

STATE OF MICHIGAN

IN THE COURT OF APPEALS

**PLANET BINGO, LLC, A California
Limited Liability Company, And
MELANGE COMPUTER SERVICES, INC.,
A Michigan Corporation,**

DOCKET NO. 328896

**Lower Court Case No.
11-1369-CK**

Plaintiffs/Appellants,

VS

**VKGS, d/b/a VIDEO KING,
A Delaware Limited Liability Company,**

Defendant/Appellee.

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BRIEF OF PLAINTIFFS/APPELLANTS

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STATEMENT OF JURISDICTION

Under MCR 7.203(A)(1) and MCR 7.204(A)(1)(b), this Court has subject matter jurisdiction over this appeal. On August 17, 2015, Plaintiffs/Appellants appealed from the Ingham County Circuit Court's (Judge Clinton Canady III's) July 27, 2015 Order Granting Plaintiffs' Motion for Summary Disposition. Under MCR 7.204(A)(1)(b), that order is the lower court case's final order. Not only does that order have the MCR 2.602 final order designation, but that order also resolved the last pending claim, Defendant VKGS, LLC's wrongful injunction claim. Plaintiffs/Appellants have also appealed from several underlying lower orders. Plaintiffs/Appellants have ordered and received all known hearing and other transcripts related to their appeal. On September 4, 2015, Defendant/Appellee cross-appealed from the above July 27, 2015 Order Granting Plaintiffs' Motion for Summary Disposition. Therefore, the Court has subject matter jurisdiction over this appeal.

QUESTIONS PRESENTED

I. WHETHER, IN GRANTING DEFENDANT SUMMARY DISPOSITION UNDER MCR 2.116(C)(10) ON PLAINTIFFS' COUNT I-BREACH OF CONTRACT CLAIMS FOR NO GENUINE ISSUES OF MATERIAL FACT ON THE BREACH ELEMENT AT ISSUE, THE LOWER COURT COMMITTED REVERSIBLE ERROR.

PLAINTIFFS-APPELLANTS RESPOND "YES."

DEFENDANT-APPELLEE RESPONDS "NO."

THE LOWER COURT WOULD RESPOND "NO."

II. WHETHER, IN DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION UNDER MCR 2.119(F), THE LOWER COURT COMMITTED REVERSIBLE ERRORS OF LAW AND ABUSED ITS DISCRETION BASED ON PALPABLE ERRORS.

PLAINTIFFS-APPELLANTS RESPOND "YES."

DEFENDANT-APPELLEE RESPONDS "NO."

THE LOWER COURT WOULD RESPOND "NO."

III. WHETHER, IN GRANTING DEFENDANT SUMMARY DISPOSITION UNDER MCR 2.116(C)(10) ON PLAINTIFFS' COUNT II-UNFAIR COMPETITION CLAIMS MICHIGAN UNIFORM TRADE SECRETS ACT [MUTSA] PREEMPTION, THE LOWER COURT COMMITTED REVERSIBLE ERRORS.

PLAINTIFFS-APPELLANTS RESPOND "YES."

DEFENDANT-APPELLEE RESPONDS "NO."

THE LOWER COURT WOULD RESPOND "NO."

IV. WHETHER, IN STRIKING PLAINTIFFS' AMENDED COMPLAINT UNDER MCRS 2.115 AND 2.118(A)(2) BASED ON UNFAIR PREJUDICE AND FUTILITY, AND IN AFFIRMING SUMMARY DISPOSITION ON PLAINTIFFS' COUNT II-UNFAIR COMPETITION CLAIMS UNDER MCR 2.116(C)(7) BASED ON THE STATUTE OF LIMITATIONS, THE LOWER COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERRORS.

PLAINTIFFS-APPELLANTS RESPOND "YES."

DEFENDANT-APPELLEE RESPONDS “NO.”

THE LOWER COURT WOULD RESPOND “NO.”

V. WHETHER, IN GRANTING DEFENDANT SUMMARY DISPOSITION ON ITS COUNT I-BREACH OF CONTRACT COUNTERCLAIM UNDER MCR 2.116(C)(10) AND DENYING PLAINTIFFS SUMMARY DISPOSITION ON THIS COUNTERCLAIM COUNT UNDER MCR 2.116(I), THE LOWER COURT COMMITTED REVERSIBLE ERROR.

