STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

GRACZYK HOLDINGS, LLC,
a Michigan limited liability company,
OFFSHORE SPARS CO., a Michigan
Corporation, ERIC R. GRACZYK, an
Individual,

Plaintiffs,

vs. Case No. 2022-004565-CB

STEVEN L. KING, an individual.

Defendant.
_____/

OPINION AND ORDER

This matter is before the Court on Defendant Steven King's ("Defendant") motion for summary disposition under MCR 2.116(C)(8) and (C)(10) filed February 21, 2023, and Plaintiffs, Graczyk Holdings ("GH"), Offshore Spar ("Offshore"), and Eric Graczyk's ("Graczyk") (collectively, "Plaintiffs") motion to disqualify Varnum LLP ("Varnum") from serving as Defendants' counsel filed February 17, 2023.

I. Background

This case arises out of GH's purchase of Offshore in December 2021. It is alleged that Defendant and Graczyk began communicating about the sale of Defendant's company, Offshore, to Graczyk's company, GH on or around September 2021. On September 24, 2021, Defendant and Graczyk executed a Letter of Intent ("LOI") for the purchase and sale of Offshore by GH. The LOI provided for a due diligence review by Graczyk of Offshore and included required disclosures by Defendant about Offshore's finances and operations. On December 6, 2021, Defendant, as President of Offshore,

and Graczyk, as sole member of GH, executed a stock purchase agreement (the Purchase Agreement) for the sale of all shares of Offshore to GH for $3,000,000. The Purchase Agreement required Defendant and Offshore to provide GH with various disclosure schedules regarding Offshore's operations and finances, including current contracts and commitments, compliance with contracts and specifications, pending litigation, warranty compliance, and financial statements. The Purchase Agreement included financing via two promissory notes and bank financing as well as a limited personal guaranty from Graczyk. It also included an employment agreement under which Defendant would work at Offshore for 12 months after the close of the sale.

The sale of Offshore closed on January 26, 2022. On that same day, two promissory notes were executed by Offshore.[1] The following day, bank financing was finalized.[2] According to Plaintiffs, within months of the closing, GH uncovered multiple breach of the warranties and representations Defendant made during the due diligence and disclosure period of the LOI as well as alleged misrepresentations and omissions by Defendant during that period. Plaintiffs also purportedly discovered Defendant misrepresented or omitted material information in the disclosures required under the Purchase Agreement. As a result, on December 5, 2022, Plaintiffs filed suit against Defendant. On February 1, 2023, Plaintiffs filed an amended complaint alleging the following: breach of contract alleged by GH (Counts I and II), fraudulent misrepresentation alleged by GH (Count III), silent fraud alleged by GH (Count IV), fraudulent inducement alleged by GH (Count V), fraudulent inducement alleged by Graczyk (Count VI),

[1] The two promissory notes totaled $1,200,000.
[2] GH and Offshore obtained a U.S. Small Business Administration (SBA) Loan with Crestmark in the amount of $1,730,000. Graczyk is personal guarantor on the SBA loan.

fraudulent inducement alleged by Offshore (Count VII), and unjust enrichment alleged by all Plaintiffs (Count VIII).

On February 17, 2023, Plaintiffs filed a motion to disqualify Defendant's counsel. Defendant filed a response on February 22, 2023. Meanwhile, on February 21, 2023, Defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10) seeking dismissal of all Plaintiffs' claims.[3] Plaintiffs filed their response on March 13, 2023, and Defendant filed his reply on March 16, 2023. The Court held oral arguments on both motions on March 30, 2023, and took both under advisement.

II. Defendant's Motion for Summary Disposition

A. Standard of Review

A motion for summary disposition under MCR 2.116(C)(8) that the opposing party "has failed to state a claim upon which relief can be granted" must be granted "if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). It tests the legal sufficiency of the complaint based on the pleadings, including any written agreement that is the basis of action. *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007). All factual allegations in the pleadings are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 263; 532 NW2d 882 (1995).

