CARE OF
MICHIGAN, LLC,**

Defendants.

**OPINION AND ORDER REGARDING
INDIVIDUAL DEFENDANTS' MOTION FOR SUMMARY DISPOSITION UNDER
MCR 2.116(C)(7), MCR 2.116(C)(8), AND MCR 2.116(I)(1)
&
SUPPORTIVE CARE DEFENDANTS' MOTION FOR SUMMARY DISPOSITION
UNDER MCR 2.116(C)(8) AND MCR 2.116(C)(10) AS TO COUNTS IV AND V
OF THE COMPLAINT, JOINED BY DEFENDANT
APRIL NEUWIRTH AS TO COUNT IV UNDER (C)(10)**

**At a session of said Court, held in the
County of Oakland, State of Michigan
June 10, 2025**

PRESENT: HON. MICHAEL WARREN

OPINION

I Overview

This case is before the Court on the Individual Defendants' Motion for Summary Disposition under MCR 2.116(C)(7), MCR 2.116(C)(8), and MCR 2.116(I)(1) and Supportive Care Defendants' Motion for Summary Disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10) as to Counts IV and V of the Complaint, joined by Defendant April Neuwirth as to Count IV under (C)(10).¹ Oral argument is dispensed as it would not assist the Court in its decision-making process.²

At stake is whether the claims asserted against Defendant Thompson are subject to dismissal pursuant to MCR 2.116(C)(7) because his employment agreement requires arbitration of any disputes "concerning this Agreement"? Because each of the claims asserted against Thompson "concern" his employment agreement, the answer is "yes," and summary disposition is warranted.

¹ Because both Motions address similar legal and factual arguments, the Court addresses both Motions in a single opinion.

² MCR 2.119(E)(3) provides courts with discretion to dispense with or limit oral argument and to require briefing. MCR 2.116(G)(1) specifically recognizes application of MCR 2.119(E)(3) to summary disposition motions. Subrule (G)(1) additionally authorizes courts to issue orders establishing times for raising and asserting arguments. This Court's Scheduling Order clearly and unambiguously set the time for asserting and raising arguments, and legal authorities to be in the briefing – not to be raised and argued for the first time at oral argument. Therefore, both parties have been afforded due process as they each had notice of the arguments and an opportunity to be heard by responding and replying in writing, and this Court has considered the submissions to be fully apprised of the parties' positions before ruling. Because due process simply requires parties to have a meaningful opportunity to know and respond to the arguments and submissions which has occurred here, the parties have received the process due.

Also at stake is whether Counts I and II must be dismissed because the Plaintiffs failed to attach the written agreements on which their claims are based? Because the Plaintiffs base their standing to assert claims belonging to Seniors Wellness on an Asset Purchase Agreement and assignment that were not attached to the Complaint, the answer is “yes,” and summary disposition is warranted. However, the Plaintiffs will have the opportunity to seek leave to amend their Complaint.

Further at stake is whether the Plaintiffs lack standing to assert Counts I and II against Neuwirth and Tuttle because they did not consent to the assignment of their employment agreements? Because Neuwirth and Tuttle’s employment agreements were no longer executory following their resignations, their consent was not required to effectuate a transfer of the right to enforce the restrictive covenants, and the answer is “no.” Accordingly, summary disposition is not warranted on this independent basis.

Additionally at stake is whether Count I of the Complaint must be dismissed pursuant to MCR 2.116(C)(8) because it fails to adequately plead “solicitation” or “confidential information”? Because this claim gives the Defendants notice of the nature of the claim sufficient to permit them to take a responsive position, the answer is “no” and summary disposition is not warranted on this independent basis.

Also at stake is whether Count II of the Complaint fails because the Plaintiffs have not identified the portion or provision of the Neuwirth and Tuttle employment agreements that would provide the Plaintiffs a right to indemnification? Because the

Plaintiffs have not sufficiently alleged which portion of the employment agreements would provide them a right to reimbursement, the answer is “yes,” and summary disposition is warranted on this independent basis. However, the Plaintiffs will have the opportunity to seek leave to amend their Complaint.

Further at stake is whether the Plaintiffs fail to state a claim for unjust enrichment (Count III) because they fail to allege what “benefit” the Defendants have unjustly retained? Because the claim for unjust enrichment does not allege the “benefit” that forms the basis for this claim, the answer is “yes,” and summary disposition is warranted pursuant to MCR 2.116(C)(8). However, the Plaintiffs will have the opportunity to seek leave to amend their Complaint.

Additionally at stake is whether the Plaintiffs’ claim for tortious interference with contract related to the Plaintiffs’ facilities contracts (Count IV) is subject to dismissal pursuant to MCR 2.116(C)(10) because the Defendants have submitted evidence that negates one of the elements of the claim? Because the Defendants have submitted evidence that Novi Lake initiated the contact with the Defendants and not the other way around, and the Plaintiffs have failed to identify any material issue of fact, the answer is “yes,” and summary disposition is warranted.

Also at stake is whether the Plaintiffs’ claim for tortious interference with contract related to Supportive Care’s alleged interference with the Plaintiffs’ employment agreements (Count V) fails because the Plaintiffs have not alleged that Supportive Care

committed a per se wrongful act or the doing of a lawful act with an unlawful purpose? Because the Plaintiff have not alleged a wrongful per se act or an unlawful purpose, the answer is “yes,” and summary disposition is warranted. However, the Plaintiffs will have the opportunity to seek leave to amend their Complaint.

Further at stake is whether the Plaintiffs’ claim for constructive fraud (Count VI) fails because the Plaintiffs have failed to allege the violation of a duty that is “separate-and-distinct” from the Defendants’ duties arising from their employment agreements? Because the Plaintiffs have not alleged the violation of a duty other than the contractual duties, the answer is “yes,” and summary disposition is warranted. However, the Plaintiffs will have the opportunity to seek leave to amend their Complaint.

Also at stake is whether the Plaintiffs fail to state a claim for civil conspiracy because the underlying tort claims fail for the reasons outlined above? Because a civil conspiracy claim requires a separate, actionable tort, the answer is “yes,” and summary disposition is warranted. However, the Plaintiffs will have the opportunity to seek leave to amend their Complaint.

Finally at stake is whether the Plaintiffs’ claim for injunctive relief must be dismissed because it is not an independent cause of action? Because a request for injunctive relief is not a cause of action, the answer is “yes,” and summary disposition is warranted. However, the Plaintiffs are not precluded from arguing that they are entitled

to injunctive relief related to other causes of action and the Plaintiffs will have the opportunity to seek leave to amend their Complaint.

