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

PATRICIA KAISER and
ON TIME VEHICLE SUPPLY, LLC,
Plaintiffs,

v.

Case No. 2022-195822-CB
Hon. Victoria Valentine

PATRICK LANGAN and
P, B AND J TRANSPORT, LLC,
d/b/a DASH AUTO LOGISTICS,
Defendants,

and

P, B, AND J TRANSPORT, LLC,
d/b/a DASH AUTO LOGISTICS,
EXPERT VEHICLE SOLUTIONS, LLC,
And PATRICK LANGAN,
Counter-Plaintiffs,

v.

PATRICIA KAISER and
ON TIME VEHICLE SUPPLY, LLC,
d/b/a INTEGRITY VEHICLE SOLUTIONS,
Counter-Defendants,

and

PATRICIA KAISER,
Third Party Plaintiff,

v.

THOMAS STODDARD,
Third Party Defendant.
_____/

OPINION AND ORDER RE: MOTIONS FOR SUMMARY DISPOSITION

This matter is before the Court on the following motions:

1) Plaintiffs' Motion for Partial Summary Disposition of Counter Complaint;
2) Defendant/Counter-Plaintiffs' Motion for Summary Disposition, Pursuant to MCR 2.116(C)(10), on Count V of Defendants' First Amended Counterclaim; and
3) Defendant/Counter-Plaintiffs' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) and (C)(10) Seeking Entry of Judgment Dismissing Plaintiffs' Complaint.

I. Factual Background

This matter arises out of a business relationship between Plaintiffs and Defendants in which they operated a vehicle leasing business under the name of Expert Vehicle Solutions, LLC.

In 2013, the individual Defendant, Patrick Langan ("Langan") formed his company, P, B and J Transport, LLC ("DASH"), which is described as an automotive logistics company. The individual Plaintiff, Patricia Kaiser ("Kaiser"), formed her company, On Time Vehicle Supply, LLC ("On Time"), in 2018 after working for several companies in the field of short-term vehicle acquisitions.

In late 2019, Kaiser and Langan began discussions regarding the possibility of entering into a business relationship together to operate a vehicle leasing business. On February 11, 2021, On Time executed a written agreement ("Agreement")[1] with DASH in order to enter into a business arrangement under the name of Expert Vehicle Solutions, LLC ("EVS"). Specifically, the Agreement states that On Time and DASH "do business under the name and style of Expert Vehicle Solutions, LLC" and "DASH and ON TIME will operate and put on auto shows under the name EXPERT VEHICLE SOLUTIONS, LLC." The Agreement also provides that "DASH shall be responsible for all funding, transportation, logistics and bookkeeping" and "ON TIME will be

[1] See Exhibit A to the Complaint.

in charge of all operations including auto shows, dates, related training, and the operation of said shows." Further, the Agreement provides that "proceeds of all net profits of EVS shall be divided sixty (60%) percent to DASH and forty (40%) percent to ON TIME."

On February 16, 2021, Langan formed EVS as its resident agent and as a member.[2] During 2021, EVS netted between $400,000.00 and $450,000.00 of profit, 40% of which was paid to On Time. In June 2022, however, there was a breakdown in the business relationship and the parties ceased working together. On June 23, 2022, Kaiser renamed On Time by filing an assumed name registration for the name Integrity Vehicle Solutions ("IVS") with the Michigan Department of Licensing and Regulatory Affairs.[3]

On August 26, 2022, Kaiser and On Time initiated this lawsuit against Langan and DASH. The Complaint alleges the following counts against Defendants: Breach of Contract (Count I); Fraud (Count II); Concert of Action (Count III); Civil Conspiracy (Count IV); Conversion (Count V); MCLA 600.2919a (Count VI); Defamation (Count VI); Fiduciary Duty (Count VIII); Tortious Interference (Count IX); and Accounting (Count XII). The Court notes that MCLA 600.2919a and Defamation are both identified as Count VI. In addition, there are no identified Counts VII, X, or XI in the Complaint.

In response, DASH and EVS filed a Counterclaim on October 4, 2022. On February 6, 2023, as permitted by the Court's February 1, 2023 Stipulated Order, both Defendants and EVS filed their First Amended Counterclaim. The Counter Plaintiffs raise the following claims in their First Amended Counterclaim: Breach of Contract (Count I); Breach of Fiduciary Duty (Count II); Conversion (Count III); Accounting (Count IV); and Breach of Contract of Guaranty (Kaiser) (Count V).

[2] See Exhibit 2 to the First Amended Counterclaim.
[3] See Exhibit 13 to Defendants' Summary Disposition Motion Pursuant to MCR 2.116(C)(8) and (C)(10).

In relation to Count V of the First Amended Counterclaim, Langan loaned Kaiser's then-boyfriend, Thomas Stoddard ("Stoddard"), $117,178.00 in 2021. Stoddard executed a loan agreement ("Loan Agreement") on December 23, 2021 in that amount as the borrower or loanee and Kaiser executed the loan agreement as the guarantor on behalf of Stoddard.[4]

On March 13, 2023, Kaiser filed a Third Party Complaint against Stoddard relative to the Loan Agreement. Kaiser raises the following claims against Stoddard: Indemnity (Count I); and Contribution (Count II). An entry of Default was subsequently entered on May 30, 2023 against Third Party Defendant Stoddard.

On August 30, 2023, the parties filed their respective motions for summary disposition pursuant to MCR 2.116(C)(8) and/or (C)(10).

II. Standards of Review

A motion under MCR 2.116(C)(8) may be granted if the opposing party fails to state a claim on which relief may be granted, and only if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). The motion is tested on the pleadings alone with all factual allegations set forth in the Complaint accepted as true by the Court. *Id*; MCR 2.116(G)(5).

"A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In 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…in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood,* 461 Mich 109, 120; 597 NW2d 817 (1999); *Quinto v Cross &*

[4] See Exhibit 3 to the First Amended Counterclaim.

Peters Co., 451 Mich 358, 362; 547 NW2d 314 (1996). "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; 934 NW2d 665 (2019). (Citation omitted).

III. Plaintiffs' Motion for Partial Summary Disposition of Counter Complaint

A. Arguments of the Parties[5]

In their Motion, Plaintiffs are seeking partial summary disposition of the First Amended Counterclaim pursuant to MCR 2.116(C)(10). In particular, Plaintiffs are seeking summary disposition of the following claims: Breach of Contract (Count I); Breach of Fiduciary Duty (Count II); Conversion, including MCLA 600.2919a (Count III); and Accounting (Count IV).

In their recitation of the facts, Plaintiffs allege that the parties agreed to form EVS as a joint venture or partnership. In June 2022, however, Plaintiffs assert that Langan closed EVS or removed Plaintiffs as joint venturers or partners. Thereafter, Langan allegedly refused to pay EVS suppliers and refused to provide Plaintiffs with access to the records and accounts of EVS' revenues, expenditures, and profits. According to Plaintiffs, Defendants have withheld their contractually guaranteed 40% of the profits realized by EVS on projects completed from May 2022 onward.

With regard to Counter Plaintiffs' Breach of Contract claim, Counter Plaintiffs allege in Paragraph 57 that "OTVS/IVS materially breached the Agreement by refusing to show PBJ the Books and Records when asked excluding PBJ from the business, setting up a competing venture and taking amounts it was not entitled to, including monies advanced by EVS which were not 'net profits.'" In their Motion, Plaintiffs dispute the allegation that they had an obligation to create and keep the venture's books and records. Rather, the Agreement provides that "DASH will provide

[5] The Court will refer to On Time and Kaiser as Plaintiffs and Langan, DASH, and EVS as Counter Plaintiffs in Sections III and IV of the Opinion.

the funding, transportation, logistics and bookkeeping."[6] While Plaintiffs concede that they assisted in setting up EVS' recordkeeping tools, and constantly shared information that would generate those records, Plaintiffs assert that they had no obligation in terms of bookkeeping.

Regarding Counter Plaintiffs' claim that Plaintiffs breached the Agreement by competing with EVS, Plaintiffs maintain that they did not compete against EVS until after Langan and Kaiser had a falling out. Moreover, the Agreement does not contain any "non-competition" language that restricts Plaintiffs from competing. Therefore, Plaintiffs argue that Defendants do not have a viable Breach of Contract claim.

In response, Counter Plaintiffs argue that Plaintiffs breached their implied duty of good faith and fair dealing. Specifically, Counter Plaintiffs assert that Plaintiffs refused to provide them with basic information concerning EVS' operations and Plaintiffs terminated the Agreement and stole jobs that EVS had quoted.

