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

JASON W. JODWAY,

Plaintiff,

Case No. 18-169482-CB

v.

Hon. Martha D. Anderson

MICHAEL N. AMINE and
WEALTH STRATEGIES FINANCIAL GROUP, LLC,

Defendants.
_____/

OPINION AND ORDER GRANTING IN PART & DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

This matter is before the Court on Defendants' Motion for Summary Disposition under MCR 2.116(C)(8) and (10). The Court, having reviewed the parties' submissions and pleadings, dispenses with oral argument under MCR 2.119(E)(3).

I.

Defendant Wealth Strategies Financial Group, LLC ("Wealth Strategies"), a financial services firm, is a registered branch office of Securian Financial Services, Inc. ("Securian"). Securian is a SEC registered broker-dealer and Wealth Strategies is only able to offer security and investment advisory services through a registered broker-dealer such as Securian. Defendant Michael N. Amine ("Amine") is the managing partner of Wealth Strategies. From September 2016 through November 2017, Plaintiff Jason Jodway ("Jodway") was registered as a representative with Securian and was a financial representative with Wealth Strategies. Thereafter, Jodway joined Wealth Watch Advisors LLC ("Wealth Watch") as an independent financial advisor. In October 2018, Plaintiff Jodway filed the instant lawsuit against Defendants Amine and Wealth Strategies alleging claims for defamation per se (Count I), tortious interference with a business expectancy (Count II), tortious interference with an employment expectancy (Count III) and unfair competition (Count IV).

Defendants now bring the pending Motion for Summary Disposition, pursuant to MCR 2.116(C)(8) and (10); however, Defendants make no argument that Plaintiff failed to state a

claim upon which relief can be granted relative to any count of Plaintiff's Complaint.[1] Consequently, the Court will analyze Defendants' motion solely under MCR 2.116(C)(10).

II.

The factual support for a claim is tested in a motion for summary disposition under MCR 2.116(C)(10). *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.

Count I – Defamation

To support a claim for defamation, a plaintiff must prove the following:

> (1) A false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of a special harm caused by the publication (defamation per quod). *Burden v Elias Brothers Big Boy Restaurants*, 240 Mich App 723, 726; 613 NW2d 378 (2000).

"A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Rouch v Enquirer & News of Battle Creek Michigan*, 440 Mich 238, 251; 487 NW2d 205 (1992) quoting 3 Restatement Torts, 2d § 559, p 156. A plaintiff claiming defamation must identify the exact language alleged to be defamatory. *Thomas M. Cooley Law School v Doe 1*, 300 Mich App 245, 262; 833 NW2d 331 (2013).

[1] A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013).

In his Complaint, Plaintiff Jodway alleges several defamatory statements by Defendants herein.[2] However, in his response to Defendants' dispositive motion, Plaintiff only discusses two "statements."

The first is an alleged statement made regarding Plaintiff's exit from Wealth Strategies.[3] Plaintiff asserts that one of his clients, Mr. Hornfeld, wrote a letter to the Michigan Department of Insurance and Financial Services in connection with a complaint against Western Life Insurance Company. The letter states, in part:

> [I] was contacted by the owner of [Wealth Strategies] who was returning one of my calls. He informed me of the following:
>
> a. [Plaintiff] was let go from the company because of low attendance, failure to participate with clients in scheduled meetings and doing business outside of their supervision.[4]

Hornfeld stated in deposition testimony that when referring to the "owner" of Wealth Strategies, he was referring to Amine.[5]

Defendants do not argue that the above-noted statements were not capable of a defamatory meaning. Rather, Defendants note that Amine does not recall making such statements and that, in any event, the statements are true.[6]

In support of the assertion that the alleged statements are true, Defendants cite deposition testimony by one of Plaintiff's co-workers that Plaintiff did not attend company meetings.[7] Defendants also cite testimony by Plaintiff acknowledging that he did not always attend staff meetings.[8] Defendants also reference deposition testimony of former clients that Plaintiff failed to show up to meetings with them.[9] With regard to the part of the statement referencing Plaintiff doing business outside the supervision of Wealth Strategies, Defendants

