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

R&M Financing, LLC,
Plaintiff,

Case No: 2021-191738-CB
Hon. Victoria Valentine

v.

BREEZER HOLDINGS, LLC,
MARKIMA, LLC,
MARK A. PAPAK, and
BLACKWELL, INC.

Defendants.

At a session of said Court held on the
5th day of December 2022 in the County of
Oakland, State of Michigan

PRESENT: HON. VICTORIA A. VALENTINE

This matter is before the Court on Defendants MARKIMA, LLC, MARK A. PAPAK, and BLACKWELL INC.'s ("NBD")[1] Motion for Summary Disposition under MCR 2.116(C)(7) and under MCR 2.116(C)(8) as to Counts V-IX of Plaintiff's First Amended Complaint ("FAC"). The Court heard oral argument on October 19, 2022, at which time the Court allowed the parties to file a five-page supplemental brief regarding the application of the single consciousness rule under *Copperweld Corp v Independence Tube Corp*, 467 US 752, 771 (1998). The Court, having read the briefs, having heard oral argument, and otherwise being advised in the premises, hereby DENIES

[1] Defendant Breezer Holdings LLC filed its own Motion for Summary Disposition, which was addressed in a separate Opinion and Order dated October 18, 2022. The Non-Breezer Defendants are denoted as "NBD".

Defendants' Motion for Summary Disposition under MCR 2.116(C)(7) and GRANTS in part and DENIES in part Defendants' motion under MCR 2.116(C)(8).

PERTINENT FACTS ALLEGED IN PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff R&M is a Michigan limited liability company owned 99% by Michael A. Nicholson as the Successor Trustee of the Raymond J. Nicholson Revocable Living Trust ("Ray Sr.'s Trust"). The Settlor of that trust, Raymond J. Nicholson, Sr., (the '"Decedent" or Ray, Sr.") died on November 30, 2019.[2]

Defendant MARKIMA, LLC ("MARKIMA") currently owns twenty-five (25%) percent of the outstanding membership interest in Defendant BREEZER.[3]

Defendant MARK PAPAK is the incorporator and believed to be the only shareholder of Defendant BLACKWELL.[4]

During Ray Sr.'s lifetime, Defendant PAPAK, individually and/or through Blackwell, acted as Decedent's and Ray Sr.'s Trust's confidante, accountant, fiduciary, financial and business records bookkeeper, investment advisor, attorney-in-fact and de facto business manager.[5]

Plaintiff alleges that "[a]ccording to Defendant PAPAK, around the time of Ray Sr.'s death, the Ray Sr.'s trust, either directly or indirectly, owned significant assets in a number of different entities and business interests."[6] Plaintiff further contends that Defendant PAPAK,

[2] ¶1 of Plaintiff's First Amended Complaint (FAC).
[3] ¶4 of Plaintiff's FAC.
[4] ¶6 of Plaintiff's FAC.
[5] ¶12 of Plaintiff's FAC.
[6] ¶14 of Plaintiff's FAC.

individually and/or through Blackwell, used his entity Defendant BLACKWELL as an advisor and consultant and investment advisor to R&M.[7]

It is alleged that according to Defendant Papak, as of October, of 2020, Defendant BREEZER owed Plaintiff R&M Twenty-Seven Million Three Hundred Thousand and 00/100 ($27,300,000.00) Dollars in principal and interest, because of loans made by Plaintiff R&M to Defendant BREEZER, commencing in 2012.[8] The loans made by Plaintiff R&M to Defendant BREEZER, commencing in 2012, were documented in a series of Promissory Notes.[9]

Plaintiff alleges that Defendant BREEZER has disputed Defendant PAPAK'S summation of the amount owing by it to Plaintiff R&M, alleging that as of December 31, 2020, Defendant BREEZER only owed Plaintiff R&M Twenty-Two Million One Hundred Eighty-Nine Thousand Five Hundred Ninety- Seven and 00/100 ($22,189,597.00) Dollars in principal and interest.[10]