In relation to their Fiduciary Duty claim, Counter Plaintiffs allege that Plaintiffs breached their fiduciary duties to DASH and EVS by refusing to share EVS' books and records and by Kaiser's actions of creating IVS and purportedly stealing EVS business. Counter Plaintiffs maintain that Kaiser was responsible for all operations of EVS' business, namely acquiring all vehicles, quoting all jobs, setting all prices, determining profit margins, and billing EVS customers. As such, Counter Plaintiffs identify Kaiser as an agent of EVS. In June 2022, Kaiser allegedly utilized EVS' information to usurp EVS' business opportunities by copying EVS' quotes to SBD Auto, Xperience, and Mitsubishi and transferring the work to IVS. Thus, Counter Plaintiffs contend that Kaiser breached her fiduciary duty to EVS.

Whereas Counter Plaintiffs claim that Kaiser had an elevated position of duty and trust, Plaintiffs argue that Langan himself, through William Paulson, asserted that he was always the

[6] See Exhibit A to the Complaint.

sole owner and manager of EVS, not Kaiser. With respect to the allegations in the First Amended Counterclaim, Plaintiffs argue that they had no fiduciary reporting duty since the Agreement states that Defendants were to provide the bookkeeping for EVS. Plaintiffs also contend that it would be legally impossible for Plaintiffs to have breached any fiduciary duty to EVS and Defendants following Kaiser's ouster.

Relative to Counter Plaintiffs' Conversion claim, Plaintiffs are alleged to have converted proceeds from four projects involving Nucleus Events, SBD Automotive, Xperience Communications, and Mitsubishi, all of which were pending when the parties' relationship broke down. In response, Plaintiffs maintain that Kaiser provided Langan's attorney, John Morad, with the customer's credit card information to facilitate EVS getting paid for the project involving Nucleus Events. Plaintiffs do acknowledge that Kaiser did receive payments for the other three projects. However, Plaintiffs allege that Langan ceased funding and performance on these pending projects on or about June 17, 2022 and so Kaiser completed the projects, including funding those projects, in June 2023. As such, Plaintiffs claim that these payments by the three customers were not personal property to which Defendants or EVS were the rightful owners.

Regarding Counter Plaintiffs' Accounting claim, Plaintiffs again argue that it was Defendants that were expressly assigned the duty of bookkeeping for EVS. Plaintiffs also point out that Langan had access to the shared utility drive utilized by the EVS clerical staff and Langan was the sole signatory on the two EVS-LLC accounts maintained at Comerica Bank.

In opposition, Counter Plaintiffs argue that Plaintiffs had control over all documents pertaining to EVS' financial performance, including documents regarding EVS' revenue and expenditures as acknowledged by Kaiser in her deposition testimony.[7] Kaiser also conceded in her answers to Defendants' discovery requests that she shared her Excel files with Langan and EVS

[7] See Exhibit 3 to Defendants' Response to Plaintiffs' Motion.

employees, however she stopped sharing her Microsoft "Teams"/Excel subscription with EVS after she was ousted from the company.[8] Ultimately, Counter Plaintiffs assert that there is a genuine issue of material fact regarding whether Defendants had access to EVS' financial information, and could ascertain EVs' finances, during Kaiser's tenure with EVS.

B. Analysis

Under their Breach of Contract claim in the First Amended Counterclaim, Langan, DASH, and EVS make the following allegations:

> 55. The Agreement required OTVS to operate EVS's business in exchange for 40% of the profits, which necessarily includes keeping all Books and Records of the company.
>
> 57. OTVS/IVS materially breached the Agreement by refusing to show PBJ the Books and Records when asked excluding PBJ from the business, setting up a competing venture and taking amounts of money it was not entitled to, including monies advanced to EVS which were not "net profits."

To prove a 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 Const., Inc.,* 495 Mich 161, 178, 848 NW2d 95, 104 (2014). In this matter, the only contract between On Time and DASH is the February 11, 2021 Agreement.

Upon review of the allegation in Paragraph 55, the Court observes that DASH is required to provide bookkeeping services in relation to EVS. Specifically, the Agreement states that "DASH will provide the funding, transportation, logistics and bookkeeping."[9] Moreover, there is no provision under the Agreement that requires On Time to provide bookkeeping services or to keep the books and records for EVS. Rather, the Agreement sets forth On Time's obligations as

[8] See Exhibit 19 to Defendants' Response to Plaintiffs' Motion.
[9] See Exhibit A to the Complaint.

follows: "On Time will be in charge of all operations including auto shows, dates, related training, and the operation of said shows."[10] Since it is the responsibility of DASH, and not On Time, to provide bookkeeping services, Counter Plaintiffs' claim for Breach of Contract fails on this ground.

In Paragraph 57 of the First Amended Counterclaim, the Counter Plaintiffs allege that OTVS/IVS breached the parties' Agreement by setting up a competing venture. In response, Kaiser and On Time contend that they did not compete against EVS until after Langan and Kaiser had a falling out. In her Affidavit, Kaiser attests to the following: "[n]either I nor OTVS engaged in any activity competitive against EVS until after Langan and I had our falling out and Langan began asserting absolute hegemony over EVS to the exclusion of me. Actually, I only began to do things to compete with EVS when and because both Langan and his lawyer refused to fund EVS' projects."[11] Notably, Defendants argue in their Motion for Summary Disposition that Kaiser terminated the parties' Agreement on June 20, 2022.[12] It was not until after June 20, 2022 when Kaiser contacted EVS customers, specifically Volkswagen representatives, to inform them that she separated from DASH and EVS.[13] Since Counter Plaintiffs present no evidence to the contrary, their claim for Breach of Contract fails on this ground.

Counter Plaintiffs also raise the argument in Paragraph 57 of the First Amended Counterclaim that On Time took amounts of money that it was not entitled to, including monies advanced to EVS that were not net profits. While the parties' Agreement addresses profit sharing,

[10] See Exhibit A to the Complaint.
[11] Kaiser's Affidavit is included, but not given an exhibit letter, in Counter Defendants' Exhibits to the Motion for Partial Summary Disposition.
[12] See page 10 of Defendants' Motion for Summary Disposition. In Exhibit 19 of Defendants' Response, Paragraph 14 of Defendants' Requests for Admission stated: "Admit that on June 15, 2022, You separated from EVS." In response, Kaiser stated, in pertinent part, that "On June 20, 2022, Langan informed Kaiser via text that the partnership was over, and began withholding funding. Therefore, Kaiser did not 'separate' from EVS. Langan ousted her."
[13] See Exhibit 14 to Defendants' Motion for Summary Disposition.

there are no restrictive provisions within the Agreement that would support this argument under a breach of contract claim. Accordingly, summary disposition of Counter Plaintiffs' Breach of Contract claim in the First Amended Counterclaim is warranted under MCR 2.116(C)(10).

The Court is cognizant of Counter Plaintiffs' argument that Plaintiffs breached their implied duty of good faith and fair dealing[14] by allegedly refusing to provide Defendants with operational information concerning EVS, by terminating the Agreement, and by stealing jobs that EVS quoted, and in some instances, performed. "However, Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing." *Fodale v Waste Mgmt. of Michigan, Inc.,* 271 Mich App 11, 35; 718 NW2d 827, 841 (2006). In addition, Counter Plaintiffs have not demonstrated how On Time's operations of EVS led to a breach of an "implied" duty when the Agreement expressly outlines the parties' respective obligations relative to EVS. Since Counter Plaintiffs' Breach of Contract claim fails, and there is no cause of action for, nor a finding of, breach of the implied covenant of good faith and fair dealing, this particular argument fails as well.

In relation to their Breach of Fiduciary Duty claim, Counter Plaintiffs make the following allegations in the First Amended Counterclaim:

> 60. Pursuant to the Agreement, OTVS/Kaiser had full operational control over EVS's business and accordingly owed fiduciary duties to PBJ and EVS of utmost good faith, loyalty and disclosure.
>
> 61. Kaiser's refusal to share the Books and Records with PBJ/EVS was a material breach of those duties.

[14] "Every contract has an implied duty of good faith and fair dealing." *MSSC, Inc. v Airboss Flexible Prod. Co.,* ____ Mich ___, ___; ___ NW2d ___ (2023). "It has been said that the covenant of good faith and fair dealing is an implied promise contained in every contract that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Hammond v United of Oakland, Inc.,* 193 Mich App 146, 151–52, 483 NW2d 652, 655 (1992).

62. Kaiser further breached her fiduciary duties to PBJ/EVS by her creation of IVS and theft of EVS business and usurpation of opportunities.

"To establish a claim for breach of fiduciary duty, a plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty, and (3) damages caused by the breach of duty." *Highfield Beach at Lake Mich. v. Sanderson*, 331 Mich App 636, 666; 954 NW2d 231 (2020).

