

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

**VASCULAR MANAGEMENT SERVICES
OF NOVI, LLC, a Michigan limited liability
Company, and VCOA MANAGEMENT, LLC,
a Michigan limited liability company,**

Plaintiffs,

Case No. 21-191539-CB

Hon. Victoria A. Valentine

v

**EMG PARTNERS, LLC, a Michigan limited liability
Company, ENVISION MEDICAL GROUP, PLLC,
a Michigan professional limited liability company,
and VILLAGEMD EASTERN MICHIGAN, LLC, a
Delaware limited liability company.**

Defendants.

**OPINION AND ORDER REGARDING DEFENDANTS ENVISION MEDICAL GROUP,
PLLCC AND EMG PARTNERS, LLC'S MOTION TO DISMISS COUNTS I AND X
PURSUANT TO MCR 2.116(C)(8) and DEFENDANT VILLAGEMD OF EASTERN
MICHIGAN LLC'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR
2.116(C)(8) and (C)(10)**

**At a session of Court
held in Oakland County, Michigan
on 8/16/2023**

OPINION

The instant action is before the Court on Defendant Envision Medical Group, PLLC and EMG Partners, LLC's (the Envision Defendants) Motion to Dismiss Counts I and X Pursuant to MCR 2.116(C)(8) and Defendant VillageMD of Eastern Michigan LLC's (VillageMD) Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) and (C)(10). The Court has reviewed the

pleadings as well as the Motions, Responses, and Replies filed by the parties and has heard oral argument on the above-entitled motions.

I.

OVERVIEW

The relationship of the parties in this case was previously explained by the Michigan Court of Appeals as follows:

In January 2017, plaintiffs and EMG Partners entered into an operating agreement through which EMG Partners and VCOA Management became 50% members of Vascular Management Services of Novi, and Mordechai Grun was named manager of Vascular Management Services of Novi. The operating agreement contained an arbitration clause. Later that month, Vascular Management Services of Novi and Envision Medical Group [“Envision”] entered into a management services agreement. Under the management services agreement, Vascular Management Services of Novi was required to “select and furnish the Practice with such space, fixed and mobile, as [was] reasonably required for the proper operation of the Practice's business, based on its volume and service contracts, including any necessary build-out, repair or replacement of such space....” [Envision] was required to operate the Practice “at least three (3) days per week.” The management services agreement did not contain an arbitration clause.

VillageMD eventually expressed an interest in acquiring certain assets of [Envision]. While VillageMD was not interested in purchasing the management services agreement, VillageMD and Grun engaged in negotiations concerning “a new Management Services Agreement” with Vascular Management Services of Novi. The negotiations were ultimately unsuccessful. VillageMD's negotiations with [Envision] proceeded forward. The acquisition between VillageMD, [Envision], and others was finalized on December 2, 2021, through an Asset Purchase Agreement, wherein VillageMD “acquired certain of Envision [Medical Group's] assets.” The management services agreement was “specifically excluded from the Asset Purchase Agreement.” Because VillageMD does not consider vascular services to be part of its business model, the vascular services that were once provided by [Envision] were discontinued.

Plaintiffs filed suit that same month. In the 10-count complaint, plaintiffs requested injunctive relief and monetary damages.¹ Plaintiffs also filed an emergency

¹ The Complaint alleged claims of “Injunctive Relief” (Count I); Breaches of Management Services Agreement and Operating Agreement (Count II); Fraudulent Misrepresentation (Count III); Silent Fraud (Count IV); Tortious Interference with a Business Relationship or Expectancy (Count V); Breach of Fiduciary Duty (Count VI); Breach of

motion for injunctive relief, requesting the trial court enter an ex parte order or schedule a show cause hearing as to why a preliminary injunction should not issue. [*Vascular Mgmt. Servs. of Novi, LLC v. EMG Partners, LLC*, unpublished per curiam opinion of the Court of Appeals, issued March 9, 2023 (Docket No. 360368), at p 1 (footnote added).]

In lieu of filing an answer to the Complaint Defendants filed a joint motion for summary disposition under MCR 2.116(C)(7) arguing that dismissal was proper because of arbitration clauses in the Operating Agreement. This Court's predecessor entered an order denying Plaintiffs' motion for a temporary restraining order and/or preliminary injunction and an order requiring Defendant to file a motion to compel arbitration by February 2, 2022.² Subsequently, Plaintiffs filed a second motion for a preliminary injunction and Defendants filed a motion to compel arbitration. This Court's predecessor granted the motion to compel arbitration, dismissed the complaint, and ordered all claims to arbitration.³ There was no ruling on the second motion for injunctive relief.

