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

BLUUM USA, INC, f/k/a Troxell Communications, Inc, a Georgia corporation,

Plaintiff,

v

Case No. 24-206636-CB
Hon. Michael Warren

BRIAN EISENBERG, KENNETH EISENBERG, STEPHEN EISENBERG, FRANK JERNEYCIC, and KENWAL INVESTMENT GROUP, LLC,

Defendants.

OPINION AND ORDER REGARDING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION OF PLAINTIFF'S COMPLAINT IN LIEU OF ANSWER PURSUANT TO MCR 2.116(C)(8) AND (C)(10) AND FOR SANCTIONS FOR FILING A FRIVOLOUS ACTION

At a session of said Court, held in the County of Oakland, State of Michigan
November 7, 2024

PRESENT: HON. MICHAEL WARREN

OPINION

I
Overview

This case arises out of the financial deterioration and bankruptcy of non-party Staymobile Venture, LLC ("Staymobile"). In the wake of Staymobile's collapse, the plaintiff Bluum USA, Inc. ("Bluum") alleges that it incurred millions of dollars in damages to fulfill service contracts purchased from Staymobile and resold to Bluum's customers.[1] Bluum filed this suit in April 2024 alleging Aiding and Abetting Breach of Fiduciary Duty (Count I), Breach of Fiduciary Duty (Count II), Silent Fraud (Count III), Fraud in the Inducement (Count IV), Negligence (Count V), Civil Conspiracy (Count VI), and Piercing the Corporate Veil (Count VII).

Before the Court is the Defendants' Motion for Summary Disposition of Plaintiff's Complaint in Lieu of Answer Pursuant to MCR 2.116(C)(8) and (C)(10) and for Sanctions for Filing a Frivolous Action. Oral argument is dispensed as it would not assist the Court in its decision-making process.[2]

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[1] Complaint ¶ 87.

[2] MCR 2.119(E)(3) provides courts with discretion to dispense with or limit oral argument and to require briefing. MCR 2.116(G)(1) specifically recognizes application of MCR 2.119(E)(3) to summary disposition motions. Subrule (G)(1) additionally authorizes courts to issue orders establishing times for raising and asserting arguments. This Court's Scheduling Order clearly and unambiguously set the time for asserting and raising arguments, and legal authorities to be in the briefing – not to be raised and argued for the first time at oral argument. Therefore, both parties have been afforded due process as they each had notice of the arguments and an opportunity to be heard by responding and replying in writing, and this Court has considered the submissions to be fully apprised of the parties' positions before ruling. Because due process

At stake is whether summary disposition of Counts I and II is warranted because, as a matter of law, the Defendants do not owe fiduciary duties to Bluum, a purported creditor of Staymobile? Because Michigan law holds that officers and directors do not owe an insolvent corporation's creditors fiduciary duties, the answer is "yes" and summary disposition of Counts I and II in the Defendants' favor is warranted.

Also at stake is whether Counts III (Silent Fraud) and IV (Fraud in the Inducement) fail to satisfy the heightened pleading standard for fraud claims in MCR 2.112(B)(1)? Because the circumstances underlying the fraud claims are not stated with particularity, the answer is "yes" and summary disposition in the Defendants' favor is warranted.

Further at stake is whether the tort claims (Counts III, IV, V, and VI) are also barred by the economic loss doctrine or the separate-and-distinct duty analysis? Because Bluum has failed to identify a separate and distinct duty outside of the contractual relationship between Staymobile and Bluum, the answer is "yes" and summary disposition in the Defendants' favor is warranted.

Additionally at stake is whether the claim for civil conspiracy (Count VI) fails for the independent reason that all of the underlying causes of action are subject to dismissal? Because the underlying tort claims fail for the reasons noted above, the answer is "yes,"

simply requires parties to have a meaningful opportunity to know and respond to the arguments and submissions which has occurred here, the parties have received the process due.

and summary disposition of the civil conspiracy claim is warranted for this independent reason.

Finally at stake is whether summary disposition of the claim for piercing the corporate veil (Count VII) is warranted because it is not an independent cause of action? Because piercing the corporate veil is a remedy for an underlying claim of liability, and here the underlying claims are subject to dismissal as noted above, the answer is "yes."

II
The Controversy

Staymobile was organized as a Michigan limited liability company in 2014.[3] Although it originally operated brick and mortar locations that provided cell phone and electronic device repair services, Staymobile pivoted its business to focus on selling electronic device repair service contracts.[4] Under the new business model, Staymobile sold or contracted with authorized resellers of service contracts for new electronic devices.[5] Bluum was one such authorized reseller of service contracts obtained from Staymobile.[6] Most of Bluum's customers (and most of Staymobile's end users) were school districts that wanted to purchase electronic devices together with service contracts for when those devices needed repair or replacement.[7]

[3] Complaint ¶ 18.
[4] *Id.* ¶¶ 19, 24.
[5] *Id.* ¶ 26.
[6] *Id.* ¶ 1.
[7] *Id.* ¶ 27.