"A fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one upon the judgment and advice of another." *In re Monier Khalil Living Trust*, 328 Mich App 151, 168; 936 NW2d 694 (2019) (quotation removed). "The test of whether an agency has been created is whether the principal has a right to control the actions of the agent." *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992).[15]

Here, Counter Plaintiffs assert that Plaintiffs were agents of EVS because they were responsible for all operations of EVS' business, namely acquiring all vehicles, quoting all jobs, setting all prices, determining profit margins, and billing EVS customers. Conversely, Plaintiffs rely on the case of *Petroleum Enhancer, LLC v Woodward*, 690 F3d 757, 768 (6th Cir, 2012) to argue that non-officers, non-directors, or employees who are not subject to non-competition agreements generally have no fiduciary duties. Plaintiffs contend that Langan has held himself out as the sole owner and manager of EVS and since Kaiser has no authority over EVS, as alleged by Counter Plaintiffs, she owes no statutory fiduciary duty under the Michigan Limited Liability Company Act.

With regard to the allegation in Paragraph 61 of the First Amended Counterclaim, the Court again references the following provision within the parties' Agreement: "DASH will provide the

[15] "An agent is one who acts for or in the place of another by authority from him; one who undertakes to transact some business or manage some affairs for another by authority and on account of the latter, and to render an account of it." *Stephenson v Golden*, 279 Mich 710, 734–35, 276 NW 849, 857 (1937). "Under principles of agency, an agent owes his principal a duty of good faith, loyalty, and fair dealing. The Michigan Courts have held that these duties prohibit an agent from acting for himself at his principal's expense during the course of his agency." *Nedschroef Detroit Corp. v Bemas Enterprises LLC,* 106 F Supp 3d 874, 882 (ED Mich, 2015) (citation and internal quotation marks omitted).

funding, transportation, logistics and bookkeeping."[16] With that in mind, Counter Plaintiffs cannot demonstrate that Kaiser had the duty to produce EVS' books and records when Plaintiffs had no contractual responsibility regarding bookkeeping or any type of record keeping.

The allegations in Paragraph 62 appear to focus on Kaiser's conduct that occurred after the parties had their falling out. As stated previously, Kaiser attested in her Affidavit that neither she nor On Time competed against EVS until after she and Langan had their falling out.[17] On June 23, 2022, Kaiser filed a Certificate of Assumed Name so that On Time could begin doing business as IVS.[18] Kaiser also sent an email to Volkswagen representatives on June 24, 2022 in which she indicated that IVS had separated from DASH and EVS.[19] Once Kaiser was no longer in a business relationship with EVS, any principal/agent relationship that may have existed, if at all, would have been terminated and so Kaiser would have been free to compete against EVS. For these reasons, summary disposition of Counter Plaintiffs' Breach of Fiduciary Duty claim in the First Amended Counterclaim is warranted under MCR 2.116(C)(10).

Regarding their Conversion claim, Counter Plaintiffs allege in their First Amended Counterclaim that "OTVS/IVS has converted payments made by EVS customers from contracts entered into, funded by, and performed using assets of EVS/PJB without consent."[20] In particular, Counter Plaintiffs assert that Plaintiffs have converted proceeds from four projects involving Nucleus Events, SBD Automotive, Xperience Communications, and Mitsubishi, all of which were pending when the parties' relationship broke down.

"The tort of conversion is any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein. Statutory conversion, by

[16] See Exhibit A to the Complaint.
[17] See Kaiser's Affidavit to Plaintiffs' Motion for Partial Summary Disposition. Paragraph 23 of the First Amended Counterclaim alleges that Kaiser suddenly quit EVS on June 15, 2022.
[18] See Exhibit 13 to Defendants' Motion for Partial Summary Disposition.
[19] See Exhibit 14 to Defendants' Motion for Partial Summary Disposition.
[20] See Paragraph 66 of the First Amended Counterclaim.

contrast, consists of knowingly "buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property." MCL 600.2919a; MSA 27A.2919(1). "To support an action for conversion of money, the defendant must have an obligation to return the specific money entrusted to his care. The defendant must have obtained the money without the owner's consent to the creation of a debtor and creditor relationship." *Head v Phillips Camper Sales & Rental, Inc.,* 234 Mich App 94, 111–12; 593 NW2d 595, 603 (1999) (citations and internal quotations omitted).

In her Affidavit, Kaiser attested that she facilitated EVS getting paid in relation to the Nucleus Events project.[21] Kaiser conceded that she and On Time received payment from the SBD Automotive project on or about June 22, 2022 once Langan allegedly declared that he would no longer fund EVS. Kaiser averred further that she funded the project and completed it on or around August 5, 2022. Kaiser submits the SBD Automotive Invoice as well as a rental agreement, outlining certain charges, as evidence that Plaintiffs funded and performed the project.[22] Kaiser also admitted to receiving payment for the Xperience Communications project once Langan purportedly directed his staff to cease funding and performance on all projects including this one. Kaiser submits the Xperience invoice as well as cancelled checks and payment receipts as evidence that Plaintiffs funded and performed the project.[23] Kaiser attested further that she and On Time completed the project on or about July 25, 2023. Finally, Kaiser represented in her Affidavit that she was paid for the Mitsubishi project after Langan allegedly directed his staff to cease funding and performance on all projects including this one. Kaiser averred that she and On Time completed the project on or about June 30, 2022. Plaintiffs submit the MRDA-AA Lab Invoice, an email

[21] See Kaiser's Affidavit and Exhibit I to Plaintiffs' Motion for Partial Summary Disposition. The Nucleus Events project no longer appears to be an issue in this matter since EVS was paid for this project.
[22] See Kaiser's Affidavit and Exhibit J to Plaintiffs' Motion for Partial Summary Disposition.
[23] See Kaiser's Affidavit and Exhibit K to Plaintiffs' Motion for Partial Summary Disposition.

from Mitsubishi engineer Joe Cesarz, the purchase order, check request forms, and a cancelled check in support of their position that they paid and funded the project.[24]

In opposition, Counter Plaintiffs allege that EVS submitted the quote for the SBD Automotive project and booked and paid for the Polestars and their transport. Counter Plaintiffs submit a quote regarding SBD Automotive's rental request as well as emails from Kaiser in support of their allegation.[25] In an email to John Murad, dated July 8, 2022, Kaiser acknowledged that DASH transported a 2022 Polestar to the venue and requested that this move be taken off what Langan owed On Time for June.[26] Counter Plaintiffs also assert that EVS booked and paid for a Polestar, Volkswagen, and a 2022 Tesla Model S for the Xperience job. Counter Plaintiffs submit a Kaiser email, a quote regarding Xperience Communications' rental request, two unsigned vehicle usage agreements for the Volkswagen and Tesla, an unidentified credit card transaction receipt, and a cost/sale analysis document related to the Polestar in support of their assertion.[27] With regard to the Mitsubishi project, Counter Plaintiffs represent that they submitted a quote to provide three vehicles.[28]

In their reply, Plaintiffs point out that Counter Plaintiffs' documents only evidence the fact that EVS bid on the projects, and not that EVS paid for or performed the projects. Upon review of the deposition testimony of both Langan and Bill Paulson, an EVS employee, neither individual could confirm whether EVS was hired and in fact funded and performed the SBD Automotive project, the Xperience project, or the Mitsubishi project.[29] The Court finds that there is no genuine

[24] See Kaiser's Affidavit and Exhibit L to Plaintiffs' Motion for Partial Summary Disposition.
[25] See Exhibit 11 to Defendants' Response to Plaintiffs' Motion for Partial Summary Disposition.
[26] See Exhibit 11 to Defendants' Response to Plaintiffs' Motion for Partial Summary Disposition. This email does not specifically reference the SBD Automotive project.
[27] See Exhibit 12 to Defendants' Response to Plaintiffs' Motion for Partial Summary Disposition.
[28] See Exhibit 13 to Defendants' Response to Plaintiffs' Motion for Partial Summary Disposition.
[29] See Exhibits LL and PP to Plaintiffs' Reply.

issue of material fact as to whether Plaintiffs converted payments by EVS customers and so summary disposition of this claim is warranted under MCR 2.116(C)(10).

With regard to Counter Plaintiffs' claim for an Accounting, Defendants allege in Paragraphs 72 and 73 of the First Amended Counterclaim that "[t]he Agreement, between PBJ and OTVS, established that PBJ is entitled to a complete accounting of all Books and Records of EVS. OTVS's refusal to share the EVS Books and Records with PBJ was a material breach of the Agreement and OTVS's fiduciary duties to account."