A motion filed under MCR 2.116(C)(10) "tests the factual sufficiency of a claim." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "Summary disposition is

[3] Defendant's motion for summary disposition was its first responsive pleading, it has not filed an answer to the first amended complaint.

appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors*, 469 Mich 177, 183; 665 NW2d 468 (2003). The court considers the documentary evidence submitted by the parties in the light most favorable to the non-moving party. *Maiden*, 461 Mich at 120. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. The initial burden is on the moving party to support its position "by affidavits, depositions, admissions, or other documentary evidence." *Smith v Globe Life Ins*, 460 Mich 446, 455; 597 NW2d 28 (1999). The burden then shifts to the opposing party to set forth specific facts via admissible evidence that establish a genuine issue of disputed fact exists. *Maiden*, 461 Mich at 121.

B. Law and Analysis

1. Breach of Contract (Count I - Representations and Warranties) and (Count II - Indemnification)

In Count I, GH claims Defendant breached the Purchase Agreement in myriad ways, including by failing to disclose contracts that were not in the ordinary course of business or that did not include standard terms and conditions, by failing to disclose work that was not or could not be performed in compliance with contract specifications, by failing to disclose warranty claims, and by failing to investigate the representations and warranties he made in the Purchase Agreement. In Count II, GH claims Defendant additionally breached the Purchase Agreement by failing to indemnify GH as required under the agreement.

Defendant argues he is entitled to summary disposition under MCR 2.116(C)(10) on these counts because he didn't breach the Purchase Agreement as GH alleges and

because GH has not established "a causal link between the breaches alleged and the harm [GH] claims it suffered." (Mot., p 17.) He further argues the alleged breach for failure to indemnify in Count II should be dismissed under MCR 2.116(C)(8) and (10) because the indemnification provision in the Purchase Agreement only requires indemnification by Offshore, not Defendant. In response, GH maintains issues of material fact exists on these claims for which discovery must be allowed to proceed, so summary disposition under (C)(10) is inappropriate. It further contends language in other portions of the indemnification provision demonstrates the parties' intent to include indemnification by Defendant, so summary disposition under (C)(8) on the breach of the indemnification provision should be denied.

With respect to Defendant's request for summary disposition under MCR 2.116(C)(10) on these two counts, where discovery has not yet occurred, a motion under this subrule is generally premature. *Townsend v Chase Manhattan Mortg Corp*, 254 Mich App 133, 140; 657 NW2d 741 (2002). Defendant's motion was filed before any discovery had occurred thus consideration of these claims under MCR 2.116(C)(10) would be premature. Moreover, the parties have provided competing affidavits from Defendant and two employees from Offshore, (Mot. Ex. 3; First Amended Compl., Exs. 17 and 18), that clearly indicate factual disputes on these claims. Accordingly, Defendant's request for summary disposition under MCR 2.116(C)(10) on Counts I and II must be denied.

As for his request for summary disposition under MCR 2.116(8) on Count II, Defendant makes a cursory argument that the indemnification provision only applies to Offshore. Beyond directly quoting only one subsection in the indemnification, §6.2, and concluding that it "clearly indicates" only Offshore is obligated to indemnify GH, Defendant

has failed to provide any analysis or basis for this conclusion, legal or otherwise. Accordingly, Defendant's request for summary disposition under MCR 2.116(C)(8) on Count II must be denied.

2. Fraudulent Misrepresentation (Count III), Silent Fraud (Count IV), and Fraudulent Inducement (Count V)

Defendant argues GH's fraud-based claims are barred by the economic loss doctrine. He further argues GH has failed to state a claim for fraudulent inducement because it has not alleged Defendant misrepresented future conduct. GH appears to concede the economic loss doctrine would bar its fraudulent misrepresentation and silent fraud claims, but because the Purchase Agreement "specifically contemplates fraud actions" the economic loss doctrine doesn't apply. GH further argues its fraudulent inducement claim is exempt from the economic loss doctrine and was sufficiently pled.