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[2] Complaint, ¶¶16a-16m.
[3] As to this allegation, the Complaint states that Defendants published the "false and defamatory" statement "that [Wealth Strategies] intended to fire Jodway. This was false because Jodway resigned." Complaint, ¶16j.
[4] Pl's Response, Exhibit L.
[5] Pl's Response, Exhibit V, p 49.
[6] Defs' Reply, p 2.
[7] *Id.* at Exhibit C, p 26.
[8] Plaintiff stated, among other things, that he was "a well-learned and highly trained professional and I just don't have time to go to voluntary meetings to discuss my schedule or talk about referrals." He also stated that "[Amine] knew I didn't want to do meetings. He told me there was no issue . . . and I would go when I was able to go." *Id.* at Exhibit D, pp 32-33.
[9] Defs' Reply, Exhibits E-G.

reference a letter dated February 2, 2017, signed by Plaintiff and Amine, reprimanding Plaintiff for submitting an "indexed/fixed annuity application with a non-approved carrier."[10]

"To be considered defamatory, statements must assert facts that are 'provable as false.'" *Sarkar v Doe*, 318 Mich App 156, 179; 897 NW2d 207 (2016) (citations omitted). The burden of proving falsity is on the plaintiff. *Rouch*, 440 Mich at 259. There is no liability for making a statement that is substantially true. Under the "substantial truth doctrine" "slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance." *Rouch*, 440 Mich at 258-259 quoting 3 Restatement Torts, 2d 581A. "It is sufficient for the defendant to justify so much of the defamatory matter as constitutes the sting of the charge, and it is unnecessary to repeat and justify every word . . . so long as the substance of the libelous charge can be justified." *Id.* (quotation marks and citation omitted).

Here, in asserting that the above-noted statement was false, Plaintiff has pointed the Court to testimony that he was not fired, but rather that he resigned.[11] But, Plaintiff has not pointed to any evidence indicating that the substance of the alleged defamatory statement (i.e., that Plaintiff did not show up to work meetings and client meetings and did business outside of the supervision of Wealth Services) is false.[12] The "sting" of the statement is Plaintiff's alleged improper conduct, not whether the termination of his employment was classified as a "resignation" or a "firing." A "resignation" is not necessarily voluntary. In fact, Defendants have presented evidence that Securian initially requested that Plaintiff be terminated, but ultimately allowed him to resign.[13] Because Plaintiff has failed to satisfy his burden of showing falsity, summary disposition is appropriate to the extent that the defamation claim is based upon the Hornfeld letter and statements attributed to Amine.

Plaintiff also bases his defamation claim on the allegation that Defendants led Plaintiff's clients to believe that annuity policies sold to them by Plaintiff were improper for

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[10] Defs' Motion, Exhibit G.

[11] Plaintiff cites deposition testimony of Amine stating that Plaintiff resigned. See Pl's Response, Exhibit D, pp 21, 26. Plaintiff also cites his resignation email dated 11/27/17. See Pl's Response, Exhibit F.

[12] While the question of whether a statement is false is a question of fact *when differing evidence is presented, TM v MZ*, 326 Mich App 227, 241-242; 926 NW2d 900 (2018) citing *Masson v New Yorker Magazine, Inc*, 501 US 495, 521 (1991), here there is no "differing" evidence.

[13] See Defs' Motion, Exhibit C, ¶9, Affidavit of Theresa Sherman Director of Operations at Wealth Strategies. See also Pl's Response, Exhibit T, including letters purportedly written by Amine which state that Plaintiff recently terminated his contract "by mutual agreement."

their needs and that Plaintiff made misrepresentations regarding the availability of bonuses on the annuities. Specifically, Plaintiff claims that he sold several of his customers annuities with National Western Life Insurance Company ("National Western") and other entities that came with an up-front bonus on amounts transferred in the first year.[14] Plaintiff further claims that "[a]fter talking to Amine, however, several of Plaintiff's insurance customers believed that Plaintiff misrepresented policies, and that the bonus did not apply to their account for another ten years, and that Plaintiff did not have their interest in mind."[15] The Court concludes that summary disposition is proper as to the defamation claim based upon these "statements" as well.

