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

HOMESITE MORTGAGE, LLC,

Plaintiff/Counter-Defendant,

v

Case No. 20-183741-CB
Hon. Michael Warren

GUARANTEED RATE,

Defendant,

and

KEVIN SADIK,

Defendant/Counter-Plaintiff.

FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING DEFENDANT GUARANTEED RATE'S MOTION FOR INVOLUNTARY DISMISSAL

At a session of said Court, held in the County of Oakland, State of Michigan Flag Day (June 14), 2022

PRESENT: HON. MICHAEL WARREN

OPINION

In this action, Plaintiff Homesite Mortgage, LLC ("Homesite") alleges that Defendant Guaranteed Rate ("Guaranteed Rate") is liable for Breach of Contract (Count I), Tortious Interference with Business Relationships (Count II), Unjust Enrichment (Count III), Civil Conspiracy (Count IV), Conversion (Count V), Vicarious

Liability/Respondeat Superior (Count VI), and Request for Preliminary Injunction and Permanent Injunction (Count VII). The Court conducted a Bench Trial regarding the same and accordingly issues these Findings of Fact and Conclusions of Law.[1]

At stake is whether Homesite can recover when it has failed to show that Guaranteed Rate engaged in any wrongful behavior or caused Homesite to suffer any damages? Because the answer is "no," Guaranteed Rate's motion for involuntary dismissal is granted and this case is dismissed.

FINDINGS OF FACT

The Court makes the following Findings of Fact based on the Court's assessment of the credibility, demeanor, veracity, vocal tone and expression, tonality, and honesty of the witnesses and the exhibits before it by clear and convincing evidence:

- Now dismissed Defendant Kevin Sadik was employed by Homesite and signed an Employment Agreement dated January 30, 2017 (the "Employment Agreement") as a condition of his employment as a mortgage originator with Homesite.

[1] At the conclusion of the Homesite's opening statement, the Court involuntarily dismissed several of Homesite's claims. As promised, the reasoning for the same is incorporated in these Findings of Fact and Conclusions of Law.

- By February 27, 2020, Sadik forgot that the Employment Agreement included a nonsolicitation provision which barred him from soliciting Homesite's customers after his employment with Homesite ended.

- On February 27, 2020, Sadik provided his manager with notice that he would be leaving his employment in 2 weeks for a new job. Homesite immediately terminated Sadik's employment. Later that day, Sadik was hired by Guaranteed Rate - which is in the same industry as Homesite - as a branch manager. He signed a Guaranteed Rate Permitted Marketing Data Affidavit and Policy attesting to Guaranteed Rate that he (1) had not taken any confidential information from his prior employer, (2) had not divulged or communicated any such confidential information to Guaranteed Rate, (3) was not violating any restrictive covenant with his prior employer, including by using or disclosing confidential information, and (4) he had the right to use any information he would submit to Guaranteed Rate for marketing purposes. Guaranteed Rate had no reason to suspect that these representations by Sadik were untrue. Having forgotten about this nonsolicitation obligation under the Employment Agreement, Sadik never disclosed the same to Guaranteed Rate.

- The next day, Sadik began working for Guaranteed Rate. Using information from his personal cell phone, which he used exhaustively for work purposes, he sent out an email to approximately 300 individuals, most of whom were prior, current, or prospective customers of Homesite. The email announced he was now working

for Guaranteed Rate. The announcement included the statement "I can offer better packages tailored exactly to your needs. Please let me know if you have an [sic] questions or mortgage wants or needs. It is an excellent time to refinance!" This February 28, 2020 email was sent on Sadik's own initiative and without the permission or knowledge of anyone else at Guaranteed Rate.

- Quickly after learning of this email, on March 9, 2020, Homesite sent a demand letter to Guaranteed Rate insisting that Sadik and Guaranteed Rate immediately cease and desist using any Homesite information and to not contact any Homesite prior, current, or prospective customers. Sadik complied - he never reached out again to any Homesite prior, current, or prospective customers unless they first contacted him. In a parallel fashion, Guaranteed Rate has not used any of the information involving Homesite's prior, current, or prospective customers independent of Sadik.

- The February 28, 2020 email produced no customers for Sadik or Guaranteed Rate or caused any loss of business for Homesite. Although Sadik did eventually serve a few former Homesite clients, all of these were unrelated to the February 28, 2022 email and all of them reached out to Sadik (not the other way around) - they all had his personal cell phone information from their prior experience with Sadik. They contacted Sadik because they were pleased with his attention to their needs, and some were also seriously frustrated and disappointed with Homesite's customer service and the high interest rates.

- All the claims against Sadik have been dismissed pursuant to a settlement between him and Homesite.

CONCLUSIONS OF LAW

I
The Law

A
Breach of Contract

A claim for breach of contract lies when the following elements are established: "(1) parties competent to contract; (2) a proper subject matter; (3) legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation." *Thomas v Leja*, 187 Mich App 418, 422 (1991). A plaintiff may recover in a breach of contract action when it proves that the defendant's breach was the proximate cause of the harm the plaintiff suffered. *Chelsea Inv Group LLC v City of Chelsea*, 288 Mich App 239, 254 (2010).