The economic loss doctrine provides that a plaintiff cannot bring a tort claim where the legal duty breached arises out of a contractual promise. *Rinaldo's Const Corp v Michigan Bell Tel Co*, 454 Mich 65, 83; 559 NW2d 647 (1997). The purpose of the doctrine is "to avoid confusing contract and tort law." *Huron Tool & Engg Co v Precision Consulting Services*, 209 Mich App 365, 374; 532 NW2d 541 (1995). Consequently, where the plaintiff's allegations are that a defendant failed to perform according to the terms of its promise, plaintiff has no cause of action in tort. *Id.* at 85. Though the term "economic loss doctrine" is frequently used in the context of the UCC, its core principle, that a tort claim must be based on "a legal duty separate and distinct from the contractual obligation," *id.* at 83, also applies to contracts for services. See *Rinaldo's Const*, 454 Mich at 84-85; *Hart v Ludwig*, 347 Mich 559, 560, 562; 79 NW2d 895 (1956). The economic loss doctrine may also bar fraud claims except for fraud in the inducement. *Citizens Ins Co v Osmose Wood*

*Preserving,* 231 Mich App 40, 46; 585 NW2d 314 (1998). However, the exception for fraud in the inducement only applies where the fraud is extraneous to the contract—that is, the misrepresentations must relate to something other than promises concerning the performance of the contract and cause harm distinct from a breach of the contract. *Huron Tool*, 209 Mich App at 373.

In its fraudulent misrepresentation claim, GH alleges Defendant "specifically represented and made disclosures to GH in the [Purchase Agreement] process that [Defendant] knew at the time of making the disclosures were false," and Defendant "falsely represented that all disclosures required under the [Purchase Agreement] were fully, accurately, and completely made." (First Amended Compl., ¶¶178-179.) In its silent misrepresentation claim, GH alleges Defendant had a "duty to disclose information set forth in the [Purchase Agreement]" and had "a duty to diligently investigate matters prior to making representations and warranties under the [Purchase Agreement]." (Id., ¶¶184-185.) It then alleges Defendant "failed to disclose all material information as required by the [Purchase Agreement]" and "misrepresented that all information required to be disclosed under the [Purchase Agreement] was fully, accurately, and completely disclosed." (Id., ¶¶186-187.)

The allegations in these two claims relate directly to Defendant's disclosure obligations in §2 of the Purchase Agreement. Though GH's breach of contract claim in Count I relates to the disclosure requirements, it does not specifically identify the breaches and instead references the breaches alleged in the common allegations in the complaint. In the common allegations Plaintiffs make multiple allegations that Defendant breached the disclosure provisions in §2 of the Purchase Agreement by failing to provide

the required information in the disclosures. (First Amended Compl, ¶¶ 72, 75, 79, 114, 109-110, 112, 114-116, 125, 129.) With respect to the allegation in the silent fraud claim that Defendant had "a duty to diligently investigate matters prior to making representations and warranties under the [Purchase Agreement]," this is nearly identical to the allegation in Count I that Defendant breached the Purchase Agreement when he "failed to diligently investigate the representations and warranties he made under [the Purchase Agreement.]" (Id., ¶162.) Consequently, by GH own pleadings, the alleged fraudulent misrepresentations and silent fraud are the same allegations that constitute alleged breaches of the Purchase Agreement.

According to GH, the indemnification provision, §6.2 of the Purchase Agreement, "specifically contemplates fraud actions" so the economic loss doctrine does not apply. It relies on language repeated throughout that subsection that states, "[N]o Indemnifying Party shall be responsible for any Adverse Consequences with respect to the breach of any representation or warranty . . . in excess of $500,000, except in the event of fraud...." (Id., Ex 1, §6.2).[4] Contrary to GH's interpretation, this language provides a limitation on damages that does not apply in the event of fraud. The Court is unpersuaded the Purchase Agreement creates a carve-out from the economic loss doctrine. Moreover, GH has failed to provide any authority that supports its contention that a parties can contract around the economic loss doctrine. Nor is the Court aware of any such authority. Indeed recognizing such an exception would undermine the central purpose of the to the