First, the Court notes that Plaintiff has not pleaded the exact language he alleges to have been defamatory and, therefore, he failed to state a claim for defamation.[16] See *Thomas M. Cooley Law School,* 300 Mich App at 262. Second, the Court has reviewed the deposition testimony cited by Plaintiff in support of his claim and notes that portions of the deposition testimony relied upon by Plaintiff references information or statements made by parties other than the Defendants.[17]

Moreover, the Court holds, as a matter of law, that any "statements" attributable to Defendants are not capable of defamatory meaning. See *Hope-Jackson v Washington*, 311 Mich App 602, 621; 877 NW2d 736 (2015). As was stated previously, [a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Rouch*, 440 Mich at 251. The circumstances surrounding the statement should be considered in determining whether a statement is defamatory. *Sawabini v Desenberg*, 143 Mich App 373, 380; 372 NW2d 559 (1985).

The deposition testimony of former clients relied on by Plaintiff does not support his claim.[18] Client Dasher testified with regard to the annuity: "Michael Amine showed me what

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[14] Pl's Response, p 12.
[15] *Id.* The bonus was apparently intended to offset surrender fees incurred by the transfer.
[16] Plaintiff alleges that Defendants made statements "[t]hat the annuity products sold to certain customers were not suitable or in their best interest" alleging "[t]his was false as Jodway has years of financial planning experience, and he worked hard to ensure every product he sold to his customers suited to their needs . . . ." Complaint, ¶16a.
[17] Client K. Hornfeld stated that he came to believe that the policy sold by Plaintiff was not in his best interest after his discussions with National Western. Pl's Exhibit V, pp 52-53.
[18] See Pl's Response at pp 12-13.

I was sold, and I wasn't happy with what I was sold."[19] Client Borkin stated that Amine told her with regard to the annuity sold by Plaintiff: "Not that it's a bad policy . . . but it's not exactly how you explained to me that you understood that it worked."[20] Client Murray testified that Amine told her that the credit on the annuity sold by Plaintiff did not "balance out financially" and that "it's an okay product, but there are better."[21] Client Cameron testified that Amine recommended that she contact National Western about the annuity. She also stated that Defendants explained the product and the surrender fees and also indicated Wealth Strategies did not sell that product and would not have recommended the policy for her portfolio.[22] Client Hornfeld acknowledged that he wrote a letter in which he stated that Amine reviewed the product and concluded that it was of little or no use to Hornfeld.[23] However, Hornfeld stated that he could not recall if Amine made such a statement to him.[24]

Amine stated in his deposition that he had contact with Plaintiff's clients after Plaintiff left Wealth Strategies.[25] Because the National Western annuity and another annuity sold by Plaintiff were not on Wealth Strategies' "platform" and he was not familiar with the products.[26] He also stated that he had to call the insurance companies to determine how the contract worked and that clients were included on the calls.[27]

The circumstances surrounding the "statements" that form the basis for Plaintiff's argument support the conclusion that Amine, who was not familiar with annuities at issue, made any statements in the context of trying to help Plaintiff's former clients understand the products. His interpretation of how the bonuses were paid and whether there were better products available are essentially his opinions based upon his knowledge and experience. Opinions generally are considered "protected speech" cannot form the basis for a defamation claim. See *Edwards of Detroit News*, 322 Mich App 1, 13; 910 NW2d 394 (2017).[28] In any

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[19] Pl's Exhibit W, p 24.
[20] Pl's Exhibit X, p 33-34
[21] Pl's Exhibit Y, p 30.
[22] Pl's Exhibit Z, pp 28-29, 31.
[23] Pl's Exhibit V, p 71.
[24] *Id.* at 71.
[25] Defs' Reply, Exhibit B, p 29.
[26] *Id.* at p 32.
[27] *Id.* at 32-33. Clients Cameron and K. Hornfeld stated that they were on calls made to National Western while meeting with Amine. See Defs' Reply, Exhibit G.
[28] An exception to the general rule exists where an expression of opinion implies the assertion of objective fact. *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 128; 793 NW2d 533 (2010). For instance, "the statement 'in

event, the statements attributable to Amine in the client deposition testimony relied on by Plaintiff are not statements that "tend[] so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Accordingly, the Court concludes that the statements made regarding the annuities were not defamatory.

Based on the foregoing, the Court finds that Plaintiff's defamation claim fails because he failed to meet his burden of showing a "false and defamatory statement" made by Defendants compelling summary disposition as to Count I, pursuant to MCR 2.116(C)(10).