II The Controversy

The Plaintiffs provide (or arrange) the provision of psychiatric care and mental health services for long-term care facilities in Michigan and elsewhere.³ In 2023, Plaintiff LTC Psychiatric Care P.C. (“LTC”) purchased certain assets and intangibles pursuant to an Asset Purchase Agreement (“APA”) from non-party Seniors Wellness Group, P.C., Seniors Wellness Group of Michigan, P.C., and Sierra Behavioral Services PLC (together “Seniors Wellness”).⁴ LTC then assigned its interest in Seniors Wellness’s employment agreements and restrictive covenants and its right to enforce them to Plaintiff Behavioral Care Solutions for Adults and Seniors, Inc. (“Behavioral Care”).⁵

Seniors Wellness provided psychiatric care and mental health services in nursing homes and long-term care facilities throughout Michigan and Ohio.⁶ Defendants April Neuwirth, Tiffany Tuttle, and Scott Thompson (the “Individual Defendants”) are former employees of Seniors Wellness.⁷ Each Individual Defendant was party to an employment agreement with Seniors Wellness, although the agreements were not identical.⁸ After the

³ Complaint ¶ 1.

⁴ *Id.* ¶ 6.

⁵ *Id.* ¶ 7.

⁶ *Id.* ¶ 22.

⁷ *Id.* ¶¶ 8-10, 27.

⁸ *Id.* ¶ 28 and Exhibits A-D.

sale of Seniors Wellness, the Individual Defendants declined to continue employment with the Plaintiffs and instead chose to voluntarily terminate their employment in 2023.⁹ After resigning their employment with Seniors Wellness, the Individual Defendants began working for the Plaintiffs' competitor, Supportive Care of Michigan I, P.C. and/or Supportive Care of Michigan, LLC (together "Supportive Care").¹⁰

During the Individual Defendants' tenure with Seniors Wellness, they were compensated for "reimbursable" hours of service or procedures performed.¹¹ The Plaintiffs allege that when the Individual Defendants submit a claim for a "reimbursable" hour or procedure/service, the employee affirmed that the services in the claim were performed in accordance with Seniors Wellness's rules, Medicare/Medicaid guidelines, and the terms of the employee's employment agreement.¹²

In 2018, the Midwestern Unified Program Integrity Center ("UPIC") reopened an audit of Seniors Wellness's claims covering the period between May 1, 2016 and April 15, 2020.¹³ The Complaint alleges that the UPIC audit identified many exemplar-claims that were overpaid and extrapolated those claims to result in a total of \$5,635,362 in

⁹ *Id.* ¶¶ 53, 27.

¹⁰ *Id.* ¶ 1.

¹¹ *Id.* ¶ 80.

¹² *Id.* ¶ 83.

¹³ *Id.* ¶ 84.

overpayments.¹⁴ This overpayment amount was reduced to \$3,150,473 by an Administrative Law Judge's ruling on appeal.¹⁵

After the Individual Defendants went to work for Supportive Care, the Plaintiffs allege that they breached their employment contracts by, among other things, accepting employment with a competitor, misappropriating the Plaintiff's confidential information, and soliciting the Plaintiffs' facilities and clients.¹⁶ The Plaintiffs also allege that the Individual Defendants breached their contract by submitting non-compensable claims for reimbursement due to improper coding, upcoding, and lack of proper documentation.¹⁷

The Plaintiffs filed the instant action in July 2024 and included the following claims:

Claim in Complaint	Cause of Action	Named Parties
Count I	Breach of Contract Employment Agreements–Restrictive Covenants and Confidentiality Provisions	Individual Defendants
Count II	Breach of Contract Employment Agreements–Compensation	Individual Defendants
Count III	Unjust Enrichment (Pled in the Alternative)	Individual Defendants
Count IV	Tortious Interference with Contract (Facilities Contracts)	Defendants Neuwirth and Supportive Care
Count V	Tortious Interference with Contract (Employment Agreements)	Defendant Supportive Care
Count VI	Constructive Fraud	Individual Defendants

¹⁴ *Id.* ¶ 85.

¹⁵ *Id.* ¶ 86.

¹⁶ *Id.* ¶¶ 101, 103, 107.

¹⁷ *Id.* ¶ 116.

Count VII	Civil Conspiracy	All Defendants
Count VIII	Injunctive Relief	All Defendants

The Individual Defendants move for summary disposition of Counts I-IV and VI-VII pursuant to MCR 2.116(C)(7) and (C)(8). Additionally, Defendants Neuwirth and Supportive Care have separately moved for summary disposition of Counts IV (Neuwirth and Supportive Care) and V (Supportive Care only) pursuant to MCR 2.116(C)(8) and (C)(10).

III Standards of Review

A MCR 2.116(C)(7)

Under MCR 2.116(C)(7), summary disposition is appropriate where claims are subject to “an agreement to arbitrate or to litigate in a different forum.” When evaluating a motion under MCR 2.116(C)(7), courts must accept the plaintiff’s well-pleaded allegations as true, and examine any pleadings, affidavits, admissions, depositions, and other documentary evidence submitted by the parties in a light most favorable to the non-moving party. *Odom v Wayne Co*, 482 Mich 459, 466 (2008); *Herman v Detroit*, 261 Mich App 141, 143-144 (2004); *Gortney v Norfolk & Western Railway Co*, 216 Mich App 535, 538-539 (1996). If the pleadings show that a party is entitled to judgment as a matter of law, or if the proofs show that there is no genuine issue of material fact, the trial court “must enter judgment without delay.” *Gortney*, 216 Mich App at 539 (citation omitted).

B
MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, not whether the complaint can be factually supported. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160 (2019); *Pawlak v Redox Corp*, 182 Mich App 758 (1990). A motion for summary disposition based on the failure to state a claim upon which relief may be granted is to be decided on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603 (2013); *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357 (1991). Exhibits attached to pleadings may be considered under MCR 2.116(C)(8) because they are part of the pleadings pursuant to MCR 2.113(C). *El-Khalil*, 504 Mich at 163. Matters of public record may also be considered. MCR 2.113(C)(1)(a). See also *Dalley v Dykema Gossett*, 287 Mich App 296, 301 n 1 (2010) (court documents are matters of public record that may be considered on a motion under MCR 2.116(C)(8)).

“All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant.” *Maiden v Rozwood*, 461 Mich 109, 119 (1999); *Wade v Dep’t of Corrections*, 439 Mich 158, 162 (1992). Summary disposition is proper when the claim is so clearly unenforceable as a matter of law that no factual development can justify a right to recovery. *Parkhurst Homes*, 187 Mich App at 360; *Spiek v Dept of Transportation*, 456 Mich 331, 337 (1998).

