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

AGA 969, LLC; RANDY GAMMO; JOANNE KALLABAT; JOSEPH KALLABAT; JONATHAN MAZUR and SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND, III, LLC,

Plaintiffs,

Case No. 23-203704-CB
Hon. Michael Warren

v

MARK ZAWAIDEH; DYLAN BORLAND; MATTHEW ANDERSON; JOHN MONTEIRO and THE BORLAND GROUP, LLC,

Defendants.

OPINION AND ORDER REGARDING
PRO SE DEFENDANT, DYLAND BORLAND'S
MOTION FOR SUMMARY DISPOSITION OF PLAINTIFF'S
SECOND AMENDED COMPLAINT UNDER MCR 2.116(C)(8) AND (10)
&
DEFENDANT JOHN MONTEIRO'S MOTION FOR SUMMARY DISPOSITION
OF PLAINTIFFS' SECOND AMENDED COMPLAINT PURSUANT TO
MCR 2.116(C)(7), (C)(8) AND (C)(10) IN LIEU OF ANSWER
&
DEFENDANT MARK ZAWAIDEH'S MOTION FOR SUMMARY DISPOSITION
OF COUNTS I AND II OF PLAINTIFFS' SECOND AMENDED COMPLAINT
PURSUANT TO MCR 2.116(C)(8) AND (C)(10) IN LIEU OF ANSWER

At a session of said Court, held in the
County of Oakland, State of Michigan
August 5, 2025

PRESENT: HON. MICHAEL WARREN

OPINION

I

This cause of action arises out the Plaintiffs' investment in a failed multifamily real estate investment project located at 220 Northpoint Drive in Houston, Texas (the "Property") and owned by Landings at Northpoint LLC ("Landings").[1]

The Plaintiffs allege Violation of Michigan Uniform Securities Act (all Defendants) (Count I); Violation of Michigan Uniform Securities Act (all Defendants) (Count II); Breach of Fiduciary Duty (Borland Group, Borland, Anderson, Monteiro) (Count III); Minority Member Oppression (Borland Group, Borland, Anderson, Monteiro) (Count IV); Negligence (Borland Group, Borland, Anderson, Monteiro) (Count V); Books and Records (Count VI); and Count VII (Accounting).[2]

Before the Court is (1) Pro Se Defendant, Dylan Borland's ("Borland") Motion for Summary Disposition of Plaintiffs' Second Amended Complaint Under MCR 2.116(C)(8) and (10);[3] (2) Defendant John Monteiro's ("Monteiro") Motion for Summary Disposition of Plaintiffs' Second Amended Complaint Pursuant to MCR 2.116(C)(7), (C)(8) and

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[1] AGA 969, LLC, Randy Gammo, Joanne Kallabat, Joseph Kallabat, Johnathan Mazur and Soaring Pine Capital Real Estate & Debt Fund, III, LLC's are collectively the "Plaintiffs."

[2] On May 13, 2024, Defendant Matthew Anderson was dismissed. On October 23, 2024, a default judgment was entered against Defendant The Borland Group, LLC on Counts III, IV, V, VI and VII of the Plaintiffs' First Amended Complaint. On March 18, 2025, all claims brought by Plaintiff Soaring Pine Capital Real Estate & Debt Fund III, LLC against Defendants Zawaideh, Borland and Monteiro were dismissed.

[3] The Affidavit of Dylan Borland is not dispositive of any of the issues addressed herein; therefore the Plaintiffs' argument that it should be stricken is moot.

(C)(10) in Lieu of Answer; and (3) Defendant Mark Zawaideh's ("Zawaideh") Motion for Summary Disposition of Counts I and II of Plaintiffs' Second Amended Complaint Pursuant to MCR 2.116(C)(8) and (C)(10) in Lieu of Answer. Oral argument is dispensed as it would not assist the Court in its decision-making process.[4]

At stake is whether Plaintiff Jonathan Mazur's ("Mazur") claims against Defendant Monteiro and Defendant Zawaideh should be dismissed because he is not an investor in Landings? Because Mazur is not a real party in interest, the answer is "yes."

Also at stake is whether the integration clause in the Operating Agreement affords Defendant Monteiro relief? Because the Plaintiffs claim that Monterio fraudulently induced them into entering in the Operating Agreement, the answer is "no" with regard to that claim only.

Additionally at stake is whether the exculpatory clause in the Operating Agreement affords Defendant Monteiro relief? Because the Plaintiffs allege willful

[4] 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.

misconduct and a knowing violation of the law, the answer is “no” with regard to those claims, but “yes” as to anything falling short of such conduct.

Further at stake is whether the Plaintiffs’ claim for Violation of Michigan Uniform Securities Act (Count I), premised upon a violation of MCL 451.2509(6), against Defendants Borland and Zawaideh should be dismissed? Because the Plaintiffs have failed to sufficiently plead a violation of MCL 451.2509(6), the answer is “yes” as to MCL 451.2509(6) against Defendant Borland, only, under MCR 2.116(C)(8), but “no” as to Defendants Borland and Zawaideh under MCR 2.116(C)(10).

Also at stake is whether the Plaintiffs’ claim for Violation of Michigan Uniform Securities Act (Count I), premised upon a violation of MCL 451.2509(2) and/or MCL 451.2509(6) against Defendant Monteiro should be dismissed? Because the Plaintiffs do not raise any allegations or evidence of Defendant Monteiro’s individual liability, the answer is “yes.”

Additionally at stake is whether the Plaintiffs’ claim for Violation of Michigan Uniform Securities Act (Count II), premised upon a violation of MCL 451.2509(4), should be dismissed for failing to state a claim? Because the Plaintiffs plead that Defendants Borland and Zawaideh are not registered agents or broker-dealers and are not exempt from registration, and they promoted the investment, provided investment advice, and sold securities, the answer is “no.”

Further at stake is whether the Plaintiffs' claim for Violation of Michigan Uniform Securities Act (Count II), premised upon a violation of MCL 451.2509(7), should be dismissed for failing to state a claim? Because the Plaintiffs have abandoned any counter-argument, the answer is "yes" as to Defendants Borland and Zawaideh.

To boot at stake is whether the Plaintiffs' claim for Violation of Michigan Uniform Securities Act (Count II), premised upon a violation of MCL 451.2509(7), against Defendant Monteiro should be dismissed? Because questions of material fact exist, the answer is "no."

Preantepenultimately at stake is whether the Plaintiffs' claim for Breach of Fiduciary Duty (Count III) against Defendants Borland and Monteiro should be dismissed? Because the Plaintiffs have not demonstrated that a manager of a limited liability company owes a fiduciary duty to its members, have failed to address the business judgment rule, and the Plaintiffs' claim is derivative in nature, the answer is "yes."

Antepenulimately at stake is whether the Plaintiffs' claim for Minority Member Oppression (Count IV) against Defendants Borland and Monteiro should be dismissed? Because the Plaintiffs have failed to address the business judgment rule or the exculpatory language of Section 6.6 of the Operating Agreement, the answer is "yes" as to Defendant Borland, and because the Plaintiffs have made only a cursory argument, the answer is "yes" as to Defendant Monteiro.

Penultimately at stake is whether the Plaintiffs' claim for Negligence (Count V) against Defendants Borland and Monteiro should be dismissed? Because the Plaintiffs fail to allege a duty separate and distinct from the Operating Agreement, the answer is "yes."

Finally at stake is whether the Plaintiffs' claim for Books and Records (Count VI) against Defendant Borland should be dismissed because the Plaintiffs do not allege that the Defendants breached Section 5.1 of the Operating Agreement? Because the Plaintiffs fail to address the argument, any contra argument is deemed abandoned and the answer is "yes."

II
Background

The Plaintiffs are among a group of investors that provided equity to support the purchase of the Property. The Plaintiffs invested in Landings, and Landings purchased the Property through a mix of equity and debt-based financing. Landings subsequently defaulted on its loan payments, and the Property was subject to a foreclosure auction.