PLAINTIFFS-APPELLANTS RESPOND “YES.”

DEFENDANT-APPELLEE RESPONDS “NO.”

THE LOWER COURT WOULD RESPOND “NO.”

VI. WHETHER, IN RESTRICTING DISCOVERY TO NO EARLIER THAN THE JANUARY 28, 2005 DEFENDANT CORPORATE EXISTENCE DATE OR THE SEPTEMBER 1, 2005 AGREEMENT DATE UNDER MCR 2.302, THE LOWER COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR.

PLAINTIFFS-APPELLANTS RESPOND “YES.”

DEFENDANT-APPELLEE RESPONDS “NO.”

THE LOWER COURT WOULD RESPOND “NO.”

VII. WHETHER, IN DISMISSING THIS ACTION UNDER MCR 2.116(C)(6), THE LOWER COURT COMMITTED REVERSIBLE ERROR.

PLAINTIFFS-APPELLANTS RESPOND “YES.”

DEFENDANT-APPELLEE RESPONDS “NO.”

THE LOWER COURT WOULD RESPOND “NO.”

STATEMENT OF SUBSTANTIVE FACTS

Founded in 1989, Plaintiff “Melange developed an industry-leading bingo hall [computer software] management system known as EPIC.” (2/24/12 Plaintiffs’ Motion for Preliminary Injunction, Exhibit 1, 2/24/12 Affidavit of Rick White in Support of Plaintiffs’ Motion for Preliminary Injunction [2/24/12 White Affidavit], para 3;

11/27/13 Answer in Opposition to Motion for Partial Summary Disposition [**11/27/13 Plaintiffs' Motion for Partial Summary Disposition Answer**], Exhibit C, 10/22/13 Deposition of William Wei [**Wei Dep**], pp8, 15, 19, 89-90)“EPIC allows a bingo hall to manage every aspect of its bingo operations, including electronic and paper bingo, pull-tabs, concession sales, paper tracking and cash tracking. It performs complete accounting and full reporting for a bingo hall’s accounting and audit departments. EPIC is renowned within the industry for its comprehensiveness and ease of use, and its ability to help [bingo] halls identify all manner of data related to operations....EPIC has the ability to download data to a broad variety of electronic bingo devices, including devices manufactured by other bingo companies. This functionality allows a hall to [use] EPIC with a broad range of devices.” (2/24/12 Plaintiffs’ Motion for Preliminary Injunction, Exhibit 1, 2/24/12 White Affidavit, para 3)

Since 1996, Melange has marketed EPIC to bingo halls. (Est 11/27/13 Plaintiffs’ Motion for Partial Summary Disposition Answer, Exhibit C, 10/22/13 Wei Dep, pp 15, 52-53)Beginning in May 1997, Plaintiff Melange and Defendant VKGS, LLC’s predecessors in interest “established a relationship whereby...the two companies would cooperate to facilitate in bingo halls the placement of EPIC, together with Video King electronic bingo devices.” (2/24/12 Plaintiffs’ Motion for Preliminary Injunction, Exhibit 1, 2/24/12 White Affidavit, para 4.

In 1992, a gaming conglomerate, Stuart Entertainment, Inc., founded Defendant VKGS, LLC’s predecessor entity, Video King, “to develop, manufacture and distribute electronic bingo equipment as complementary products to its paper products in the regulated bingo industry.” (3/30/12 Defendant’s Brief in Opposition to Plaintiffs’ Motion