Plaintiff alleges that on December 14, 2021, Plaintiff learned that Defendants had devised a scheme or plan to transfer/convey all of Defendant BREEZER's assets in exchange for inadequate consideration consisting of an (1) an unspecified amount of stock in a newly formed company, and (2) an unspecified portion of unrealized profits in this newly formed company, Maxify Solutions, LLC.[11] Plaintiff further alleges that "Defendants' scheme/ plan, if carried forward, as it has been, would render Defendant BREEZER

[7] ¶15 of Plaintiff's FAC.
[8] ¶19 of Plaintiff's FAC.
[9] ¶20 of Plaintiff's FAC.
[10] ¶21 of Plaintiff's FAC.
[11] ¶22 of Plaintiff's FAC.

insolvent, without meaningful assets or income, and unable to pay its debts, including, but not limited to, the more than $27,000,000.00 due and owing to Plaintiff R&M."[12]

On April 28, 2022, Plaintiff filed its First Amended Complaint alleging the following causes of action:

- Count I: Breezer Loan #1;
- Count II: Breezer Loan #2;
- Count III: Breach of Loan Agreements/Anticipatory Breach Against Defendant Breezer;
- Count IV: Violations of Fraudulent Transfer Act Against all Defendants;
- Count V: Tortious Interference with contracts against Defendants Papak, Markima, and Blackwell;
- Count VI: Defendants' Tortious Interference with Breezer Loans;
- Count VII: Civil Conspiracy to Breach Loan Agreements;
- Count VIII: Conspiracy to Tortiously Interfere with the R&M Loan Agreements; and
- Count IX: Conspiracy to Fraudulently Convey Assets.

NBDs now file this Motion for Summary Disposition under MCR 2.116(C)(7) and under MCR 2.116(C)(8) as to Counts V-IX of Plaintiff's First Amended Complaint.

STANDARD OF REVIEW

MCR 2.116(C)(7)

Summary disposition may be granted under MCR 2.116(C)(7) where "[e]ntry of judgment, dismissal of the action, or other relief is appropriate because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate or to litigate in a different forum, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

[12] ¶23 of Plaintiff's FAC.

"In reviewing the motion, a court must review all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Yono v Dep't of Transp (Yono I),* 495 Mich 982, 982-983 (2014); see also MCR 2.116(G)(5). "If the movant properly supports his or her motion by presenting facts that, if left unrebutted, would show that there is no genuine issue of material fact that the movant [is entitled to summary disposition], the burden shifts to the nonmoving party to present evidence that establishes a question of fact." *Yono v Dep't of Transp (On Remand) (Yono II)*, 306 Mich App 671, 679-680 (2014), rev'd on other grounds, 499 Mich 636 (2016). "If the trial court determines that there is a question of fact as to whether the movant [is entitled to summary disposition], the court must deny the motion." *Yono II*, 306 Mich App at 680, *citing Dextrom v Wexford Co*, 287 Mich App 406, 431 (2010).

MCR 2.116(C)(8)

A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the Complaint based on the pleadings alone. *Beaudrie v Henderson,* 465 Mich 124, 129 (2001). All well-pleaded factual allegations are accepted as true and construed in the light most favorable to the nonmovant. *Wade v Dep 't of Corrections*, 439 Mich 158, 162-63 (1992). A motion under MCR 2.116(C)(8) may be granted when the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* at 163. Once a document is attached as part of the pleading, the instrument becomes part of that pleading "even for purposes of review under MCR 2.116(C)(8)." See *Laurel Woods Apartments v Roumayah,* 274 Mich App 631, 635 (2007). MCR 2.116(C)(8) "requires the court to consider evidence only from the pleadings, while (C)(10) motions denounce a claim's factual

sufficiency and allow the court to consider evidence beyond the pleadings." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160 (2019).