The Plaintiffs allege they were induced to invest in Landings and the Property based on representations made and information provided by the Defendants and claim they will neither recoup their investment nor realize a return on investment.

The Plaintiffs allege the Defendants (1) solicited their investments through email communications, verbal communications, printed materials, and online videos; (2) the Defendants provided investment advice; (3) the Defendants acted as brokers-dealers and/or agents of Landings and the Defendants sold securities to the Plaintiffs. In particular, the Plaintiffs' allegations relate to a variable interest rate; representations regarding a goal of "9-10% or better annual cash on cash for investors and at least a 20% IRR in 5 years or less"; and statements made in a video sent to investors and in printed materials and on social media.

Defendant Borland is the manager of Borland Group, a manager of Landings, who allegedly solicited the investments.

Defendant John Monteiro ("Monteiro") is a manager of Landings and a minority member of the Landings.

Defendant Zawaideh allegedly solicited the investments and is himself an investor in the Property.

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 "release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate or to litigate in a different forum, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action." 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 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).

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). *Id.* 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 357 (1991); *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 v Rozwood,* 461 Mich 109, 119-120 (1999); 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 v Oakwood Healthcare,* *Inc*, 504 Mich 152, 160 (2019) (citation omitted). Granting a motion for summary disposition under MCR 2.116(C)(10) is warranted if the substantively admissible evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362-363.

IV
Because Plaintiff John Mazur is Not a Real Party in Interest, His Claims Against Defendant Monteiro and Defendant Zawaideh Are Dismissed

A
The Law Regarding Real Parties in Interest

"An action must be prosecuted in the name of a real party in interest." MCR 2.201 (B). However, MCR 2.201(B)(1)-(4) creates limited exceptions to this rule. "A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another." *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 356 (2013), quoting *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 95 (1995). The real party in interest "is the party who under the substantive law in question owns the claim asserted." *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v. Pontiac No 2*, 309 Mich App 611, 622 (2015), citing *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 356 (2013)). The real party in interest rule, similar to the doctrine of standing, is a prudential limitation which limits a litigant's ability to assert the legal rights of another. *Id.* at 621.

B
Plaintiff John Mazur is Not a Real Party in Interest

Defendant Monteiro and Defendant Zawaideh argue that John Mazur did not invest in Landings and is therefore not a real party in interest and his claims must be dismissed. The Plaintiffs do not dispute that Mazur did not invest in Landings. Instead, the Plaintiffs argue that "Mazur has sincerely and vigorously advocated this lawsuit to recover his investment," he "is interested in the outcome of this litigation as it relates to his investment," and even if Mazur is only nominally interested, the Court should substitute Two White Ducks, LLC as a party.

In *DeLong v Marston*, 308 Mich 63 (1944), the Michigan Supreme Court recognized that parties could later be joined or substituted if the real party in interest was not named in the original complaint. *DeLong,* 308 Mich 68-69 ("If this suit was brought in the name of a party who is only nominally interested rather than being the real party in interest, it was in the power of the trial court to add or substitute as a party or parties plaintiff the actual parties, rather than to dismiss the bill"). However, the Court recently clarified that a party must take the proper steps to cure a real party in interest defect:

> To be clear, failure to bring suit in the name of the real party in interest is a ground for dismissal. However, it does not follow—as defendants suggest—that a suit originally filed in the name of someone other than the real party in interest must necessarily be dismissed. It is possible, in some circumstances, for a plaintiff to cure this defect.
>
> However, they must take the proper steps to do so. A plaintiff may not fix real party in interest defects by unilateral actions taken outside of court, as the plaintiffs here attempted. Instead, plaintiffs must take some action in

> the litigation that would allow the court to assess the effect of the change in parties. One possible process would be to file an amended complaint joining or substituting the proper plaintiff. Intervention by the real party in interest may accomplish the same purpose. A plaintiff can also file an amended complaint reflecting the fact that they have become the real party in interest through an assignment. In all of these instances, the court will be able to consider whether the correction of the real party in interest defect may relate back to when the original complaint was filed, or whether the suit will be barred by the running of the statute of limitations or the one-year-back rule—as well as any other obstacles that might arise. And, as will be discussed in more detail later in this opinion, the equitable remedy of rescission also addresses this issue. If a prior assignment is rescinded, the assignor plaintiff may effectively become the real party in interest at the time the suit was filed.
>
> [*C-Spine Orthopedics, PLLC v Progressive Michigan Insurance Company*, ___ Mich ___ (2025) (Docket Nos. 165537, 165538, and 165964), p 14 (citations omitted).]

In the instant case, there is no question that Mazor himself did not invest in Landings. As such, he is not a real party in interest. Since November 2023 (i.e., close to 2 full years), the Plaintiffs have taken no steps to cure the real party in interest defect. The Plaintiffs' cursory request in the instant briefing for the substitution of Two White Ducks, LLC fails. That request is not properly before the Court (i.e., in a response to a motion for summary disposition). This type of procedural mechanism is notably absent from the Supreme Court's rendition. *C-Spine Orthopedics, PLLC,* ___ Mich at p 14. This is so because the responses to motions for summary disposition are in of themselves not the proper mechanism to add or substitute parties. Accordingly, Mazur's claims against Defendant Monteiro and Defendant Zawaideh are dismissed.[5]

[5] Defendant Borland did not raise this argument and does not seek the same relief.

V
The Integration Clause in the Operating Agreement Does Not Afford Defendant Monteiro Relief in Connection with Fraudulent Inducement (only)

A
The Law of Integration Clauses

Section 12.15 of the Operating Agreement includes the following "integration clause":

> **12.15 Entire Agreement.** This Agreement and each of the exhibits attached hereto set forth all (and are intended by all parties hereto to be an integration of all) of the promises, agreement, conditions, understandings, warranties, and representations among the parties hereto with respect to the Company; and there are no promises, agreements, conditions, understandings, warranties, or representations, oral or written, express or implied, among them other than as set forth herein. In the event of any inconsistencies or conflicts between the provisions contained in this Agreement and the Act, the provisions of this Agreement shall govern with respect to such inconsistencies or conflicts.
>
> [Operating Agreement, Section 12.15.]

Under Michigan law, an integration clause "nullifies all antecedent agreements." *Archambo v Laws Title Ins Corp*, 466 Mich 402, 413 (2002) (citations omitted). Likewise, to the extent that a fraud claim alleges reliance on a misrepresentation that was not included a final agreement, a merger clause will make it "unreasonable for plaintiff's agent to rely on any representations not included in the letter of agreement." *UAW-GM Hum Res Ctr v KSL Recreation Corp*, 228 Mich App 486, 504 (1998). An integration clause releases all antecedent claims arising from prior or contemporaneous representations and promises unless the alleged fraud invalidated the integration clause itself. *Hamade v Sunoco Inc (R & M)*, 271 Mich App 145, 169 (2006); *UAW-GM*, 228 Mich App at 498. Consequently, collateral agreements or understandings between two parties that are not expressed in a written contract are eviscerated by a merger clause, but fraud may still proven with extrinsic evidence when it would invalidate the merger clause itself, i.e. fraud relating to the merger clause or fraud that invalidates the entire contract including the merger clause. *Star Ins Co v United Com Ins Agency, Inc*, 392 F Supp 2d 927, 929 (ED Mich, 2005) (summarizing Michigan law).