B
Tortious Interference with a Business Relationship or Expectancy

The elements of tortious interference with a business relationship or expectancy are "(1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4)

resulting damage to the party whose relationship or expectancy was disrupted." *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 90 (2005). To establish the third element of the tort requires that the plaintiff demonstrate that the defendant acted intentionally, and the interference was improper or without justification:

> In other words, the intentional act that defendants committed must lack justification and purposely interfere with plaintiffs' contractual rights or plaintiffs' business relationship or expectancy. *Winiemko v Valenti,* 203 Mich App 411, 418 n 3 (1994) (citations omitted); *Feldman v Green,* 138 Mich App 360, 369 (1984). The "improper" interference can be shown either by proving (1) the intentional doing of an act wrongful per se, or (2) the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiffs' contractual rights or business relationship. *Id.*
>
> [*Advocacy Organization for Patients & Providers v Auto Club Ins Ass'n,* 257 Mich App 365, 383 (2003).]

"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." *Feldman v Green,* 138 Mich App at 369-370.

C
Unjust Enrichment

"The elements of a claim for unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Barber v SMH (US), Inc.*, 202 Mich App 366, 375 (1993) (citation omitted). In other words, the law will imply a contract to prevent unjust

enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense. *Morris Pumps v Centerline Piping Inc,* 273 Mich App 187, 195 (2006).

Our Court of Appeals has summarized unjust enrichment as follows:

> "The essential elements of a quasi contractual obligation, upon which recovery may be had, are the receipt of a benefit by a defendant from a plaintiff, which benefit it is inequitable that the defendant retain." *MEEMIC* [v Morris, 460 Mich 180,] 198 [(1999)], quoting *Moll v Wayne Co,* 332 Mich 274, 278-279 (1952). Thus, in order to sustain a claim of quantum meruit or unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. *Barber v SMH (US), Inc,* 202 Mich App 366, 375 (1993). In other words, the law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense.
>
> [*Morris Pumps, 273* Mich App at 195-196.]

D
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) (quotation marks and citation omitted). "Liability does not arise from a civil conspiracy alone; rather, it is necessary to prove a separate, actionable tort." *Id*. at 530 n 13 (quotation marks and citation omitted). In the absence of an underlying tort, a civil conspiracy claim must fail. *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384 (2005) ("a claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort."); *Levitt v Bloem*, unpublished per ciruam opinion of the Court

of Appeals, issued May 21, 2019 (Docket No. 343299) ("Plaintiff's claim for civil conspiracy is based on his claims of defamation, false light, IIED, and tortious interference with business expectancy. Because the circuit court properly dismissed all of these claims and no underlying tort exists in this case, the circuit court also properly dismissed the civil conspiracy claim.").

E
Statutory Conversion

Statutory conversion under MCL 600.2919a(1)(a), as amended in 2005, creates a remedy against a person who "steal[s] or embezzl[es] property or convert[s] property to the other person's own use." MCL 600.2919a. MCL 600.2919a provides as follows:

> (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:
>
> (a) Another person's stealing or embezzling property or converting property to the other person's own use.
>
> (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.
>
> (2) The remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise.
>
> [MCL 600.2919a.]

The statute does not define the term "conversion." "When a statute does not define a term, [Michigan courts] will construe the term according to its common and approved

usage." *Nelson v Grays,* 209 Mich App 661, 664 (1995). "A legal term of art, however, must be construed in accordance with its peculiar and appropriate meaning." *Brackett v Focus Hope, Inc,* 482 Mich 269, 279 (2008). Because the term "conversion" has acquired a peculiar meaning under Michigan common law, the common law defines the term for both common-law and statutory purposes. *Victory Estates LLC v NPB Mortg LLC,* unpublished per curiam opinion of the Court of Appeals, issued November 20, 2012 (Docket No. 307457); p 2, quoting *Id.* (concluding that the common-law definition defines both common-law and statutory conversion under Michigan law). See also *Bronson Methodist Hosp v Allstate Ins Co,* 286 Mich App 219, 223 (2009) ("Because the role of the judiciary is to interpret rather than to write law, courts lack authority to venture beyond a statute's unambiguous text. Undefined statutory terms are generally given their plain and ordinary meanings. Where words 'have acquired a peculiar and appropriate meaning in the law," they should be construed according to that meaning' [footnotes omitted]). Common law conversion is defined as "any distinct act of dominion wrongfully exerted over another's personal property in denial or inconsistent with the rights therein." *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc,* 497 Mich 337, 351-352 (2015), quoting *Nelson & Witt v Texas Co,* 256 Mich 65, 70 (1931) (citation and quotation marks omitted). See also *Lawsuit Financial v Curry,* 261 Mich App 579, 591 (2004) (citation omitted). Statutory conversion requires an additional showing that the defendant "employed the converted property for some purpose personal to the defendant's interests." *Aroma Wines & Equip, Inc*, 497 Mich at 358-359. See also MCL 600.2919a.