[4] "Adverse Consequences" are defined as "any actions, suits, proceedings, hearings, investigations, charges, complaints, claims, demands, Injunctions, judgments, orders, decrees, rulings, damages, dues, penalties, interest, fines, costs, amounts paid in settlement, liabilities, obligations, taxes, liens, losses, expenses and fees, Including court costs and reasonable legal and accounting fees and expenses." (First Amended Compl., Ex. 1, §6.2.)

economic loss doctrine which is to "avoid confusing contract and tort law" and "allowing contract law to 'drown in a sea of tort' . . . where fraud and breach of contract claims are factually indistinguishable." *Huron Tool*, 209 Mich App 375. The Court finds that GH's claims for fraudulent misrepresentation (Count III) and silent fraud (Count IV) are inextricably interwoven with its breach of contract claim in Count I and as a result, do not give rise to any independent tort actions.

As for GH's claim for fraudulent inducement (Count V), while such claims may be exempt from the economic loss doctrine, to be exempt the fraud must be extraneous to the contract—that is, the misrepresentations must relate to something other than promises concerning the performance of the contract and cause harm distinct from a breach of the contract. *Huron Tool*, 209 Mich App at 373. Moreover, unlike traditional fraud, which "must be predicated on a statement relating to a past or an existing fact," a claim for fraud in the inducement must allege the defendant "materially misrepresent[ed] future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 161; 742 NW2d 409 (2007) quoting *Custom Data Sols. v Preferred Capital*, 274 Mich App 239, 243; 733 NW2d 102 (2006). As Defendant correctly argues in his motion, GH's claim for fraudulent inducement is expressly based on present or past facts and fails to allege Defendant misrepresented future conduct.

In its fraudulent inducement claim, GH alleges Defendant "made multiple representations and promises to GH regarding the full and complete disclosure as required under the [Purchase Agreement] regarding [Offshore]," that he "failed to disclose all material information as required by the [Purchase Agreement]," and that he "knowingly

and intentionally withheld material and relevant information that should have been disclosed to GH in inducing it to enter into the [Purchase Agreement] and obtaining the SBA loan." (First Amended Compl., ¶¶194, 196, and 197.) Significantly, GH also alleged Defendant's "misrepresentations and omissions to GH related to past or present facts of Offshore and not future promises under the [Purchase Agreement]." (Id., ¶195.) Because Offshore expressly states Defendant's alleged misrepresentations and omissions that are the basis of this claim relate to past or present facts, and not promises related to future conduct, it has not stated a claim for fraudulent inducement and must be dismissed under MCR 2.116(C)(8).

Contrary to the assertion by Plaintiffs' counsel that *Custom Data*, 274 Mich App 239, allows for fraud in the inducement based on misrepresentations of past or present facts, nothing in the decision supports this assertion. On the contrary, the *Custom Data* Court expressly stated, "Michigan also recognizes fraud in the inducement which occurs where a party materially misrepresents *future conduct* under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Id.* 242–43 (emphasis added). It then affirmed summary disposition in favor of the plaintiff on its fraud in the inducement claim where the unrebutted evidence showed the defendant's misrepresentations about its future ability to provide services and products induced plaintiff into a contract. *Id.* at 244-245. Nowhere does the court indicate it relied on misrepresentations of past or then-existing facts to support the fraud in the inducement claim. Thus *Custom Data* does not save GH's fraudulent inducement claim.

In sum, GH's claims of fraudulent misrepresentation (Count III) and silent fraud (Count IV) are barred by the economic loss doctrine and therefore must be dismissed

under MCR 2.116(C)(8). Likewise, because its claim for fraudulent inducement (Count V) is legally insufficient, it must be dismissed under MCR 2.116(C)(8).