B
The Integration Clause Does Not Bar the Plaintiffs' Fraudulent Inducement Claims (But May Not Be Used for Other Purposes)

Defendant Monteiro argues that Section 12.15 of the Operating Agreement precludes the Plaintiffs from relying on any representations not reflected or expressed in the Operating Agreement against Defendant Monteiro. The Plaintiffs argue that there is no conflict over the terms of the Operating Agreement or whether it is integrated, and evidence of Defendant Monteiro's representations can be admitted to demonstrate that the Plaintiffs were fraudulently induced to invest in Landings. The Plaintiffs are correct. "[W]here the inducements for the execution of a contract are fraudulent representations as to existing facts, testimony as to such representations is not within the parol evidence rule. They do not vary, change, or alter the terms of the written contract and are admissible in evidence, as bearing upon the question of whether the contract, fair on its face, was procured by fraud." *Robinson v Great Lakes College, Inc*, 294 Mich 192, 196 (1940).

On the other hand, such alleged fraudulent statements cannot be sued for other purposes. In other words, if the claim of fraudulent inducement fails, they may not be used as the basis for other theories of liability because the integration clause bars such use.

VI
The Operating Agreement's Exculpatory Clause Does Not Afford Defendant Monteiro Relief from Claims of Willful Misconduct and Knowing Violations of the Law

A
The Law Regarding Exculpatory Clauses

Under MCL 450.4407, an operating agreement may limit a manager's monetary liability to a limited liability company or its members for breach of a duty under MCL 450.4404:

> A provision in the articles of organization or an operating agreement may eliminate or limit the monetary liability of a manager to the limited liability company or its members for breach of any duty established in section 404, except that the provision does not eliminate or limit the liability of a manager for any of the following:
> (a) The receipt of a financial benefit to which the manager is not entitled.
> (b) Liability under section 308.
> (c) A knowing violation of law.
> (d) An act or omission occurring before the date when the provision becomes effective.
>
> [MCL 450.4407.]

In light of that statutory provision, Section 6.6 of the Operating Agreement provides as follows

> **6.6 Exculpation from Liability.** To the fullest extent permitted pursuant to the Act, no Manager shall be liable to the Company or to any Member for any loss suffered by the Company unless such loss is caused by such Manager's willful misconduct or knowing violation of law. No Manager shall be liable for errors, acts or omissions that do not constitute willful misconduct or a knowing violation of law. The Managers may consult with counsel an accountants in respect of Company affairs, and provided the Managers act in good faith reliance upon the advice or opinion of such counsel or accountants, the Managers shall not be liable for any loss suffered by the Company in reliance thereon. The Managers do not, in any way, guarantee the return of the Members' Capital Contributions or a profit for the Members from the operations of the Company. The Managers shall not be responsible to any Members because of a loss of their investment in the Company or a loss in the operations of the Company. The Managers shall incur no liability to the Company or to any of the Members as a result of engaging in any other business or venture. The Managers shall be entitled to any other protection afforded to managers under the Act.
>
> [Operating Agreement, Section 6.6.]

B
To the Extent the Plaintiffs have alleged that Monteiro Engaged in Willful Misconduct and a Knowing Violation of Law, the Exculpatory Clause Does Not Shield Monteiro from Liability

Defendant Monteiro argues that there are no allegations in the Second Amended Complaint that rise to the level of willful misconduct or a knowing violation of the law. The Plaintiffs respond that the Second Amended Complaint alleges that Defendant Monteiro engaged in willful misconduct by knowingly abstaining from the management of Landings, by failing to apprise investors of risks that Defendant Borland hid, and by failing to intervene in Defendant Borland's management of the investment. They also allege further misconduct in ¶92 and ¶93 of the Second Amended Complaint, to wit: "92. As set forth above, the Managers engaged in willful misconduct and knowing violation of law and breached their fiduciary duty to Plaintiffs by failing to act honestly, acting in bad faith and failing to exercise the degree and skill or care required with respect to Landings, the Property and the Project" and "93. The Managers' misconduct includes, but is not limited to, replacing Better World, a credible and performing property management company, with Juniper and P.G. Borland, who had no property management experience and who failed to engage in any on site management, failing to obtain Plaintiffs' approval of the replacement, failing to properly supervise Juniper and P.G. Borland or take necessary action to address Juniper's and P.G. Borland's failure in managing the Property, failing to ensure that Juniper and P.G. Borland collected rent, evicted or took other appropriate action for non-payment of rent, and allowing the Property to fall into a state of disrepairand neglect." [Second Amended Complaint, ¶92-¶93.]

In the end, the Plaintiffs have alleged that Defendant Monteiro engaged in willful misconduct and a knowing violation of law against Defendant Monteiro and summary disposition is not warranted on the basis of the exculpatory clause alone. However, the exculpatory clause shields Monteiro for any conduct falling shore of willful misconduct and knowing violation of the law.

VII
Summary Disposition of the Plaintiffs' Claims Alleging Violation of Michigan Uniform Securities Act (all Defendants) (Count I)]

A
MCL 421.2509(2) (Untrue Statements and Omissions) & MCL 451.2509(6) (Fraud)

MCL 451.2509(2) imposes civil liability upon a person selling a security by means of an untrue statement:

> (2) A person is liable to the purchaser if the person sells a security in violation of section 301, or by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission, and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. All of the following apply to an action under this subsection:
> (a) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at 6% per year from the date of the purchase, costs, and reasonable attorney fees determined by the court, upon the tender of the security, or for actual damages as provided in subdivision (c).
> (b) The tender referred to in subdivision (a) may be made any time before entry of judgment. Tender requires only notice in a record of ownership of the security and willingness to exchange the security for the amount specified. A purchaser that no longer owns the security may recover actual damages as provided in subdivision (c).
> (c) Actual damages in an action arising under this subsection are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it and interest at 6% from the date of purchase, costs, and reasonable attorney fees determined by the court.
>
> [MCL 451.2509(2).]

In parallel fashion, MCL 451.2509(6) imposes civil liability upon a person that receives consideration for providing investment advice by employing a device, scheme, or artifice to defraud:

> (6) A person that receives, directly or indirectly, any consideration for providing investment advice to another person and that employs a device, scheme, or artifice to defraud the other person or engages in an act, practice, or course of business that operates or would operate as a fraud or deceit on the other person is liable to the other person. The person defrauded may maintain an action to recover the consideration paid for the advice and the amount of any actual damages caused by the fraudulent conduct that gives rise to liability under this subsection, interest at 6% from the date of the fraudulent conduct, costs, and reasonable attorney fees determined by the court, less the amount of any income received as a result of the fraudulent conduct. This subsection does not apply to a broker-dealer or its agents if the investment advice provided is solely incidental to transacting business as a broker-dealer and no special compensation is received for the investment advice.
>
> [MCL 451.2509(6).]

B
The Claim Under MCL 451.2509(2) is Plausible

Defendants Borland, Monteiro and Zawaideh argue that the Plaintiffs' claim under MCL 451.2509(2) should be dismissed because it lacks plausibility since the Plaintiffs admit the Defendants invested their own capital and the belief that the Defendants would act against their own self-interest strains credibility. The Plaintiffs respond that MCL 451.2509 does not require the Plaintiffs to plead or prove "logic" behind the fraudulent scheme. The Plaintiffs add that the Defendants' reliance on *In re GeoPharma, Inc Sec Litig*, 399 F Supp 2d 432 (SDNY 2005), in which a securities claim was dismissed because "the alleged scheme could not possibly have succeeded," is misplaced.

In fact, the Defendants fail to explain why this Court should follow nonbinding, federal precedent presumably following New York law. Indeed, the Defendants' arguments really to speak the credibility of the motives and intentions of the Plaintiffs and the Defendants – a classic fact issue for the factfinder. In the end, the Defendants have failed to sufficiently demonstrate that the purported violation of MCL 451.2509(2) lacks plausibility or that plausibility is an appropriate basis for summary disposition.

C
Whether Purported Misrepresentations Constitute Fraud is Properly Left for the Factfinder

Defendants Borland and Zawaideh argue that future promises or projections and good-faith opinions and puffery do not constitute actionable fraud.