Count II – Tortious Interference with Business Expectancy

The elements of a claim of tortious interference with a business relationship or expectancy are:

> (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the defendant, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the plaintiff.

Total Quality, Inc v Fewless, 332 Mich App 681, 704-705; 958 NW2d 294 (2020).[29] In order to establish the existence of a valid business expectancy, Plaintiff must show that the expectancy is a "reasonable likelihood or probability, not mere wishful thinking." *Cedroni Assoc, Inc v Tomblinson, Harburn Assoc, Architects & Planners, Inc*, 492 Mich 40,45; 821 NW2d 1 (2012) (quotation marks and citation omitted).

Plaintiff alleges in the Complaint that he "has maintained valid business relationships and expectancy of business relationships with his customers" and "[D]efendants intentionally and unjustifiably interfered with [Plaintiff's] business relationships and expectancies."[30] Defendants point out in their motion that Plaintiff's former clients testified that no action taken by Defendants influenced their decision to end their relationship with Plaintiffs.[31] In response, Plaintiff argues that the basis of his claim "is not about whether

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my opinion Jones is a liar' may cause just as much damage to a person's reputation as the statement 'Jones is a liar.'" *Id.* (citation omitted). Such exception does not appear to be applicable in this case.

[29] Plaintiff analyzes both claims for tortious interference with business expectancy and tortious interference with employment expectancy under this standard.

[30] Complaint, ¶¶28-30.

[31] See Defs' Motion, Exhibit B.

Plaintiff's insurance clients *would* do business with him in the future, but rather, the fact that his insurance clients *did* business with him already by purchasing the annuities and Defendants caused a cancellation of those contracts, resulting in significant damages to Plaintiff.[32] The damages were allegedly incurred from amounts charged back on commissions received by Plaintiff on those contracts. Plaintiff alleges that he had a valid business expectancy that his clients would honor the insurance contracts and Defendants interfered with such expectancy by inducing several clients to cancel their policies.

Assuming, without deciding, that Plaintiff has a valid business expectancy that his clients would not cancel their annuities, the Court finds that his claim still fails. Plaintiff alleges that Defendants "engaged in a course of conduct designed to make [the clients] believe the product was not in their best interest, was unsuitable for their needs, and was fundamentally misrepresented to them by Plaintiff."[33] Plaintiff further states that Defendants coached the clients on how to get out of their insurance contracts.

To establish the third element of a claim for tortious interference, an "intentional interference" "inducing or causing a breach of a business relationship," a plaintiff must show that the defendant acted both intentionally and either improperly or without justification. *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 323-324; 788 NW2d 679 (2010).

> To establish that a lawful act was done with malice and without justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference. Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.

BPS Clinical Laboratories v Blue Cross & Blue Shield of Mich (On Remand), 217 Mich App 687, 699; 552 NW2d 919 (1996) (citations omitted).

Here, Plaintiff has not demonstrated "with specificity, affirmative acts by the defendant that corroborate the improper motive of interference." See *BPS Clinical*, 217 Mich App at 699. Plaintiff attaches copies of faxes bearing Wealth Services' logo sent from the clients to the insurance company as evidence that Defendants induced the termination of the

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[32] Pl's Response, p 16.
[33] *Id.*

insurance contracts.[34] But even if this evidence supports a finding that Defendants "induced" the clients to terminate the contract, Plaintiff has not specified affirmative acts which corroborate an improper motive on the part of Defendants or demonstrate that any actions of Defendants were not motivated by legitimate business reasons. Accordingly, summary disposition is warranted as to Count II, pursuant to MCR 2.116(C)(10).

Count III – Tortious Interference with Employment Expectancy

Plaintiff alleges that Defendants told Plaintiff's new employer, Wealth Watch, that Plaintiff was subject to a noncompete and nonsolicitation agreement when in fact he was not.[35] As a result, Plaintiff claims his new employer has prohibited him from soliciting his "broker-dealer clients" and but for Defendants' conduct he would have been able to transfer $10,000,000 in assets under management to Wealth Watch.