Plaintiffs appealed the order compelling arbitration and also argued that the Court erred in denying their first motion for a preliminary injunction. First, with regard to the denial of injunctive relief, the Court of Appeals determined that this Court's predecessor did not err in concluding that an adequate remedy at law existed. *Vascular Mgt Servs of Novi*, Docket No. 360368 at p 4. The Court of Appeals also determined that Plaintiffs failed to show that they were entitled to specific performance.⁴ *Id.* at p 4.

Overarching Partnership (Count VII); Aiding and Abetting (Count VIII); Civil Conspiracy (Count IX); Misappropriation of Trade Secrets (Count X).

² Orders entered January 26, 2022.

³ Order entered February 9, 2022.

⁴ As part of their request for a preliminary injunction, the Plaintiffs argued that under the Management Services Agreement between Envision and Vascular Management Services, Envision was required to operate the practice at least three times a week. The Plaintiff sought a ruling from the court directing doctors who once worked for Envision and now work for VillageMD to operate the Vascular clinic at least three days as week as required by the Management

With regard to the order compelling arbitration, the Court of Appeals first rejected Plaintiffs’ argument that Defendants were judicially estopped from enforcing the arbitration agreement. *Id.* at p 6. The Court of Appeals then determined that, contrary to the argument of VillageMD, the question of arbitrability was a question for the trial court to resolve. *Id.* at p 11. Next, the Court of Appeals affirmed the trial court’s decision that Plaintiffs’ claims against nonsignatory defendants (Envision and VillageMD) were subject to the arbitration clause in the Operating Agreement. *Id.* at p 8. The Court of Appeals then noted that the Operating Agreement provides that certain limited claims are to be filed in circuit court and the remainder are subject to arbitration but that this Court’s predecessor ordered “all claims to arbitration, without any specificity between the type of claims or relief sought.” *Id.* at p 10. Accordingly, the Court of Appeals remanded the case for a determination of whether any of the claims are “are expressly exempted from arbitration by the terms of the contract.” *Id.* at p 10.

Following remand, the parties submitted briefs regarding the arbitrability of specific claims made in the Complaint. After reviewing the arguments of the parties, this Court entered an order providing that Count I (Injunctive Relief); Count II (Breach of Contract); and Count X (Misappropriation of Trade Secrets) would proceed in this Court and that the remaining counts of the Complaint would proceed to arbitration.⁵

The Envision Defendants now move to dismiss Counts I and X pursuant to MCR 2.116(C)(8). Defendant VillageMD moves for summary disposition under MCR 2.116(C)(8) and (C)(10) as to Counts I, II and X.

Services Agreement. The Court of Appeals determined that “[b]ecause plaintiffs failed to present evidence of a contractual agreement between plaintiffs and the individual doctors who once worked for Envision Medical Services, plaintiffs were not entitled to that specific performance.” *Vascular Mgmt. Servs. of Novi, LLC v. EMG Partners, LLC*, unpublished per curiam opinion of the Court of Appeals, issued March 9, 2023 (Docket No. 360368), at p 4.

⁵ Order Re Arbitrability Following Remand entered May 11, 2023.

II.

STANDARDS OF REVIEW

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; 934 NW2d 665 (2019); *Pawlak v Redox Corp*, 182 Mich App 758, 763; 453 NW2d 304 (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; 835 NW2d 413 (2013); *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357, 360; 466 NW2d 404 (1991).

“All well-pleaded factual allegations are accepted as a true and construed in a light most favorable to the nonmovant.” *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Wade v Dep’t of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). Summary disposition is proper when the claim is so clearly unenforceable as a matter of law that no factual development can justify a right to recovery. *Parkhurst Homes*, 187 Mich App at 360; *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

“Michigan is a notice-pleading jurisdiction, which means that a complaint is required to contain only enough information reasonably to inform the defendant of the nature of the claim against which [it] must defend.” *Veritas Auto Machinery, LLC v FCA Int’l Operations, LLC*, 335 Mich App 602, 615; 968 NW2d 1 (2021) (quotation marks and citation omitted).

MCR 2.116(C)(10)

A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001). The court, in reviewing a motion under MCR 2.116(C)(10), “considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion.” *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citation omitted). The motion may be granted “if the affidavits or other documentary evidence show 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.” *Id.*

III.

ANALYSIS

A. Summary disposition of Count I (Injunctive Relief) is proper as to all Defendants

All Defendants seek summary disposition as to Count I for Injunctive Relief.⁶ Defendants are correct that “an injunction is an equitable remedy, not an independent cause of action.” *Terlecki v Stewart*, 278 Mich App 644, 663; 754 NW2d 899 (2008). *See also Redmond v Heller*, 332 Mich

⁶ Plaintiffs allege that ¶ 10.2 of the Operating Agreement between Plaintiffs and Defendant EMG Partners and ¶ 8.5 of the Management Services Agreement between Plaintiffs and Defendant Envision provide the right to obtain injunctive relief. Complaint, ¶¶ 42-43. Count I (Injunctive Relief) requests the entry of an injunctive order directing:

the Defendants, and each of them, to refrain from entering into any agreement that violates or changes any of the contracts in place among the Plaintiffs and the Envision Defendants. Further, Plaintiffs pray that this Honorable Court enjoin VillageMD from entering into any purchase agreement that would interfere with the contractual rights of the Plaintiffs. In addition, Plaintiffs pray that this Honorable Court direct that no funds be transferred between and/or among the Defendants and/or their shareholders until further order of the court. Moreover, Plaintiffs pray that this Honorable Court order the Defendants to continue to perform medical services and procedures at the clinic managed by Plaintiffs pursuant to the agreement between the parties and accordance [sic] with the status quo ante. . . . [Complaint p 12.]