for Preliminary Injunction[**3/30/12 Defendant’s Motion for Preliminary Injunction Opposition**], Exhibit 1, 3/30/12 Affidavit of Russell Morin[**3/30/12 Morin Affidavit**], paras 2, 3. *Accord, VKGS*, 285 Neb 599, 601). On July 7, 1997, Stuart Entertainment acquired “substantially all the assets of Power Bingo Corp., the market leader in handheld electronic bingo units.” (5/21/14 Plaintiffs’ Answer in Opposition to Defendants’ Motion for Summary Disposition[**5/21/14 Plaintiffs’ Motion for Summary Disposition Answer**], Exhibit E, *Stuart Entertainment Acquires Power Bingo (7/7/97)*) About the same time, Stuart agreed to collaborate with Melange Computer Services, Inc., to provide EPIC with Stuart’s fixed-based electronic gaming equipment in Native American casinos. (5/21/14 Plaintiffs’ Motion for Summary Disposition Answer, Exhibit E, *Stuart Entertainment Acquires Power Bingo (7/7/97)*) Stuart needed a POS bingo management system able to integrate with and download data from a wide variety of electronic bingo devices. Stuart confirmed the above agreement with Melange. (3/30/12 Defendant’s Motion for Preliminary Injunction Opposition, Exhibit 1, 3/30/12 Morin Affidavit, para 7. *Accord, 5/21/14 Plaintiffs’ Motion for Summary Disposition Answer, Exhibit F, 5/14/97 Letter Agreement*) **The 1997 agreement created a de facto joint venture between them to “cooperate...to permit the integration of [Stuart] products...with the Melange Epic system.”** (5/21/14 Plaintiffs’ Motion for Summary Disposition Answer, Exhibit F, 5/14/97 Letter Agreement (our emphasis). **The agreement provided: “Nothing in this agreement will give Stuart or Power Bingo any ownership in any resulting software and code or other intellectual property[,], which is the end result of such integration (Modifications’).**” (5/21/14 Plaintiffs’ Motion for Summary Disposition Answer, Exhibit F, 5/14/97 Letter Agreement) (our emphasis)

For the next several years, Defendant’s predecessors and Melange continued their joint venture under the above agreement and a series of letter agreements “to work cooperatively and profitably.”(3/30/12 Defendant’s Motion for Preliminary Injunction Opposition, Exhibit 1, 3/30/12 Morin Affidavit, para 8).For example, on March 24, 1999, Melange and Stuart agreed to a marketing agreement, where Stuart would market EPIC, but where all “intellectual property interests in EPIC, including any and all future developments and supplements to EPIC, are and shall remain [Melange’s] property.” (8/21/13 Plaintiffs’ Amended Complaint, Exhibit B, 5/14/99 Letter Agreement). On March 24, 1999, the same parties signed a similar agreement with similar provisions for the State of Texas. (8/21/13 Plaintiffs’ Amended Complaint, Exhibit C, 3/24/99 Letter Agreement).On April 23, 1999, the same parties signed a similar agreement with similar provisions for the State of Washington (8/21/13 Plaintiffs’ Amended Complaint, Exhibit D, 4/23/97 Letter Agreement).

In 1999, Stuart Entertainment went bankrupt.The bankruptcy led to the spin-off of the Video King Division into a new company, BK Entertainment. (11/27/13 Answer in Opposition to Motion for Partial Summary Disposition [**11/27/13 Plaintiffs’ Motion for Partial Summary Disposition Answer**], Exhibit P, 11/4/13 Deposition of Russell Morin [**11/4/13 Morin Dep**], p 19)) **The main Video King executives, Tim Stuart, Russell Morin, and Dan Free, remained with the new company.** (3/30/12 Defendant’s Motion for Preliminary Injunction Opposition, Exhibit 1, 3/30/12 Morin Affidavit, para 20, Exhibit I, 12/31/08 Agreement Addendum; 11/27/13 Plaintiffs’ Motion for Partial Summary Disposition Answer, Exhibit P, 11/4/13 Morin Dep],pp 5-6, 19, 22-23, 25-26,

33, 36-38, 41-42, 49, Exhibit Q, 11/27/13 Deposition of Timothy Stuart [**11/27/13 Stuart Dep**], pp 22-23, 32-33, 40, 71-72, 264)

On October 29, 2002, the parties agreed to extend the above Texas marketing agreement. (3/6/13 Plaintiffs' Opposition to Defendant's Motion for Partial Summary Disposition, etc.[**3/6/13 Plaintiff's Motion for Partial Summary Disposition Opposition**], Exhibit 9, 10/29/02 Renewal Letter Agreement)In 2002 or 2003, BK Entertainment, declared bankruptcy. (5/21/14 Plaintiffs' Summary Disposition Answer, p 7; 11/27/13 Plaintiffs' Motion for Partial Summary Disposition Answer, Exhibit P, 11/4/13 Morin Dep, pp 37, 41)**During this period, Melange forwarded copies of its EPIC software to Video King and regulatory compliance agencies, to enable Video King handsets to interact with EPIC nationwide.**(3/30/12 Defendant's Motion for Preliminary Injunction Opposition, Exhibit 1, 3/30/12 Morin Affidavit, para 9, &Subexhibit N, 9/7/06 Email).