“[T]he mere statement of a pleader’s conclusions, unsupported by allegations of fact, will not suffice to state a cause of action.” *ETT Ambulance Serv Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395 (1994).

C
MCR 2.116(C)(10)

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 (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*, 461 Mich at 119-120; MCR 2.116(C)(10); MCR 2.116(G)(4); *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 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 nonmoving 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

nonmoving 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 (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 121-120 (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 (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 (1999). A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *El-Khalil*, 504 Mich at 160 (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.

IV Arbitration Provision in Thompson's Employment Agreement

Defendant Thompson argues that if any of the claims against him survive his challenge based on MCR 2.116(C)(8), they must be dismissed in favor of arbitration under MCR 2.116(C)(7) pursuant to the arbitration provision in his employment agreement. Even though this argument was raised last in the Individual Defendant's motion, as a threshold issue, it should be resolved first. Afterall, "[i]f a dispute is arbitrable, the merits of the dispute are for the arbitrator." *Altobelli v Hartmann*, 499 Mich 284, 296 (2016).

A The Law Regarding the Contractual Right to Arbitration

"The existence of an arbitration agreement and the enforceability of its terms are judicial questions for the court, not the arbitrators." *Ferndale v Florence Cement Co*, 269 Mich App 452, 458 (2006). "Arbitration is a matter of contract." *Altobelli*, 499 Mich at 295. "[A] valid agreement must exist for arbitration to be binding." *Florence Cement Co*, 269 Mich App at 460. A three-prong test applies to determine whether an issue is subject to arbitration: "1) is there an arbitration agreement in a contract between the parties; 2) is the disputed issue in its face or arguably within the contract's arbitration clause; and 3) is the dispute expressly exempted from arbitration by the terms of the contract." *In re Nestorovski Estate*, 283 Mich App 177, 202 (2009). Arbitration is favored and the burden is on the party seeking to avoid an arbitration agreement, not on the party seeking to enforce arbitration. *Altobelli*, 499 Mich at 295.

B

Analysis

In the present matter, the first prong of the three part test is met. Thompson's employment agreement contains the following arbitration clause:

Arbitration. If a dispute arises concerning this Agreement, the parties agree to submit this matter to arbitration, upon written direction of either party. The arbitration shall be conducted under the rules provided by the American Arbitration Association. The arbitration shall be binding and the decision of the arbitrator shall be final and binding on all parties.¹⁸

Additionally, Thompson's employment agreement includes the following provision regarding attorneys' fees:

Attorney's Fees. In the event of any action, suit, or other proceeding concerning the negotiation, interpretation, validity, performance, or breach of this Agreement, the prevailing party shall recover all of such party's actual attorney's fees, expenses and cost not limited to cost of suit, incurred in each and every such action, suit, or other proceeding, including any and all appeals or petitions relating thereto. As used herein actual attorney's fees' means the full and actual cost of any legal services actually performed in connection with the matter for which such fees are sought calculated on the bases of the usual fees charged by the attorneys performing such services, and shall be limited to "reasonable attorneys' fees" as that term may be defined in statutory or decisional authority.¹⁹

¹⁸ Complaint, Exhibit D ¶ 20.

¹⁹ *Id.*, Exhibit D ¶ 24.

With regard to the second prong, the claims must fit within the contract's arbitration provision. Thompson's employment agreement mandates the arbitration of disputes "concerning this Agreement."

The Plaintiffs try to avoid this conclusion by arguing Thompson's arbitration provision "would not apply to the claims related to Thompson's billing practices or negligence resulting in audit penalties."²⁰ However, the Plaintiffs do not provide any meaningful argument or support for this position. "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 (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 (2008). Michigan jurisprudence is well-settled that this trial 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 (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"). Furthermore, in the context of the applicability of arbitration provisions, Michigan jurisprudence favors arbitration and the burden rests on the party attempting to avoid it. See authorities above.

²⁰ Plaintiffs' Response in Opposition to the Individual Defendants' Motion for Summary Disposition, p 12-13.

Contrary to the Plaintiffs' bald assertion, Thompson's employment agreement mandates the arbitration of disputes "concerning this Agreement." Clearly Counts I and II, which allege a breach of contract, fall into this category. Count III, which is pled against Thompson and the other Individual Defendants, is a claim for unjust enrichment that is pled in the alternative to the breach of contract claims in Counts I and II. The Complaint, as discussed in further detail below, does not contain sufficient factual specificity to know what "benefits" Thompson stands accused of unlawfully retaining.²¹ However, since this claim is being pled in the alternative to the previous claims for breach of contract, presumably whatever "benefits" form the basis of this claim were benefits that Thompson was given pursuant to the terms of his employment agreement. Accordingly, to the extent that this claim is based on "benefits" awarded under Thompson's employment agreement (such as his wages credited for allegedly non-compensable claims), this claim would be subject to arbitration because it "concerns" his employment agreement.

Likewise, the claim asserted against Thompson for constructive fraud (Count VI) is broadly based on his alleged misappropriation of confidential information and his submission of "reimbursable" hours which were later determined to be non-compensable.²² Both of these allegations will necessarily involve the interpretation of Thompson's obligations under the employment agreement, including the nondisclosure provision,²³ the covenant not to compete/solicit business,²⁴ and the employee

²¹ Complaint ¶¶ 122-124.

²² *Id.* ¶¶ 137-152.

²³ *Id.*, Exhibit D ¶ 10.

²⁴ *Id.*, Exhibit D ¶ 9.

compensation provisions regarding reimbursable services.²⁵ Accordingly, because this claim, broadly speaking, concerns his employment agreement, it must be submitted to an arbitrator. The claims for civil conspiracy against Thompson (Count VII) and the request for injunctive relief (Count VIII) as to Thompson must be dismissed pursuant to MCR 2.116(C)(7) for the same reason, namely this claim and the request for relief involves allegations that “concern” Thompson’s duties and obligations in his employment agreement.

Accordingly, Thompson’s request for summary disposition of all claims asserted against him in the Complaint is granted. Thompson’s request for attorney’s fees as the prevailing party pursuant to Section 24 of his employment agreement is also granted.

V
Failure to Comply with MCR 2.113(C)

All the Defendants argue that the causes of action which are based on contractual rights stemming from an agreement that was not attached to the Complaint must be dismissed pursuant to MCR 2.113.