Because Michigan is a notice-pleading jurisdiction, a complaint is required to contain only enough information "reasonably to inform the defendant of the nature of the claim against which he must defend." *Veritas Auto Machinery, LLC v FCA Int'l Operations, LLC*, 335 Mich App 602, 615 (2021); MCR 2.111(B).

ANALYSIS

MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(7)

Defendants argue that a prior probate action (Oakland County Probate Case No. 21-400938-CZ), filed by the Successor Trustee, Michael A. Nicholson against two of the four Defendants herein, Mark Papak and Markima, LLC, bars this present action based on the doctrine of res judicata. "The res judicata doctrine provides that, where two parties have fully litigated a particular claim and a final judgment has resulted, the claim may not be relitigated by either party." *VanDeventer v Mich Nat'l Bank*, 172 Mich App 456, 464 (1988). The doctrine bars a second, subsequent action when:

(1) "the prior action was decided on the merits,

(2) both actions involve the same parties or their privies, and

(3) the matter in the second case was, or could have been, resolved in the first. This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. [*Adair v. State*, 470 Mich. 105, 121, 680 N.W.2d 386 (2004) (citation omitted).]"

*Dep't of Env Quality v Sancran*t, 337 Mich App 696, 709 (2021).

Contrary the Defendant's claim, the Court finds that the probate matter (Oakland County Probate Case No. 21-400938-CZ), does not bar this action as it was not decided on the merits.

Rather, the verified complaint[13] filed in the probate matter sought an examination and discovery pursuant to MCL 700.1205.[14] Its prayer for relief specifically sought:

> "WHEREFORE, pursuant to MCL 700.1205(1) and 700.1309(b), Plaintiff respectfully requests that this Court order the Defendants to
>
> (1) appear before the court and be examined upon the matter of this complaint,
>
> (2) produce each and every record relating to the assets of Raymond Nicholson Sr.'s Trust and estate listed in Exhibit 1,
>
> (3) identify each and every person, company organization or entity that may have record relating to the assets of Raymond Nicholson Sr.'s Trust and estate listed in Exhibit 1,
>
> (4) submit an interim accounting of the decedent's assets, income, and liabilities,
>
> (5) be enjoined from engaging in any conduct that threatens any interested persons interest in the trust, and

[13] Defendants' MSD Exhibit 1: Verified Complaint for Examination and Discovery. The Court notes that the issue of res judicata is brought under MCR 2.116(C)(7), which allows the Court to consider documentary evidence submitted by the parties. "In reviewing the motion, a court must review all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Yono v Dep't of Transp (Yono I),* 495 Mich 982, 982-983 (2014); see also MCR 2.116(G)(5).

[14] MCL 700.1205(1) specifically provides:

> 1) The court may order a person to appear before the court and be examined upon the matter of a complaint that is filed with the court under oath by a fiduciary, beneficiary, creditor, or another interested person of a decedent's or ward's trust or estate alleging any of the following:
>
> (a) The person is suspected of having, or has knowledge that another may have, concealed, embezzled, conveyed away, or disposed of the trustee's, decedent's, or ward's property.
> (b) The person has possession or knowledge of a deed, conveyance, bond, contract, or other writing that contains evidence of, or tends to disclose, the right, title, interest, or claim of the trustee, decedent, or ward to any of the trust or estate.
> (c) The person has possession or knowledge of a decedent's last will.

(6) grants Plaintiff any and all other relief the Court deems appropriate."[15]

On December 8, 2021, the parties in the probate matter appeared before the Honorable Kathleen A. Ryan of Oakland County Probate Court, regarding motions to compel. At this hearing, the Probate Court specifically found that the complaint was filed as a general action-civil action, not as a trust or decedent's action.[16] "This is not a Circuit Court case. We are a court of limited jurisdiction."[17] The Court discussed MCL 700.1205, the statue under which the verified probate complaint was filed, and indicated on the record[18] that the

> statute is simple procedure to get information to the fiduciary to expedite administration pursuant to the provisions in EPIC that you need to Probate. All the plaintiff, and from the way I read it, gets is the court's authority to compel a party to appear and be examined.