"An action for fraud cannot be predicated upon an expression of opinion or upon puffery" and "[i]n general, an action for fraud cannot be based on the failure of future events to transpire as represented or predicted." *Mercantile Bank of Michigan v CLMIA, LLC*, unpublished per curiam opinion of the Court of Appeals, issued February 12, 2015 (Docket No. 316777), p 8. However, under the bad faith exception, a fraudulent misrepresentation may be based upon a promise made in bad faith without intention of performance. *Hi-Way Motor Co v International Harvester Co,* 398 Mich 330, 338-339 (1976); *Foreman v Foreman*, 266 Mich App 132, 143 (2005) ("[A]n unfulfilled promise to perform in the future is actionable when there is evidence that it was made with a present undisclosed intent not to perform." Further, fraud in the inducement rests on a false representation of some future act. *Custom Data Sol, Inc v Preferred Capital, Inc*, 274 Mich App 239, 242-243 (2006) (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"). In the end, whether the purported misrepresentations were merely projections or matters of opinions and puffery is a question of material fact properly left for the factfinder.

D
The Second Amended Complaint Fails to Sufficiently Allege a Violation of MCL 451.2509(6) as to Defendant Borland

Defendant Borland argues that the Second Amended Complaint fails to sufficiently allege that he received consideration and in particular, "does not allege which of the Plaintiffs paid which of the Defendants for investment advice, what advice was received, and in what amounts." Defendants Borland and Zawaideh also argue that Count I based on MCL 451.2509(6) fails to meet the heightened pleading requirements applicable to fraud.

When pleading a cause of action involving fraud, the circumstances alleged to constitute fraud must be stated with particularity. MCR 2.112(B)(1). See also *Stephens v Worden Ins Agency, LLC*, 307 Mich App 220, 229–30 (2014) ("Fraud claims must be pleaded with particularity, addressing each element of the tort"). Because of this heightened pleading standard, fraud "is not to be lightly presumed, but must be clearly proved . . .

by clear, satisfactory and convincing" evidence. *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414 (2008) (citations and quotations omitted). Michigan courts have relied on the federal "who, what, when, where, and how" requirement for particularity in fraud claims. See *Bell v Keller*, unpublished per curiam opinion of the Court of Appeals, issued May 20, 2021 (Docket No. 352421), p 7, quoting *Dileo v Ernst & Young*, 901 F2d 624, 627 (CA 7, 1990).

Paragraph 55 of the Second Amended Complaint alleges that "(a) Zawaideh and Borland represented a goal of '9-10% or better annual cash on cash for investors and at least a 20% IRR in 5 years or less,' (b) in a video recorded by Borland that was sent to investors by Borland and Zawaideh in separate emails, Borland stated, (1) multi-family properties continue to be a strong asset class, 'our portfolio is still very very healthy. Multi-family continues to be a very strong asset class,' (2) per the final pro forma, 'we were able to keep investors pretty much what we had promised you,' and (3) 'we're anticipating at least a 20% IRR [Internal Rate of Return] or above on this asset' (4) 'Obviously there is a lot of things that are affected by government shutdowns in the current pandemic. Thankfully the assets that we purchased have not been affected, thank goodness, based on our investment strategy,' and (5) 'the pro forma is final at this point, so that's it locked in stone,' (c) Zawaideh represented to Plaintiffs, directly and indirectly, that Landings was a stabilized property and was a secured investment in which returns would exceed the amount of capital invested plus the preferred return on such investment, and (d) Zawaideh published and circulated printed materials and videos on

YouTube and other social media sites promoting his expertise in placing investments in, amongst other things, multi-family developments and other types of developments involving passive income." [Second Amended Complaint, ¶55.]

Further, the Plaintiffs argue that ¶19-¶22 allege that Defendants Borland Zawaideh sold the Plaintiffs securities by way of fraud:

> 19. Borland and Zawaideh represented a goal of '9-10% or better annual cash on cash for investors and at least a 20% IRR in 5 years or less.' January 18, 2021 emails, **Exhibit 1.**
>
> 20. In the same emails, Zawaideh and Borland attached a video recorded by Borland in which Borland stated, among other things: (1) 'our portfolio is still very very healthy. Multi-family continues to be a very strong asset class,' (2) per the final pro forma, 'we were able to keep investors pretty much what we had promised you,' (3) 'we're anticipating at least a 20% IRR [Internal Rate of Return] or above on this asset' (4) 'Obviously there is a lot of things that are affected by government shutdowns in the current pandemic. Thankfully the assets that we purchased have not been affected, thank goodness, based on our investment strategy,' and (5) 'the pro forma is final at this point, so that's it locked in stone.'
>
> 21. The same email also included a hyperlink to the 'final' pro forma as referenced by Borland in the attached video. (Exhibit 2, 'final' Pro Forma). This pro forma consisted of a three-page summary of information that stated the debt service associated with the Property would be static over four years, that insurance was considered a 'fixed' expense, and that investors could anticipate a 23. 4 % 5 year IRR.
>
> 22. Zawaideh and Borland's representations as related to an anticipated IRR are consistent with those set forth in the Private Placement Memorandum circulated to Plaintiffs and other investors which states: 'Anticipated 5 year IRR is expected to be above 20%, anticipated annual cash on cash is expected to fall between 8-10%.' The Private Placement Memorandum is in Defendants' possession.
>
> [Second Amended Complaint, ¶19-¶22.]

The Plaintiffs have pleaded fraud by alleging that Defendant Borland and Zawaideh made untrue statements of material fact; Defendant Borland and Zawaideh provided the fraudulent information identified in ¶19-¶21; misrepresentations were made in email communications on January 18, 2021; and these statements were false and made to induce the Plaintiffs' reliance on them.

However, the Plaintiffs do not sufficiently allege that Defendant Borland received consideration. The Plaintiffs point to ¶26 ("Ultimately, Plaintiffs invested in Landings, and Defendants Borland and Zawaideh received compensation for promotion of the investment, providing investment advice to Plaintiffs and selling securities to Plaintiffs and other investors") and ¶27 ("Specifically, after Plaintiffs invested in Landings, and Landings completed its purchase of the Property, Borland and Zawaideh were paid a 'syndication fee' within days of the closing date"), but neither allegation identifies who paid for the investment advice, what amount was paid, and what advice was received.[6] These allegations fall short. Accordingly, summary disposition of Count I premised upon a violation of MCL 451.2509(6), against Defendant Borland (remember Defendant

[6] Defendant Borland's argument that the Plaintiffs admitted they never paid him for any investment advice was not raised until the Reply. By waiting until the Reply, the argument is inappropriately before the Court. To hold otherwise would undermine due process. Well-settled procedural rules clearly establish that the time to identify and flesh out the authority, evidence and arguments upon which a moving party believes summary disposition is warranted is at the time the Motion is filed – not after the response in opposition has been submitted noting material deficiencies. See, e.g., MCR 2.119(A)(1)(b) (requiring a motion to "state with particularity the grounds and authority on which it is based"). Binding precedent further provides that "[r]eply briefs may contain only rebuttal argument, and raising an issue for the first time in a reply brief is not sufficient to present the issue for appeal." *Blazer Foods, Inc v Restaurant Properties, Inc.,* 259 Mich App 241, 252 (2003).

Zawaideh did not timely make this argument) is warranted under MCR 2.116(C)(8).[7] Genuine issues of material fact preclude summary dismissal of Count I, premised upon a violation of MCL 451.2509(6) against Defendant Borland and Defendant Zawaideh under MCR 2.116(C)(10).