A
MCR 2.113(C)

MCR 2.113(C)(1) requires that “[i]f a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the

²⁵ *Id.*, Exhibit D ¶ 3.

pleading” unless an exception to this rule applies. The requirement to attach the written instrument to the complaint is mandatory. *Stocker v Clark Ref Corp*, 41 Mich App 161, 165 (1972) (interpreting an identical provision of former GCR 1963, 113.4). Where the complaint fails to attach the relevant agreement upon which a claim is based, the claim is insufficient as a matter of law, and summary disposition is appropriate under MCR 2.116(C)(8). See *Woodward Nursing Home, Inc v Med Arts, Inc*, unpublished per curiam opinion of the Court of Appeals, issued January 24, 2006 (Docket No. 262794), p 3 (holding that because the plaintiff did not attach a copy of the written contract to the complaint, the pleadings were legally insufficient to state a claim for breach of contract).

MCR 2.113(C)(1)(c) further provides an exception to this general requirement to attach the written instrument if the instrument is “inaccessible to the pleader and the pleading so states, giving the reason.”

B Application

The Plaintiffs have alleged a number of claims based on contractual agreements between Seniors Wellness and the Individual Defendants. The Plaintiffs allege that LTC purchased certain assets and intangibles from Seniors Wellness pursuant to the APA. The Plaintiffs further allege that LTC assigned its interest acquired through the APA to BCS. The Plaintiffs’ ability to pursue claims that would otherwise belong to Seniors Wellness is derived from these contractual agreements, and yet they were not attached to the

Complaint. Accordingly, because the contractual claims are based on written agreements that were not attached to the Complaint, summary disposition of Counts I and II is warranted. However, the Plaintiffs shall have the opportunity to seek leave to amend under MCR 2.116(I)(5).

Additionally, with respect to Defendant Tuttle, the Plaintiffs allege that Tuttle signed a Noncompetition, Nonsolicitation, and Confidentiality Agreement but that “Plaintiffs are unable to locate Tuttle’s signed Noncompetition Agreement. . . .”²⁶ MCR 2.113(C)(1)(c) requires that where a written instrument is inaccessible to the pleader, the pleading must so state and give the reason for its inaccessibility. The Complaint does not conform to this requirement. Accordingly, Count I (Breach of Contract—Employment Agreements—Restrictive Covenants and Confidentiality Provisions) against Tuttle is defective for this additional reason. As noted above, the Plaintiffs shall have the opportunity to seek leave to amend under MCR 2.116(I)(5).

VI

Standing Based on Purported Assignments

The Individual Defendants also argue that the Plaintiffs’ claims that are based on the Plaintiffs’ purported rights to enforce contracts between Seniors Wellness and the

²⁶ Plaintiffs’ Response in Opposition to the Individual Defendants’ Motion for Summary Disposition, p 5.

Individual Defendants fail because the Individual Defendants did not consent to the assignment of these contracts.²⁷

A The Law of Assignments

“Under general contract law, rights can be assigned unless the assignment is clearly restricted.” *Burkhardt v Bailey*, 260 Mich App 636, 653 (2004). After an assignment, the “assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses.” *Id.* However, personal services contracts are generally not assignable without consent because they involve “a personal trust in the party” or “personal skill.” *Northwestern Cooperage & Lumber Co v Byers*, 133 Mich 534, 537 (1903). Accordingly, in *Globe & Rutgers Fire Ins Co v Jones*, 129 Mich 664, 666-668 (1902), the Michigan Supreme Court rejected the argument that a personal service contract to work for a specific company could simply pass to a new corporation formed by merger because “the master cannot shift his liability by turning the servant over to another master. . . .” Rather, the Supreme Court held that “the consent of the parties is essential to effect a substitution. . . .” *Id.* (citation omitted).

²⁷ Because this Motion is brought under MCR 2.116(C)(8), the Court assumes that Defendant Tuttle signed a Noncompetition, Nonsolicitation, and Confidentiality agreement that is identical to the one signed by Defendant Neuwirth as alleged in the Complaint. See Complaint ¶ 43 and Exhibit A. However, Defendant Tuttle disputes that she signed a restrictive covenant.

B Application

The two employment agreements for Defendants Tuttle and Neuwirth do not contain an assignment provision or enumerate the conditions under which an assignment would be permitted.²⁸

The Plaintiffs argue that the assignment of the restrictive covenants from Seniors Wellness to the Plaintiffs is valid because, at the time of the assignment, the contracts were no longer executory. In general, a contract term prohibiting assignment of “the contract” bars only the delegation to the assignee of the performance by the assignor, not an assignment of a right to damages for breach of the contract. Restatement of Contracts 2d, § 322(1)-(2), p 31-32 (2024). Consequently, when a contract is no longer executory, courts have upheld the assignment of a right to payment under or damages for the breach of a contract despite an anti-assignment provision. *Morris v Schnoor*, unpublished per curiam opinion of the Court of Appeals, issued May 29, 2014 (Docket No. 315006) p 27 (“[O]nce a party to a contract performs its obligations to the point that the contract is no longer executory, its right to enforce the other party’s liability under the contract may be assigned without the other party’s consent, even if the contract contains a non-assignment clause”) (citations and quotations omitted).

²⁸ Defendant Thompsons’s employment agreement, which was executed in October 2007, includes an anti-assignment provision. Complaint, Exhibit D ¶ 15. However, because the claims relating to Thompson’s employment agreement are subject to mandatory arbitration, that is a matter for the arbitrator.

The parties agree that there is limited Michigan case law examining whether the right to enforce a restrictive covenant found in a non-executory employment contract may be assigned without an employee's consent. And, as noted above, obligations under an employment agreement are not generally assignable without consent due to the personal nature of the contract.

However, the Court of Appeals examined the assignability of a non-compete agreement (albeit in a different context) in *Virchow Krause & Co v Schmidt*, unpublished per curiam opinion of the Court of Appeals, issued June 27, 2006 (Docket No. 266271), which this Court finds instructive. The defendant was an accountant who signed an "At-Will Statement/Non-Competition Agreement" with Nemes Allen & Co. which contained a restrictive covenant *Id.* at 1. In October 2003, the defendant resigned her employment. Subsequent to her departure, Nemes transferred certain intangible assets, including client information and rights under employment relationships with Nemes's employees, to Virchow. Virchow then brought suit for breach of the restrictive covenants between the defendant and Nemes when the defendant took a position with another accounting firm, and that accounting firm was retained by several Nemes clients. The trial court, in evaluating the parties' motions for summary disposition, held that the non-compete agreement was part of the defendant's employment agreement and could not be assigned without her consent. *Id.* The Court of Appeals reversed. *Id.* at 2. Although personal contracts such as employment agreements are generally not assignable without consent, the Court held that the defendant's employment agreement merely acknowledged her at

will status and set forth the restrictive covenant which did not require “personal trust, special skills, or knowledge,” and therefore, was not a personal contract. In fact, the Court specifically found that although the defendant’s “employment as an accountant . . . involved personal trust and her special skills and knowledge, there is no language in the agreement that calls for [defendant’s] personal trust or use of her special skills or knowledge.” *Id.* 2. Thus, the Court held that the non-compete agreement was assignable without the defendant’s consent.