In support of this claim Plaintiff references an email and attachment sent by Theresa Sherman ("Sherman") of Wealth Strategies to Wealth Watch in December 2017. The attachment included a letter sent to Plaintiff from Amine in connection with the end of his employment and stated, in pertinent part:

> As you are aware we have been notified that you have a pending registration with an outside Registered Investment Advisor firm, Wealth Watch Advisors. With this notification you have made us aware that you Intend to resign from Securian, Minnesota Life and Wealth Strategies Financial Group.
>
> Upon your official resignation the following are expected to be followed and adhered to:
>
> - All contracts to be honored including but not limited to:
> - Your non-compete
> - Your indebtedness[36]

Also attached to the email was a list of clients.[37]

Plaintiff asserts that as a result of the email he was required to sign a letter of understanding with his new employer which prohibited him from soliciting or contacting his former clients.[38] The April 2018 Letter of Understanding ("Letter of Understanding") signed

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[34] Pl's Response, Exhibit R.
[35] Complaint, ¶¶37-40.
[36] Pl's Response, Exhibit H.
[37] *Id.*
[38] Pl's Response, p 6.

by Plaintiff, Jason Moore ("Moore") the Chief Compliance Consultant of Wealth Watch and William Gastl ("Gastl") the Chief Operating Officer of Wealth Watch states, in part:

> This Letter of Understanding is based on our discussion relative you a [sic] non-compete/non-contact agreement between you and Minnesota Life and Securian. After reviewing the agreement(s), we wish to reach an understanding with you about any future marketing or sales efforts as they may relate to the agreement.
>
> After having discussed the agreement with you, it is our understanding that you fully intend to comply with the terms of the Minnesota Life/Securian agreement. *Specifically, that you will not intentionally contact or cause to be contacted any of your prior clients to replace any product or service that is current enforce [sic] or managed by Minnesota Life or Securian*. Additionally, you have agreed not to besmirch or defame any of these parties.[39]

Plaintiff argues that Defendants mispresented that he was bound by any non-compete agreement and points to an Agent Contract with Minnesota Life Insurance Company ("Minnesota Life Contract"), an Insurance Agent Agreement Securian Financial Services, Inc. ("Securian Insurance Agent Agreement"), and a Securian Financial Services, Inc. Associate Agreement ("Securian Associate Agreement"). The Securian Agent and Associate Agreements do not appear to have any non-compete or non-solicitation clauses.[40] The Minnesota Life Contract has a clause which states, in part:

> Preservation of Business. You agree that, after your agency relationship with us is terminated, *you will not*, without our express consent, for a period of one year following the termination of your agency relationship: (1) *directly, or indirectly, by or through any partner, agent, employer, employee or firm on your behalf, advise, induce or attempt to induce any of our product owners to lapse, cancel or replace any of our products*. . . . If you breach this provision, you agree that we or GA may pursue all remedies, legal or equitable, including injunction, to enforce compliance with this provision.[41]

Plaintiff also references the affidavit of Moore of Wealth Watch which states that he received a phone call from an employee at Wealth Strategies who represented that Plaintiff was "contractually prohibited from contacting any clients that were ever associated with [Wealth Strategies]."[42] The affidavit also stated that "[a]s a result of [Wealth Strategies']

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[39] Pl's Response, Exhibit I (emphasis added).
[40] Pl's Response, Exhibits B and C.
[41] Pl's Response, Exhibit A, Section 7 ¶D.
[42] Pl's Response, Exhibit G, ¶6.

communications with [Wealth Watch], [Wealth Watch] required Jodway to sign a Letter of Understanding, where Jodway agreed not to solicit his former clients, whether insurance or brokerage."[43]

Defendants assert that the email sent by Sherman was sent pursuant to a valid non-solicitation clause in the Minnesota Life Contract (see above) and in the Experienced Agent Transition Program Supplement ("Supplement") signed by Plaintiff. The Supplement states that it is "part of your Minnesota Life Agent's Contract and your Agent Sales Agreement with Securian Financial Services, Inc. ("SFS"), Minnesota Life's affiliated broker-dealer, and it is subject to all of their terms, definitions, and conditions."[44] The Supplement also states:

> Non-Solicitation and Non-Replacement. After your Minnesota Life Agent's Contract terminates, and for as long as you have a debt with Minnesota Life, any of its affiliates, or your General Agent, you agree that you will not, directly or indirectly, solicit, sell, or attempt to solicit or sell any insurance, investment, annuity, or other product or service *of the kind issued or marketed by Minnesota Life* to any client with whom you or any other agent associated with your General Agent(s) did business.[45]

Defendants also note that Moore stated, in his deposition, that his beliefs regarding the type of business that Plaintiff was prohibited from doing was set out in the contracts with Minnesota Lie and Securian.[46] Additionally, when questioned about the statement in his affidavit that he received a phone call from someone at Wealth Strategies, Moore stated that he recalls having a conversation with someone he identified as Amine's attorney who stated that Plaintiff was prohibited from competing with Wealth Strategies in any way.[47]

Although Defendants argue that they were acting consistently with the above-noted contracts and in furtherance of a legitimate business purpose in notifying Wealth Watch of restrictions applicable to Plaintiff, the Court finds that there is a question of fact as to whether Defendants' actions were supported by the agreements and, therefore, justified.[48]

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[43] *Id.* at ¶10.
[44] Defs' Motion, Exhibit J at ¶A.
[45] *Id.* at ¶g (emphasis added). Amine is listed as the "General Agent" under the Minnesota Life Contract. See Pl's Response, Exhibit A.
[46] Defs' Motion, Exhibit K, pp 40-41. Moore's Affidavit is dated before his deposition was taken.
[47] Exhibit K, pp 37-39.
[48] In analyzing the claim of tortious interference with employment expectancy, the parties employ the same legal standard as was applied to the tortious interference with business expectancy claim.

The Court notes that the non-solicitation provisions in the agreements relied upon by Defendants, the Minnesota Life Contract and the Supplement, seem to restrict Plaintiff's conduct only with regard to products or services related to those provided by Minnesota Life. However, the Letter of Understanding that Plaintiff signed with Wealth Watch which states, in part, that Plaintiff "will not intentionally contact or cause to be contacted any of your prior clients to replace any product or service that is current enforce [sic] or managed by Minnesota Life *or Securian*" expands the restriction to products offered by Securian. It is not clear whether the products offered by Minnesota Life and Securian are one and the same or whether they are distinct, as is asserted by Plaintiff.[49] If the latter is true, a question of fact exists as to whether the expanded restriction in the Letter of Understanding was the result of any improper motive or interference on the part of Defendants.[50] Accordingly, summary disposition is denied as it relates to Count III, pursuant to MCR 2.116(C)(10).

Count IV – Unfair Competition

The doctrine of unfair competition was recently described as follows:

> Michigan law "follows the general principles of unfair competition." *Marion Labs., Inc v Mich Pharmacal Corp*, 338 F Supp 762, 767 (ED Mich 1972), aff'd mem, 473 F.2d 910 (6th Cir 1973); see also *A&M Records, Inc v MVC Distrib Corp*, 574 F2d 312, 313 (6th Cir 1978). And the Michigan Supreme Court has defined "unfair competition," according to its general principles, to mean "the simulation by one person, for the purpose of deceiving the public, of the name, symbols, or devices employed by a business rival, or the substitution of the goods or wares of one person for those of another, thus falsely inducing the purchase of his wares." *Clipper Belt Lacer Co v Detroit Belt Lacer Co*, 223 Mich 399, 406 (1923) (citing Nims on Unfair Competition (2d ed) § 4, pp 12–14). Even in the small number of cases when Michigan law has been interpreted to extend beyond claims for passing off one's goods as those of another, "[t]he gist of the action ... in all unfair competition cases, is fraud, and the gist of the charge is that the public is so misled that [the wronged party] loses some trade by reason of the deception." *Clairol, Inc v Boston Disc Ctr of Berkley, Inc*, 608

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[49] Under the Securian Associate Agreement "Approved Products" is defined as "[t]hose investment and insurance products and services, which, in Securian's sole discretion, are available for sale through Securian and which Securian has also specifically approved for offer and sale by Associate." Pl's Response, Exhibit C. Whereas the Minnesota Life Contract defines "products" as "[t]hose life insurance policies, annuity contracts, and other types of polices, riders and contracts listed in the contract update and sold under this contract." Pl's Response, Exhibit A.