E
The Plaintiffs Have Failed to Plead Monteiro Committed Fraud

Defendant Monteiro argues that there are no allegations or evidence that he had communications with the Plaintiffs before their investments were made. Defendant Monteiro further argues that the Plaintiffs do not allege that he provided investment advice, solicited investments or received any consideration from the Plaintiffs. The Plaintiffs do not challenge this argument. Indeed, the Plaintiffs' Response to Defendant Monteiro's Motion addresses Borland's individual liability, not the individual liability of Defendant Monteiro. [Plaintiffs' Response, pp 6-8.] "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). Accordingly, summary disposition of Count I as to Defendant Monteiro is warranted.

[7] In his Reply, Defendant Zawaideh argues that the Plaintiffs fail to allege consideration for providing investment advice. However, this argument was not raised in Defendant Zawaideh's Motion and is not appropriately before the Court. See above.

VIII
Violation of Michigan Uniform Securities Act (all Defendants) (Count II)

A
MCL 451.2509(4)

MCL 451.2509(4) imposes civil liability on a person acting as a broker-dealer that sells securities in violations of certain sections: "A person acting as a broker-dealer or agent that sells or buys a security in violation of section 401(1), 402(1), or 506 is liable to the customer. The customer, if a purchaser, may maintain an action for recovery of actual damages as specified in subsection (2) or, if a seller, a remedy as specified in subsection (3)."[8] A "broker-dealer" is "a person engaged in the business of effecting transactions in securities for the account of others or for the person's own account." MCL 451.2102(d). MCL 451.2401 prohibits a person from " transact[ing] business in this state as a broker-

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[8] Subsection (2) provides as follows:

> (2) A person is liable to the purchaser if the person sells a security in violation of section 301, or by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission, and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. All of the following apply to an action under this subsection:
> (a) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at 6% per year from the date of the purchase, costs, and reasonable attorney fees determined by the court, upon the tender of the security, or for actual damages as provided in subdivision (c).
> (b) The tender referred to in subdivision (a) may be made any time before entry of judgment. Tender requires only notice in a record of ownership of the security and willingness to exchange the security for the amount specified. A purchaser that no longer owns the security may recover actual damages as provided in subdivision (c).
> (c) Actual damages in an action arising under this subsection are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it and interest at 6% from the date of purchase, costs, and reasonable attorney fees determined by the court.

dealer unless the person is registered under this act as a broker-dealer or is exempt from registration as a broker-dealer under subsection (2) or (4)." MCL 451.2401(1).

In *Pransky v Falcon Group, Inc*, 311 Mich App 164 (2015), our Court of Appeals determined that "[b]y defining a broker-dealer to be a person 'engaged in the business of effecting transactions in securities,' the Legislature limited the term to those persons whose business operations regularly include transactions in securities." *Pransky*, 311 Mich App at 175. The *Pransky* Court remarked that "it is not enough that the person's business involves transactions in securities in any way; the person's business must be one 'effecting' transactions in securities. The verb 'effect' suggests something stronger than tangential involvement in the transfer of securities; rather, the person's business must involve bringing about or accomplishing the transactions in securities." *Id*.

In parallel fashion, an "agent" is "an individual other than a broker-dealer who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities or represents an issuer in effecting or attempting to effect purchases or sales of the issuer's securities." MCL 451.2102(b). MCL 451.2401(1). MCL 451.2402 prohibits an individual from "transact[ing] business in this state as an agent unless the individual is registered under this act as an agent or is exempt from registration as an agent under subsection (2)." MCL 451.2402(1).

1
The Allegations

The Second Amended Complaint alleges:

> 78. With respect to the promotion and sale of securities in Landings to Plaintiffs, Defendants acted as agents or broker-dealers and/or transacted business as agents or broker-dealers pursuant to MUSA.
>
> 79. Defendants received compensation for promotion of the investment, providing investment advice to Plaintiffs and selling securities to Plaintiffs and other investors.
>
> 80. Defendants are not registered agents or broker-dealers and are not exempt from registration.
>
> 81. Defendants' actions violate MCL 451.2401, MCL 450.2402 and MCL 451.2509(4).
>
> [Second Amended Complaint, ¶78-¶81.]

2
Analysis

a
Defendant Borland

Defendant Borland argues that Count II fails to state a claim because the Plaintiffs (a) "fail to allege that any Defendant was required to register as a broker-dealer or agent" and (b) "allege no facts that any of the Defendants 'effectuated trades' in securities or represented a person or entity who did." However, Defendant Borland's argument is unavailing because the Second Amended Complaint pleads that "Defendants are not registered agents or broker-dealers and are not exempt from registration" and that the

Defendants promoted the investment, provided investment advice and sold securities. [Second Amended Complaint, ¶78-¶81.] Hence, the Plaintiffs have sufficiently stated a claim for violation of MCL 451.2509(4), and summary disposition is not warranted.

b
Defendant Zawaideh

Defendant Zawaideh argues that a person can only be liable under MCL 451.2509(4) if the person is an unregistered broker-dealer or agent and either (a) sold unregistered securities in violation of Section 301 or (b) made an untrue statement of material fact or omitted a material fact in connection with the alleged sale. Defendant Zawaideh further alleges that the Plaintiffs have not alleged that the Defendants sold unregistered securities and have not alleged that Defendant Zawaideh made an untrue statement of material fact or omitted a material fact. However, as noted above, the Seconded Amended Complaint specifically alleges that the Defendants sold securities in violation of the law because they were not registered broker-dealers or agents. The Plaintiffs correctly argue that Defendant Zawaideh misconstrues the language of 451.2509(4) by expanding upon the requisite elements for liability under subsection (4). The conduct establishing liability under subsection (2) ("sell[ing] a security in violation of section 301, or by means of an untrue statement of a material fact or an omission to state a material fact . . .") is not incorporated into MCL 451.2509(4). Instead, MCL 451.2509(4) merely references subsection (2) as the means to calculate actual damages. In the end, summary disposition is not warranted.

B
Liability Under MCL 451.2509(7)

MCL 451.2509(7) imposes joint and several liability on persons associated with persons liable under MCL 451.2509(2) to MCL 451.2509(6):

> (7) The following persons are liable jointly and severally with and to the same extent as persons liable under subsections (2) to (6):
> (a) A person that directly or indirectly controls a person liable under subsections (2) to (6), unless the controlling person sustains the burden of proving that the controlling person did not know, and in the exercise of reasonable care could not have known, of the existence of the conduct by reason of which the liability is alleged to exist.
> (b) An individual who is a managing partner, executive officer, or director of a person liable under subsections (2) to (6), including each individual having a similar status or performing similar functions, unless the individual sustains the burden of proving that the individual did not know and, in the exercise of reasonable care could not have known, of the existence of the conduct by reason of which the liability is alleged to exist.
> (c) An individual who is an employee of or associated with a person liable under subsections (2) to (6) and who materially aids the conduct giving rise to the liability, unless the individual sustains the burden of proving that the individual did not know and, in the exercise of reasonable care could not have known, of the existence of the conduct by reason of which the liability is alleged to exist.
> (d) A person that is a broker-dealer, agent, investment adviser, or investment adviser representative that materially aids the conduct giving rise to the liability under subsections (2) to (6), unless the person sustains the burden of proving that the person did not know and, in the exercise of reasonable care could not have known, of the existence of the conduct by reason of which liability is alleged to exist.
>
> [MCL 451.2509(7).]

1
The Allegations

The Second Amended Complaint alleges:

> 82. To the extent any of the Defendants are not directly liable for violations of MCL 451.2509(4), they are jointly and severally liable with the directly liable Defendants pursuant to MCL 451.2509(7).
>
> 83. Specifically, pursuant to MCL 451.2509(7)(a), Defendants directly and/or indirectly controlled one another, through a veiled design in which the controlling and controlled individuals intended to deceive and mislead Plaintiffs with respect to Defendants' promotion and sale of the investment and the Project, Defendants' solicitation of investors and communications sent to investors by or through Defendants.
>
> 84. Defendants are managing partners, executive officers, directors or persons having similar status or performing similar functions for the Borland Group and are therefore liable for the conduct giving rise to liability under MCL 451.2509(4), pursuant to MCL 45 l .2509(7)(b).
>
> 85. Defendants materially aided one another, as employees of the Borland Group or otherwise as associated persons, in the conduct giving rise to liability under MCL 451.2509(4), rendering them liable pursuant to MCL 451.2509(7)(c).
>
> 86. Defendants are broker-dealers, agents, investment advisers or investment adviser representatives who materially aided one another in conduct giving rise to liability under MCL 451.2509(4), rendering them liable for such conduct pursuant to MCL 451.2509(7)(d).
>
> [Second Amended Complaint, ¶82-¶86.]