The Probate Court found that even though a probate estate had not been opened, it ordered the examination to take place. The Court found the complaint is a limited action governed exclusively by MCL 700.1205.[19] "The court is limited, the way I read this, to only allow

[15] Defendants' MSD Exhibit 1: Verified Complaint for Examination and Discovery, pp 8-9.
[16] Transcript (Tr) of the 12/8/2021 probate proceedings, pp 16, 19 & 21. MRE 201(b) permits a judge to take judicial notice of facts which are "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." In *In re Stowe,* 162 Mich App 27, 33 (1987) the Court of Appeals found that "the instant petition was filed in Oakland County, the same county in which the judgment of divorce had been entered and was presumably on file. Thus, the fact that respondent had been ordered to pay child support was a fact which could be readily and accurately determined by reference to a source whose accuracy cannot be questioned." Similarly, here the transcript of the probate proceedings was filed in Oakland County, the same county in which this case was filed and whose accuracy cannot reasonably be questioned.
[17] Tr 12/8/2021 p. 16.
[18] Tr 12/8/2021 p. 15.
[19] Tr 12/8/2021 pp 20-23 & 31.

the parties to come in and do the examination."[20] Judge Ryan again indicated that MCL 700.1205 controls the case, and it has a limited purpose.[21]

Based on the above the Court DENIES Defendants' Motion for Summary Disposition under MCR 2.116(C)(7) (res judicata) as it was not decided on the merits in the probate matter.[22]

MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(8) ON COUNTS V-IX

Count V- Tortious Interference with Contract Against Papak, Markima, and Blackwell

The Court DENIES the MCR 2.116(C)(8) motion relating to this Count.

Tortious interference with a contract is a cause of action distinct from tortious interference with a business relationship or expectancy. *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 89 (2005). The elements of tortious interference with a contract are (1) the existence of a contract; (2) a breach of the contract; (3) an unjustified instigation of the breach by the defendant; and (4) damages. *Knight Enters v RPF Oil Co*, 299 Mich App 275, 279-80 (2013); M Civ JI 125.01. The plaintiff must allege the "intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in the law for the purpose of invading the contractual rights or business relationship of another." *Knight Enters*, 299 Mich App at 280. A per se wrongful act is "an act that is inherently wrongful or an act that can never be justified under any circumstances." *Id.*

Here, when viewing the Amended Complaint and considering all well-pleaded factual allegations are accepted as true, the Court finds that the alleged claim of tortious interference is

[20] Tr 12/8/2021 p 21.
[21] Tr 12/8/2021 p 31.
[22] The Court recognizes that the Probate Court file reflects that on March 14, 2022, an Order was entered, which indicates that complete relief has been rendered and closed the case. The Order does not reflect that the matter was closed with prejudice.

not "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v Dep 't of Corrections*, 439 Mich 158, 163 (1992). Here for purposes of a (C)(8) motion R&M's Amended Complaint alleges the elements of tortious interference with a contract as to Defendants Markima, Papak, and Blackwell.

As to Defendant Blackwell, the Amended Complaint alleges upon information and belief Papak is the only shareholder of Blackwell; Papak used Blackwell as the entity which consulted R&M on its loans with Breezer; Papak acted individually and/or through Blackwell. R&M further alleges the following:

> 22. On December 14, 2021, Plaintiff learned that Defendants had devised a scheme or plan to transfer/convey all of Defendant BREEZER's assets in exchange for inadequate consideration consisting of an (1) an unspecified amount of stock in a newly formed company, and (2) an unspecified portion of unrealized profits in this newly formed company, Maxify Solutions, LLC. See December 14, 2021 email message, attached as **Exhibit 6**.
>
> 23. Defendants' scheme / plan, if carried forward, as it has been, would render Defendant BREEZER insolvent, without meaningful assets or income, and unable to pay its debts, including, but not limited to, the more than $27,000,000.00 due and owing to Plaintiff R&M.
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> * * *
>
> 75. At all relevant times, PAPAK, MARKIMA and BLACKWELL knew of these Breezer #1 and Breezer #2 Documents and Loans and contracts, including the pledge of certain of Defendant BREEZER's assets as security for the loans, of the Notes and of the R&M ADDITIONAL LOANS.