This reasoning is persuasive even though the factual context is distinct. Although the restrictive covenants here were signed as a part of larger employment agreements which were personal contracts for the Individual Defendants’ specialized services, after the Individual Defendants left the employment of Seniors Wellness, the only provisions that survived the end of their employment were the restrictive covenants. These covenants, just like the ones at issue in *Virchow*, do not involve a personal trust in a party or special skills or knowledge. Thus, under *Virchow*, the restrictive covenants became transferrable after the termination of employment.

Courts in other states have applied similar reasoning. For example, in *AutoMed Techs, Inc v Eller*, a federal district court in Illinois found:

First, the covenants typically take effect upon termination of employment, at which point the employer has no further obligations to the employee. Because the employer has completed its promised performance, the contract is no longer executory. Second, for this very same reason, the contract loses its element of personality. An employee has a clear interest in controlling for whom he works. But the identity of

the party enforcing a restrictive covenant should make little difference to a former employee. A third, and somewhat related point, is that courts, for public policy reasons, already scrutinize restrictive covenants closely. Because courts only enforce covenants to the extent they are reasonable and necessary to protect an employer's legitimate interests, an employee will not be prejudiced by having the contract assigned to a successor business.

[*AutoMed Techs, Inc v Eller*, 160 F Supp 2d 915, 924 (ND Ill, 2001).]

Consequently, after the Individual Defendants left their employment with Seniors Wellness, the contracts at issue were no longer executory and lost the defining characteristics of a "personal contract." Accordingly, under Michigan law, Seniors Wellness was permitted to assign its right to damages for breach of the restrictive covenants without the consent of its employees. Accordingly, summary disposition is not warranted on this basis.

VII

Count I Breach of Contract—Employment Agreements Restrictive Covenants and Confidentiality Provisions

The Individual Defendants next argue that Count I fails because the claim is based "solely on Plaintiffs' conclusory inferences without supporting facts."²⁹ However, Michigan is a notice-pleading jurisdiction, and a complaint is required to contain only enough information "reasonably to inform the defendant of the nature of the claim

²⁹ Individual Defendants' Motion for Summary Disposition Under MCR 2.116(C)(7), MCR 2.116(C)(8), and MCR 2.116(I)(1), p 11.

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). “While the lack of an allegation can be fatal under MCR 2.116(C)(8), the lack of evidence in support of the allegation cannot.” *El-Khalil*, 504 Mich at 162.

Count I of the Complaint alleges:

101. Neuwirth breached the Neuwirth Agreement as described herein, namely by accepting employment with a competitor prior to the expiration of the restrictive covenants, misappropriating Plaintiffs’ confidential information, soliciting Plaintiffs’ facilities/clients, and causing at least one facility to terminate its contract with Plaintiffs.

* * *

103. Tuttle breached the Tuttle Agreement as described herein, namely by accepting employment with a competitor and soliciting Plaintiffs’ facilities/clients.

These allegations are sufficient to “give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position.” *Dalley v Dykema Gossett*, 287 Mich App 296, 305 (2010). To the extent that the Individual Defendants find the pleaded facts too general, they are free to file a motion for a more definite statement under MCR 2.115(A) or interrogatories requesting greater specificity. *Iron County v*

Sundberg, Carlson & Assocs, Inc, 222 Mich App 120, 125 (1997). Accordingly, summary disposition is not warranted on this basis.³⁰

VIII

Count II Breach of Contract—Employment Agreements—Compensation

Next, the Individual Defendants argue that Count II—Breach of Contract—Employment Agreements fails to state a claim because, in addition to lacking standing to pursue this claim (as discussed above), the Plaintiffs claim a right to indemnification yet the fail to identify the portion or provisions of the contracts providing such a right.

A

The Right to Indemnity

“Indemnity relates to the obligation of one person or entity to make good a loss another has incurred while acting for its benefit or at its request.” *Langley v Harris Corp*, 413 Mich 592 (1982). Michigan law recognizes three sources of a right to indemnity: the common law, an implied contract, and an express contract. *Id.* The right can only be

³⁰ The Individual Defendants also note that the Complaint does not contain a claim for misappropriation of trade secrets under the Michigan Uniform Trade Secrets Act (“MUTSA”). However, confidentiality agreements may be used to protect “confidential information” that does not meet the statutory definition of a trade secret under Michigan law. See *Indus Control Repair, Inc v McBroom Elec Co*, unpublished per curiam opinion of the Court of Appeals, issued Oct. 10, 2013 (Docket No. 302240), p 7 (observing that information such as customer identity, customer information, and customer lists are “protectable by a confidentiality agreement” even though such information is not a trade secret under MUTSA). Accordingly, the Plaintiffs’ failure to bring a claim under MUTSA does not require summary disposition of the claim for breach of contract.

enforced where the liability arises vicariously or by operation of law from the acts of the party from whom indemnity is sought. *Id.* at 601.

B Analysis

In the instant case, Count II seeks reimbursement for compensation paid to the Individual Defendants based on the non-compensable claims as determined by the audit and the ALJ. Specifically:

117. Neuwirth, Tuttle, and Thompson were “credited” with these non-compensable claims and paid their usual rates even though these claims were non-compensable due to these Defendants’ improper documentation in violation of their employment agreements.

As noted in the Complaint, Thompson’s employment agreement includes an indemnification provision. However, the employment agreements with Defendants Neuwirth and Tuttle do not contain express indemnification provisions, and the Plaintiffs have not identified any contractual provision that would allow Seniors Wellness (and the Plaintiffs as successors) to claw back compensation following a determination several years after payment was made to the employee that the services were not, in fact, reimbursable. Rather the Plaintiffs argue that “nothing in the relevant agreements prohibited Seniors Wellness from seeking reimbursement from Neuwirth or Tuttle”³¹ But a Court’s “goal in contract interpretation is to give effect to the intent of the

³¹ Plaintiffs’ Response in Opposition to the Individual Defendants’ Motion for Summary Disposition, p 15.