Defendant Kenwal Investment Group, LLC ("KIG") is a private equity company that owned Staymobile during the events relevant to this case.[8] KIG, in turn, is owned by Kenneth, Brian, and Stephen Eisenberg.[9] Frank Jerneycic serves as a financial advisor to the Eisenberg family and KIG.[10] The Eisenberg family made significant financial investments in Staymobile.[11]

Bluum alleges that the Defendants used KIG's ownership of Staymobile to "dominate and control" Staymobile's operations, acting as Staymobile's de facto management.[12] Bluum further alleges that the Defendants directed Staymobile's management to prioritize sales and maximize cash flow. [13] Aside from funds reserved for very short-term liabilities, all unallocated cash was allegedly categorized as "surplus," which the Defendants pressured Staymobile's management to remit to Brian in repayment for loans made to Staymobile.[14]

In late 2020, Bluum's original reseller agreement with Staymobile was set to expire and Bluum sought to conduct due diligence on Staymobile's ability to handle the service obligations in contracts already sold and in the additional contracts it was anticipating selling.[15] In October 2020, Staymobile sent a formal response to Bluum's request for

[8] *Id.* ¶ 4.
[9] *Id.* ¶¶ 13-15.
[10] *Id.* ¶ 16.
[11] *Id.* ¶ 20.
[12] *Id.* ¶ 31.
[13] *Id.* ¶ 35.
[14] *Id.* ¶¶ 36-37.
[15] *Id.* ¶ 39.

information (the "Diligence Response") but allegedly did not provide detailed information regarding Staymobile's capitalization and reserves.[16] Bluum also requested confirmation that Staymobile maintained a contractual liability insurance policy ("CLIP"). Bluum alleges that Staymobile explained that although the CLIP policy had been cancelled as a cost saving measure, it would be reinstated with Bluum added as a named insured.[17]

Bluum alleges that by October 2021, Staymobile's officers identified a need for a "capital infusion of $13-16 million in order to continue to operate and to cover the potential liability of the service contracts that Staymobile had already sold."[18] Several of Staymobile's officers resigned in late 2021 or early 2022 including Christopher Beyersdorff (CFO) in December 2021, Eric Stang[19] (VP of Sales) in February 2022, and Robert Lennox (CEO) in April 2022.[20] On May 9, 2022, Staymobile filed a voluntary petition for Chapter 7 bankruptcy. Bluum alleges that after the bankruptcy filing, it had to assume liability for its customers' service contracts with Staymobile, which resulted in millions of dollars in damages.[21]

Bluum filed this suit in April 2024 alleging Aiding and Abetting Breach of Fiduciary Duty (Count I), Breach of Fiduciary Duty (Count II), Silent Fraud (Count III),

[16] *Id.* ¶ 40.
[17] *Id.* ¶ 41.
[18] *Id.* ¶ 53.
[19] Eric Stang is referred to both as "Stang" and "Strang" in the Complaint. *See Id.* ¶¶ 32 and 57.
[20] Complaint ¶¶ 55-58.
[21] *Id.* ¶ 63.

Fraud in the Inducement (Count IV), Negligence (Count V), Civil Conspiracy (Count VI), and Piercing the Corporate Veil (Count VII). The Defendants now move for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) and also seek sanctions.

III
Standards of Review

A
MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, not whether the complaint can be factually supported. *El-Khalil v Oakwood Healthcare, Inc,* 504 Mich 152, 159-160 (2019); *Pawlak v Redox Corp*, 182 Mich App 758 (1990). A motion for summary disposition based on the failure to state a claim upon which relief may be granted is to be decided on the pleadings alone. *Bailey v Schaaf,* 494 Mich 595, 603 (2013); *Parkhurst Homes, Inc* v *McLaughlin*, 187 Mich App 357 (1991). Exhibits attached to pleadings may be considered under MCR 2.116(C)(8) because they are part of the pleadings pursuant to MCR 2.113(C). *El-Khalil*, 504 Mich at 163. Matters of public record may also be considered. MCR 2.113(C)(1)(a). See also *Dalley v Dykema Gossett,* 287 Mich App 296, 301 n 1; (2010) (court documents are matters of public record that may be considered on a motion under MCR 2.116[C][8]).

"All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119 (1999); *Wade v*

Dep't of Corrections, 439 Mich 158, 162 (1992). Summary disposition is proper when the claim is so clearly unenforceable as a matter of law that no factual development can justify a right to recovery. *Parkhurst Homes*, 187 Mich App at 360; *Spiek v Dept of Transportation*, 456 Mich 331, 337 (1998).

"[T]he mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action." *ETT Ambulance Serv Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395 (1994).