"A claim for accounting exists when the aggrieved party cannot ascertain the sums to which it is entitled." *Basinger v Provident Life & Acc. Ins. Co.,* 67 Mich App 1, 9; 239 NW2d 735, 739 (1976). In line with the analysis provided herein, Counter Plaintiffs have not demonstrated that they are the aggrieved party because they are only required under the Agreement to keep the books of EVS. Plaintiffs are under no obligation under the Agreement to produce the EVS books and records, nor do Plaintiffs have a fiduciary duty to produce such books and records. Therefore, summary disposition of Counter Plaintiffs' Accounting claim under the First Amended Complaint is warranted under MCR 2.116(C)(10).

Based upon the foregoing analysis, the Court finds that there is no genuine issue of material fact and so Plaintiffs' Motion for Partial Summary Disposition of Counter Complaint is GRANTED as to the Breach of Contract claim (Count I), the Breach of Fiduciary Duty claim (Count II), the Conversion claim (Count III), and the Accounting claim (Count IV) in the First Amended Complaint. As such, Counts I, II, III, and IV are dismissed.

IV. Defendant/Counter-Plaintiffs' Motion for Summary Disposition, Pursuant to MCR 2.116(C)(10), on Count V of Defendants' First Amended Counterclaim

A. Arguments of the Parties

In their Motion, Counter Plaintiffs reference the December 23, 2021 Loan Agreement wherein Stoddard received a $117,178.00 loan from Langan with Kaiser executing the document as Guarantor, thereby guaranteeing "the loan's full repayment and any interest due."[30] Counter Plaintiffs maintain that there is no dispute that there is a contract between Langan and Kaiser.

Counter Plaintiffs also argue that Stoddard breached the Loan Agreement by failing to make payments. During her deposition, Kaiser answered "[t]hat is correct" to the question: "to your knowledge, Stoddard has not repaid any principle of the loan but has made some interest payments, correct?"[31]

Counter Plaintiffs also contend that Kaiser admitted that she is bound by the terms of the Loan Agreement. Specifically, Kaiser answered "correct" to the question: "you were agreeing to guarantee the loan's full repayment; isn't that correct?"[32] Defendants acknowledge that Kaiser made payments on Stoddard's behalf on at least eight occasions,[33] however, she allegedly ceased making payments in October 2022. Further, Counter Plaintiffs maintain that there is no dispute that the contract has been breached and that Langan has been injured as a result of Kaiser's breach since he has not received repayment of the loaned funds.

Finally, Counter Plaintiffs claim that the Loan Agreement is payable on demand because it does not contain a fixed time for repayment. According to Counter Plaintiffs, the filing of the Complaint is considered a demand to pay the Loan Agreement. "A loan made with no fixed time

[30] See Exhibit 3 to the First Amended Counterclaim.
[31] See Exhibit 3 to Defendants' Motion for Summary Disposition on Count V.
[32] See Exhibit 3 to Defendants' Motion for Summary Disposition on Count V.
[33] See Exhibit 3 to Defendants' Motion for Summary Disposition on Count V.

of repayment is payable on demand." *Jackson v Est. of Green*, 484 Mich 209, 217; 771 NW2d 675, 678–79 (2009) (YOUNG and MARKMAN, concurring).

In response, Plaintiffs argue that the Loan Agreement requires monthly interest payments of $1,500.00. Based upon Langan's testimony that 8 payments of $1,500.00 were made, or $12,000.00 total, Plaintiffs presume these payments were made in January 2022 through August 2022. With that in mind, the monthly payments were current at the time the July 18, 2023 demand letter was sent.

Plaintiffs assert further that the Loan Agreement calls for an interest rate of 15.36% per year, which is well in excess of the usury limit in Michigan. Based upon Michigan's usury limit, Plaintiffs contend that Langan is only entitled to $105,178.00, minus any adjustments, should he seek to collect interest.

Additionally, Plaintiffs argue that Kaiser, as guarantor, is entitled to any personal defenses and set offs that she may have against Langan as raised in the Complaint. Plaintiffs also contend that Stoddard has been defaulted with regard to the Third Party Complaint and so he is liable to Kaiser for any amount she is held responsible to Langan under the Loan Agreement. Plaintiffs request the Court to take Defendants' Motion under advisement until the Complaint is adjudicated and in any event, to deny Defendants' Motion in any amount over $105,178.00. If the Court grants Defendants' Motion, Plaintiffs request the Court to grant a Default Judgment against Stoddard on the Third Party Complaint in the amount Defendants are awarded under the Loan Agreement.

In their Reply, Counter Plaintiffs maintain that Langan is not seeking to enforce a usurious interest rate and so the Court should at least enter judgment in Langan's favor and against Kaiser of at least $105,178.00.

B. Analysis

In Count V, namely Breach of Contract of Guaranty (Kaiser), of the First Amended Counterclaim, Counter Plaintiffs allege in Paragraphs 78, 79, and 81 that "[a]s guarantor, on November 1, 2022, Kaiser became obligated to pay Langan the $1,500 payment of October 22 interest…Kaiser failed to do so…As guarantor, Kaiser is obligated to immediately pay Langan the $6,000 in interest that is presently due and owing."

As stated previously, "[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 [injury] to the party claiming breach." *Miller-Davis*, 495 Mich at 178.

Here, it is undisputed that Langan, Kaiser, and Thomas Stoddard executed a Loan Agreement on December 23, 2021.[34] Further, neither party contests the fact that both Stoddard and Kaiser, as guarantor, have breached the Loan Agreement when they have failed to make the $1,500.00 interest payment since October 2022. In Paragraph 82 of the First Amended Counterclaim, Langan represents that he has been damaged in excess of $25,000.00 on account of this and other breaches as alleged in the pleading. Clearly, there is no genuine issue of material fact that Kaiser breached the Loan Agreement. Thus, Counter Plaintiffs have proven their Breach of Contract claim against Kaiser.

The issue becomes, however, whether the interest amount is prohibitive under MCL 438.31. Plaintiffs note that the Loan Agreement calls for an interest rate of 15.36% per year, which is well in excess of the usury limit in Michigan. MCL 438.31 provides that "[t]he interest of money shall be at the rate of $5.00 upon $100.00 for a year, and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate

[34] See Exhibit 3 of the First Amended Counterclaim.

in writing for the payment of any rate of interest, not exceeding 7% per annum."[35] Based upon Michigan's usury limit, Plaintiffs contend that Langan is only entitled to $105,178.00, minus any adjustments, should he seek to collect interest.

The Court is cognizant of Plaintiffs' request to withhold action on this motion until any setoffs can be ascertained. "While claims for set-off and recoupments envision resolution in the same suit, this does not mean that claims which may be offset must be resolved at trial, as opposed to summarily adjudicated on an undisputed record. Rather, a "[c]ourt may grant summary judgment in favor of a moving party, even if there is a possibility of set-off brought about by claims remaining as an issue for litigation." *RSM Richter, Inc. v Behr Am., Inc.,* 781 F Supp 2d 511, 517 (ED Mich, 2011).

Accordingly, and based upon the foregoing analysis, the Court finds that there is no genuine issue of material fact and so Defendant/Counter-Plaintiffs' Motion for Summary Disposition Pursuant to MCR 2.116(C)(10), on Count V of Defendants' First Amended Counterclaim is GRANTED wherein Kaiser is liable to Langan in the amount of $105,178.00.

Accordingly, Langan is hereby granted a judgment against Kaiser in the amount of $105,178.00 to include statutory interest, moving forward, as of the date of this Opinion and Order.

With regard to her request for a Default Judgment on the Third Party Complaint, Kaiser must file the appropriate motion pursuant to the Michigan court rules.

[35] "Any seller or lender or his assigns who enters into any contract or agreement which does not comply with the provisions of this act or charges interest in excess of that allowed by this act is barred from the recovery of any interest, any official fees, delinquency or collection charge, attorney fees or court costs and the borrower or buyer shall be entitled to recover his attorney fees and court costs from the seller, lender or assigns." MCL 438.32.

V. Defendants/Counter-Plaintiffs' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) and (C)(10) Seeking Entry of Judgment Dismissing Plaintiffs' Complaint

A. Arguments of the Parties

In their Motion, Defendants argue that the Court should dismiss Plaintiffs' claim for Breach of Contract (Count I), in which Plaintiffs allege that Defendants failed to deliver to Plaintiffs their 40% net profits during 2022, refused to account to Plaintiffs for EVS' financial transactions, and refused Plaintiffs access to EVS' books and records. Defendants assert that this claim should be dismissed because Plaintiffs' right to receive 40% of EVS net profits terminated in June 2022. Since the Agreement did not contain a term, duration, or manner of termination, Defendants contend that the Agreement was terminable at the will of either party and that occurred when the Agreement was terminated on June 20, 2022.