2
Analysis

a
Defendant Borland

Defendant Borland argues that the Plaintiffs' claim for joint and several liability under MCL 451.2509(7) fails because the Plaintiffs fail to plead or sufficiently allege (a) a viable underlying primary violation and (b) that Borland controlled Zawaideh.

Defendant Borland also argues that the Second Amended Complaint "contains no facts, just conclusions, that would make Borland liable for the actions of Zawaideh. ¶¶71-75." [Borland Motion, p 11.]

The Plaintiffs counter that Zawaideh is liable for violations under MCL 451.2509(2) and MCL 451.2509(6), and Borland was sufficiently associated with Zawaideh to be held liable under MCL 451.2509(7). However, the Plaintiffs' Response addresses the factual sufficiency of the claim rather than the legal sufficiency. Indeed, the Plaintiffs' Response cites to evidence (i.e., depositions, the Zawaideh's questionnaire and emails) and fails to address the purported pleading deficiencies. The Plaintiffs have therefore abandoned any counter-argument to Defendant Borland's position that the Plaintiffs fail to state a claim under MCL 451.2509(7). This Court need not divine or conjure the Plaintiffs' argument because after all, "[t]rial [c]ourts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute." *Walters v Nadell*, 481 Mich 377, 388 (2008). Accordingly, summary disposition of Count I premised on a violation of MCL 451.2509(7) is warranted in Defendant Borland's favor under MCR 2.116(C)(8).

b
Defendant Zawaideh

Defendant Zawaideh similarly argues that the Plaintiffs fail to plead a viable underlying primary violation. The Plaintiffs respond that Borland is liable for violations under MCL 451.2509(2) and MCL 451.2509(6), and Zawaideh was sufficiently associated with Borland to be held liable under MCL 451.2509(7). However, the Plaintiffs' Response again addresses the factual sufficiency of the claim rather than the legal sufficiency. Indeed, the Plaintiffs' Response cites to evidence (i.e., depositions, the Zawaideh's questionnaire and emails) and fails to address the purported pleading deficiencies. The Plaintiffs have therefore abandoned any counter-argument to Defendant Borland's position that the Plaintiffs fail to state a claim under MCL 451.2509(7). This Court need not divine or conjure the Plaintiffs' argument because after all, "[t]rial [c]ourts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute." *Walters*, 481 Mich at 388. Accordingly, summary disposition of Count I premised on a violation of MCL 451.2509(7) is warranted in Defendant Zawaideh's favor under MCR 2.116(C)(8).

c
Defendant Monteiro

Defendant Monteiro argues that he cannot be held jointly and severally liable because the Plaintiffs cannot prove fraud against the person primarily alleged to have sold securities. Defendant Monteiro further argues that he did not direct or control Borland or Borland's alleged acts or statements.

The Plaintiffs argue that Monteiro is jointly and severally liable for Borland's violations under MCL 451.2509(2), (4) and (6) because Monteiro was sufficiently associated with Borland and materially aided Borland's conduct. The Plaintiffs claim that Monteiro was associated with Borland by virtue of his position as a manager of Landings, guarantor of the loan, and because he was identified as "general partner" investment presentation documents. The Plaintiffs also claim that Monteiro aided Borland's conduct because he was required to be named a manager as a signer on the loan, he knew that the loan was subject to a variable interest rate, knew of risks associated with a variable interest loan and assumed disclosures were being made. There are sufficient genuine issues of fact to preclude summary disposition in favor of Monteiro.

C
Breach of Fiduciary Duty (Borland Group, Borland, Anderson, Monteiro) (Count III)

1
The Law

a
MCL 450.4404(1)

Under MCL 450.4404(1) of the Michigan Limited Liability Company Act, "[a] manager shall discharge the duties of manager in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner the manager reasonably believes to be in the best interests of the limited liability company." "MCL 450.4404(1) indicates that a manager's fiduciary duties are owed to the company, not the individual members." *BSA Mull, LLC v Garfield Investment Co*, unpublished, per curiam opinion of the Court of Appeals, issued September 30, 2014 (Docket Nos. 310989, 311911, 315359, 315544), p 6.

b
The Business Judgment Rule

Generally, in the absence of bad faith or fraud, courts are reluctant to interfere in the conduct of corporate affairs. *In re Butterfield Estate*, 418 Mich 241, 255 (1983). "Under the business-judgment rule, courts refrain from interfering in matters of business judgment and discretion unless the directors or officers 'are guilty of willful abuse of their discretionary powers' or act in bad faith." *Franks v Franks*, 330 Mich App 69, 100 (2019) quoting *Reed v Burton*, 344 Mich 126, 130 (1955).

2
Analysis

a
Defendant Borland

Defendant Borland argues a manager's fiduciary duties are owed to the company and not the individual members, the business judgment rule bars any allegations that the Defendants mismanaged the Property, and the Plaintiffs lack standing because their allegations are derivative in nature, not direct. The Plaintiffs contend that the Court should apply the Michigan Supreme Court's determination in *Murphy v Inman*, 509 Mich 132 (2022), that "corporate directors owe their shareholders fiduciary duties under Michigan common law that exist independently of the duties prescribed in the BVA," to this cause of action notwithstanding that Landings is a limited liability company, not a corporation. However, the Plaintiffs fail to proffer any authority to compel the Court to disregard *BSA Mull, LLC* which speaks directly to MCL 450.4404(1) of the Michigan Limited Liability Company Act. In short, the Plaintiffs have not demonstrated that a manager of a limited liability company owes a fiduciary duty to its members.

Further, the Plaintiffs do not address the business judgment rule. Instead, the Plaintiffs argue that Defendant Borland breached his fiduciary duty by obtaining the loan which was subject to a variable interest rate, mismanaging the Property, removing Matt Anderson's access to Landings' bank accounts, withdrawing Landings funds and failing to provide those funds to investors. By failing to join the argument, the Plaintiffs have abandoned any contra argument to Defendant Borland's position that the Plaintiffs' allegations of mismanagement are not justiciable under the business judgment rule. "A party abandons a claim when it fails to make a meaningful argument in support of its position." *Berger*, 277 Mich App at 712. Accordingly, summary disposition of the Plaintiffs' claim for Breach of Fiduciary Duty (Count III) against Defendant Borland is warranted.[9]

[9] Defendant Borland's additional argument that the Plaintiffs lack standing because their allegations are derivative in nature, not direct, is moot. Nonetheless, this additional argument was also not addressed by the Plaintiffs.

b
Defendant Monteiro

i
The Second Amended Complaint Fails to State a Claim

Defendant Monteiro argues that the Second Amended Complaint does not allege that he acted intentionally to thwart his own interests and his actions with respect to the variable interest rate do not rise to the level of willful abuse of discretionary power or bad faith. The Plaintiffs again argue that the Court should apply *Murphy v Inman*, 509 Mich 132 (2022); however, the Court has rejected this argument above. The Plaintiffs further argue that the business judgment rule does not shield Defendant Monteiro's conduct where he was willfully uninvolved and took no part in the management of Landings, but the Second Amended Complaint does not allege a lack of management or failure to exercise oversight.

ii
The Plaintiffs Have No Standing

Defendant Monteiro further argues that the Plaintiffs' allegations of mismanagement are derivative in nature, not direct, which divests the Plaintiffs of standing.