[50] The Court notes that the email sent by Sherman to Wealth Watch states: "Per your conversation with Mike Amine today attached is our letter and a list of client names." Pl's Response, Exhibit H. Thus, there is evidence of some prior communication between Defendants and Wealth Watch regarding the restrictions.

F2d 1114, 1120 (6th Cir 1979) (quoting *Revlon, Inc v Regal Pharmacy, Inc*, 29 FRD 169, 174 (ED Mich 1961)).

Tech and Goods, Inc v 30 Watt Holdings, LLC, opinion of the United States District Court for the Eastern District of Michigan, 2020 WL 2395216 at p 3, Case No. 2:18-cv-13516 (issued May 12, 2020). Either actual or probable deception must be shown "for if there is no probability of deception, there is no unfair competition." *Burns v Schotz*, 343 Mich 153, 157; 72 NW2d 149 (1955). Additionally, there must be "actual competition shown from specific instances or as a natural tendency of [the defendant's] acts." *Id.* citing *Good Housekeeping Shop v Smitter*, 245 Mich 592; 236 NW2d 872 (1931).

The Complaint alleges that Defendants "made false and defamatory statements about Jodway to his customers in an effort to eliminate Jodway as a competitor" and, further, that Defendants "coached Plaintiff's clients to file false accusations against Plaintiff with the State of Michigan in an effort to eliminate Jodway as a competitor."[51]

The conduct alleged by Plaintiff does not fit into the common law cause of action for unfair competition. The cases cited by Plaintiff in support of the unfair competition claim involve circumstances not present here. Defendants are not accused of misleading the public by operating under Plaintiff's name. See *Good Housekeeping Shop v Smitter*, 254 Mich App 592; 236 NW2d 872 (1931). And the allegations against Defendants do not involve "a fraud upon the public" as that term is used in unfair competition cases. Compare *Clairol, Inc v Boston Discount Center of Berkley, Inc*, 608 F2d 1114, 1120 (CA 6, 1979) where the defendants sold professional-use hair color to the public without warning or instructions for use and the court found the practice to "constitute in the most general sense a deceit and thus a fraud upon the public."[52] Additionally, this Court has determined that Plaintiff's defamation claims fail so that any claim for unfair competition based upon the assertion that statements were defamatory must also fail.

In his response to Defendants' motion, Plaintiff also argues that Defendants misled Plaintiff's customers into believing he left with their money when in fact he was ill and unable to contact them. Plaintiff cites to Amine's deposition testimony that some customers were

[51] Complaint, ¶¶43-44.

[52] See also *Burns v Scholtz*, 343 Mich 153, 156; 72 NW2d 149 (1955) (allegations that the defendant's trade name was designed to deceive the public into believing they were dealing with the Plaintiff)

concerned that they could not reach Plaintiff and that Amine informed them that Plaintiff was no longer with Wealth Strategies, but did not think he could, under privacy laws, inform them that Plaintiff was in the hospital.[53] Plaintiff has presented nothing to counter the assertion by Amine that he believed he could not disclose Plaintiff's hospitalization. Moreover, there is no indication of a fraud upon the public by failing to notify clients that Plaintiff was ill.

Lastly, Plaintiff argues that Defendants' assertion of a noncompete agreement when none existed also misled the public into thinking that Plaintiff could not bring his clients with him to Wealth Watch. The Court has already discussed, at great length, the circumstances surrounding the noncompete issue. The basis for the claim presented by Plaintiff is that the existence of such an agreement was communicated to Plaintiff's new employer, not that it was communicated to former clients or the public at large. For the above stated reasons, the Court grants summary disposition on Plaintiff's claim of unfair competition under Count IV, pursuant to MCR 2.116(C)(10).

IV.

THEREFORE, IT IS HEREBY ORDERED that Defendants' Motion for Summary Disposition is **GRANTED** as to Counts I, II and IV, pursuant to MCR 2.116(C)(10), and **DENIED** as to Count III, pursuant to MCR 2.116(C)(10).

IT IS SO ORDERED.

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

/s/ Martha Anderson
September 16, 2021
HON. MARTHA D. ANDERSON
CIRCUIT COURT JUDGE

Dated: 9/16/2021.

[53] Pl's Response, Exhibit D, pp 27-28.