F
Respondeat Superior

"Under the doctrine of respondeat superior, an employer may be vicariously liable for the acts of an employee committed within the scope of his employment." *Heise v Morcom,* 219 Mich App 14, 21 (1996). As such, an allegation of respondent superior "is not a separate cause of action, but rather an effort to impose vicariously liability on [an employer] for the alleged wrongful acts of their employees performed during the scope of their employment." *Pierzchala v MGM Grand Detroit, LLC,* unpublished opinion of the Court of Appeals, issued June 13, 2013 (Docket No. 302874), p 3.

G
Injunctive Relief

Injunctive relief is not an independent, stand-alone cause of action, but a specific form of equitable relief. *Richard v Heller,* 332 Mich App 415, 432 (2020). "'It is not the remedy that supports the cause of action, but rather the cause of action that supports a remedy.'" *Henry v Dow Chemical Co,* 473 Mich 63, 96-97 (2005), quoting *Wood v Wyeth-Ayerst Labs*, 82 SW3d 849, 855 (Ky, 2002). See also *Richard,* 332 Mich App at 432 (same).

II
Discussion

In light of the Findings of Fact, Homesite cannot prevail.

A
With no damages and no privity, the Breach of Contract claim fails

A fundamental maxim of contract law is that no person can breach a contract to which it is not a party. *Kirchhoff v Morris,* 282 Mich 90, 95 (1937) ("It is fundamental that certain elements are necessary to make a contract. There must be, among other things, an offer and acceptance as well as a consideration. Mere discussions and negotiations, or even unaccepted offers of settlement, cannot be a substitute for the formal requirements of the contract. The claimed agreement utterly lacks consideration and a promise to pay is not binding if made without consideration"). Guaranteed Rate was not a party to the Employment Agreement. In fact, it did not even know it existed until a cease-and-desist letter was sent by Homesite. As such, it could not breach the contract to which it was not a party.

In addition, the breach of contract claim fails because there was no proximate cause to any injury or damages. *Chelsea Inv Group LLC*, 288 Mich App at 254.

B

With no tortious conduct or damages, there can be no claim for Tortious Interference with a Business Relationship or Expectancy

Because Guaranteed Rate did not know about Sadik's solicitation and in fact had no reason to believe that Sadik had or would use confidential information of Homesite, hiring Sadik was not tortious conduct. *Advocacy Organization for Patients & Providers,* 257 Mich App at 383; *Health Call of Detroit*, 268 Mich App at 90.

Furthermore, since Homesite failed to prove damages, this claim is untenable. *Health Call of Detroit*, 268 Mich App at 90.

C

Because Guaranteed Rate did not obtain a benefit, no such benefit would have been inequitable, and there are no damages; thus, the Unjust Enrichment claim fails

In light of the Findings of Fact, because Guaranteed Rate never received a benefit from Homesite, the claim fails. *Barber,* 202 Mich App at 375.

Furthermore, Homesite has failed to show any inequity supporting a valid claim for unjust enrichment. *Morris Pumps,* 273 Mich App at 195-196.

Again, there are no damages here.

D
Without underlying substantive claims,
the claim for Civil Conspiracy must fall

As all the other substantive claims are dismissed, there can be no civil conspiracy. *Swain*, 332 Mich App at 530.

E
Because Guaranteed Rate did not steal, embezzle, exert dominion, or convert property and there are no damages, the Statutory Conversion claim fails

Because Guaranteed Rate did not steal, embezzle, or convert property, there is no claim for statutory conversion. MCL 600.2919a. See also *Aroma Wines & Equip, Inc*, 497 Mich at 358-359; *Nelson,* 209 Mich App at 664.

Furthermore, even if Sadik's February 28, 2020 email solicitation could be considered conversion by Guaranteed Rate, because it resulted in no damages, there is no viable statutory conversion claim. MCL 600.2919a. See also *Aroma Wines & Equip, Inc*, 497 Mich at 358-359; *Nelson,* 209 Mich App at 664.

F
Because there are no substantive claims remaining against Sadik,
Respondeat Superior cannot be the basis of liability

The claims against Sadik have all been dismissed. Since there are no surviving claims supporting affixing liability to Guaranteed Rate for Sadik's actions, this claim fails. *Heise v Morcom,* 219 Mich App at 21; *Pierzchala,* slip opin. at 3.

Likewise, Homesite has failed to prove that Guaranteed Rate engaged in any tortious or other wrongful conduct through Sadik. Guaranteed Rate was unaware of the Employment Agreement and Sadik's February 28, 2020 email - and did not authorize the email.

G
Injunctive Relief

In fashion parallel to the Respondeat Superior claim, because there is no underlying claim to support the remedy of injunctive relief, this claim is fatally flawed. *Henry,* 473 Mich at 96-97; *Terlecki v Stewart,* 278 Mich App 644, 663 (2008); *Richard,* 332 Mich App at 432.

ORDER

In light of the foregoing Findings of Fact and Conclusions of Law, the Complaint is hereby DISMISSED.

THIS RESOLVES THE LAST PENDING CLAIM AND CLOSES THE CASE.