On October 1, 2003, Video King and Melange signed a Marketing Agreement to market Melange's EPIC with Video King's bingo handsets. The agreement had a 9-month term but provided for automatic renewal "for successive one year periods[.]" (5/30/14 Plaintiffs' Motion for Relief from Order or Judgment [**5/30/14 Plaintiffs' Motion for Relief**], Exhibit D, 10/1/03 Marketing Agreement, para 1). This agreement recognized Melange's proprietary interest in its EPIC software. In an Addendum, the parties extended the term by 9 months to March 31, 2005 (**6/24/15 Plaintiffs' Renewed Motion for Summary Disposition**], Exhibit B, Subexhibit E & Exhibit C, 5/26/04 Marketing Agreement Addendum)

On May 19, 2004, “the Video King Electronic Handset Division was spun off from the parent company, and a new company, VKGS, [LLC,] was formed.”

(5/21/14 Plaintiffs’ Summary Disposition Answer, p 7, &Exhibit G, 5/19/04 VKGS, LLC Certificate of Formation) (our emphasis)In 2004, VKGS began negotiating to buy Melange.(5/21/14 Plaintiffs’ Summary Disposition Answer, Exhibit H, 8/2/04 VKGS Letter w/7/29/04 Proposal)These negotiations collapsed due to VKGS’s “unwillingness to adhere to [its] initial LOI [letter of intent]...sent to Melange.” (See 5/21/14 Plaintiffs’ Motion for Summary Disposition Answer, p 7; 3/30/12 Defendant’s Motion for Preliminary Injunction Opposition, Exhibit 1, 3/30/12 Morin Affidavit, para 9)

On June 18, 2004, Video King and Melange signed a Software Licensing Agreement for the EPIC system recognizing **“their long-term business relationship....** the historical relationship between the PARTIES has been an association where Melange has provided at VKGS’s request the SOFTWARE for VKGS’s use....[T]he parties have operated this relationship...under both written documents and verbal agreements.” (5/9/12 Defendant’s Renewed Motion for Summary Disposition, Exhibit 4, Subexhibit A, 6/18/04 Software Licensing Agreement, p 1) The 2004 Software Licensing Agreement included the following intellectual property provisions:

“The PARTIES...agree that the UNITS and the SOFTWARE included in this Agreement are the exclusive, proprietary products of the respective PARTIES, protected under Patent Law, Copyright Law and Trade Secret Laws of general applicability....”

“The PARTIES...agree that all rights, titles, and interest in and to the UNITS are and shall remain with VKGS. The PARTIES...agree that all rights, titles, and interest in and to the EPIC software are and shall remain with MELANGE. This agreement does not convey to either Party an interest in or to the other Party’s property but only a limited right of use[.]”

(5/9/12 Defendant's Renewed Motion for Summary Disposition, Exhibit 4, Subexhibit A, 6/18/04 Software Licensing Agreement, p 3)

On September 10, 2004, the parties signed a Confidentiality Agreement recognizing their mutual confidentiality interests and obligations. (5/30/14 Plaintiffs' Motion for Relief, Exhibit C, 9/10/04 Confidentiality Agreement) But by late 2004, "[u]nknown to Melange, VKGS, LLC was dire financial straits[,] as its bank had called in its loans." (5/21/14 Plaintiffs' Motion for Summary Disposition Answer, p 7) In January 2005, VKGS signed an agreement with and received \$10 million in rescue funding from Nogales Investors, LLC (5/21/14 Plaintiffs' Motion for Summary Disposition Answer, p 7 & Answer Exhibit I, 1/28/05 VKGS-Nogales Agreement, pp 1-3) **The VKGS-Nogales Agreement compelled VKGS to buy Melange "(and its EPIC system) or develop its own software system with the functional equivalent of Melange's EPIC system within 24 months of the agreement."** (5/21/14 Plaintiffs' Motion for Summary Disposition Answer, p 7, & Exhibit I, 1/28/05 VKGS-Nogales Agreement, Sec 5.3(b), pp 43-44) (our emphasis) If VKGS did not buy Melange or develop its EPIC-equivalent software, Nogales would reduce its rescue funding by \$2 million. (*Id.*, p 7, & Exhibit I, 1/28/05 VKGS-Nogales Agreement, Secs 1.2(d) & 5.3(b))