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 (2016). Here, unlike the Thompson employment agreement, the employment contracts with Neuwirth and Tuttle do not contain an indemnification clause. Additionally, the Neuwirth and Tuttle agreements both contain a merger provision in which the parties agreed that “[t]his Agreement constitutes the entire agreement and understanding of the parties pertaining to the subject matter contained herein and supersedes all prior and contemporaneous agreements, representations and understandings, whether written or oral, as to the matters herein set forth.”³²

The Plaintiffs have not identified a provision in the contract that would support their request for indemnification as to Defendants Neuwirth and Tuttle. Accordingly, the Individual Defendants’ request for summary disposition of Count II pursuant to MCR 2.116(C)(8) is granted for this independent reason. However, as noted above, the Plaintiffs will have the opportunity to seek leave to amend their Complaint.

IX

Count III Unjust Enrichment (Pled in the Alternative)

The Individual Defendants next argue that Count III for Unjust Enrichment fails for multiple reasons, including (1) there are express contracts covering the same subject

³² Complaint, Exhibit A and Exhibit C.

matter, and (2) the claim does not contain an allegation of what “benefits” were conferred on the Individual Defendants.

A

The Law of Unjust Enrichment

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 Schools*, 443 Mich 176, 185-186 (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 (2012).

B

Analysis

In Count III, the Plaintiffs allege:

122. Defendants Neuwirth, Thompson, and Tuttle received and retained benefits from Plaintiffs (and Plaintiffs’ predecessor in interest) as set forth herein.

123. There is inequity resulting to Plaintiffs because of these Defendants’ unlawful retention of the benefits conferred upon them by Plaintiffs.

124. Plaintiffs have suffered damages as a direct and proximate result of these Defendants' unjust enrichment.

Count III is deficient because it does not sufficiently allege what "benefit" the Plaintiffs or their predecessor conferred on the Individual Defendants that forms the basis for this claim. Even under Michigan's liberal notice-pleading standards, this claim is deficient because it does not include enough information "reasonably to inform the defendant of the nature of the claim against which he must defend." *Veritas Auto*, 335 Mich App at 615; MCR 2.111(B)(1).³³

Accordingly, because the Plaintiffs' claim for unjust enrichment does not comply with MCR 2.111(B)(1), summary disposition is warranted. However, the Plaintiffs will have the opportunity seek leave to amend under MCR 2.116(I)(5).

X

Count IV Tortious Interference with Contract (Facilities Contracts)

Count IV of the Complaint alleges that Defendants Neuwirth and Supportive Care tortiously interfered with the Plaintiffs' or their predecessors' contract with Novi Lakes Health Campus. Defendants Neuwirth and Supportive Care allege that this claim is subject to dismissal under MCR 2.116(C)(8) because the claim does not allege the intentional doing of a per se wrongful act, and pursuant to MCR 2.116(C)(10) because

³³ Further analysis of the insufficient nature of the "benefit" retained is futile unless and until an amendment addressing this pleading deficiency is granted.

there is no genuine issue of material fact that Novi Lakes reached out to Supportive Care and Neuwirth, not the other way around.

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 (2005).³⁴

“By definition, tortious interference with a contract is an intentional tort.” *Knight Enters v RPF Oil Co*, 299 Mich App 275, 280 (2013). Thus, “[o]ne who alleges tortious interference with a contractual . . . 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 business relationship of another.” *Id.* (citations and quotations omitted). A per se wrongful act is an act that “is inherently wrongful or an act that can never be justified under any circumstances.” *Id.* (citations and

³⁴ The Defendants cite the standard for the related, but not identical, claim of tortious interference with business relations/expectancies. 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). However, because the Plaintiffs have not included a claim for tortious interference with a business relationship or expectancy, the Court will not utilize this standard.

quotations omitted). “It generally does not constitute improper interference with a contract if a defendant simply takes the initiative to gain an advantage over the competition. . . .” *Id.* at 282.

B Analysis

Count IV alleges as follows:

126. Plaintiffs (as assignees) were parties to a contract with Novi Lakes Health Campus.

127. Defendant Neuwirth was aware of the contract with Novi Lakes Health Campus.

128. Defendant Supportive Care was aware of the contract with Novi Lakes Health Campus.

129. Utilizing the confidential information she misappropriated from Plaintiffs and in violation of the Neuwirth Agreement, Neuwirth and Supportive Care caused Novi Lakes Health Campus to terminate its contract with Plaintiffs.

130. As a direct and proximate result of Neuwirth's and Supportive Care's tortious interference, Plaintiffs have incurred damages in excess of \$25,000.00.

First, Defendants Neuwirth and Supportive Care argue that the Plaintiffs fail to state a claim because they have not alleged the intentional doing of a per se wrongful act. However, paragraph 129 of the Complaint alleges that the Defendants used confidential information that Neuwirth misappropriated from the Plaintiffs in violation of her employment agreement. Whether or not this allegation is true, it is sufficient to state a

claim for tortious interference with contract because knowingly using confidential information that was misappropriated from a former employer (or from a current employee's former employer) in violation of the terms of an employment agreement constitutes an intentional act that is inherently wrongful. Consequently, the Defendants' challenge based on MCR 2.116(C)(8) is unpersuasive.

The Defendants also raise a challenge pursuant to MCR 2.116(C)(10), arguing that the evidence does not support the allegations in Count IV. The Defendants have submitted the affidavits of Dr. Melody Angel and Tim Reardon (of Novi Lakes) in which they aver that it was Novi Lakes that first reached out to Supportive Care and April Neuwirth in January 2024, and not the other way around.³⁵ This evidence is sufficient to defeat the claim absent a showing of a material issue of fact because it shows that there was no "unjustified instigation" of Novi Lakes' termination of its contract with the Plaintiffs because the Defendants did not instigate the interaction.

Accordingly, the burden shifts to the Plaintiffs to demonstrate that a material issue of fact exists with respect to this claim. Although summary disposition is generally premature if it is granted before discovery is complete, the "the mere fact that the discovery period remains open does not automatically mean that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate." *Marilyn Froling*

³⁵ Supportive Care Defendants' Motion for Summary Disposition under MCR 2.116(C)(8) and MCR 2.116(10) as to Counts IV and V of the Complaint, Joined by Defendant April Neuwirth as to Count IV under (C)(10), Exhibits 1 and 2.

Revocable Living Tr v Bloomfield Hills Country Club, 283 Mich App 264, 292 (2009). A party opposing summary disposition “cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence.” *Id.* “The party opposing summary disposition must offer the required MCR 2.116(H) affidavits, with the probable testimony to support its contentions.” *Id.* at 292-293.