3. Graczyk Claim of Fraudulent Inducement (Count VI)

In Count VI, Graczyk alleges Defendant fraudulently induced it into executing the personal guaranty in the Purchase Agreement. In his motion, Defendant argues, among other things, that Graczyk has failed to state a claim for fraudulent inducement because it has not alleged Defendant misrepresented future conduct. In response, Graczyk contends he alleged a legally sufficient claim for fraudulent inducement, and during oral arguments, his counsel argued that case law allows for fraudulent inducement based on assertions of past or current facts.

As noted earlier, unlike traditional fraud, which "must be predicated on a statement relating to a past or an existing fact," fraud in the inducement "occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Rooyakker*, 276 Mich App at 161 quoting *Custom Data*, 274 Mich App at 243. The allegations in Graczyk's fraudulent inducement claim are nearly identical to those in GH's fraudulent inducement claim, with the only difference being that Defendant's alleged misrepresentations and omissions were directed at Graczyk. (First Amended Compl., ¶¶205, 207, and 208.) And just as in GH's fraudulent inducement claim, Graczyk alleges Defendant's "misrepresentations and omissions were related to past or present facts of Offshore and not future promises under the [Purchase Agreement]." (Id., ¶206.) Like GH's fraudulent inducement claim, because Graczyk expressly states Defendant's alleged misrepresentations and omissions related to past or present facts, and not promises related to future conduct, he has not stated a

claim for fraudulent inducement. Additionally, as explained earlier in dismissing GH's fraudulent inducement claim, *Custom Data*, 274 Mich App 239, does not support Plaintiffs' counsel's assertion that fraud in the inducement may be based on misrepresentations of past or present facts. Consequently, Graczyk's claim for fraudulent inducement in Count VI must be dismissed under MCR 2.116(C)(8)

4. Offshore's Claim of Fraudulent Inducement (Count VII)

In Count VII, Offshore also alleges a claim for fraudulently induced. Specifically, it alleges Defendant fraudulently induced it into executing the Promissory Notes. As he did with the other Plaintiffs' fraudulent inducement claims, Defendant argues, among other things, that Offshore has failed to state a claim for fraudulent inducement because it has not alleged Defendant misrepresented future conduct. Offshore responded with the same arguments as the other Plaintiffs: it alleged a legally sufficient claim for fraudulent inducement, and case law allows for fraudulent inducement based on assertions of past or current facts.

Offshore's fraudulent inducement claim is nearly identical to GH and Graczyk's fraudulent inducement claims, with the only difference being that Defendant's alleged misrepresentations and omissions were directed at Offshore. (First Amended Compl., ¶¶214, 216, and 217.) And just as in GH and Graczyk's fraudulent inducement claims, Offshore alleged Defendant's "misrepresentations and omissions to Offshore related to past or present facts of Offshore and not future promises under the [Purchase Agreement]." (Id., ¶215.) As with GH and Graczyk's fraudulent inducement claims, because Offshore expressly states Defendant's alleged misrepresentations and omissions related to past or present facts, and not promises related to future conduct, it has not stated a claim for fraudulent inducement. Additionally, as explained earlier in

dismissing GH's fraudulent inducement claim, *Custom Data*, 274 Mich App 239, does not support Plaintiffs' counsel's assertion fraud in the inducement may be based on misrepresentations of past or present facts. Consequently, Offshore's claim for fraudulent inducement in Count VII must be dismissed under MCR 2.116(C)(8)

5. All Plaintiffs' Claim of Unjust Enrichment (Count VIII).

In Count VIII, all three Plaintiffs allege a claim of unjust enrichment. To sustain an action for unjust enrichment, a plaintiff must "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 New York Mellon*, 300 Mich App 9, 22–23; 831 NW2d 897 (2012). Defendant argues this claim is barred as a matter of law because an express agreement, i.e., the Purchase Agreement, exists. As Plaintiffs correctly contend, this argument ignores that under MCR 2.111(A)(2), they may plead unjust enrichment in the alternative, even if there is an alleged express contract. See *HJ Tucker & Assoc v Allied Chucker & Engg*, 234 Mich App 550, 574; 595 NW2d 176 (1999) ("[P]laintiff was not required to elect to proceed under one theory or the other, but could seek recovery on the basis either of an express verbal contract, or an implied contract if the trier of fact found that the express verbal contract did not exist.") Accordingly, Defendant's request for summary disposition as to Count VIII must be denied.