Defendants argue further that the Agreement only requires Defendants to be responsible for all funding, transportation, logistics, and bookkeeping. According to Defendants, Plaintiffs have not alleged that Defendants breached any responsibility outlined in the Agreement. Moreover, Defendants maintain that Kaiser exclusively controlled EVS' billing and she alone determined and set the price that EVS charged its customers.[36]

In response, Plaintiffs argue that Defendants have violated their responsibility in terms of funding and bookkeeping. Plaintiffs refer to the Expert Report of Thomas Frazee wherein Frazee represents that Defendants' records of EVS' financial transactions are extremely limited and incomplete and do not treat EVS as if it was a standalone entity.[37] According to Plaintiffs, Langan also violated his duty to fund EVS' operations and so his actions initiated the falling out. The parties' work acquaintance, Kenneth Spencer, attested at his deposition that during the week of

[36] See Exhibit 3 to Defendants' Summary Disposition Motion Pursuant to MCR 2.116(C)(8) and (C)(10).
[37] See Exhibit CC to Plaintiffs' Brief Opposing Summary Dismissal of Plaintiffs' Complaint.

June 20, 2022, Langan indicated that he was shutting EVS down, which was why he was not paying anyone.[38]

Finally, Defendants argue that Langan and EVS are not parties to any contract with Plaintiffs. Rather, the only contract at issue in this matter is the Agreement between On Time and DASH. As such, Plaintiffs' Breach of Contract claim should be dismissed as to Langan and EVS.[39]

Regarding the claim for Fraud (Count II), Plaintiffs allege in Paragraph 14 of the Complaint that "[i]n the course of negotiating to form and forming EVS and the 2021 Agreement, Langan made a number of factual representations to Kaiser concerning his intentions to fund the operations of EVS, and share the resulting profits with Kaiser, as well as his intention that EVS be operated for their continuing mutual benefit." Plaintiffs allege further in Paragraph 15 that "[a]t the time he made the above representations, Langan knew they were false, and that he had other intentions in mind for EVS ad [sic] Plaintiffs." Contrary to these allegations in the Complaint, Kaiser admitted during her deposition that she was not sure that the representations made by Langan, as identified in Paragraph 15 of the Complaint, were false at the time that he made them.

In their response, Plaintiffs concede that Kaiser expressed honest uncertainty as to when Langan's intentions became other than what he originally expressed. However, Plaintiffs submit Spencer's deposition testimony in which he understood the relationship to be a partnership, noting that Langan said to Kaiser, "aren't you glad that you own your own company now?"[40]

With respect to Plaintiffs' Conversion claims (Counts V and VI), Defendants argue that these claims are barred by the economic loss doctrine. When a contract governs the parties' conduct, all tort claims are foreclosed. Here, Plaintiffs are claiming that Defendants converted or failed to deliver 40% of EVS' net profits, however, the parties' rights and obligations concerning

[38] See Exhibit XX to Plaintiffs' Brief Opposing Summary Dismissal of Plaintiffs' Complaint.
[39] EVS is not a party to the original Complaint.
[40] See Exhibit XX to Plaintiffs' Brief Opposing Summary Dismissal of Plaintiffs' Complaint.

profits are governed by the Agreement. For these reasons, Plaintiffs' conversion claims should be dismissed.

Conversely, Plaintiffs argue that there is no dispute that Defendants have retained revenue from the joint venture's projects and stopped distributing Plaintiffs' 40% of net profits in May 2022. Plaintiffs rely on the case of *Citizens Ins. Co. of Am. v Delcamp Truck Ctr., Inc.,* 178 Mich App 570; 444 NW2d 210, 213 (1989)[41], to essentially argue that a claim for conversion was allowed to stand even though there was an existing contract between the parties.

Plaintiffs contend further that Defendants do not address their claim of MCLA 600.2919a (Count VI) other than to provide the definition of statutory conversion within their analysis. Plaintiffs refer to Langan's deposition testimony wherein he admitted that EVS revenue was received and deposited into the EVS bank accounts by Langan, and it was his responsibility to turn the 40% net profits over to Kaiser.[42] Plaintiffs again reference the Expert Report, in which Frazee stated that "Langan withdrew large amounts of money from the EVS bank accounts without maintaining any record explaining the reason/purpose. The amounts flowing out of the accounts were significantly larger after June 2022."[43] Frazee also represents that the "bank statements indicate that the cash remaining in the EVS accounts as of July 31, 2023 was $61,594…[which] is less than the amount withheld from Kaiser." Frazee has calculated Plaintiffs' 40% share of EVS' net profits as $37,182 for the period between May 1, 2022 and June 20, 2022.[44]

Defendants argue further that Plaintiffs' claim for Defamation (Count VII) should be dismissed because the statements at issue are not actionable. Plaintiffs identify the alleged

[41] The *Citizens* case differs from the case herein because the defendant company failed to return the overpayment from an issued check following a request for the return of those funds. *Id.* at 576.
[42] See Exhibit WW to Plaintiffs' Brief Opposing Summary Dismissal of Plaintiffs' Complaint.
[43] See Exhibit CC to Plaintiffs' Brief Opposing Summary Dismissal of Plaintiffs' Complaint. The allegations against Langan concern his conduct as owner or sole member of EVS. MCL 450.4501(4) provides that a member of a limited liability company is not liable for the acts, debts, or obligations of the limited liability company. The Court notes that EVS is not a party to the Complaint.
[44] See Exhibit CC to Plaintiffs' Brief Opposing Summary Dismissal of Plaintiffs' Complaint.

defamatory statements in Paragraph 12 in their Response to Defendants' Second Discovery Requests.[45] Plaintiffs also contend in their Response that Defendants' statements have placed Kaiser in a negative light.

In their claim for Breach of Fiduciary Duty (Count VIII), Plaintiffs allege in Paragraphs 66 and 67 of the Complaint that Langan owed a fiduciary duty to Plaintiffs because EVS is either a joint venture, a general partnership, or an LLC rightfully belonging to On Time and PBJ. Plaintiffs allege further that as a manager of EVS, Langan had a fiduciary relationship with Plaintiffs. Defendants, on the other hand, argue that there is no fiduciary relationship herein. Since Kaiser is not a member of EVS, within the meaning of MCL 450.4501 of the Michigan Limited Liability Company Act, Defendants do not owe her any fiduciary duty.

In contrast, Plaintiffs argue that Langan, DASH, Kaiser, and On Time were joint venturers. Plaintiffs defer to the parties' Agreement to assert that the parties agreed to jointly work under the name and style of EVS. As such, Plaintiffs maintain that the parties stand in a fiduciary relationship to one another since they were working solely for the interests of the venture.

In relation to Plaintiffs' claim for Tortious Interference (Count IX), Defendants argue that they did not induce or instigate the breach or interruption of Plaintiffs' business relationships or expectancies. Defendants contend further that there is no evidence that Defendants engaged in any tortious interference. While Kaiser identifies Volkswagen as the customer with which Defendants tortiously interfered, Defendants argue that the evidence actually demonstrates that Kaiser was attempting to divert EVS' contracts with Volkswagen to her company.[46] However, Volkswagen had pending purchase orders that had been previously issued to EVS. Defendants simply performed the work for Volkswagen that it was awarded and pursuant to the invoices.

[45] See Exhibit 29 to Defendants' Summary Disposition Motion Pursuant to MCR 2.116(C)(8) and (C)(10).
[46] See Exhibit 15 to Defendants' Summary Disposition Motion Pursuant to MCR 2.116(C)(8) and (C)(10).

In response, Plaintiffs maintain that they can identify 16 customers, with which Kaiser expected to continue business when she entered into the EVS venture.[47] Plaintiffs argue that Defendants intended to disrupt their relationships with these customers by representing that Langan has always been the sole owner of EVS, and that Kaiser left EVS to compete with it. Additionally, Spencer represented during his deposition that Langan told him that he was going to destroy Kaiser.[48] According to Plaintiffs, Langan's words evidence his malicious intentions toward Kaiser.

Finally, Defendants argue that Plaintiffs' claims for Concert of Action and Civil Conspiracy (Counts III and IV) should be dismissed because the underlying tort claims fail. Conversely, Plaintiffs contend that if Defendants' conduct is found to be tortious, then they are jointly and severally liable for Plaintiffs' damages.