B
MCR 2.116(C)(10)

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim or defense. See, e.g., MCR 2.116(G)(3)(b); *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996). Accordingly, "[i]n evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden,* 461 Mich at 119-120; MCR 2.116(C)(10); MCR 2.116(G)(4); *Quinto*, 451 Mich at 358. The moving party "must specifically identify the issues" as to which it "believes there is no genuine issue" of material fact and support its position as provided in MCR 2.116. MCR 2.116(G)(4).

Under Michigan law, the moving party may satisfy its burden of production under MCR 2.116(C)(10) by demonstrating to the court that the non-moving party's evidence is

insufficient to establish an essential element of the nonmoving party's claim. *Quinto*, 451 Mich at 361. If the moving party properly supports its motion, the burden "then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Id.* at 362. If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion. MCR 2.116(G)(4). See also *Meyer v City of Center Line*, 242 Mich App 560, 575 (2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116(C)(10)).

In all cases, MCR 2.116(G)(4) squarely places the burden on the parties, not the trial court, to support their positions. A reviewing court may not employ a standard citing mere possibility or promise in granting or denying the motion, *Maiden*, 461 Mich at 121-120 (citations omitted), and may not weigh credibility or resolve a material factual dispute in deciding the motion. *Skinner v Square D Co*, 445 Mich 153, 161 (1994). Rather, summary disposition pursuant to MCR 2.116(C)(10) is appropriate if, and only if, the evidence, viewed most favorably to the non-moving party fails to establish any genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362, citing MCR 2.116(C)(10) and (G)(4); *Maiden*, 461 Mich at 119-120 (1999). A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *El-Khalil*, 504 Mich at 160 (citation omitted). Granting a motion for summary disposition under MCR 2.116(C)(10) is warranted if the substantively admissible evidence shows that there is no genuine issue

in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362-363.

IV
Under Michigan Law, Directors/Officers of an Insolvent Company Do Not Owe Fiduciary Duties to Creditors

A
The Arguments

Count I of the Complaint alleges that the Defendants aided and abetted the officers of Staymobile in breaching their fiduciary duties to creditors when they "ordered the Officers to ignore [the alleged undercapitalization] and breach their fiduciary duties to creditors such as Bluum" by focusing on sales and operating based on cash flow, removing cash from Staymobile to send to the Defendants, refusing to provide adequate capitalization, and providing Bluum with false information.[22]

Count II of the Complaint for breach of fiduciary duties includes similar factual allegations but alleges that the Defendants directly breached duties they owed to Staymobile's creditors (such as Bluum) because the Defendants were acting as Staymobile's de-facto management and board.[23]

[22] Complaint ¶ 68.
[23] *Id.* ¶¶ 73-74.

The Defendants argue that these claims must be dismissed because, under Michigan law, neither Staymobile nor the Defendants owed creditors fiduciary duties.

B
The Law

"A fiduciary duty is [a] duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person." *Wallad v Access BIDCO, Inc*, 236 Mich App 303, 307 (1999) (citations and quotations omitted). In some jurisdictions, a company's directors have a duty to act in the company's creditor's interests when the company is insolvent. See *Geyer v Ingersoll Publications Co*, 621 A2d 784 (Del Ch, 1992) (holding that under Delaware law, directors of an insolvent corporation have a fiduciary duty to act for the benefit of corporate creditors).

Michigan, however, has not adopted this rule. The Michigan Supreme Court addressed this purported duty to creditors in the context of preferences in *Bank of Montreal v JE Potts Salt & Lumber Co*, 90 Mich 345 (1892). In that case, the Court refused to set aside assignments made by an insolvent corporation, holding that it is not "the law of this state that, as soon as a corporation becomes insolvent, the directors of the corporation become trustees for all the creditors alike, in such sense as to prevent their giving valid security by way of preference to one of the stockholders or directors." *Id*. at 350. The Court further observed that, "[t]he rule in this state has, we think, been established since the case of *Town v Bank*, 2 Doug (Mich) that a corporation may, in the absence of

legislative restriction, deal with its property precisely as an individual may, and may prefer one creditor over another; and hence that the assets do not become a trust fund, for pro rata distribution among all its creditors." *Id.*

The Court of Appeals addressed this issue more recently in *DeWitt v Sealtex Co*, unpublished per curiam opinion of the Court of Appeals, issued June 5, 2008 (Docket No. 273387). In that case, various unsecured creditors of an insolvent corporation bought suit against the corporation and its officers and directors. The unsecured creditors argued that the officers of the insolvent corporation owed them a fiduciary duty and that they breached the fiduciary duty by selling the corporation's assets to pay a secured creditor while the company was insolvent. *Id.* at 9. The Court observed that the general rule followed in many states is that "when a corporation becomes insolvent, officers and directors of a corporation owe a fiduciary duty to the corporation's creditors." *Id.* But the Court expressly rejected this rule, noting that "Michigan follows the minority rule, not the rule stated above." *Id.* Thus, the Court concluded that "under the Michigan law, the trial court erred in holding that defendants Koning owed plaintiffs a fiduciary duty." *Id.* at 11.