In the instant action, the Plaintiffs rely on the text messages of Olivia Musabekova, to show that she and the CEO of Supportive Care had been told about the non-compete agreements the various Seniors Wellness employees had signed. Although this may be relevant to Count V, which alleges that Supportive Care tortiously interfered with the Plaintiffs’ employment contracts, it does not create a material issue of fact as to whether the Defendants unjustifiably instigated a breach of the Plaintiffs’ contract with Novi Lakes. The Plaintiffs point to no other evidence (or the likelihood that it will arise) to support the claim against Novi Lakes. Discovery is closing in about 2 weeks. Accordingly, summary disposition of Count IV is warranted pursuant to MCR 2.116(C)(10).

XI

Count V Tortious Interference with Contract (Employment Contracts)

In Count V, the Plaintiffs allege that Supportive Care had actual knowledge of Neuwirth, Tuttle, and Thompson’s employment agreements and the restrictive covenants contained therein, and they induced the Individual Defendants to breach their

employment agreements with the Plaintiffs. Supportive Care argues that this claim is subject to dismissal under MCR 2.116(C)(8) because the Complaint does not allege that Supportive Care *wrongfully instigated* the alleged breaches. Supportive Care also argues that this claim is subject to dismissal under MCR 2.116(C)(10) because Olivia Musabekova was responsible for hiring the Individual Defendants, and she understood that none of the Individual Defendants were under any employment contract.

Supportive Care first argues that, even if it were true that Supportive Care knew that the Individual Defendants were bound by restrictive covenants, the Complaint is deficient because it does not include allegations that Supportive Care *wrongfully* interfered with their contracts as opposed to hiring the Individual Defendants for legitimate business reasons.

As discussed above, to maintain a claim for tortious interference with contract, a plaintiff “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 business relationship of another.” *Badiee*, 265 Mich App at 367 (citations and quotations omitted). “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.” *Id.*

Here, the intentional act that is alleged in the complaint is that Supportive Care hired the Individual Defendants. That act, in and of itself, is not inherently wrongful

because it may have been undertaken as the result of legitimate business purposes. Thus, in order to demonstrate tortious interference, the Plaintiffs must plead and prove specific, affirmative acts that corroborate the alleged unlawful purpose of the interference. Because Count V does not contain any such allegations, the claim for tortious interference with contract is deficient and summary disposition is warranted pursuant to MCR 2.116(C)(8). However, the Plaintiffs will have the opportunity seek leave to amend under MCR 2.116(I)(5).

XII

Count VI Constructive Fraud

In Count VI, the Plaintiffs allege that the Individual Defendants committed constructive fraud by submitting their reimbursable hours and representing that they were actually performed, necessary, and supported by the proper documentation. Some of these hours were later deemed non-compensable by the ALJ decision. The Individual Defendants argue that this claim is barred by the economic loss doctrine.

A

The Law of Constructive Fraud

The Michigan Supreme Court has explained the distinction between actual fraud and constructive fraud as follows:

Actual fraud is intentional fraud; it consists in deception, intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed.

Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feisor, the law declares fraudulent because of its tendency to deceive others. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud. An intent to deceive is an essential element of actual fraud. The presence or absence of such an intent distinguishes actual fraud from constructive fraud.

[*Goodrich v Waller*, 314 Mich 456, 461–62 (1946) (citations and quotations omitted)]

Consequently, constructive fraud “only requires a misrepresentation which need not amount to a purposeful design to defraud.” *Gen Elec Credit Corp v Wolverine Ins Co*, 420 Mich 176, 188 (1984).

Additionally, MCR 2.112 requires that where the pleader makes allegations of fraud or mistake, “the circumstances constituting fraud or mistake must be stated with particularity.”

B Analysis

In the present case, Count VI alleges that the Individual Defendants committed constructive fraud as follows:³⁶

³⁶ The Complaint contains a number of allegations in Count VI (Constructive Fraud) that relate to the Individual Defendants’ alleged misappropriation of “highly confidential and private patient information.” Complaint ¶¶ 137-144. As stated above, constructive fraud requires a misrepresentation, but these paragraphs do not allege a misappropriation with the specificity required by MCR 2.112. Consequently, to the extent that these allegations form the basis for the constructive fraud claim, they fail to state a claim pursuant to MCR 2.116(C)(8). To the extent that the Plaintiffs now allege silent fraud (Plaintiff’s Response in Opposition to the Individual Defendants’ Motion for Summary Disposition, p 16), this is a separate cause

145. Each week during their employment, Defendants Neuwirth, Tuttle, and Thompson submitted their “Reimbursable” hours to receive compensation.

146. By submitting their “Reimbursable” hours and then accepting compensation based on the submission, Defendants Neuwirth, Tuttle, and Thompson represented that the services provided were (1) actually performed; (2) correspond to the appropriate CPT codes; (3) were necessary for the patient; and (4) were supported by proper documentation.

* * *

148. Defendants Neuwirth, Tuttle, and Thompson each submitted for compensation multiple claims that were deemed non-compensable by the ALJ decision and/or were not supported by proper documentation as discovered by Plaintiffs’ separate and ongoing investigation.

* * *

150. By submitting non-compensable claims, Defendants Neuwirth, Tuttle, and Thompson deceived their employer and induced compensation and, as a result of their misrepresentations and omissions, received and retained compensation.

151. Defendants Neuwirth, Tuttle, and Thompson each fraudulently caused Plaintiffs (as assignee of Seniors Wellness) to pay thousands of dollars in unmerited compensation and Defendants indisputably received and retained the unmerited compensation.

The Individual Defendants argue that the claim is barred by the economic loss rule because the claim alleges an intentional tort that is based on a breach of duties that come directly and solely from the employment agreements. Although the Individual

of action which was not pled in the Complaint. However, the Plaintiffs will have the opportunity to seek leave to amend.