B. Analysis

In their respective filings, the parties explore the nature of the parties' relationship to one another. Specifically, the parties address whether On Time and DASH had agreed to enter into a joint venture or a partnership by executing the February 11, 2021 Agreement. If the parties indeed were a part of a joint venture, Plaintiffs argue that they would owe a fiduciary duty to one another. "It is an oft-repeated proposition that joint adventurers stand in a fiduciary relationship to one another. It is their duty to work solely for the interests of the adventure as far as the property is concerned." *Georges v Ballard*, 20 Mich App 554, 557, 174 NW2d 311, 313 (1969). See also *Schmude Oil Co. v Omar Operating Co.,* 184 Mich App 574, 583; 458 NW2d 659, 664 (1990). Similarly, "courts universally recognize the fiduciary relationship of partners and impose on them

[47] See Exhibits V and the Kaiser Affidavit attached to Plaintiffs' Brief Opposing Summary Dismissal of Plaintiffs' Complaint.
[48] See Exhibit XX to Plaintiffs' Brief Opposing Summary Dismissal of Plaintiffs' Complaint.

obligations of the utmost good faith and integrity in their dealings with one another in partnership affairs." *Band v Livonia Assocs.,* 176 Mich App 95, 113; 439 NW2d 285, 294 (1989).

In consideration of the fact that EVS is a limited liability company, the Court finds that the parties did not have a partnership under the Agreement.[49] As noted by Defendants, MCL 449.6(2)[50] provides that business associations organized under other statutes are not partnerships. The Court finds that the parties' business relationship is not a partnership.

"[A] joint venture is an association to carry out a single business enterprise for a profit. Whether or not a joint venture exists is a legal question for the trial court to decide. A joint venture has six elements:

(a) an agreement indicating an intention to undertake a joint venture;
(b) a joint undertaking of;
(c) a single project for profit;
(d) a sharing of profits as well as losses;
(e) contribution of skills or property by the parties;
(f) community interest and control over the subject matter of the enterprise."

Berger v Mead, 127 Mich App 209, 214–15; 338 NW2d 919, 922 (1983) (Citations and internal quotes omitted).

With regard to the first element in *Berger*, namely "an agreement indicating an intention to undertake a joint venture, the parties' Agreement provides, among other things, that On Time and DASH "desire to work under the name and style of Expert Vehicle Solutions, LLC" and "DASH and ON TIME will operate and put on auto shows under the name EXPERT VEHICLE SOLUTIONS, LLC." As evidenced by the language of the Agreement, the parties intended to undertake a joint venture by working together through their respective companies to operate a vehicle leasing business under the name of EVS, LLC. Therefore, element (a) has been satisfied.

[49] See Exhibit A to the Complaint. The Agreement identifies EVS as a limited liability company.
[50] MCL 449.6(2) provides in pertinent part: "[b]ut any association formed under any other statute of this state, or any statute adopted by authority, other than the authority of this state, is not a partnership under this act, unless such association would have been a partnership in this state prior to the adoption of this act."

When determining whether the parties engaged in a joint undertaking, as set forth in element (b), the Court observes that the operation of EVS itself was a joint undertaking, even though the parties had different responsibilities. Thus, element (b) of the *Berger* analysis is met. Both On Time and DASH also operated and put on auto shows under EVS to earn profits. As such, element (c) has also been satisfied.

With respect to element (d), namely a sharing of profits as well as losses, it is clear that the parties shared EVS' profits. However, the parties' Agreement does not address losses. Therefore, element (d) remains in question for purposes of summary disposition. Regarding elements (e) and (f), the contribution of skills or property by the parties and interest and control over the subject matter of the enterprise, these factors have been met.

Based upon the analysis of the *Berger* elements above, the Court finds that there is a question of fact as to whether the parties' business relationship constituted a joint venture. Whether or not the parties' business relationship constituted a joint venture, however, is immaterial to the parties' respective allegations, which concern conduct that occurred *after* the parties' Agreement terminated on or about June 20, 2022.

When a contract does not contain a provision concerning the term, duration, or manner of termination, that contract is terminable at the will of any party to the contract. *Lichnovsky v Ziebart Int'l Corp.,* 414 Mich 228, 236, 324 NW2d 732, 736–37 (1982). According to Michigan law, "[t]he relationship of joint adventurers may not be changed, departed from, abandoned or dissolved without the mutual consent of all parties concerned." *Midfield Concession Enterprises, Inc. v Areas USA, Inc.,* 130 F Supp 3d 1122, 1137 (ED Mich, 2015) (citation omitted). Evidence must be considered to examine whether the parties' actions demonstrate a mutual intent to dissolve or terminate a joint venture. *Id.*

In this case, neither party disputes that their business relationship could be terminated at any time. Furthermore, the June 2022 text messages between Kaiser and Langan clearly establish a mutual breakdown of the parties' business relationship.[51] On June 24, 2022, Kaiser emailed EVS' customer, namely Volkswagen, representing that On Time/Integrity Vehicle Solutions had separated from DASH and EVS.[52] During his deposition, Kenneth Spencer averred that during the week of June 20, 2022, Langan intended to shut down EVS. Spencer attested further that Langan and Kaiser stopped doing business together as of June 2022.[53] Even if the parties' business relationship constituted a joint venture, the undisputed facts show a mutual intent by the parties to dissolve the business relationship in June of 2022. Once the Agreement was terminated, the parties no longer owed any contractual or fiduciary duties to one another.

In their Motion, Defendants are seeking the dismissal of Plaintiffs' Breach of Contract claim (Count I) in the Complaint. Plaintiffs' allegations in the Complaint, with respect to the Breach of Contract claim, are:

> 28. During 2022, Defendants have failed to deliver to Plaintiffs their contractually prescribed 40% of profits, as referenced in paragraph 12, above.
>
> 29. Defendants further refuse to account to Plaintiffs for EVS' financial transactions, and refuse Plaintiffs access to EVS' books and records.

"To state a claim for breach of contract under Michigan law, a plaintiff first must establish the elements of a valid contract. The elements of a valid contract in Michigan are 1) parties competent to contract, 2) a proper subject matter, 3) a legal consideration, 4) mutuality of agreement, and 5) mutuality of obligation." *JAC Holding Enterprises, Inc. v Atrium Cap. Partners, LLC,* 997 F Supp 2d 710, 740 (ED Mich, 2014). "A party asserting a breach of contract must

[51] See Exhibit 12 to Defendants' Motion for Summary Disposition.
[52] See Exhibit 14 to Defendants' Motion for Summary Disposition.
[53] See Exhibit XX to Plaintiffs' Response to Defendants' Motion for Summary Disposition.

establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in [injury] to the party claiming breach." *Miller*-Davis, 495 Mich at 178.

Clearly, the parties' February 11, 2021 Agreement[54] is the contract at issue in this matter and the parties to the Agreement are only DASH and On Time. Thus, Plaintiffs cannot establish the elements of a valid contract, to pursue a Breach of Contract claim, relative to Langan since he is not a party to the Agreement. Therefore, Plaintiffs' Breach of Contract claim against Langan lacks merit and the claim is dismissed against Langan. The Court will now address Plaintiffs' Breach of Contract claim against Defendant DASH.

In Paragraph 28 of their Complaint, Plaintiffs allege that during 2022, Defendants have failed to deliver to Plaintiffs their contractually prescribed 40% of net profits. In response, Defendants argue that Plaintiffs' right to receive 40% of EVS' net profits terminated in June 2022 when the Agreement terminated.[55]

The parties' Agreement provides that "the proceeds of all net profits of EVS shall be divided sixty (60%) percent to DASH and forty (40%) percent to On Time." While Defendants argue that Plaintiffs are not entitled to receive net profits due to the Agreement's termination in late June 2022, it is clear that Plaintiffs are seeking net profits that would have been due and owing *prior to* the termination of the Agreement. Plaintiffs present evidence to support their position that they are owed 40% of EVS' net profits, or $37,182.00 as calculated by Plaintiffs' expert, for the period *prior to* the termination of the Agreement.[56] Based upon the evidence presented, the Court finds that On Time is owed 40% of EVS' net profits for the period *prior to* the termination of the

[54] See Exhibit A to the Complaint.
[55] "[W]here the parties have not agreed upon the term, duration, or manner of termination of such an agreement it is generally deemed to be terminable at the will of either party because they have not agreed otherwise." *Lichnovsky v Ziebart Int'l Corp.,* 414 Mich 228, 240–41; 324 NW2d 732, 738–39 (1982).
[56] See Exhibit CC to Plaintiffs' Brief Opposing Summary Dismissal of Plaintiffs' Complaint.

Agreement or from May 1, 2022 to June 20, 2022. The remaining issue to be determined is the exact amount of net profits due and owing to On Time. Therefore, summary disposition in Defendants' favor as to Count I is not warranted.