C
Analysis

In the present case, the Defendants argue that Counts I and II of the Complaint must be dismissed because Michigan law holds that directors and/or officers of an

insolvent company do not owe a fiduciary duty to its creditors. Based on a review of relevant Michigan caselaw, this Court agrees. Although the cases discussed above both address the issue in the context of preferential transfers and assignments, the language used by both courts applies to fiduciary duties to creditors of insolvent companies more generally. Specifically, the Court in *DeWitt* discussed the general rule applied by states such as Delaware wherein officers and directors of an insolvent corporation owe fiduciary duties to the corporation's creditors and rejected this rule.

Bluum primarily relies on the Michigan Supreme Court case of *Veeser v Robinson Hotel Co*, 275 Mich 133 (1936) to argue that Michigan law does recognize fiduciary duties owed to creditors. In *Veeser*, the plaintiffs were trustees of a defunct bank from whom one of the defendants borrowed $11,000. The defendant deposited 349 shares of his hotel company stock with the bank as collateral for the loan. When the bank failed, the trustees liquidated the bank's nonliquid assets, including the defendant's note, and sold the stock used as collateral. The plaintiffs then asked to have the stock transferred to them in the company's ledger. The defendants refused to do so. The trustees filed a bill "to declare plaintiffs the owners of the stock entitled to have the same transferred on the books." The plaintiffs further argued that the attempt by the majority shareholder who was also a director to reduce the rent he paid for a building owned by the corporation he controlled was fraudulent and should be set aside.

The Court in *Veeser* opined that "[t]he directors of a corporation stand in a fiduciary relation to the corporation and to its creditors." *Id.* at 137. However, after the

bank's liquidation of its nonliquid assets (including the defendant's note) and the sale of the stock used as collateral, the plaintiffs in *Veeser* were minority shareholders, not creditors. Thus, the key holding in *Veeser* is that "[t]he law requires of the majority the utmost good faith in the control and management of the corporation *as to the minority*, and it is the essence of this trust that it must be so managed as to produce *to each stockholder* the best possible return upon his investment." *Id.* at 138 (emphasis added).[24]

Because the Court's language about fiduciary duties owed to creditors in *Veeser* is dicta, it is not dispositive in the present action. Rather, the two cases cited by the Defendants (*Bank of Montreal* and *DeWitt*), which directly address the issue and hold that directors and officers do not owe fiduciary duties to creditors, are controlling. Accordingly, summary disposition of Counts I and II in the Defendants' favor is warranted.

[24] Several treatises cite *Veeser* for this proposition. For example, 12B Fletcher Cyclopedia Corporations, § 5810 cites *Veeser* as support for the principles that "[m]ajority shareholders, to the extent to which they control the corporation, must act in good faith *with respect to the rights of minority shareholders*," and "[i]t is a breach of duty [for majority shareholders] to manipulate the business of the company in their own interests *to the injury of minority shareholders*." Additionally, 6 Mich. Civ. Jur. Corporations § 246 cites *Veeser* for the proposition that "majority shareholders cannot use their power to defraud, oppress, or injure the minority, because it is a breach of duty for the majority to manipulate the business of the company in their own interests *to the injury of the minority shareholders*."

V
The Fraud Claims are Not Pled with Particularity

A
The Arguments

The Defendants argue that they are entitled to summary disposition pursuant to MCR 2.116(C)(8) of Bluum's fraud claims (Silent Fraud—Count III and Fraud in the Inducement—Count IV) because the claims fail to satisfy the heightened pleading standards of MCR 2.112(B)(1).

B
The Law of Silent Fraud and Fraud in the Inducement

Michigan courts have long recognized a claim for silent fraud for "the suppression of a material fact, which a party in good faith is duty-bound to disclose" because it is "equivalent to a false representation and will support an action in fraud." *M&D, Inc v WB McConkey*, 231 Mich App 22, 29 (1998) (citations and quotations omitted). Thus, to prove a claim of silent fraud, "a plaintiff must show that some type of representation that was false or misleading was made and that there was a legal or equitable duty of disclosure." *Id.* at 32. Stated another way, a plaintiff must prove that the defendant knew of a material fact but concealed or suppressed the truth through false or misleading statements or actions with the intent to deceive. *Roberts v Saffell*, 280 Mich App 397, 404 (2009). "A plaintiff cannot merely prove that the defendant failed to disclose something; instead, 'a

plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive.'" *Lucas v Awaad*, 299 Mich App 345, 364 (2013).

"In order to rescind a contract on the basis of fraudulent inducement, a party must show that: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage." *Bank of Am, NA v Fid Nat Title Ins Co*, 316 Mich App 480, 499 (2016).