App 415, 432; 957 NW2d 357 (2020). “It is not the remedy that supports the cause of action, but rather the cause of action that supports a remedy.” *Terlecki*, 278 Mich App at 663.

Plaintiffs have requested injunctive relief in connection with Count II (Breaches of Management Services Agreement and Operating Agreement) and have requested injunctive relief with regard to Count X (Misappropriation of Trade Secrets).⁷ Accordingly, the Court will construe the Defendants’ request for injunctive relief as a remedy rather than an independent cause of action and summary disposition under MCR 2.116(C)(8) is granted and Count I is dismissed. However, the Plaintiffs are not precluded from arguing that they are entitled to injunctive relief under Counts II and/or X. *See Farish v Dept of Talent and Economic Dev*, 336 Mich App 433, 438 n 2; 971 NW2d 1 (2021) (summary disposition was proper on separate claim for equitable relief but plaintiffs were not foreclosed from an equitable remedy if entitled to such relief under a different cause of action.)

B. Summary disposition is proper in favor of Defendant VillageMD as to Count II (Breach of Management Services Agreement and Operating Agreement)

Defendant VillageMD moves for summary disposition under MCR 2.116(C)(8) as to the breach of contract claim.

“A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach.” *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014).

It is alleged in the Complaint that “[i]n January of 2017, Plaintiff VCOA Management LLC entered into an agreement with Defendant EMG Partners, LLC and Plaintiff Vascular Management

⁷ Complaint, pp 13-14, 27.

Services of Novi.”⁸ It is also alleged that “there is a Management Services Agreement entered into between Defendant Envision Medical Group PLLC and the Plaintiff. . . .”⁹ It is not alleged that VillageMD was a party to either the Operating Agreement or the Management Services Agreement.

Plaintiffs do not dispute that VillageMD was not a party to these agreements and state that “[i]n reality, the Complaint does not contain a breach of contract count against VillageMD. Rather, Plaintiffs’ breach of contract claim is directed to the Envision Defendants.”¹⁰ Although Plaintiffs acknowledge at VillageMD “cannot be directly liable for breach of contract,” Plaintiffs argue that “Village MD’s presence is required to resolve the breach of contract count because Plaintiffs’ request for specific performance and/or injunctive relief must, inevitably, impact VillageMD.”¹¹ Plaintiffs further state that “[g]iven that Plaintiffs have not brought a claim for breach of contract against VillageMD, there is no basis to consider VillageMD’s motion for summary disposition as it related to Count II of Plaintiffs’ Complaint. However, if VillageMD fails to participate in the portion of the litigation relating to Count II (and the corresponding portion of Court [sic] I relating to Plaintiffs’ breach of contract claim against the Envision Defendants), VillageMD will have waived any rights it might otherwise have to object to the relief sought by Plaintiffs in conjunction with those claims.”¹²

⁸ Complaint at ¶ 8 alleges *See also* Exhibit B to Complaint, 1/12/17 Operating Agreement for Vascular Management Services of Novi, LLC.

⁹ *Id.* at ¶ 22. *See also* Exhibit F to Complaint, Management Services Agreement.

¹⁰ Pls’ Response to VillageMD Motion, p 6. While Counts III-IX include titles indicating to which Defendant(s) the specific count applies (for example the Title for Count III states “Fraudulent Misrepresentation (Envision Defendants)”) Counts I, II, and X make no distinction as to Defendants. Therefore, it is not unreasonable for VillageMD to speculate as to whether Count II for breach of contract was being alleged against Village MD.

¹¹ Pls’ Response to VillageMD’s Motion, p 6.

¹² *Id.* at p 7.

Based on the foregoing, to the extent that Count II can be read as alleging a breach of contract claim against VillageMD, summary disposition is proper in favor of VillageMD under MCR 2.116(C)(8) where Plaintiffs acknowledge that the breach of contract claim is limited to the Envision Defendants. With regard to Plaintiffs' argument that VillageMD waives any rights to object to the relief sought if it fails to participate in the defense of Count II, the Court will not rule on this issue. Plaintiffs have not cited any legal authority in support of its position and therefore, such position is deemed abandoned. *See Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008) (It is well-settled that "[t]rial courts are not the research assistants of the litigants" and that "the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute."); *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (It is not enough for a party to "simply announce a position or assert an error and leave it up to this Court to discover and rationalize the basis for [its] claims"); *Moses, Inc v Southeast Mich Council of Governments*, 270 Mich App 401, 417; 716 NW2d 278 (2006) ("If a party fails to adequately brief a position, or support a claim with authority, it is abandoned.")