76. Defendants PAPAK, MARKIM and BLACKWELL facilitated, directed or orchestrated R&M's loans to Defendant BREEZER.

77. Defendants knew that Defendant BREEZER materially breached, was and is in default of:

(1) Breezer Loan #1,

(2) Breezer Loan #2, and,

(3) R&M ADDITIONAL LOANS

78. Defendants know Defendant BREEZER has not repaid any of the principal amounts of R&M's loans to Defendant BREEZER, and that by improper alienation of substantially all of Defendant BREEZER's assets, to Maxify Solutions, LLC, that Defendant BREEZER is insolvent, and unable to meet its obligations to Plaintiff R&M.

79. Defendants knew and know that per the terms of the Breezer Revolving Promissory Note, Plaintiff R&M and Defendant BREEZER agreed to, and granted, a self-operative security interest in Defendant BREEZER's assets to Plaintiff R&M

80. Despite Defendants' knowledge of Defendant BREEZER's material breach, and default, Defendants did further encumber, and destroy, the secured interest in whatever of Defendant BREEZER's assets by:

(A) Acting in concert, pursuant to a plan / scheme, to have Defendant BREEZER enter into the Maxify Reverse Merger, for inadequate consideration, in violation of terms of the security interest in those assets provided to Plaintiff R&M, thereby rendering Defendant BREEZER insolvent;

(B) Actively entering into the (i) Revolving Credit and Security Agreement and Factoring Agreement in March 2019 with Sterling Commercial Credit; and

(C) Entering into the Purchase Order Purchase Agreement (Factoring Agreement) with Sterling Commercial Credit.

81. Defendants PAPAK, MARKIMA and BLACKWELL, along with others, pursuant to a scheme / plan, have taken actions including, but not limited to:

(a) Instituting the Maxify merger; and

(b) Entering into the contracts with Sterling Commercial Credit.

82. Defendants PAPAK, MARKIMA and BLACKWELL, along with other persons not named as Defendants herein intentionally, maliciously, and improperly interfered with the Breezer Loan Agreements, and have facilitated / caused a fraudulent transfer of Defendant BREEZER's assets, which were subject to a security interest in the favor of Plaintiff R&M, for inadequate and/or insufficient consideration.

83. Defendants PAPAK, MARKIMA and BLACKWELL's actions were done without justification, were done for an improper purpose and for the purpose of interfering with the rights of Plaintiff R&M and with the knowledge that it would likely render Defendant BREEZER insolvent, and incapable of meeting its obligations to Plaintiff R&M, and leaving Plaintiff R&M with little or no ability to collect on this debt, which was facilitated by the acts of Defendants PAPAK, MARKIMA and BLACKWELL.

84. The actions of Defendants PAPAK, MARKIMA and BLACKWELL, as described further throughout this Amended Complaint, are further proof of Defendant PAPAK's, MARKIMA's and BLACKWELL's malicious and wrongful intent and/or purpose, and their actions based on that intent and/or purpose in effectively causing the material breech and default of Defendant BREEZER of its loan obligations to Plaintiff R&M.

85. Plaintiff R&M has been, and continues to be, damaged as a direct and proximate result of the Defendants' acts, omissions and commissions in the amount of, at least, Twenty-Seven Million Three Hundred Thousand and 00/100 ($27,300,000.00) Dollars in principal and interest.

Based on the above allegations, the Court finds that Plaintiff sufficiently alleged (1) the existence of a contract; (2) a breach of the contract; (3) an unjustified instigation of the breach by the defendant; and (4) damages. *Knight Enters v RPF Oil Co*, 299 Mich App 275, 279-80 (2013); M Civ JI 125.01. Defendants' Motion for Summary Disposition on Count V is DENIED.