When pleading a cause of action involving fraud, the circumstances alleged to constitute fraud must be stated with particularity. MCR 2.112(B)(1). See also *Stephens v Worden Ins Agency, LLC*, 307 Mich App 220, 229–30 (2014) ("Fraud claims must be pleaded with particularity, addressing each element of the tort"). Because of this heightened pleading standard, fraud "is not to be lightly presumed, but must be clearly proved . . . by clear, satisfactory and convincing" evidence. *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414 (2008) (citations and quotations omitted).

Michigan courts have relied on the federal "who, what, when, where, and how" requirement for particularity in fraud claims. See *Bell v Keller*, unpublished per curiam opinion of the Court of Appeals, issued May 20, 2021 (Docket No. 352421), p 7, quoting *Dileo v Ernst & Young*, 901 F2d 624, 627 (CA 7, 1990).

C
Analysis

In this case, the fraud claims lack the particularity required by MCR 2.112 with respect to the following elements:

i. Who?

In a fraud claim, it is important to identify which parties are alleged to have made fraudulent statements or engaged in fraudulent actions, especially where there are multiple defendants. "[T]he complaint, therefore, may not rely upon blanket references to acts or omissions by all of the 'defendants,' for each defendant named in the complaint is entitled to be apprised of the circumstances surrounding the fraudulent conduct with which he individually stands charged." *Benoay v Decker*, 517 F Supp 490, 493 (ED Mich, 1981), aff'd, 735 F2d 1363 (CA 6, 1984) (citation and quotation omitted).

In the instant case, the allegations supporting the silent fraud claim simply assert that "the Defendants" instructed Staymobile's officers to provide vague and inaccurate information to Bluum, but the Complaint does not identify who specifically is alleged to have given that instruction.[25] Likewise, in the fraudulent inducement claim, Bluum alleges that "the Defendants" instructed Staymobile's officers to provide vague and inaccurate information to induce Bluum to continue to do business with Staymobile.[26]

[25] Complaint ¶ 83-87.
[26] *Id.* ¶¶ 91-92.

Consequently, the fraud claims lack the particularity required as to "who" is responsible for each act.

ii. When?

To satisfy the particularity requirement of MCR 2.112(B)(1), the fraud claims must identify the "time, place, and content of the alleged misrepresentation." *Chesbrough, MD v VPA, PC*, 655 F3d 461, 467 (CA 6, 2011) (interpreting Federal Rule of Civil Procedure (9)(b), the federal corollary to MCR 2.112(B)(1), and finding that a plaintiff must allege the time and place of the alleged misrepresentation to sufficiently plead fraud). This includes a sufficiently detailed statement as to *when* the alleged misrepresentations took place. See *Osprey SA Ltd v Webber Inv Co, LLC*, unpublished per curiam opinion of the Court of Appeals, issued December 10, 2015 (Docket No. 324001), p 9 (dismissing a fraud counterclaim when it "failed to particularly state when these identified material representations took place, thus failing to fully plead with particularity the circumstances of the alleged fraud").

Here, Bluum's allegations supporting its fraud claims do not contain dates or a specific timeframe as to when the supposed fraudulent concealment and/or inducement took place. This falls short of the particularity requirements of MCR 2.112(B)(1).

iii. What?

The substance of the alleged fraudulent concealment and/or fraudulent inducement is also somewhat murky in Counts III and IV. As to silent fraud, Bluum alleges that "the Defendants knew that Staymobile was undercapitalized, [but] they intentionally concealed this from Bluum by instructing the Officers to provide Bluum with vague and inaccurate information concerning Staymobile's financial ability to fulfill its obligations under the service contracts . . ."[27] Bluum further alleges that the information provided by Staymobile's officers was "incomplete and gave Bluum the false impression that Staymobile was in a significantly stronger financial position than it actually was."[28] Staymobile provided its unaudited balance sheet and income statement as of September 2020.[29] The claim for silent fraud is not sufficiently specific as to what information was withheld or missing that made these representations misleading.

Additionally, Bluum alleges that, under the Defendants' direction, Staymobile's officers failed to disclose "that Staymobile had not renewed its CLIP policy."[30] In the Diligence Response, Staymobile disclosed that they "cancelled that policy due to unfavorable economics in the spring of 2020 (copy of front page attached)."[31] Staymobile further disclosed that it would be willing to reactivate the policy with Bluum as a named insured, "however these would be new SKU's that reflect the increased cost to Staymobile to have the plans insured." Bluum's allegations in Count III do not make clear what

[27] *Id.* ¶ 83.
[28] *Id.* ¶ 86.
[29] *Id.*, Exhibit 1.
[30] *Id.* ¶ 84.
[31] *Id.*, Exhibit 1.

information was omitted from its disclosure regarding the CLIP policy that made Staymobile's representations misleading.