C. Misappropriation of Trade Secrets (Count X)

Pursuant to Michigan's Uniform Trade Secrets Act (MUTSA), MCL 445.1901 *et seq.*, misappropriation of a trade secret "includes disclosure or use of a trade secret without consent." *CMI Intern, Inc v Internet Intern Corp*, 251 Mich App 125, 132; 649 NW2d 808 (2002) citing MCL 445.1902(b)(ii). "To succeed on a claim for misappropriation of a trade secret under Michigan law, a plaintiff must prove: '1) the existence of a trade secret; 2) its acquisition in confidence; and 3) the defendant's unauthorized use of it.'" *Nedschroef Detroit Corp v Bemis Enterprises, LLC*, 106 F Supp 3d 874, 884 (ED Mich, 2015). *See also Theisen v Inventive*

Consulting, LLC, unpublished per curiam opinion of the Court of Appeals, issued August 12, 2021 (Docket Nos. 352952, 353990), p 3.¹³

All Defendants move for summary disposition of Count X.¹⁴ Defendants argue that Plaintiffs have not alleged the supposed trade secrets with the alleged particularity required and that Plaintiffs have not alleged actual misappropriation of any trade secrets by Defendants.

1. Sufficiency of Pleading Regarding the Existence of a Trade Secret

The MUTSA defines “trade secret” as follows:

“Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that is both of the following:

(i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. [MCL 445.1902(d).]

“It is the plaintiff’s burden of pleading and proving the specific nature of the trade secrets.”

Theisen, p 3 quoting *Apex Tool Grp, LLC v Wessels*, 119 F Supp 3d 599, 608 (ED Mich, 2015);

Lowry Holding Co v Geroco Tech Holding Corp, unpublished per curiam decision of the Court of Appeals, issued May 24, 2012 (Docket No. 303694), p 3. *See also Erlich Protection Sys, Inc v*

Flint, unpublished per curiam decision of the Michigan Court of Appeals issued November 7, 2019

(Docket No. 345323), p 3 quoting *Dura Global Tech, Inc v Magna Donnelly Corp*, 662 F Supp2d

¹³ Unpublished decisions of the Court of Appeals are not binding on this Court but may be considered as persuasive authority. MCR 7.215(C)(1); *Slater v Ann Arbor Public Schls Bd of Ed*, 250 Mich App 419, 432; 648 NW2d 205 (2002). Likewise, the decisions of lower federal courts are not binding on this Court but may be considered as persuasive. *Home-Owners Ins Co v Perkins*, 328 Mich App 570, 584 n 6; 939 NW2d 705 (2019) citing *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

¹⁴ Defendant VillageMD seeks summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10). Defendants EMG Partners and Envision seek summary disposition solely under MCR 2.116(C)(8).

855, 859 (ED Mich, 2009) (“A party alleging trade secret misappropriation must particularize and identify the purported misappropriated trade secrets with specificity.”)

The Court agrees with Defendants that Plaintiffs have not met their burden of specifically pleading the existence of trade secrets, at least in part. The relevant portions of the Complaint allege:

117. Plaintiffs possess *trade secrets in the financial management and oversight of operating specialized medical facilities such as those at issue in this litigation.*

118. Plaintiffs have developed their trade secrets by expending considerable time, resources and money and has developed them on an independent basis.

119. Plaintiffs’ trade secrets include information, including a formula, pattern, compilation, program, method, technique, or process, that derives independent economic value from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

120. Plaintiffs’ trade secrets afford it a competitive advantage over competitive providers of similar service to those offered by Plaintiffs.

121. Plaintiffs take numerous measures to safeguard the secrecy of their trade secret and confidential information. *Plaintiffs’ pricing methodologies, financial methods, forecasting and analytics* are not generally known or publically [sic] available and Plaintiffs employs [sic] a number of security measures to keep said information from its competitors and the public at large.¹⁵

The only allegations which identify the purported trade secrets appear in paragraph 117 (“trade secrets in the financial management and oversight of operating specialized medical facilities such as those at issue in this litigation”) and paragraph 121 (“Plaintiffs’ pricing methodologies, financial methods, forecasting and analytics.”)¹⁶ Plaintiffs argue that these allegations are sufficient to plead the existence of a trade secret. According to Plaintiffs, there is no special pleading requirement for trade secrets and that its Complaint “is required to contain

¹⁵ Complaint ¶¶ 117-121 (emphasis added).

