

STATE OF MICHIGAN
IN THE OAKLAND COUNTY CIRCUIT COURT

GARY J. MACK, an individual, and
SGMCONSULTING1950 INC.,
a Michigan corporation,

Plaintiffs,

v.

SIMIRON, INC.,
a Michigan corporation,

Defendant.

Case No. 2023-199542-CB
Hon. Victoria A. Valentine

Sarah S. Prescott (P70510)
Zachary B. Mack (P62742)
Salvatore Prescott Porter & Porter, PLLC
Attorneys for Plaintiffs
105 East Main Street
Northville, MI 48167
Tele: (248) 679-8711
Fax: (248) 773-7280
Email: prescott@sppplaw.com
mack@sppplaw.com

Thomas J. Davis (P78626)
Marianne J. Grano (P82901)
Kienbaum Hardy Viviano Pelton & Forrest, PLC
Attorneys for Defendant
280 N. Old Woodward Ave., Suite 400
Birmingham, MI 48009
(248) 645-0000
tdavis@khvpf.com
mgrano@khvpf.com

**OPINION AND ORDER REGARDING DEFENDANT'S MOTION FOR
SUMMARY DISPOSITION**

At a session of said Court held on the
28th day of July 2023 in the County of
Oakland, State of Michigan
PRESENT: HON. VICTORIA A. VALENTINE

The matter before the Court is on Defendant's Motion for Summary Disposition under MCR 2.116(C)(8) and (C)(10), seeking dismissal of Plaintiffs' Michigan Sales Representative Commission Act claim (Count II) of Plaintiffs' Complaint. The parties appeared on July 19, 2023, for oral argument at which time the Court took the matter under advisement. The Court, having read the briefs, having heard oral argument, and

being fully advised in the premises, hereby DENIES Defendant's motion for the reasons set forth below.

PERTINENT FACTS

As alleged in Plaintiffs' Complaint, "[t]his case arises out of an agreement between Plaintiff Mack and Defendant whereby Plaintiff Mack was contracted by Defendant to assist Defendant in the approval and sale of Defendant's cold pourable pavement repair product in Michigan . . . for maintenance and repair of roadways and other drivable surfaces under state or local government control."¹ Plaintiff's Complaint further alleges that "this case arises out of Defendant's failure to pay sales commissions due and owing to Plaintiffs for the sales of Defendant's cold pourable pavement repair product totes in Michigan."²

According to Plaintiffs, "Mr. Palushaj, on behalf of Defendant, offered to pay Plaintiff Mack \$1,000 per tote of liquid pothole and crack filling material sold . . . up to a maximum annual amount of \$100,000"³ When Defendant failed to pay Plaintiff the agreed upon \$1,000 per tote for all sales of Defendant's cold pour rubber product on all applicable road projects,"⁴ Plaintiff filed its 3-count complaint, which alleges breach of contract-failure to pay commissions (Count I); violation of MCL 600.2961-Michigan Sales Representative Commission Act ("MSRCA")(Count II); and unjust enrichment (Count III).

Defendant now files its Motion for Summary Disposition under MCR 2.116(C)(8) and (C)(10), seeking dismissal of Count II. Defendant argues that Plaintiff's claim of

¹ Plaintiff's Complaint, ¶ 5.

² Plaintiff's Complaint, ¶ 6.

³ Plaintiff's Complaint, ¶ 19.

⁴ Plaintiff's Complaint, ¶ 26.

\$1,000 per tote does not constitute “commissions” as defined by the MSRCA and that such alleged payment arrangements fall outside the MSRCA’s terms.

STANDARD OF REVIEW

Summary disposition under MCR 2.116(C)(8) may be granted where “[t]he opposing party has failed to state a claim on which relief can be granted.” When deciding a motion on this ground, a court may consider only the parties’ pleadings. MCR 2.116(G)(5). “[A]ll well-pleaded allegations are accepted as true, and construed most favorably to the non-moving party.” *Wade v Dep’t of Corrections*, 439 Mich 158, 162-163 (1992). “A mere statement of a pleader’s conclusions and statements of law, unsupported by allegations of fact, will not suffice to state a cause of action.” *Varela v Spanski*, 329 Mich App 58, 79 (2019) (plaintiff failed to plead facts in support of his claim but instead made conclusory statements and conclusions of law). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Wade*, 439 Mich at 163

Summary disposition under MCR 2.116(C)(10) may be granted where “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” This motion tests the factual sufficiency of the complaint and “must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact.” MCR 2.116(G)(4). The moving party bears the initial burden of supporting its position. *Smith v Globe Life Ins Co*, 460 Mich 446, 455 (1999). “Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required . . . when judgment is sought based on [MCR 2.116(C)(10)].” MCR 2.116(G)(3)(b).

“The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.” *Smith*, 460 Mich at 455 (citations omitted).

In evaluating a motion for summary disposition on this ground, a trial court must consider any affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, subject to the limitations in MCR 2.116(G)(6) (material submitted for consideration must be admissible as evidence). MCR 2.116(G)(5). This evidence should be considered in the light most favorable to the nonmoving party. *Brown v Brown*, 478 Mich 545, 551-552 (2007).