On January 28, 2005, VKGS, LLC acquired the assets and business operating as "Video King" from Video King Gaming Systems, Inc. and Western Bingo Supplies, Inc. (9/19/13 Brief in Support of Motion to Strike Amended Complaint[**9/19/13 Motion to Strike Amended Complaint Brief**], p 13; 8/21/13 Amended Complaint, Exhibit F, 1/28/05 VKGS-Nogales Agreement) This acquisition included assignment of the June 18, 2004 Software Licensing Agreement from Video King Gaming Systems, Inc. to VKGS,

LLC. (5/9/12 Defendant's Renewed Motion for Summary Disposition, p 3) **The same predecessor company executives kept control of the new VKGS.** (5/21/14 Plaintiffs' Motion for Summary Disposition Answer, p 7 FN6; 3/30/12 Defendant's Motion for Preliminary Injunction Opposition, Exhibit 1, 3/30/12 Morin Affidavit, para 3; 7/9/13 Defendant's Motion for Summary Disposition, Exhibit 1, 7/2/13 Morin Affidavit, para 2¶ 4 (Timothy Stuart);11/27/13 Plaintiffs' Motion for Partial Summary Disposition Answer, Exhibit P, 11/4/13 Morin Dep, pp 5-6, 19, 22-23, 25-26, 33, 36-38, 41-42, 49, Exhibit Q, 11/27/13 Stuart Dep,pp 22-23, 32-33, 40, 71-72, 264) During 1998-2006, Melange dealt with many of the same people. (*Id*, Exhibit C, 10/22/13 Wei Dep, p 78)

The parties' joint efforts culminated in a September 1, 2005 Agreement further facilitating "the use of EPIC on Video King's electronic bingo equipment." VKGS, 285 Neb 599, 602. The 2005 agreement incorporated the 2003 Marketing Agreement. (12/20/11 Complaint, Exhibit A, 9/1/05 Agreement, para 8) The 2005 Agreement included the above-quoted 2004 Software License Agreement property rights provision.(12/20/11 Complaint, Exhibit A, 9/1/05 Agreement, para 12),and a detailed, extensive Confidentiality Provision reading in relevant part:

"The PARTIES agree that all information, including without limitation the SOFTWARE including any updates, enhancements and new releases thereof, the Documentation, including formulas, methods, know-how, processes, designs, new product, developmental work, marketing requirements, marketing plans, customer names, prospective customer names, the terms and pricing of agreements, and in general, any other information related to this Agreement, transmitted to the other, (the `Confidential Information`) shall be handled as confidential information regardless of the means through which it is disclosed, in accordance with the provisions of this clause. Confidential information shall be used exclusively for the purposes set forth in this Agreement and its Exhibits, therefore, at no time whatsoever, neither party may be entitled to provide, transfer, publish, reproduce or disclose such Confidential Information to third parties whether directly or indirectly through third parties, or in any manner whatsoever.

“Each party acknowledges and accepts that the Confidential Information that it has received through any means or form and at any time, as well as that it may receive in the future under this Agreement and its Exhibits, is and shall continue to be the exclusive property of the party issuing such Confidential Information. Neither party shall be entitled to retain the Confidential provided to it under the terms of this Agreement. The obligations contained in this clause [regarding] nondisclosure of Confidential Information shall survive for a period of five (5) years from the termination, rescission, or expiration date of the this Agreement....Each party acknowledges that Confidential Information may be unique and valuable to its owner, and that disclosure in breach of this agreement will result in irreparable injury to the owner of such Confidential Information[.]”