With regard to Plaintiffs' allegation that Defendants breached the Agreement by refusing to account to Plaintiffs for EVS' financial transactions and by refusing Plaintiffs access to EVS' books and records, the Court observes that Defendants were only contractually responsible for providing bookkeeping and not an accounting of EVS' financial transactions. Specifically, the Agreement provides that "DASH shall be responsible for all funding, transportation, logistics, and bookkeeping." Additionally, there is no provision in the Agreement that requires Defendants to provide Plaintiffs with access to EVS' books and records. Even if the parties' business relationship constituted a joint venture, Plaintiffs' allegation references conduct that occurred *after* the parties' business relationship terminated. Following the termination of the Agreement and the parties' business relationship, Defendants no longer owed any duty to Plaintiffs. Therefore, summary disposition is warranted as to this claim, as outlined in Paragraph 29, of the Complaint.

In summary, Defendants' Motion for Summary Disposition is denied under MCR 2.116(C)(10) as to Plaintiffs' Breach of Contract claim against DASH concerning the 40% net profits and granted with respect to Langan and the allegation set forth in Paragraph 29.

With regard to their claim for Fraud (Count II), Plaintiffs allege in Paragraph 14 of the Complaint that "[i]n the course of negotiating to form and forming EVS and the 2021 Agreement, Langan made a number of factual representations to Kaiser concerning his intentions to fund the operations of EVS, and share the resulting profits with Kaiser, as well as his intention that EVS be operated for their continuing mutual benefit." Plaintiffs allege further in Paragraph 15 that "[a]t the time he made the above representations, Langan knew they were false, and that he had other intentions in mind for EVS ad [sic] Plaintiffs."

"The general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth, and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery." *Hi-Way Motor Co. v Int'l Harvester Co.,* 398 Mich 330, 336; 247 NW2d 813, 816 (1976). "The burden of proof rests with plaintiffs." *Id.*

Here, Plaintiffs admit that Kaiser expressed honest uncertainty as to when Langan's intentions became other than what he originally expressed. Further, the parties acknowledge that they performed their promises or obligations under the Agreement for more than one year. To establish fraud, the plaintiff must prove that the defendant's material representation was false, and he knew that it was false when he made that representation. Thus, Plaintiffs cannot establish the elements of fraud and so summary disposition is granted as to Count II under MCR 2.116(C)(10).

With respect to their Conversion claims, namely Counts V and VI, Plaintiffs allege that Defendants have failed and refused to turn over their realized 40% net profits and Defendants have stolen, embezzled, or converted those funds by putting the funds to their own use. "The tort of conversion is any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein. Statutory conversion, by contrast, consists of knowingly buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property. MCL 600.2919a; MSA 27A.2919(1). To support an action for conversion of money, the defendant must have an obligation to return the specific money entrusted to his care. The defendant must have obtained the money without the owner's consent to the creation of a debtor and creditor

relationship." *Head v Phillips Camper Sales & Rental, Inc.,* 234 Mich App 94, 111–12; 593 NW2d 595, 603 (1999) (citations and internal quotations omitted).

Defendants argue that these claims[57] are barred by the economic loss doctrine. The "essence of the economic loss rule is that contract law and tort law are separate and distinct, and the courts should maintain that separation in the allowable remedies. There is a danger that tort remedies could simply engulf the contractual remedies and thereby undermine the reliability of commercial transactions. Once the contract has been made, the parties should be governed by it." *Huron Tool & Eng'g Co. v Precision Consulting Servs., Inc.,* 209 Mich App 365, 370–71; 532 NW2d 541, 544 (1995) (citations and internal quotations omitted). Under the parties' Agreement, On Time is legally entitled to 40% of the net profits of EVS. Since Plaintiffs have a viable Breach of Contract claim, it cannot pursue the same relief under a common law or statutory conversion claim and so summary disposition is warranted as to both claims under MCR 2.116(C)(8) and (C)(10).

Regarding Plaintiffs' claim for Defamation (Count VI), the parties address the alleged defamatory statements identified in Paragraph 12 of Plaintiffs' Response to Defendants' Second Discovery Requests.[58] "To recover under a claim for defamation, the plaintiff must show: (a) a false and defamatory statement concerning plaintiff; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod)." *New Franklin Enterprises v Sabo*, 192 Mich App 219, 221; 480 NW2d 326, 328 (1991). "A communication is defamatory if it tends to lower an individual's reputation in the community or deters third persons from associating or

[57] Defendants address both Plaintiffs' common law and statutory conversion claims in the same argument that the economic loss doctrine precludes actions in tort when contract law applies.
[58] See Exhibit 29 to Defendants' Summary Disposition Motion Pursuant to MCR 2.116(C)(8) and (C)(10).

dealing with that individual. However, not all defamatory statements are actionable. Generally, if a statement cannot be reasonably interpreted as stating actual facts about the plaintiff, it is protected by the First Amendment." *Reighard v ESPN, Inc.,* 341 Mich App 526, 538; 991 NW2d 803, 810, *appeal dismissed,* 980 NW2d 719 (Mich, 2022) (citation and internal quotation marks omitted).

Plaintiffs first allege that "Langan started phoning and email EVS clients…informing them Kaiser and Langan did not shut down EVS and that Kaiser was giving an unfounded story (calling Kaiser a liar) and that he was the sole owner and always the sole owner of the enterprise. These calls took place starting on July 1, 2022." In light of the LARA filing, Langan was and is a member of EVS.[59] As evidenced by the June 2022 text exchange, Kaiser did not receive a Schedule K1 for EVS.[60] It is also evident that the parties' perspectives on how the business relationship terminated are conflicting. Notwithstanding, none of these statements are actionable as defamation.

Plaintiffs next allege that Langan and William Paulson ousted Kaiser and informed the clients that EVS was not shutting down and this caused irritation with Kaiser's long-time customers.[61] Defendants admit that Langan and Paulson reached out to EVS' customers in order to protect its business interests, which has no bearing on Kaiser's reputation. The Court finds that this statement is not actionable as defamation.

Plaintiffs also allege that Langan told one supplier, Brett Whiting, that Kaiser was not authorized to spend. In his Affidavit, Whiting attests that Langan "told me that Kaiser did not have any authorization to spend. He tried to convince me that Kaiser was in no authority to rent my cars."[62] Defendants defend Langan's representation by arguing that Kaiser was required to

[59] See Exhibit 7 to Defendants' Summary Disposition Motion Pursuant to MCR 2.116(C)(8) and (C)(10).
[60] See Exhibit F to Plaintiff's Motion for Partial Summary Disposition.
[61] See Exhibit 29 to Defendants' Summary Disposition Motion Pursuant to MCR 2.116(C)(8) and (C)(10).
[62] See Exhibit ZZ to Plaintiffs' Brief Opposing Summary Dismissal of Plaintiffs' Complaint.

seek authorization from Langan in order for EVS' vendors to receive payment and she could not access or spend EVS funds without Langan's approval. Moreover, Plaintiffs state in their Response to the Motion that Langan's gambit, of accusing Kaiser of claiming authority that she did not have, failed in the case of Brett Whiting.[63] "Although Michigan courts have not precisely defined the terms 'special harm' or 'special damages' in relation to defamation claims, it is clear that such damages must be established absent comments that are defamatory per se." *Nehls v Hillsdale Coll.,* 65 F App'x 984, 990–91 (6th Cir 2003). Since Plaintiffs have not established damages, and Langan's representation was technically accurate, this statement is not actionable as defamation.

Plaintiffs allege further that Langan told another client, Nissan North America, that Kaiser changed one letter of the name and that he still owned the company (referring to IVS). The evidence shows that Kaiser did change the assumed name of On Time to IVS. Nothing in this statement by Langan casts Kaiser's reputation in a bad light.

Finally, Plaintiffs allege that Langan called Kaiser a "crazy bitch" to Kennth Spencer[64] as well as told many contractors some unfounded things including she was crazy and would soon learn. As noted by Defendants, however, the Court of Appeals in *Ireland v Edwards*, 230 Mich App 607, 616–17; 584 NW2d 632, 637 (1998), determined that a statement must be provable as false to be actionable as defamation. A subjective statement, which cannot be provable as false, is not actionable. As such, the Court finds that Langan's statements are not actionable as defamation. Accordingly, summary disposition of Count VI is warranted under MCR 2.116(C)(10).

[63] See page 18 of Plaintiffs' Brief Opposing Summary Dismissal of Plaintiffs' Complaint.
[64] See Exhibit 4 to Defendants' Summary Disposition Motion Pursuant to MCR 2.116(C)(8) and (C)(10).