"[A] suit to enforce corporate rights or to redress injury to the corporation is a derivative suit; although it may be brought by the shareholder, the action itself belongs to the corporation." *Murphy v Inman*, 509 Mich 132, 160-161 (2022). A shareholder has no standing to sue if a claim is derivative. MCL 450.1491a defines a "derivative proceeding" as a "civil suit in the right of a domestic corporation or foreign corporation that is authorized to or does transact business in this state." Thus, in general, "a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising from contract or tort, ordinarily must be brought in the name of the corporation and not that of a stockholder, officer or employee." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 474 (2003). Our Court of Appeals has recognized two exceptions to this general rule where (1) the individual "has sustained a loss separate and distinct from that of other stockholders generally," *Christner v Anderson, Nietzke & Co, PC*, 433 Mich 1, 9 (1989) (quotation marks omitted), or where (2) the individual shows a "violation of a duty owed directly to the individual that is independent of the corporation," *Belle Isle Grill*, 256 Mich App at 474.

On the other hand, a direct action belongs to a shareholder when the shareholder suffers harm or seeks to enforce a personal right. Our Supreme Court has refined the framework for determining whether an action is direct or derivative, explaining:

> [I]n order to distinguish between direct and derivative actions brought by shareholders of a corporation in Michigan, courts must ask (1) who suffered the alleged harm, and (2) who would receive the benefit of any remedy recovered. The second question logically follows from the first. If the answer to both questions is the corporation, the action is derivative. If the shareholder suffers the harm independent of the corporation and receives the remedy rather than the corporation, the action is direct.

[*Murphy*, 509 Mich at 165.][10]

The Plaintiffs claim to meet both of the enumerated exceptions to enable them to bring this claim as members of Landings. In particular, the Plaintiffs argue they were individually harmed and they would receive the benefit of any remedy recovered. However, the Second Amended Complaint alleges that the managers alleged misconduct "resulted in diminished occupancy and reduced revenue, which ultimately led to an inability to service the Property's debt and loss of the Property in foreclosure, which in tum has resulted in a total loss by Plaintiffs of their investment and the expected and promised return thereon." [Second Amended Complaint, ¶94.] This allegation reflects direct harm to Landings and derivative harm to the Plaintiffs. As such, summary disposition of the Plaintiffs' claim for Breach of Fiduciary Duty (Count III) against Defendant Monteiro is warranted on this independent basis.

D
Minority Member Oppression (Borland Group, Borland, Monteiro) (Count IV)

1
MCL 450.4515

Under MCL 450.4515, a member of a limited liability company may have a cause of action where "acts of the managers or members in control of the limited liability

[10] The Court in *Murphy* found that the plaintiff had standing to bring a direct shareholder action against the defendants for an alleged breach of their common-law fiduciary duties in handling a cash-out merger transaction because a breach would directly and exclusively harm the shareholders of the corporation.

company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member." MCL 450.4515(1). "'Willfully unfair and oppressive conduct' means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interest of the member as a member." MCL 450.4515(2). Willfully unfair and oppressive conduct "does not include conduct or actions that are permitted by the articles of organization, an operating agreement, another agreement to which the member is a party, or a consistently applied written company policy or procedure." *Id.* The "'harm' that is actionable under MCL 450.4515 is the 'substantial interference with the interest of the member as a member.'" *Frank v Linkner*, 500 Mich 133, 151 (2017).

2
Analysis

a
Defendant Borland

Defendant Borland again argues that the business judgment rule precludes the Plaintiffs' allegations of mismanagement. Defendant Borland further argues that Section 6.1 of the Operating Agreement[11] authorizes the Defendants to manage the Property and

[11] Section 6.1 of the Operating Agreement provides:

> **6.1 Management.** Except as otherwise expressly required by this Agreement and the non-waivable provisions of applicable law, the entire overall management and control of the business and affairs of the Company shall be vested with managers (the **"Managers"**) and the Managers shall make all decisions regarding the business of the Company. A Manager need not be a resident of the State of Michigan or be a Member of the Company. Subject to <u>Sections 6.5</u> and <u>9.1</u>, the Managers shall have full and complete authority, power and discretion to manage and control the business, affairs and properties of the Company, to

Section 6.6 of the Operating Agreement precludes a manager from being held "liable to the Company or any Member for any loss suffered by the Company unless such loss is caused by such Manager's Willful misconduct or knowing violation of law." [Operating Agreement, Section 6.6.]

The Plaintiffs argue that Defendant Borland's intentional acts and misrepresentations are sufficiently illegal or fraudulent and constitute willfully unfair and oppressive conduct to make him liable under MCL 450.4515(1). However, the Plaintiffs have again failed to address the business judgment rule or the exculpation from liability in Section 6.6 of the Operating Agreement. By failing to meaningfully join the argument, the Plaintiffs have abandoned any contra argument to Defendant Borland's position that Count IV fails to state a claim. *Berger*, 277 Mich App at 712 ("A party

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make all decisions regarding those matters and to perform any and all other acts and activities customary or incident to the management of the Company business, including but not limited to any of the following:
(a) changing the fundamental nature of the business or purposes of the Company;
(b) selling, exchanging, leasing, or otherwise transferring or disposing of all or substantially all of the assets of the Company;
(c) arranging for the operation and/or management of the Property and hiring of a management agent to provide for such operation and/or management, which management agent may be an affiliate of any Member or Manager;
(d) selling, exchanging or otherwise transferring any real property of the Company;
(e) making any capital expenditures or any capital additions or improvements;
(f) borrowing money in its name in furtherance of the business, securing such indebtedness by mortgage, pledge or other lien on any of its property, or modifying the terms of any such indebtedness, except in the ordinary course of business;
(g) loaning or advancing to or allowing a withdrawal by a Member of the Company;
(h) managing, administering, conserving, improving, developing, operating, leasing, utilizing and defending the Company's property, directly or through third parties; or
(i) creating any class of Units with powers, preferences, rights, privileges, qualifications, limitations and restrictions that are superior to those of the then-existing Units.

[Operation Agreement, Section 6.1.]

abandons a claim when it fails to make a meaningful argument in support of its position”). Accordingly, summary disposition of the Plaintiffs’ claim for Minority Member Oppression (Count IV) against Defendant Borland is warranted.

b
Defendant Monteiro

Defendant Monteiro argues that his actions in assisting with securing a variable rate loan were within the purview of Section 6.1 of the Operating Agreement and actions permitted by an operating agreement are not willfully unfair and oppressive conduct under MCL 450.4515(2). Defendant Monteiro further argues that no evidence has been presented that he engaged in bad faith, willful misconduct or knowingly violated any laws under MCL 450.4515. The Plaintiffs argue that their claim survives because “Monteiro’s persistent absence despite being named a manager of Landings interfered with the Plaintiffs’ interests as members of Landings seeking a return on their investment.” The Plaintiffs’ cursory argument fails to address Section 6.1 of the Operating Agreement. The Plaintiffs further fail to cite legal authority to support that the “persistent absence” is willfully unfair and oppressive conduct. “A party cannot assert a position and then it to this Court to search for authority to sustain or reject that position, or to unravel and elaborate for him his arguments.” *People v Bennett*, unpublished per curiam opinion of the Court of Appeals, issued April 8, 2008 (Docket No. 274390), p. 3. In the end, summary disposition of the Plaintiffs’ claim for Minority Member Oppression (Count IV) against Defendant Monteiro is warranted.