The fraudulent inducement claim suffers from the same defect. Bluum alleges that the Defendants instructed Staymobile's officers to provide "vague and inaccurate information concerning Staymobile's financial ability to fulfill its obligations under the service contracts that it had sold to Bluum and Bluum's customers."[32] Bluum has attached the Diligence Response that Staymobile provided Bluum in October 2020, but has not specified which portions of this document it contends are inaccurate, or indeed, whether the alleged fraudulent statements are even the ones contained in the Diligence Response. Accordingly, the fraud claims do not meet the particularity requirements of MCR 2.112(B)(1), and summary disposition in the Defendants' favor is therefore warranted.

VI
The Separate-and-Distinct Analysis Also Bars Bluum's Tort Claims

A
The Arguments

Next the Defendants argue that Bluum's tort claims (fraud, negligence, and civil conspiracy) are barred by Michigan's economic loss doctrine and/or the separate-and-distinct analysis because Bluum's claims are based on its contractual relationship with Staymobile as Staymobile's customer.

[32] *Id.* ¶ 91.

B
The Law

The basic premise of the economic loss doctrine is that "economic losses that relate to commercial transactions are not recoverable in tort." *Quest Diagnostics, Inc v MCI WorldCom, Inc*, 254 Mich App 372, 376 (2002). The Michigan Supreme Court adopted the economic loss doctrine in *Neibarger v Universal Coop, Inc*, 439 Mich 512 (1992), explaining:

> [W]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only economic losses. This doctrine hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts.
> [*Id*. at 520–521 (citations and quotations omitted).]

The Court of Appeals recently analyzed this issue *in 1-800 Bathtub, LLC v. ReBath, LLC*, unpublished per curiam opinion of the Court of Appeals, issued Apr. 18, 2024 (Docket No. 357932), which the Court finds well-reasoned and instructive.[33] In *1-800 Bathtub*, the Court of Appeals reviewed the trial court's opinion which vacated an arbitration award on Bathtub's conversion claim having found that the arbitrator should have applied the economic-loss doctrine to bar the claim. The Court of Appeals found that the trial court reached the right conclusion for the wrong reason. In doing so, the *1-*

[33] Unpublished decisions of the Court of Appeals are not binding, MCR 7.215(C)(1), but they can be "instructive or persuasive." *Paris Meadows, LLC v. City of Kentwood*, 287 Mich App 136 n 3 (2010).

800 Bathtub Court extensively detailed the scope, history of, and law pertaining to both the economic loss doctrine and the separate-and-distinct analysis. The Court concluded:

> The circuit court correctly vacated the portion of the arbitrator's award related to conversion. In doing so, it incorrectly concluded that the economic-loss doctrine barred Bathtub's conversion claim. **But the economic-loss doctrine does not apply to contracts for services**, see *Quest Diagnostics, Inc v MCI WorldCom, Inc*, 254 Mich App 372, 380 (2002), and it does not apply to intentional torts, see *Huron Tool & Engineering Co v Precision Consulting Servs, Inc*, 209 Mich App 365, 374 (1995), so it does not bar Bathtub's conversion claim. The circuit court nonetheless reached the right conclusion—that the conversion claim is barred—because the conversion claim does not impose duties separate and distinct from the duties existing under the contract, namely, not to steal the number. See *Rinaldo's Constr Corp v Mich Bell Tel Co*, 454 Mich 65, 83-85 (1997).
>
> [*1-800 Bathtub*, unpub. op. at 5 (emphasis added)].

However, in addition to analyzing the case under the economic loss doctrine, the Court of Appeals in *1-800 Bathtub* also conducted a "separate-and-distinct" analysis ultimately concluding:

> But here, we find it determinative that no relationship between Bathtub and ReBath existed giving rise of a legal duty separate from the MSA. Bathtub's conversion claim arises from ReBath's failure to abide by the MSA. Further, defendant's failure to perform a contractual duty cannot give rise to a tort action, unless a separate-and-distinct duty exists separate from the contractual obligations. As the Supreme Court noted in *Hart*, 347 Mich at 563, while misfeasance is required for a tort action to lie, "[t]here must be some breach of duty distinct from breach of contract." We conclude that there is no duty separate and distinct from the contractual obligation because any alleged duty under the statute—not to convert the number—is the same as the duty under the contract. More fundamentally, ReBath's ability or

> opportunity to convert the number to its own use only arose through virtue of the contractual relationship between Bathtub and ReBath. Ultimately, because there is no separate duty distinct from that existing under the contractual obligations and because breach of the duty would not have been possible but for the contractual relationship, we conclude that the arbitrator manifestly disregarded the law in concluding that Bathtub's conversion claim could lie.
>
> [*1-800 Bathtub*, unpub. op. at 9 (citations omitted)].