Count VI- Tortious Interference with Breezer Loans

The Court GRANTS the MCR 2.116(C)(8) motion relating to this Count.

Tortious interference with a contract is a cause of action distinct from tortious interference with a business relationship or expectancy. *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 89 (2005). Here, however, Count VI alleges tortious interference with the promissory notes and with the R & M ADDITIONAL Loan, which forms the basis of the tortious interference with a contract claim set forth in Count V.

Count VI alleges:

87. Plaintiff R&M and Defendant BREEZER established advantageous business relationships/expectancies with one another, in the form and substance of a lender – borrower relationship, under the terms of the Notes and the R&M ADDITIONAL LOAN.

The Court finds that Count VI is duplicitous of Count V; it is not an alternative claim as it relates to the notes and additional loan set forth in Count V and it is not a separate business expectancy. Count VI is therefore DISMISSED.

Count VII & VIII- Civil Conspiracy to Breach Loan Agreements and Conspiracy to Tortiously Interfere with R&M Loan Agreements

The Court GRANTS the MCR 2.116(C)(8) motion relating to Count VII alleging conspiracy to breach loan agreement and Court DENIES the MCR 2.116(C)(8) Motion alleging a conspiracy to tortiously interfere with R&M.

"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." See *Swain v Morse,* 332 Mich App 510, 530 (2020), *lv den,* 507 Mich 927 (2021). "Liability does not arise from a civil conspiracy alone; rather, it is necessary to prove a separate, actionable tort." *Swain v Morse,* 332 Mich App at 530 n 13. Thus, if the underlying tortious-interference claim cannot succeed, the civil-conspiracy and concert-of-action claims must also be dismissed. *Advocacy Org for Patients & Providers v Auto Club Ins Assoc*, 257 Mich App 365, 384 (2002).

Count VII alleges conspiracy to breach loan agreement. It does not allege an underlying actionable tort, but rather a breach of contract. Therefore, the Court GRANTS the Motion for Summary Disposition on this Count.

Count VIII, however, does allege a conspiracy to tortiously interfere with R&M. Defendants, however, argue that the intra-corporate conspiracy doctrine applies. Here, Defendant Papak is the alleged sole shareholder of Defendant Blackwell[23] and allegedly controls and/or owns all or at least a controlling interest of Defendant Markima.[24] Defendants, therefore, argue that Papak could not conspire with either Blackwell or Markima.

Defendant also argues that there are no facts supporting the assertion of a conspiracy

[23] ¶6 of Plaintiff's FAC.
[24] ¶9 of Plaintiff's FAC.

between Blackwell and Markima. Defendants further seek summary disposition based on the single-consciousness rule set forth in *Copperweld Corp v Independence Tube Corp,* 167 US 752, 771 (1984).

The general rule is that a corporation does not "conspire" with its own agents or employees when the agents or employees are acting within the scope of their employment and not for personal purposes. *Tropf v Holzman*, 2006 WL 120377 *1.[25]

> Pursuant to the intracorporate-conspiracy doctrine, officers of a single entity generally cannot commit a conspiracy when they are acting in their official capacities on behalf of the entity. *Ziglar v Abbasi*, ––– US ––––, –––– 137 S Ct 1843, 1867; 198 L Ed 2d 290 (2017); *Blair v Checker Cab Co*, 219 Mich App 667, 674; 558 NW2d 439 (1996). However, the intracorporate-conspiracy doctrine does not apply where the officers "have an independent personal stake in" the matter and "are actually acting on their own behalf." *Blair*, 219 Mich App at 674-675.

Barbour v City of Detroit, 2021 WL 5504194 * 7.