IX
Negligence (Borland Group, Borland, Monteiro) (Count V)

A
The Allegations

The Second Amended Complaint alleges that:

> 105. The Managers owe a duty of care to Plaintiffs regarding the management, operation, and finances of the Property and Landings.
>
> 106. The Managers' misconduct includes, but is not limited to, replacing Better World, a credible and performing property management company, with Juniper and P.G. Borland, who had no property management experience and who failed to engage in any on site management, failing to obtain Plaintiffs' approval of the replacement, failing to properly supervise Juniper and P.G. Borland or take necessary action to address Juniper's and P.G. Borland's failure in managing the Property, failing to ensure that Juniper and P.G. Borland collected rent, evicted or took other appropriate action for non-payment of rent, and allowing the Property to fall into a state of disrepair and neglect.
>
> 107. These failures resulted in diminished occupancy and reduced revenue, which ultimately led to an inability to service the Property's debt and loss of the Property in foreclosure, which in turn has resulted in a total loss by Plaintiffs of their investment and the expected and promised return thereon.
>
> [Second Amended Complaint.]

B
The Law of Negligence

To establish negligence, a plaintiff must prove: (1) a duty owed to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6 (2000). The "failure to perform a contractual duty cannot give rise to a tort action unless the plaintiff alleges a violation of a duty separate and distinct from the underlying contractual obligation." *Smith Living Trust v Erickson Retirement Communities*, 326 Mich App 366, 395 (2018). "The threshold inquiry is whether the plaintiff alleges violation of a legal duty separate and distinct from the contractual obligation." *Rinaldo's Const Corp v Mich Bell Telephone Co*, 454 Mich 65, 84 (1997).

C
The Economic Loss Doctrine

The economic loss doctrine is a "judicially created doctrine" that bars tort claims for economic losses resulting from commercial transactions. Under the economic loss doctrine, economic losses are only recoverable in contract, not tort. *Quest Diagnostics, Inc v MCI WorldCom, Inc*, 254 Mich App 372, 376 (2002); *Neibarger v Universal Coops, Inc*, 439 Mich 512, 520-523 (1992) (explaining that the economic loss doctrine provides that "where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only economic losses."). However, the economic loss doctrine is only applied to contracts for the sale of goods. See *1-800 Bathtub, LLC v ReBath, LLC*, unpublished per curiam opinion of the Court of Appeals, issued April 18, 2024 (Docket No. 357932), p 7 ("We have only applied the economic-loss doctrine to contracts for goods, and we have specifically declined to apply the doctrine to service contracts"), citing *Higgins v Lauritzen*, 209 Mich App 266 (1995) (reversing summary disposition on basis that the economic-loss doctrine was wrongly applied to a contract for services) and *Quest Diagnostics,* 254 Mich App at

379 ("This Court has declined to apply the economic[-]loss doctrine where the claim emanates from a contract for services.").

D
The Plaintiffs Have Failed to Plead a Viable Claim of Negligence

Defendants Borland and Monteiro argue that the Plaintiffs' claim for negligence is barred by the economic loss doctrine and the business judgment rule because the Defendants' managerial duties arose out of Sections 6.1 and 6.4 of the Operating Agreement. The Plaintiffs fail to address the economic loss doctrine or the business judgment rule in the context of their claim for negligence, but instead argue that the Second Amended Complaint alleges legal duties separate and distinct from any contractual obligations under the Operating Agreement. In particular, the Plaintiffs point to ¶93 and ¶105 of the Second Amended Complaint. However, ¶93 of the Second Amended Complaint alleges that "The Managers' misconduct includes, but is not limited to, replacing Better World, a credible and performing property management company, with Juniper and P.G. Borland, who had no property management experience and who failed to engage in any on site management, failing to obtain Plaintiffs' approval of the replacement, failing to properly supervise Juniper and P.G. Borland or take necessary action to address Juniper's and P.G. Borland's failure in managing the Property, failing to ensure that Juniper and P.G. Borland collected rent, evicted or took other appropriate action for non-payment of rent, and allowing the Property to fall into a state of disrepair and neglect" and ¶105 of the Second Amended Complaint alleges "[t]he Managers owe a duty of care to Plaintiffs regarding the management, operation, and finances of the Property and Landings," [Second Amended Complaint, ¶93, ¶105]. Neither allegation identifies a duty owed separate and distinct from the Operating Agreement. Further, the Plaintiffs' argument that the status as investor and manager creates a legal duty is unsupported by legal authority. Accordingly, summary disposition of the Plaintiffs' claim for Negligence (Count V) against Defendant Borland is warranted.

X
Books and Record (Count VI)

A
The Allegations

The Second Amended Complaint alleges that

> 110. The Managers are in possession and control of the books and records of Landings.
>
> 111. Pursuant to the Operating Agreement and MCL 450.4503, Plaintiffs are entitled to inspect the books and records of Landings and obtain true and full information regarding the current state of Landings.
>
> 112. Plaintiffs have requested access to the books and records of Landings, but the Managers have failed and/or refused to produce all of the requested documents.

[Second Amended Complaint.]

B
MCL 450.4503(5)

MCL 450.4503(5) provides that "A member may have a formal accounting of a limited liability company's affairs as provided in an operating agreement or whenever circumstances render it just and reasonable." Section 5.1 of the Operating Agreement provides that "Such books and records shall be open to inspection by any Member (or such Member's authorized representative) upon such Member's reasonable request and during ordinary business hours." [Operating Agreement, Section 5.1.]

C
The Plaintiffs Have Failed to Plead a Claim Under MCL 450.4503(5)

Defendant Borland argues that Count VI should be summarily dismissed because "the Plaintiffs do not allege that [the] Defendants breached Section 5.1 of the Operating Agreement" and "[t]here is no basis to adjudicate a claim for books and records under MCL 450.4503 when Plaintiffs failed to allege that Defendants breached Section 5.1 of the Operating Agreement."

The Plaintiffs present no counter-argument to address or challenge Borland's position. If a party fails to adequately brief a position, or support a claim with authority, it is abandoned. *Yee v Shiawassee Co Bd of Commrs*, 251 Mich App 379, 406 (2002). Thus, the Plaintiffs have abandoned any contra argument to Borland's position that Count VI must be summarily dismissed. After all, judges "are not like pigs, hunting for truffles" that might support a party's position. *Dibrell v City of Knoxville,* 984 F3d 1156 (CA 6, 2021).

Accordingly, the Plaintiffs' claim for Books and Records (Count VI) against Defendant Dylan Borland is dismissed.[12]

[12] Defendant Monteiro did not raise this argument and does not seek the same relief.

ORDER

In light of the foregoing Opinion,

- Plaintiff Jonathan Mazur's claims against Defendant John Monteiro and Defendant Mark Zawaideh are DISMISSED;

- the Plaintiffs' claim for Violation of Michigan Uniform Securities Act (Count I), against Defendant Dylan Borland premised upon a violation of MCL 451.2509(6), is DISMISSED under MCR 2.116(C)(8);

- the Plaintiffs' claim for Violation of Michigan Uniform Securities Act (Count I), against Defendant John Monteiro premised upon a violation of MCL 451.2509(2) and/or MCL 451.2509(6), is DISMISSED;

- the Plaintiffs' claim for Violation of Michigan Uniform Securities Act (Count II) against Defendant Dylan Borland and Defendant Mark Zawaideh premised upon a violation of MCL 451.2509(7) is DISMISSED under MCR 2.116(C)(8);

- the Plaintiffs' claim for Breach of Fiduciary Duty (Count III) against Defendant Dylan Borland and Defendant John Monteiro is DISMISSED;

- the Plaintiffs' claim for Minority Member Oppression (Count IV) against Defendant Borland and Defendant John Monteiro is DISMISSED;

- the Plaintiffs' claim for Negligence (Count V) against Defendant Borland and Defendant Monteiro is DISMISSED;

- the Plaintiffs' claim for Books and Records (Count VI) against Defendant Dylan Borland is DISMISSED; and

- All other relief is denied.

/s/ Michael Warren
____
HON. MICHAEL WARREN
CIRCUIT COURT JUDGE