III. Plaintiffs' Motion to Disqualify Defendant's Attorney

Plaintiffs have moved to disqualify Defendants' counsel, Varnum, because Varnum represented both Defendant and Offshore jointly during the negotiation and execution of the Purchase Agreement. They further argue Defendant's attorneys from Varnum, Sarah Wixson ("Wixson") and Matthew Maltz ("Maltz") may be called as witnesses in this case.

In response, Defendant contends Plaintiffs have failed to establish Varnum obtained relevant confidential information from Offshore or that they would be prejudiced if Varnum were disqualified. Defendant also contends Plaintiffs have not demonstrated Wixson and Maltz are necessary witnesses and the information sought from them cannot be obtained from other sources.

Disqualification of counsel "is a drastic measure which courts should hesitate to impose except when absolutely necessary." *Debiasi v Charter County of Wayne*, 284 F Supp 2d 760, 770-771 (ED Mich 2003). "The party seeking disqualification bears the burden of demonstrating specifically how and as to what issues in the case the likelihood of prejudice will result." *Rymal v Baergen*, 262 Mich App 274, 319; 686 NW2d 241 (2004).

Plaintiffs first argue Varnum's representation of Defendant in this case violates MRPC 1.9(a), which provides:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

In *Alpha Capital Management v Rentenbach*, 287 Mich App 589; 792 NW2d 344 (2010) the Court of Appeals analyzed this rule by adopting the following three-part test set forth in *INA Underwriters Ins Co v Nalibotsky*, 594 F Supp 1199, 1206 (ED Pa, 1984):

1. What is the nature and scope of the prior representation at issue?

2. What is nature and scope of the present lawsuit against the former client?

3. In the course of the prior representation, might the client have disclosed to his attorney confidences, which could be relevant to the present action? In particular, could any such confidences be detrimental to the former client in the current litigation?

The Court in *INA* further explained:

> In answering the first question, the court should consider both the purposes for which the attorney was employed and the facts underlying the matter for which the attorney was responsible. However, the focus should be upon the reasons for the retention of counsel and the tasks which the attorney was employed to perform. Once the purposes for which the attorney was employed are clear, it is then possible to consider the type of information which a client would impart to an attorney performing such services for him.
>
> The second question is relatively simple to answer. All that is necessary is an evaluation of the issues raised in the present litigation and the general facts upon which the legal claims asserted in the present action are based.
>
> In resolving the third question—whether confidential information "might" have been received in the course of the prior representation which would be substantially related to the present representation—the court should not allow its imagination to run free with a view to hypothesizing conceivable but unlikely situations in which confidential information "might" have been disclosed which would be relevant to the present suit. "The lawyer 'might have acquired' the [substantially related] information in issue if (a) the lawyer and the client ought to have talked about particular facts during the course of the representation, or (b) the information is of such a character that it would not have been unusual for it to have been discussed between lawyer and client during their relationship.

*Id.*

Here, the scope of Varnum's representation of Offshore allegedly consisted of advising Defendant and his company, Offshore, concerning the potential sale of Offshore. It allegedly helped negotiate and draft the Purchase Agreement and advised Defendant and Offshore as to their disclosure and warranty obligations under the Purchase Agreement. Lastly, Varnum purportedly defended Offshore in customer disputes.