Generally, a grant of summary disposition is premature before discovery on a disputed issue is complete. *Mackey v Dep’t of Corrections*, 205 Mich App 330, 333. However, a party may not simply allege that summary disposition is premature. The party must clearly identify the disputed issue for which it asserts discovery must be conducted and support the issue with independent evidence. *Powell-Murphy v Revitalizing Auto Communities Environmental Response Trust*, 333 Mich App 234, 253 (2020) (quotation marks and citation omitted). “The dispositive inquiry is whether further discovery presents a fair likelihood of uncovering factual support for the party’s position.” *Id.*

(C)(8) motions are distinct from (C)(10) motions: (C)(8) motions denounce a claim’s legal sufficiency and require the court to consider evidence only from the

pleadings, while (C)(10) motions denounce a claim's factual sufficiency and allow the court to consider evidence beyond the pleadings. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160 (2019). Courts should be careful to analyze the summary disposition motion under the correct standard. See *id.* "While the lack of an allegation can be fatal under MCR 2.116(C)(8), the lack of evidence in support of the allegation cannot." *Id.* at 162 ("the Court of Appeals erroneously conducted what amounted to analysis under MCR 2.116(C)(10) in deciding a motion under MCR 2.116(C)(8) by requiring evidentiary support.

Here, Defendant attaches portions of Plaintiff's deposition to the Motion. Therefore, because Defendant relies on documentary evidence beyond the pleadings to support the motion for summary disposition, this Court will construe the motion pursuant to MCR 2.116(C)(10). See *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152 (2019).⁵

ANALYSIS

MCL 600.2961(1)(a) defines "commission" under the Sales Representative Commission Act as:

- (a) "Commission" means compensation accruing to a sales representative for payment by a principal, the rate of which is expressed as a percentage of the amount of orders or sales or as a percentage of the dollar amount of profits.

Here, the issue is the if the payment constitutes a "commission" under the MSRCA. It is also uncontested that Plaintiff received payment of \$1,000 per tote from Defendant.

⁵ The Court notes that even under a (C)(8) Motion, which confines the Court to review only the pleading, the Motion would be denied. Plaintiff's Complaint repeatedly references "commissions:" See Plaintiff's Complaint, ¶ 6 "sales commissions"; Plaintiff's Complaint, ¶ 24, "commission checks"; Plaintiff's Complaint, ¶ 25, "commission payments"; Plaintiff's Complaint, ¶¶ 27-28, "outstanding commissions"; and Plaintiff's Complaint, ¶¶ 29, 34, 41, 44, 46, 47 and 51, "commissions."

What is unknown, however, is how this amount of \$1000 per tote was determined. Plaintiff argues that “the \$1,000 per tote could certainly be a figure which was calculated as ‘a percentage of the dollar amount of profits.’”⁶ Plaintiff concedes that *if* that is not the situation, then the SRCA may not apply. Plaintiff has propounded discovery to this effect and is not satisfied with the answers to discovery, and may bring a motion to compel.

Further, discovery does not end until December 2023. While some discovery has been propounded, Defendant has been incomplete in answering all of Plaintiff’s propounded discovery. For example, see Defendant’s Answer to Plaintiff’s Interrogatory 3,⁷ which specifically sought information regarding the way Defendant

3. Please describe in detail how each of Plaintiffs’ commission payments made by Defendant were calculated by Defendant, including but not limited to the commission payments evidenced by the documents attached as Exhibits A, B, and C, as well as those evidenced by the IRS 1099s Defendant issued to Plaintiffs.

Response: Defendant objects to this request insofar as the term “commission payments” is vague and ambiguous, and because it assumes as true facts not admitted in the Requests to Admit regarding Exhibits A-C and purported 1099s.

Subject to and without waiving the foregoing objections, Simiron issued checks to Mack (or Mack’s corporation), the amount of which were calculated by multiplying \$1,000 by the number of totes of Simiron’s cold pour rubber product used in road projects—up to an annual maximum of \$100,000—for those specific road contracts that Mr. Mack personally worked on procuring for Simiron.

⁶ Plaintiff’s Response, p 2.

⁷ Plaintiff’s Exhibit C

⁸ See also Defendant’s Answer to Plaintiff’s Interrogatory 4: Plaintiff’s Exhibit C.

And the Court notes that Defendant itself characterized payments to Plaintiff as a “COMMISSIO[N]” on pay stubs:⁹

SIMIRON, INC Gary Mack		10/29/2019	Check No. 9550		9550
Document No.	Document Date	Posting Description	Amount	Discount	Net Amount
COMMISSIO	10/25/2019	Invoice PI002170	15,000.00	0.00	15,000.00
Total					15,000.00

SIMIRON, INC Gary Mack		07/13/2020	Check No. 11046		11046
Document No.	Document Date	Posting Description	Amount	Discount	Net Amount
COMMISSIO	7/13/2020	Invoice PI004400	25,000.00	0.00	25,000.00
Total					25,000.00

Therefore, when viewing the evidence in the light most favorable to Plaintiff, the non-moving party, and when considering that discovery has not ended, the Court finds that Defendant’s motion under MCR 2.116(C)(10) is premature.

Further discovery presents a fair likelihood of uncovering factual support for the party's position.” *Powell-Murphy v Revitalizing Auto Communities Environmental Response Trust*, 333 Mich App 234, 253 (2020) (quotation marks and citation omitted).

⁹ Plaintiff’s Exhibit B.

CONCLUSION

For the reasons set forth above:

Defendant's Motion for Summary Disposition is DENIED.

IT IS SO ORDERED.

THIS IS NOT A FINAL ORDER AND DOES NOT CLOSE OUT THE CASE.