C
Analysis

In this case, the Defendants argue that Bluum's claims for fraud, negligence, and conspiracy are barred by the economic loss doctrine. But Bluum correctly points out that the economic loss doctrine does not apply to contracts for services. *1-800 Bathtub*, unpub. op at 5. Here, the parties disagree as to whether the contracts at issue in this case are for the goods or services. Neither party has fully analyzed and briefed the issue, nor are the contracts at issue before the Court. Accordingly, the Court cannot determine whether the economic loss doctrine applies, and summary disposition in the Defendants' favor is not warranted on this basis.

However, this does not end the Court's analysis, because it must also determine whether the duties underlying the tort claims are "separate and distinct" from the duties arising from the contract. Bluum has alleged that the Defendants, as the de facto managers and board of Staymobile, "owed *customers* such as Bluum a duty to act in good faith and with the ordinary care that a reasonably prudent officer would exercise in a

manner designed to further the best interests of Staymobile and its *customers*."[34] Bluum does not cite any authority for the proposition that a company's officers owe its *customers* the duty to manage its corporate affairs with due care and indeed does not raise any in its opposition. Because Bluum has not supported its position that the Defendants owed it a duty to manage Staymobile with good faith and due care *as Staymobile's customer*, this position is abandoned. After all, "Trial Courts are not the research assistants of the litigants; the parties have a duty to fully present legal arguments for its resolution of their dispute." *Walters v Nadell*, 481 Mich 377, 388 (2008). "A party abandons a claim when it fails to make a meaningful argument in support of its position." *Berger v Berger*, 277 Mich App 700, 712 (2008). Michigan jurisprudence is well-settled that this trial court need not divine the intentions, search for arguments, or otherwise make conclusions on a party's behalf. *Mitcham v City of Detroit*, 355 Mich 182, 203 (1959) ("It is not enough . . . to simply announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and rationalize the basis for his arguments, and then search for authority either to sustain or reject his position"). Accordingly, this purported duty to Staymobile's customers will not form the basis for "separate and distinct" duties that would support Bluum's tort claims.

Additionally, for the reasons noted in Section IV *supra*, Michigan law does not impose on officers and directors of an insolvent company fiduciary duties to the company's creditors. Because Bluum has failed to identify which duties the Defendants

[34] Complaint ¶ 97 (emphasis added).

owed that are "separate and distinct" from the duties arising from the contract between the parties, summary disposition is warranted.[35]

VII
Civil Conspiracy Lacks a Viable Underlying Tort Claim

A
The Arguments

In addition to their argument that the conspiracy count should be dismissed pursuant to the economic loss doctrine, the Defendants argue that the claim for civil conspiracy should be dismissed for the independent reason that Bluum cannot succeed on a conspiracy claim when its underlying causes of action fail.

B
The Law

"A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Swain v Morse*, 332 Mich App 510, 530 (2020) (citation omitted). "[A] claim for civil conspiracy may not exist in the air; rather, it is necessary to

[35] Although the economic loss doctrine does not bar claims of fraud in the inducement, the Court of Appeals recently held that the "separate and distinct" analysis must be applied to claims of fraudulent inducement where the tort claims arose from contractual breaches. See *Fraser Engine Rebuilder, Inc v Lancaster*, unpublished per curiam opinion of the Court of Appeals, issued June 8, 2023 (Docket No. 360110), p 7 (reversing the trial court's application of the economic loss doctrine but remanding to the trial court "to evaluate whether plaintiffs sufficiently alleged a violation of a legal duty separate and distinct from the contractual obligation with respect to their fraudulent inducement claims").

prove a separate, actionable tort." *Advoc Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384 (2003) (citation omitted).

C
Analysis

Here, each of Bluum's underlying tort claims is subject to dismissal for the reasons noted above. Accordingly, the conspiracy claim cannot survive because it cannot stand on its own. Summary disposition of the claim for civil conspiracy is warranted for this additional reason.

VIII
Piercing the Corporate Veil is a Remedy, and Here the Underlying Claims for Liability Fail

A
The Arguments

The Defendants argue that the claim for "Piercing the Corporate Veil" should be dismissed because (1) it is not an independent cause of action under Michigan law, and (2) Bluum cannot establish any genuine issues of material fact that would support piercing through two levels of the corporate veil (Staymobile and KIG).

B
The Law

In *Gallagher v Persha*, 315 Mich App 647 (2016), the Court of Appeals explained the reasoning for piercing the corporate veil under Michigan law:

> As has been said many times before today, Michigan law respects the corporate form, and our courts will usually recognize and enforce separate corporate entities. But "usually" means not always, and when the requisite evidence establishes that the corporate form has been abused, the corporate form will be pierced so that creditors (and sometimes others) can seek payment of a corporate debt (like the judgment in this case) from a responsible corporate shareholder. Consequently, piercing the veil of a corporate entity is an equitable remedy sparingly invoked to cure certain injustices that would otherwise go unredressed in situations "where the corporate entity has been used to avoid legal obligations. . . ." It is therefore a remedy, and not a separate cause of action.
> [*Gallagher*, 315 Mich App at 653-654 (internal citations omitted)].