(12/20/11 Complaint, Exhibit A, 9/1/05 Agreement, para 17). **VKGS itself drafted this Confidentiality Provision.**(5/21/14 Plaintiffs’ Motion for Summary Disposition Answer, p 8 & Exhibit J, 11/23/05 & 11/25/05 Emails)

The 2005 agreement included an assignment provision reading as follows:

“22. Assignment. This Agreement may be assigned by either PARTY upon the prior written consent of the other PARTY[,] which consent shall not be unreasonably withheld.”

(12/20/11 Complaint, Exhibit A, 9/1/05 Agreement, para 22).

On or about July 17, 2006, Planet Bingo acquired Melange. (5/21/14 Plaintiffs’ Motion for Summary Disposition Answer, p 8; 11/27/13 Plaintiffs’ Motion for Partial Summary Disposition Answer, Exhibit C, 10/22/13 Wei Dep, pp107, 113-116, 129) On or about July 30, 2007, Defendant and Planet Bingo amended the 2005 Agreement to extend it from August 31, 2007 to December 31, 2008. (12/20/11 Complaint, para 15 & Exhibit B, 7/30/07 Amendment; 11/27/13 Plaintiffs’ Motion for Partial Summary Disposition Answer, Exhibit D, 7/30/07 Amendment) In the 2007 amendment, the parties recognized that Melange had assigned the 2005 Agreement to Planet Bingo in 2006. Defendant’s Chief Executive Officer signed the amendment. In 2008, 2009, and 2010, the parties amended the 2005 agreement. These agreements and amendments extended the parties’ relation to December 31, 2011. (3/30/12 Defendant’s Motion for Preliminary

Injunction Opposition, Exhibit 1, 3/30/12 Morin Affidavit, paras 11, 20, 21& Exhibit H, 12/31/08 Agreement, Exhibit I, 11/24/09 Amendment, Exhibit J, 12/22/10 Amendment; VKGS, 285 Neb 599, 602)

Following Planet Bingo's acquisition of Melange, VKGS "perceived [Planet Bingo]...to be an aggressive and hostile industry competitor." (3/30/12 Defendant's Motion for Preliminary Injunction Opposition, Exhibit 1, 3/30/12 Morin Affidavit, para 9; VKGS, 285 Neb 599, 602)Having failed to buy Melange, and under its obligation to Nogales, **VKGS began developinga product to compete with EPIC called OMNI. However in developing OMNI, VKGS used Plaintiffs' confidential information inviolation of the parties' agreements. (See Below& Argument, Section I) Plaintiffs provided Defendant with confidential computer code and documentation for EPIC, so Defendant could become familiar with EPIC's operation, and could market it to bingo halls, and train bingo halls in its use. But Plaintiffs never provided EPIC's source code.**(3/30/12 Defendant's Motion for Preliminary Injunction Opposition, Exhibit 1, 3/30/12 Morin Affidavit, paras 9, 31 & Exhibit N, 9/7/06 Email)**Melange invited Video King "to attend private and confidential training sessions,"whereMelange communicated confidential information not communicated to other EPIC users. (2/24/12 Plaintiffs' Motion for Preliminary Injunction, Exhibit 1, 2/24/12 White Affidavit para5) Before July 17, 2006, Defendant and its predecessors were the only users having EPIC in its entirety: "[T]hey had it at a level that none of our customers had...."** (6/18/14 Motion for Reconsideration, p 8, quoting 10/22/13 Wei Dep, p 160) Defendant and its predecessors alone had access to a feature permitting them to "get in

and message [EPIC] data at their discretion.” (6/18/14 Motion for Reconsideration, p 8, quoting 10/22/13 WeiDep, pp 160-161)

**RELEVANT PROCEDURAL HISTORY-US DISTRICT
COURT & NEBRASKA COURTS LITIGATION**

A. On May 5, 2011, Planet Bingo and Melange sued VKGS in the US District Court for the Western District of Michigan for breach of contract, unfair competition, and unjust enrichment. (*VKGS*, 285 Neb 599, 602; 5/9/12 Defendant VKGS, LLC d/b/a Video King’s Renewed Motion for Summary Disposition [**5/9/12 Defendant’s Renewed Motion for Summary Disposition**]), Exhibit 2, US District Court Case No 1:11-cv-464 Summons and Complaint and Demand for Jury Trial)