¹⁶ Paragraph 119 merely restates the definition of a trade secret provided in MCL 445.1902(d).

only enough information reasonably to inform the defendant of the nature of the claim against which he must defend.” See *Veritas Auto Machinery*, 335 Mich App at 615 (2021). However, as was explained above, case law provides that Plaintiffs have “the burden of *pleading* and proving the specific nature of the trade secrets.” *Theisen*, p 3 quoting *Apex Tool*, 119 F Supp at 608 (emphasis added.) See also *Erlich*, p 3 quoting *Dura Global Tech*, 662 F Supp2d at 859.

First, the Court determines that the allegations of the Complaint regarding “pricing methodologies” sufficiently identify “specific nature” of a claimed trade secret. Courts addressing trade secret claims under Michigan law have “generally recognized that pricing can be a trade secret.”¹⁷ *Stryker Corp v Ridgeway*, Case No. 1:13-CV-1066, 2015 WL 8759220 at p 10 (WD Mich, 2015) (collecting cases). See also *Kubik, Inc v Hull*, 56 Mich App 335, 368; 224 NW2d 80 (trial court properly concluded that pricing system constituted protectable trade interest.).

However, the general allegations regarding “trade secrets in the financial management and oversight of operating specialized medical facilities” and “financial methods, forecasting and analytics” are not sufficiently specific. While the allegations regarding pricing indicate part of the “financial management and oversight” which Plaintiffs claim as trade secrets, the same cannot be said of the description “financial methods, forecasting and analytics.”¹⁸ This description provides no guidance as to which particular methods, forecasting or analytics used by Plaintiffs are at issue

¹⁷ Of course, a plaintiff must prove the existence of a trade secret with the requisite specificity. See MCL 445.1902(d).

¹⁸ Plaintiffs have cited *Radiant Global Logistics, Inc v Furstenu*, 368 F Supp 3d 1112 (ED Mich, 2019) to support the argument that financial methods have been recognized as trade secrets. This may be so, but *Radiant* does not support the argument that trade secrets regarding financial methods have been pleaded with the requisite specificity in this case. *Radiant* involved the request for a preliminary injunction and the court was presented with information identifying the claimed trade secrets including “a highly confidential spreadsheet containing a detailed analysis” of all of the plaintiff’s customers throughout the United States; “highly confidential spreadsheet containing the identity and compensation for all employees in the Detroit office;” a spreadsheet entitled “Customer Analysis;” an email containing the CEO’s assessment of “internal software and process improvement roll-out” and the company’s plans to implement the changes to specific customer accounts. *Radiant*, 368 F Supp3d at 1126. No such detail has been provided in the Complaint in this case.

or the subject matter to which the methods, forecasting or analytics apply. *See e.g. Jasper v Bloomfield Village Investor Holding, LLC*, unpublished per curiam opinion of the Court of Appeals, issued April 3, 2018 (Docket No. 337098), p 5 (deficiency in complaint which resulted summary disposition under MCR 2.116(C)(8) was not cured in the proposed second amended complaint where “plaintiff failed to identify with particularity which portion of his 103-page business plan constituted the trade secret.”)¹⁹

Based upon the foregoing, the Court determines that summary disposition under MCR 2.116(C)(8) is appropriate as to Count X to the extent that Plaintiffs are alleging “financial methods, forecasting and analytics” as trade secrets and is denied to the extent that Plaintiffs are alleging pricing methodologies as a trade secret. Plaintiffs shall have the opportunity to amend their complaint to address the above-explained deficiencies.²⁰ MCR 2.116(I)(5).

¹⁹ Although *Theisen* and *Jasper* are unpublished decisions of the Michigan Court of Appeals, Plaintiffs do not cite any binding authority contradicting those decisions on the issue of a plaintiff’s burden under Michigan law of “pleading and proving the specific nature of the trade secrets.” Rather, Plaintiffs cite certain lower federal court decisions which Plaintiffs claim support a finding that specificity is not required at the pleading stage.

First, this Court agrees with Defendants that the cases cited by Plaintiffs are distinguishable. *See* Defendant Envision’s Reply Brief, at pp 4-5 for example, in *Foulk Consulting Serv, Inc v Blazemeter, Inc*, Case No. 20-11446, 2020 WL 10620265, p 4 (ED Mich, Nov 16, 2020) the allegations identifying alleged trade secrets made in the complaint in *Foulk* included allegations that the plaintiff “created a software program that would allow users to transfer older load testing data to a new platform,” this provides more detail than the allegations in this case. Moreover, as was discussed above, at least one panel of the Court of Appeals applied the specificity requirement at the pleading stage. *See Jasper v Bloomfield Village Investor Holding, LLC*, unpublished per curiam opinion of the Court of Appeals, issued April 3, 2018 (Docket No. 337098), p 5. Lastly, the Court agrees with Defendants that even if the specificity requirement did not apply at the pleading stage, the allegations in the Complaint with regard to “financial methods, forecasting and analytics” not sufficiently specific to provide Defendants of notice of the nature of the MUTSA claims that it must defend. *See* MCR 2.111(B)(1).