In order to successfully pierce the corporate veil, a Plaintiff must establish: (1) the entity was the mere instrumentality of the owner, (2) the owner exercised his or her control in such a manner as to defraud or wrong the complainant in some way, and (3) the complainant would suffer an unjust loss or injury unless the court disregards the existence of the entity as separate from its owner. *Green v Ziegelman*, 310 Mich App 436, 454 (2015). But "[t]here is no single rule delineating when a corporate entity should be disregarded, and the facts are to be assessed in light of a corporation's economic

justification to determine if the corporate form has been abused." *Rymal v Baergen*, 262 Mich App 274, 294 (2004).

C
Analysis

As a preliminary matter, although piercing the corporate veil is not in and of itself a separate cause of action, the party seeking to disregard the separate existence of a corporation may do so in its original complaint or in a subsequent complaint after a judgment has been entered against the entity. *Gallagher*, 315 Mich App at 665-66; see also *Hinderer v Snyder*, unpublished per curiam opinion of the Court of Appeals, issued Jan. 29, 2019 (Docket No. 339759), p 9 ("The party asking the trial court to disregard the separate existence of an entity may do so in his or her original complaint or may do so in a subsequent complaint after a judgment has been entered against the entity"). Consequently, Bluum can include piercing the corporate veil in the complaint and summary disposition in favor of the Defendants would not be warranted if the underlying liability was still in dispute.

However, piercing the corporate veil is only available as a *remedy* for liability in the underlying causes of action. Here, summary disposition of each of the underlying causes of action is warranted for the reasons discussed above. Accordingly, summary disposition of the remedy of piercing the corporate veil is also warranted.

IX
Sanctions are Not Warranted

The Defendants request that this Court sanction Bluum and its counsel for bringing this action. The purpose of imposing sanctions "is to deter parties and attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose." *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 405 (2005) (quotation marks and citation omitted). A party should not be penalized for asserting a claim that "initially appears viable but later becomes unpersuasive." *Louya v William Beaumont Hosp*, 190 Mich App 151, 163 (1991). "Not every error in legal analysis constitutes a frivolous position." *Kitchen v Kitchen*, 465 Mich 654, 663 (2002).

The mere fact that a court rejects a party's legal position does not mean that the party's position was frivolous. *Id*. "The determination whether a claim or defense is frivolous must be based on the circumstances at the time it was asserted." *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36 (2003) (citation omitted). "That the alleged facts are later discovered to be untrue does not invalidate a prior reasonable inquiry." *Id*.

In the end, the Defendants have failed to show that sanctions are warranted. Indeed, the higher courts have established an exceedingly high threshold for granting sanctions and have reversed trial courts for awarding them under similar circumstances. See, e.g., *Kozma v Scott Law,* unpublished per curiam decision of the Court of Appeals,

issued March 14, 2024 (Docket Nos. 363508 and 364450), p 9 (dedicating nine pages of analysis to reverse the granting of sanctions, finding that "plaintiff's claim was not frivolous because it was sufficiently grounded in law and fact"); *Davis v Wayne County Commission*, unpublished per curiam opinion of the Court of Appeals, issued May 11, 2023 (Docket No. 362547), p 1 ("The trial court clearly erred in concluding that Davis's complaint was devoid of arguable legal merit and intended to harass"); *Thayer v Dipple*, unpublished per curiam opinion of the Court of Appeals, issued May 11, 2023 (Docket No. 362213), p 1 ("The circuit court granted the Thayers' motion to impose sanctions against Siudara based on 'deliberate misrepresentations to the Court.' We vacate the court's order and remand for further proceedings consistent with this opinion"); *Mass2Media, LLC v Cimini*, unpublished per curiam opinion of the Court of Appeals, issued March 30, 2023 (Docket Nos. 357973, 360357) (finding that sanctioning a party who was found to have based his entire case on lies was erroneous when the dispute boils down to a contract dispute).

Accordingly, the Court finds that sanctions are not warranted in this case.

ORDER

Based on the foregoing Opinion, the Court hereby orders as follows:

1) The Defendants' Motion for Summary Disposition is GRANTED AND THE COMPLAINT IS DISMISSED.

2) The Defendants' Request for Sanctions is DENIED.

ANY REQUEST TO AMEND THE COMPLAINT IN LIGHT OF THIS OPINION AND ORDER MUST BE MADE BY SEPARATE MOTION TO BE FILED NO LATER THAN NOVEMBER 27, 2024 OR IT WILL BE DEEMED ABANDONED. UNLESS SUCH A MOTION IS MADE AND GRANTED, THIS OPINION AND ORDER RESOLVES THE LAST PENDING CLAIM AND CLOSES THE CASE.

/s/ Michael Warren

HON. MICHAEL WARREN
CIRCUIT COURT JUDGE