As to the nature of the claims in this case, in light of the Court's determination above that Offshore's claim for fraudulent inducement must be dismissed, the only claim that involves Offshore is claim for unjust enrichment in Count VIII. In that claim, Offshore alleges it would not have entered the promissory notes for payment of the purchase of Offshore had Defendant "disclosed the true condition of the business, including . . . failure

to deliver projects per contract specifications, the true nature of the New Toronto Court House Project, and other undisclosed liabilities of Offshore." (First Amended Compl., ¶226.) According to Offshore, Defendant would be unjustly enriched at Offshore's expense if he is not required to indemnify Plaintiffs under the Purchase Agreement. (Id., ¶227.) Plaintiffs' counsel acknowledged during oral arguments that Offshore's unjust enrichment claim is based on its execution of the promissory notes, which occurred after Varnum's representation of Offshore ended.

With regards to the third element, Plaintiffs assert that in the course of representing Defendant and Offshore in the advising, negotiating, and drafting the Purchase Agreement, Varnum acquired information concerning existing warrantying claims, contracts, purchase orders, the disclosures under §2.6 of the Purchase Agreement, whether projects were improperly built, and their intent as to the indemnification provision in the Purchase Agreement. However, the assertion that this information is confidential is belied by the fact that Defendant was Offshore's sole shareholder and President from 2013 through its sale to GH and was Varnum's sole contact when it represented him and Offshore. (Def.'s Resp., Ex. 3.) As such, Defendant necessarily has full knowledge of all communications and information provided to Varnum related to Offshore concerning all aspects of sale of Offshore to GH that culminated in the Purchase Agreement. In short, Varnum has no confidential information regarding Offshore that is not already known to Defendant. Moreover, Defendant still has knowledge of all the information regarding Offshore, which he will likely use in his defense, with or without Varnum as counsel. As Defendant aptly notes, "disqualifying Varnum as counsel will not resolve the harm Offshore alleges it will suffer as a result of Varnum's representation of Defendant." (Resp.,

p 17.) Accordingly, Varnum's continued representation of Defendant would not prejudice Offshore. Based on the foregoing, the Court finds Plaintiffs have failed to establish MRPC 1.7(a) requires disqualifying Varnum as Defendant's counsel.

Plaintiffs also maintain Varnum should be disqualified under MRPC 3.7, which governs lawyers as witnesses, and provides:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> (1) The testimony relates to an uncontested issue;
>
> (2) The testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) Disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

A party seeking to disqualify opposing counsel because the attorney is a necessary witness bears the burden of showing the attorney's testimony is necessary and the substance of the attorney's testimony is unavailable from other witnesses. *In re Susser Estate*, 254 Mich App 232, 238; 657 NW2d 147 (2002). Plaintiffs have failed at this time to meet this burden as they have simply assert it is "*quite possible* that Wixson or Maltz will be called as a fact witness . . . ." (Mot., p 11) (emphasis added). A "possibility" of calling them as witnesses falls short of the required showing of "necessity." Additionally, Plaintiffs failed to address, let alone demonstrate, there are no other witnesses (such as Defendant or employees of Offshore) who could give the same substantive testimony about the negotiation, drafting, and closing of the Purchase Agreement and the required disclosures under the agreement. Thus, Plaintiffs have failed to demonstrate at this time

that Wixson and Maltz are necessary witnesses sufficient to warrant disqualification under MRPC 3.7.

## IV. Conclusion

For the reasons set forth above, Defendant's motion for summary disposition is GRANTED IN PART as GH's claims in the first amended complaint of fraudulent misrepresentation (Count III), silent fraud (Count IV), and fraudulent inducement (Count V), Graczyk's claim of fraudulent inducement (Count VI), and Offshore's claim of fraudulent inducement (Count VII). The motion is DENIED IN PART in all other respects.

For the reasons set forth above, Plaintiffs' motion to disqualify is DENIED. This Opinion and Order neither resolves the last pending claim nor closes this case. MCR 2.602(A)(3).

IT IS SO ORDERED.

Date: 05/10/2023


Kathryn A. Viviano

signed by KATHRYN VIVIANO 05/10/2023 03:04:16 oNzGkxDk

Hon. Kathryn A. Viviano, Circuit Court Judge