²⁰ “When a trial court grants summary disposition pursuant to MCR 2.116(C)(8), or (C)(10), the opportunity for the nonprevailing party to amend its pleading pursuant to MCR 2.118 should be freely granted, unless the amendment would not be justified.” *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52-53; 684 NW2d 320 (2004) citing MCR 2.116(I)(5). An amendment would not be justified if it would be futile. *Id.* Here it is not evident that amendment to cure the above-noted deficiencies would be futile. The case relied on by the Envision Defendants for their argument that “business operations” cannot be trade secrets is distinguishable. In *Nagler v Garcia*, 370 Fed Appx 678, 681 (CA 6, 2010) the court was considering a summary judgment motion and stated that the plaintiff in that case “has not produced any evidence that he possesses secret knowledge about how to operate a profitable weight-loss clinic.” The

2. Misappropriation of a trade secret

Under MCL 445.1902(b), misappropriation of a trade secret occurs under the following circumstances:

“Misappropriation” means either of the following:

- (i) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means.
- (ii) Disclosure or use of a trade secret of another without express or implied consent by a person who did 1 or more of the following:
 - (A) Used improper means to acquire knowledge of the trade secret.
 - (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it, acquired it under circumstances giving rise to a duty to maintain its secrecy or limit its use, or derived from or through a person who owed a duty to the person to maintain its secrecy or limit its use.
 - (C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake. [MCL 445.1902(b) ²¹]

court did not rule that business operations could never constitute a trade secret only that the plaintiff had not produced evidence of a trade secret.

²¹ “Improper means” as used in MCL 445.1902(b) “includes theft, bribery, misrepresentation, breach, or inducement of a breach of duty to maintain secrecy or espionage through electronic or any other means.” MCL 445.1902(a). In this case it is alleged that:

122. Pursuant to the contractual relationship that existed between Plaintiffs, on the one hand, and the Envision Defendants, on the other, Plaintiffs agreed to disclose certain trade secrets and confidential information it possessed to Defendant Envision under terms of confidence as set forth in the Agreement.

123. Specifically, the Management Services Agreement noted that the information was supplied in confidence thereunder by Plaintiffs and was to be treated as such by Defendants. Defendants were prohibited from disclosing the protected information to any third parties.

124. Defendants agreed that they would not misuse the information and also agreed that it would not use it or otherwise reveal or disseminate it to third parties as a condition of the Management Services Agreement with Plaintiffs.

Thus, it appears that Plaintiffs are alleging the Envision Defendants’ breach of a contractual duty to maintain secrecy.

“The statute, therefore, contains two possible ways to misappropriate a trade secret: improper acquisition of a trade secret and disclosure or use of a trade secret.” *Endoscopy Corp of America v Kenaan*, unpublished per curiam decision of the Court of Appeals, issued March 9, 2023 (Docket No. 359398), p 6.

In this case it is alleged that:

128. Upon information and belief, Defendant Envision intends to and/or is currently misappropriating trade secrets and protected information belonging to Plaintiffs and received in confidence pursuant to contacts [sic?] with Plaintiffs and are using that information in connection and furtherance of its clandestine relationship and affiliation with Defendant VillageMD to unfairly compete with Plaintiffs, obtain Plaintiffs’ business relationships and otherwise emulate Plaintiffs’ unique business mode [sic?].

129. Plaintiffs are justifiably fearful that the trade secrets and other protected information will be disclosed by Defendant Envision to Defendant VillageMD to unfairly compete against Plaintiffs in the market and otherwise destroy Plaintiffs’ goodwill and reputation in the industry.²²

The Envision Defendants argue that it is not alleged that they disclosed trade secrets to VillageMD but only that it is feared that this might happen. The Envision Defendants assert that Plaintiffs’ “fear” that the Envision Defendants might disclose trade secrets to VillageMD is not enough to allege the unauthorized use of any trade secret. VillageMD argues that because there is no allegation that VillageMD provides vascular services, there can be no misappropriation of the alleged trade secrets. VillageMD also argues that allegations of threatened disclosure based solely on the affiliation between the Envision doctors and VillageMD is not enough to allege misappropriation.

²² Complaint ¶¶ 128-129.

First, contrary to the argument made by the Envision Defendants, the Complaint does not merely allege a potential misappropriation. Rather, it is alleged that “Defendant Envision intends to and/or *is currently misappropriating trade secrets* and protected information belonging to Plaintiffs and received in confidence pursuant to contacts [sic?] with Plaintiffs and *are* using that information in connection and furtherance of its clandestine relationship and affiliation with Defendant VillageMD.”²³ Thus, the Complaint sufficiently pleads misappropriation by the Envision Defendants.²⁴

²³ Complaint ¶ 128.