In their claim for Breach of Fiduciary Duty (Count VIII), Plaintiffs allege in Paragraphs 66 and 67 of the Complaint that Langan owed a fiduciary duty to Plaintiffs because EVS is either a joint venture, a general partnership, or an LLC rightfully belonging to On Time and PBJ. Plaintiffs allege further that as a manager of EVS, Langan had a fiduciary relationship with Plaintiffs. Plaintiffs also assert that "[c]ommencing in June, 2022, however, Langan has engaged in the various behaviors described above, in an effort to set up his own business to either co-opt or compete with EVS and Plaintiffs, for his sole benefit…Based on Defendant Langan's representations, certain customers of EVS have agreed to do business with Defendant Langan, and terminate their relationships with Plaintiffs."[65]

As stated previously, "a fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one on the judgment and advice of another. Relief is granted when such position of influence has been acquired and abused, or when confidence has been reposed and betrayed. *Id.* A person in a fiduciary relation to another is under a duty to act for the benefit of the other with regard to matters within the scope of the relation." *Teadt*, 237 Mich App at 580–81 (citation omitted). Moreover, "[i]t is an oft-repeated proposition that joint adventurers stand in a fiduciary relationship to one another. It is their duty to work solely for the interests of the adventure as far as the property is concerned." *Georges*, 20 Mich App at 557.

Upon review of the allegations in Count VIII of the Complaint, the Court observes that Langan's purported behavior occurred following the parties' termination of their business relationship or outside of the scope of the parties' business relationship. Even if the Court were to find that the parties had a joint venture, the parties' business relationship or "joint venture" terminated on or about June 20, 2022. Consequently, there was no obligation on the part of either

[65] See Paragraphs 68 and 69 of Plaintiff's Complaint.

party to continue a fiduciary relationship, if any, to one another after they terminated their relationship.

The Court also agrees with Defendants that Langan owed no fiduciary duty to either Kaiser or On Time under the Michigan Limited Liability Company Act. MCL 450.4404(1) provides that "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." Here, the duty is owed to the company or EVS. MCL 450.4515 (1) provides that a "member of a limited liability company may bring an action to establish that acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member." However, the moving party must be a member. While Defendants claim that Langan is the only member, there is no evidence to establish either way if Kaiser or On Time were members of EVS. In addition, there does not seem to be a dispute that the parties could terminate the Agreement at any time, and the undisputed facts show that the business relationship was terminated in June of 2022. For the reasons stated above, Plaintiffs' Breach of Fiduciary Duty claim under MCR 2.116(C)(8) and (C)(10) is ripe for dismissal.

In relation to Plaintiffs' claim for Tortious Interference (Count IX), Plaintiffs make the following allegation in the Complaint:

> 77. Beginning in June 2022, and continuing to the present, Defendants directed written and non-written communications to several of Plaintiffs' and EVS' current and prospective customers and suppliers, which falsely claim that Defendant Langan has sole authority over EVS, and accusing Plaintiffs of unethical and unlawful behavior, implicitly threatened the addressees, and demanded that the addressees discontinue any business they had with Plaintiffs in an attempt to coerce the addressees into terminating their dealings with Plaintiffs and doing business with Defendants instead.

78. Said communications were directed to customers with whom Plaintiffs had a contract or business relationship or expectancy.

"The elements of tortious interference [with a business contract] are (1) a contract, (2) a breach, and (3) an unjustified instigation of the breach by the defendant. One who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another. A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances. If the defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference." *Badiee v Brighton Area Sch.,* 265 Mich App 343, 366–67; 695 NW2d 521, 539 (2005) (citations and internal quotation marks omitted).

"The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff. 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 Lab'ys v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698–99; 552 NW2d 919, 925 (1996) (citations omitted).

While Kaiser identifies Volkswagen as a customer with which Defendants tortiously interfered, the Court agrees with Defendants that the evidence seems to indicate that Kaiser was

attempting to divert EVS' contracts with Volkswagen to her company. [66] While Kaiser may have worked with certain clients in the past, these clients were not On Time's clients because On Time did not begin to transact business until 2021 through EVS.[67] In fact, the identified clients were all customers of EVS, and EVS is not a party to the Complaint. EVS would have had a contract or business expectancy or relationship with the customers and not Plaintiffs.

Though Plaintiffs argue that Langan interfered with fourteen customers, with whom Kaiser has generally had a business relationship since 2002, [68] the Court again notes that Kaiser did not conduct her own business until On Time entered into the February 11, 2021 Agreement. Any prior business relationship that Kaiser had with EVS' clients was through her former employment with Midway Group, LaFontaine, Competitive Vehicle Services, etc. and not through On Time. Additionally, and as argued by Defendants in their Reply, Plaintiffs do not assert that any of these business relationships were breached or terminated on account of Defendants' actions.

For these reasons, Plaintiffs cannot establish that they had any contract or business relationship or expectancy, which is a necessary element of a tortious interference claim. Moreover, there is no evidence to establish that Defendants tortiously interfered with EVS' clients or induced or caused a breach of a contract or business relationship or expectancy of EVS. As such, summary disposition of Count IX is warranted under MCR 2.116(C)(10).

Regarding Plaintiffs' claims for Concert of Action (Count III) and Civil Conspiracy (Count IV), Plaintiffs allege that Defendants falsely represented their good intentions to them in early 2021 and they engaged in concerted activities as described within the Complaint by express or implied agreement.

[66] See Exhibit 15 to Defendants' Summary Disposition Motion Pursuant to MCR 2.116(C)(8) and (C)(10).
[67] See Exhibit 3 to Defendants' Summary Disposition Motion Pursuant to MCR 2.116(C)(8) and (C)(10).
[68] See Exhibit TT to Plaintiffs' Brief Opposing Summary Dismissal of Plaintiffs' Complaint.

"A plaintiff may proceed on the theory of concert of action if he or she can prove that all defendants acted tortiously pursuant to a common design." *Cousineau v Ford Motor Co.,* 140 Mich App 19, 37; 363 NW2d 721, 731 (1985). "Concert of action cannot be the tort or unlawful action underlying a conspiracy claim. Concert of action is itself a claim which, like conspiracy, cannot exist independently of an underlying tortious act." *Id.* "A conspiracy is a combination of two or more persons, by some concerted action, to accomplish an unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Rosenberg v Rosenberg Bros. Special Acct.,* 134 Mich App 342, 354; 351 NW2d 563, 569 (1984). An "allegation of conspiracy must be coupled with a substantive theory of liability in order to sustain a cause of action." *Mohammed v Union Carbide Corp.,* 606 F Supp 252, 257 (ED Mich, 1985).

The Court agrees with Defendants that Plaintiffs' claims for Concert of Action and Civil Conspiracy should be dismissed because the underlying tort claims fail. Thus, summary disposition of Counts III and IV is warranted under MCR 2.116(C)(10).

Finally, the Court recognizes that Defendants have not provided any argument as to why Count XII, Accounting, should be dismissed. As such, Count XII remains.

Based upon the foregoing analysis, Defendant/Counter-Plaintiffs' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) and (C)(10) Seeking Entry of Judgment Dismissing Plaintiffs' Complaint is GRANTED IN PART as to Plaintiffs' claims as follows: Breach of Contract (Count I) only as it relates to Langan and the allegations in Paragraph 29; Fraud (Count II); Concert of Action (Count III); Civil Conspiracy (Count IV); Conversion (Count V); MCLA 600.2919a (Count VI); Defamation (Count VI); Fiduciary Duty (Count VII); and, Tortious Interference (Count IX).

Defendants/Counter-Plaintiffs' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) and (C)(10) Seeking Entry of Judgment Dismissing Plaintiffs' Complaint is DENIED

IN PART as to Plaintiffs' Breach of Contract claim (Count I) against DASH and in regard to the allegation set forth in Paragraph 28. Effectively, the remaining issue is the determination of the exact amount of net profits, namely 40% of EVS' net profits from May 1, 2022 to June 20, 2022, due and owing to On Time.

Plaintiffs' request for judgment under MCR 2.116(I)(2) is GRANTED in relation to DASH's contractual obligation to pay On Time 40% of EVS' net profits from May 1, 2022 to June 20, 2022.

Plaintiffs' request for judgment under MCR 2.116(I)(2) is DENIED on all other counts.

All claims in Plaintiffs' Complaint are dismissed except for Plaintiffs' claims for Breach of Contract (Count I), as limited herein, and Accounting (Count XII).

THIS ORDER DOES NOT RESOLVE THE LAST PENDING CLAIM OR CLOSE THE CASE.

/s/Victoria A. Valentine

Dated: 10/16/23

Honorable Victoria Valentine
Business Court Judge