Here a conspiracy is alleged to exist between Defendant Mark A. Papak and Defendant Markima LLC, and Blackwell Inc. While Plaintiff alleges Defendant Papak is the sole shareholder of Defendant Blackwell Inc[26] and allegedly controls and/or owns all or at least a controlling interest of Defendant Markima LLC[27] the Defendant has not answered the First Amended Complaint and therefore the allegations have neither been admitted nor denied.

Therefore, the Court DENIES Defendants' Motion as to Defendant Papak.

[25] Unpublished decisions of this Court 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). "
[26] ¶6 of Plaintiff's FAC.
[27] ¶9 of Plaintiff's FAC.

As to conspiracy between the entities Defendants Blackwell Inc and Markima LLC, Defendants rely on the single-consciousness rule set forth in *Copperweld Corp v Independence Tube Corp,* 167 US 752, 771 (1984) where the Supreme Court found that:

> [T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of §1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one."

The United States Supreme Court, however, specifically limited its "inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act. We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own." *Copperweld,* supra at 767.

Here, it is not alleged that Defendant Blackwell Inc and Markima LLC have a parent/subsidiary relationship. Further, this case does not involve a claim for conspiring in violation of §1 of the Sherman Act. And Defendant fails to cite the Court to Michigan case law, which applies the *Cooperweld* "single-consciousness" theory case to facts similar to those as set forth herein. Based on the above, the Court DENIES Defendants' Motion as to Markima LLC and Blackwell, Inc.

Count IX- Conspiracy to Fraudulently Convey Assets

The Court DENIES the MCR 2.116(C)(8) motion relating to Count IX.

As previously noted, "[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." See *Swain v Morse,* 332 Mich App 510, 530 (2020).

"Liability does not arise from a civil conspiracy alone; rather, it is necessary to prove a separate, actionable tort." *Swain v Morse,* 332 Mich App 510, 530 n 13 (2020); *Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n,* 257 Mich App 365, 384 (2003). For a civil conspiracy claim to succeed, it is necessary to prove a separate, actionable tort. *Id.*

Here, Count IX alleges a conspiracy to fraudulently convey assets. And Count IV alleges a violation under the Uniform Fraudulent Transfer Act under MCL 566.34.[28] The Court finds that when reading the complaint as a whole[29], Plaintiff alleged a separate, actionable tort to sustain this count of conspiracy. See *Warner Norcross & Judd, LLP v Police & Fire Retirement Systems of the City of Detroit*, 2014 WL 2600554, where the Court of Appeals found that plaintiff's alleged separate, actionable tort was fraudulent conveyance (violation of UFTA).[30] Based on the above, Defendants' Motion for Summary Disposition on Count IX is DENIED.

For the above stated reasons, IT IS HEREBY ORDERED that:

- Defendants' Motion for Summary Disposition under MCR 2.116(C)(7) is DENIED.
- Defendants' Motion under MCR 2.116(C)(8) as to Count V is DENIED.
- Defendants' Motion under MCR 2.116(C)(8) as to Count VI is GRANTED.
- Defendants' Motion under MCR 2.116(C)(8) relating to Count VII is GRANTED.
- Defendants' Motion under MCR 2.116(C)(8) as to Count VIII is DENIED.
- Defendants' Motion under MCR 2.116(C)(8) as to Count IX is DENIED.

IT IS SO ORDERED.

This is not a final order and does not close out the case.

[28] The Act is called the Uniform Voidable Transaction Act. "AN ACT to provide for the setting aside and modification of certain transfers, conveyances, and obligations; to make uniform the law of fraudulent transfers; and to provide remedies."

[29] "To determine the nature of the claim, we seek its 'gravamen,'and therefore "we disregard the labels given to the claim[ ] and instead read the complaint as a whole...." *Trowell v. Providence Hosp. & Med. Ctrs., Inc.*, 502 Mich. 509, 519, 918 N.W.2d 645 (2018)." *Meyer v Rieck,* __Mich___(2022).

[30] The Court, however, found that because plaintiff failed to establish a fraudulent conveyance, the conspiracy count must also fail.

/s/Victoria A. Valentine