²⁴ Plaintiff also argues that it has stated a threatened misappropriation claim under the theory of “inevitable disclosure.” Under that theory, it is presumed that a defendant’s new employment would eventually lead to the new employer discovering trade secrets. *See CMI Intern, Inc v Internet Intern Corp*, 251 Mich App 125, 132-133; 649 NW2d 808 (2002). Plaintiffs analogize this situation to the situation in this case where it is alleged that former Envision doctors now work for VillageMD.

The Court in *CMI* stated that no Michigan case has interpreted the statutory provision concerning threatened misappropriation, MCL 445.1903, and “even assuming that the concept of ‘threatened misappropriation’ of trade secrets encompasses a concept of inevitable disclosure, that concept must not compromise the rights of employees to change jobs.” *Id.* at 133-134. The court then held that “for a party to make a claim of threatened misappropriation, whether under a theory of inevitable disclosure or otherwise, the party must establish more that the existence of generalized trade secrets and a competitor’s employment of the party’s former employee who has knowledge of trade secrets.” *Id.* at 134. Plaintiffs argue that the *CMI* case should be read as permitting a claim for threatened misappropriation where there is evidence of a defendant’s willingness to disclosure trade secrets. In support of this argument Plaintiffs note the *CMI* court’s discussion of the seventh circuit case of *Pepsi Co v Redmond*, 54 F3d 1262 (CA 7, 1995) where the court, applying Illinois law, found that a claim of trade secret misappropriation may be based upon inevitable disclosure. The Seventh Circuit’s decision to affirm the issuance of a preliminary injunction was based on the lower court’s determination that the former employee’s conduct evidenced a lack of candor and a willingness to misuse trade secrets. *Id.* at 1271.

However, contrary to Plaintiffs’ argument, it is not clear that Michigan courts accept the inevitable disclosure theory. In *Endoscopy Corp of America v Kenaan*, unpublished per curiam opinion of the Court of Appeals, issued March 9, 2023 (Docket No. 359398), the Court, noting that *CMI* rejected the theory of “inevitable disclosure,” found that the plaintiff did not sufficiently plead the disclosure or use of a trade secret where it was not alleged that any disclosure or use of the trade secret had already occurred. *Id.* at p 8. *See also Erlich Protection Sys, Inc v Flint*, unpublished per curiam opinion of the Court of Appeals, issued Nov 7, 2019 (Docket No. 345323), p 3 (“Michigan has not yet adopted the more forgiving ‘inevitable disclosure’ doctrine.”); *Degussa Admixtures, Inc v Burnett*, 277 Fed Appx 530, 535 (CA 6, 2008) (Michigan has not endorsed the inevitable disclosure theory.); *Leach v Ford Motor Co*, 299 F Supp 2d 763, 775 (ED Mich, 2004) (“*CMI International, Inc.* involved a gratuitous discussion of the doctrine in dicta.”) *But see Actuator Specialties, Inc v Chinavare*, unpublished per curiam decision of the Court of Appeals, issued December 1, 2011(Docket No. 297915) (entry of injunction was not an abuse of discretion where behavior of former employee and his new employer established a willingness to use and/or disseminate trade secret information) and *Radiant Global Logistics, Inc v Furstenau*, 368 F Supp 3d 1112, 1130 (ED Mich, 2019) (Although the federal district court acknowledged that “threatened misappropriation” has not been expressly adopted by Michigan Courts, it found that

With regard to VillageMD, first, the Court is not persuaded that any failure to allege that VillageMD provides vascular services means that there can be no finding of misappropriation by VillageMD. The Court agrees with Plaintiffs that the allegations regarding trade secrets are not limited to vascular services.²⁵

However, the Complaint does not sufficiently allege misappropriation by VillageMD. The paragraphs in the Complaint alleging misappropriation address the actions of the Envision Defendants but do not allege acquisition or use by VillageMD.²⁶ See MCL 445.1902(b)(i) and MCL 445.1902(b) (ii) (A) and (B).

Based upon the foregoing, the Court determines that summary disposition under MCR 2.116(C)(8) is denied as to allegations of misappropriation against the Envision Defendants. Summary disposition under MCR 2.116(C)(8) is granted with regard to allegations of misappropriation against VillageMD. However, Plaintiffs shall have the opportunity to amend

the former employee's complete lack of candor established the plaintiff's likelihood of success on claims of threatened misappropriation).

Although it is by no means clear that the inevitable disclosure theory applies in Michigan or whether it would even apply in this case which does not involve former employees of Plaintiffs, but doctors formerly employed by the Envision Defendants, it is not necessary for the Court to resolve the issue at this time. As was stated above, the Complaint sufficiently alleges actual or current misappropriation by the Envision Defendants and therefore, survives summary disposition on the pleadings.