Defendants label this argument the “economic loss doctrine,”³⁷ the argument should be considered as the “separate-and-distinct” analysis recently outlined in *1-800 Bathtub, LLC v ReBath, LLC*, unpublished per curiam opinion of the Court of Appeals, issued April 18, 2024 (Docket No. 357932), which the Court finds well-reasoned and instructive. The Court concluded:

But here, we find it determinative that no relationship between Bathtub and ReBath existed giving rise of a legal duty separate from the MSA. Bathtub’s conversion claim arises from ReBath’s failure to abide by the MSA. Further, defendant’s failure to perform a contractual duty cannot give rise to a tort action, unless a separate-and-distinct duty exists separate from the contractual obligations. As the Supreme Court noted in *Hart*, 347 Mich at 563, while misfeasance is required for a tort action to lie, “[t]here must be some breach of duty distinct from breach of contract.” We conclude that there is no duty separate and distinct from the contractual obligation because any alleged duty under the statute – not to convert the number – is the same as the duty under the contract. More fundamentally, ReBath’s ability or opportunity to convert the number to its own use only arose through virtue of the contractual relationship between Bathtub and ReBath. Ultimately, because there is no separate duty distinct from that existing under the contractual obligations and because breach of the duty would not have been possible but for the contractual relationship, we conclude that the arbitrator manifestly disregarded the law in concluding that Bathtub’s conversion claim could lie.

[*Bathtub*, unpub op at 9 (citations omitted)].

³⁷ The Plaintiffs are correct Michigan courts have “declined to apply the economic loss doctrine where the claim emanates from a contract for services.” *Quest Diagnostics, Inc v MCI WorldCom, Inc*, 254 Mich App 372, 379 (2002). Accordingly, the Court will not analyze the economic loss doctrine here because the contract at issue in the present case is for services.

The Individual Defendants argue that the duty to accurately and truthfully submit their reimbursable hours and services arises from their employment contracts, and the Plaintiffs have not alleged that the Individual Defendants violated any “separate-and-distinct” duties to the Plaintiffs. In response, the Plaintiffs did not point to any separate or distinct duty outside of the employment contracts that would form the basis for Count VI. Accordingly, summary disposition is warranted under MCR 2.116(C)(8). However, the Plaintiffs will have the opportunity to seek leave to amend their Complaint.

XIII Count VII Civil Conspiracy

A The Law of 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.” *Swain v Morse*, 332 Mich App 510, 530 (2020) (citation omitted). “[A] claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort.” *Advoc Org for Patients & Providers v Auto Club Ins Ass’n*, 257 Mich App 365, 384 (2003) (citation omitted).

For a civil conspiracy to exist, each particular defendant who is to be charged with responsibility must be proceeding tortiously, which is to say with intent to commit the tort or with negligence. *Rosenberg v Rosenberg Bros Special Account*, 134 Mich App 342, 354

(1984). “One who innocently does an act which furthers the tortious purpose of another is not acting in concert with him.” *Id.*

Proof of a civil conspiracy may be established through circumstantial evidence and may be premised on inference. *Temborius v Slatkin*, 157 Mich App 587, 600 (1986). Direct proof of an agreement need not be shown, nor is it necessary to show a formal agreement. “It is sufficient if the circumstances, acts and conduct of the parties establish an agreement in fact.” *Id.*

B Analysis

In the instant case, the Defendants argue that the claim for civil conspiracy fails because there is no viable underlying tort to support the claim. Because all of the underlying tort claims are subject to dismissal for the reasons outlined above, the claim for civil conspiracy also fails. However, the Plaintiffs will have the opportunity to seek leave to amend their complaint.

XIV Count VIII Injunctive Relief

The Individual Defendants also seek summary disposition as to Count VIII for Injunctive Relief. The Defendants are correct that “an injunction is an equitable remedy, not an independent cause of action.” *Terlecki v Stewart*, 278 Mich App 644, 663 (2008). See also *Redmond v Heller*, 332 Mich App 415, 432; 957 NW2d 357 (2020). “It is not the remedy

that supports the cause of action, but rather the cause of action that supports a remedy.”
Terlecki, 278 Mich App at 663.

The Plaintiffs have also requested injunctive relief in their prayer for relief to enjoin the Defendants from unfairly competing with the Plaintiffs, unfairly exploiting the Plaintiffs’ confidential information, providing competitive services in violation of the restrictive covenants in the employment agreements, and soliciting or contracting any person or entity that is or was a current or prospective client, business contact, employee, contractor, consultant, or referral source of Plaintiffs.

Accordingly, the Court will construe the Defendants’ request for injunctive relief as a requested remedy rather than an independent cause of action. Therefore, summary disposition under MCR 2.116(C)(8) is granted and Count VIII is dismissed. However, the Plaintiffs are not precluded from arguing that they are entitled to injunctive relief under other causes of action. See *Farish v Dept of Talent and Economic Dev*, 336 Mich App 433, 438 n 2 (2021) (summary disposition was proper on separate claim for equitable relief but plaintiffs were not foreclosed from an equitable remedy if entitled to such relief under a different cause of action).

ORDER

Based on the foregoing Opinion, the Court hereby orders as follows:

- 1) Thompson's request for summary disposition of all claims asserted against him in the Complaint is GRANTED. Thompson's request for attorney's fees as the prevailing party pursuant to paragraph 24 of his employment agreement is also GRANTED.
- 2) Defendant Tuttle and Neuwirth's request for summary disposition of Counts I and II (Breach of Contract) for the failure comply with MCR 2.113(C)(1) is GRANTED.
- 3) Defendant Tuttle and Neuwirth's request for summary disposition of Count II (Breach of Contract) pursuant to MCR 2.116(C)(8) is also GRANTED.
- 4) Defendant Tuttle and Neuwirth's request for summary disposition of Count III (Unjust Enrichment) pursuant to MCR 2.116(C)(8) is GRANTED.
- 5) Defendant Neuwirth and Supportive Care's request for summary disposition of Count IV (Tortious Inference with Contract) pursuant to MCR 2.116(C)(10) is GRANTED.

- 6) Defendant Supportive Care's request for summary disposition of Count V (Tortious Interference with Contract) pursuant to MCR 2.116(C)(8) is GRANTED.
- 7) Defendant Neuwirth and Tuttle's request for summary disposition of Count VI (Constructive Fraud) pursuant to MCR 2.116(C)(8) is GRANTED.
- 8) Defendant Neuwirth, Tuttle, and Supportive Care's request for summary disposition of Count VII (Civil Conspiracy) pursuant to MCR 2.116(C)(8) is GRANTED.
- 9) Defendant Neuwirth, Tuttle, and Supportive Care's request for summary disposition of Count VIII (Injunctive Relief) pursuant to MCR 2.116(C)(8) is GRANTED.

ANY REQUEST TO AMEND THE COMPLAINT IN LIGHT OF THIS OPINION AND ORDER MUST BE MADE BY SEPARATE MOTION TO BE FILED NO LATER THAN JUNE 26, 2025 OR IT WILL BE DEEMED ABANDONED.

/s/ Michael Warren

HON. MICHAEL WARREN
CIRCUIT COURT JUDGE