²⁵ See *Id.* at ¶ 117 which references “trade secrets in the financial management and oversight of operating specialized medical facilities such as those at issue in this litigation.” Construed in a light most favorable to Plaintiff, this allegation can be read as an example of and not a limitation on the type of medical facilities at issue.

²⁶ Plaintiffs argue in their response to VillageMD's motion that in November 2021 an affiliate of VillageMD entered into a non-disclosure agreement during negotiations regarding VillageMD's possible assumption of the Management Services Agreement with Plaintiffs. According to Plaintiffs, VillageMD had access to the financial records, vendor identities and “the percentages, margins and other rates” that Plaintiffs were receiving. Pls' Response, pp 8-9. Plaintiffs also assert that VillageMD used such information “to negotiate downward any potential acquisition of continuance of the MSA by VillageMD.” *Id.* at 9. However, Plaintiffs do not reference any allegations in the Complaint regarding the non-disclosure agreement or VillageMD's use of information subject to any non-disclosure agreement. Furthermore, this Court has independently reviewed the Complaint and has found no such allegations.

their complaint to address the above-explained deficiencies with regard to VillageMD. MCR 2.116(I)(5).²⁷

ORDER

Based upon the foregoing Opinion **IT IS HEREBY ORDERED** that:

Count I (Injunctive Relief): Summary disposition under MCR 2.116(C)(8) is **GRANTED** as to the Envision Defendants and VillageMD and Count I is hereby **DISMISSED**;

Count II (Breach of Contract): Summary disposition under MCR 2.116(C)(8) is **GRANTED** as to VillageMD and Count II is hereby **DISMISSED** as to VillageMD;

Count X (Misappropriation Trade Secrets): Summary Disposition under MCR 2.116(C)(8) based upon lack of specificity in identifying trade secrets is **DENIED** as to all Defendants to the extent that the alleged trade secret is “pricing methodologies” but is **GRANTED** as to all Defendants to the extent that the alleged trade secrets are “financial methods, forecasting and analytics” and such claims are **DISMISSED**.

Summary disposition under MCR 2.116(C)(8) based upon the improper pleading of misappropriation is **DENIED** as to the Envision Defendants. Summary disposition under MCR

²⁷ VillageMD asserts that amendment would be futile based upon an affidavit of Paul Martino, the Chief Growth Officer at VillageMD’s parent company. Mr. Martino states that VillageMD has not received and is not in possession of any purported trade secrets belonging to Plaintiffs. VillageMD argues that because the affidavit is already in the record as part of the response to the request for preliminary injunctive relief, this Court may take judicial notice of it for purposes of MCR 2.116(C)(8). This Court declines to do so. In the case relied on by VillageMD in support of its argument, the trial court took judicial notice of prior judgments, court orders and court decisions that were in the court record. *See Ponte v Estate of Ponte*, unpublished per curiam opinion of the Court of Appeals, issued April 24, 2022 (Docket No. 300789) p 1 n 1. It did not take judicial notice of an affidavit previously submitted by a party in order to support a finding that the plaintiff’s claim failed as a matter of law under MCR 2.116(C)(8).

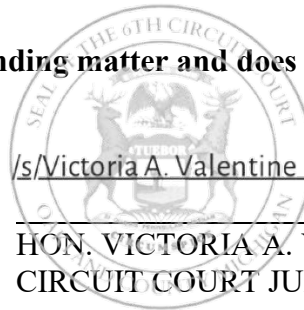
VillageMD also seeks summary disposition under MCR 2.116(C)(10) based upon Mr. Martino’s affidavit. Generally, summary disposition before discovery is complete is premature. *Caron v Cranbrook Ed Community*, 298 Mich App 629, 645; 828 NW2d 99 (2012). An exception to the general rule applies where further discovery does not stand a fair chance of uncovering factual support for the party opposing the motion. *Id.* The Court determines that it would be premature to grant summary disposition under MCR 2.116(C)(10).

2.116(C)(8) based upon the improper pleading of misappropriation is **GRANTED** as to VillageMD and Count X is **DISMISSED** as to Village MD. VillageMD's motion for summary disposition under MCR 2.116(C)(10) is **DENIED**.

IT IS FURTHER ORDERED that any motion to amend the Complaint to cure the defects regarding Misappropriation of Trade Secrets (Count X) claims dismissed under MCR 2.116(C)(8) must be filed no later than August 30, 2023, OR BE DEEMED ABANDONED.

IT IS SO ORDERED.

This Order does NOT resolve the last pending matter and does NOT close the case.

The seal of the 6th Circuit Court of Michigan is circular, featuring a central figure holding a scale and a sword, surrounded by the text "SEAL OF THE 6TH CIRCUIT COURT MICHIGAN".
/s/Victoria A. Valentine
HON. VICTORIA A. VALENTINE
CIRCUIT COURT JUDGE

Dated: 8/16/23