B. On December 21, 2011, the US District Court dismissed the case for lack of diversity jurisdiction. (*VKGS*, 285 Neb 599, 602; 5/9/12 Defendant’s Renewed Motion for Summary Disposition, Exhibit 3, 12/21/11 US District Court Order Dismissing Complaint for Lack of Subject Matter Jurisdiction)

C. On December 13, 2011, VKGS sued Planet Bingo and Melange in Nebraska’s Douglas County District Court for a declaratory judgment declaring the parties rights and obligations under their 2005 agreement and any other confidentiality agreements. (*VKGS*, 285 Neb 599, 602; 5/9/12 Defendant’s Renewed Motion for Summary Disposition, Exhibit 4, Douglas County District Court, Nebraska Complaint) This action is pending.

RELEVANT PROCEDURAL HISTORY-MICHIGAN LITIGATION

1. On December 20, 2011, Plaintiffs Planet Bingo and Melange sued Defendant VKGS for Count I: Breach of Contract, Count II: Common Law Unfair Competition, and Count III: Unjust Enrichment in the Ingham County Circuit Court. (Ingham County Circuit Court Case No. 11-1369-CK 12/20/11 Summons and Complaint)

2. On February 13, 2012, Defendant moved to dismiss the action based on MCR 2.116(C)(6), another pending action involving the same parties and claims. (Est 2/13/12 Defendant VKGS, LLC d/b/a Video King's Motion for Summary Disposition[**2/13/12 Defendant's Motion for Summary Disposition**])

3. On April 10, 2012, the lower court denied the above motion without prejudice pending the Nebraska Supreme Court's personal jurisdiction decision. (4/10/12 Order Denying Defendant's Motion for Summary Disposition)

4. On May 9, 2012, Defendant renewed its earlier Motion for Summary Disposition under MCR 2.116(C)(6) based on another pending action between the same parties involving the same claims. (5/9/12 Defendant VKGS, LLC d/b/a Video King's Renewed Motion for Summary Disposition[**5/9/12 Defendant's Renewed Motion for Summary Disposition**]) The lower court never ruled on this motion.

5. On July 6, 2012, the lower court, Judge Canady, on its own motion, appointed Bruce F. Webster as the Court Expert "to ascertain whether there is a likely probability that Video King "(a) utilized information relating to EPIC (b) which was obtained from Plaintiffs between September 1, 2005 and the present and (c) which was neither in the present domain nor otherwise known to Video King, to design OMNI[.]" (7/6/12 Order Appointing Expert by the Court, etc.[**7/6/12 Expert Appointment Order**], p 2) On July 2, 2013, the lower court, Judge Canady, granted Defendant's Motion to Engage Court Expert to Review and Evaluate Reports of Parties' Experts. (7/2/13 Order Granting Defendant's Motion to Engage Court Expert to Review and Evaluate Reports of Parties' Experts [**7/2/13 Order Re Court Expert**])

6. On July 25, 2012, the lower court, Judge Canady, and limited discovery to documents and information dated on the September 1, 2005 Agreement date or later. (7/25/12 Order Granting in Part and Denying in Part Plaintiffs' and Defendant's First Motions to Compel [Discovery])

7. On September 18, 2012, Defendant moved for leave to amend its Answer to add Count I-breach of contract and Count II-unfair competition counterclaims. (9/18/12 Defendant's Motion for Leave to File Amended Answer & Counterclaim)

8. On October 18, 2012, Mr. Webster filed and served his First Report. (10/18/12 First Report of Findings to Date [**10/18/12 Webster First Report**].) On July 23, 2013, Mr. Webster filed his second expert report (7/23/13 Report of Parties' Expert Reports [**7/23/12 Webster Second Report**]). On May 28, 2014, Mr. Webster filed his Third Report. (5/28/14 Statement to the Court [**5/28/14 Webster Third Report**])

9. On October 24, 2012, the lower court, Judge Canady, permitted Defendant to file its proposed Count I-Breach of Contract Counterclaim, but denied the motion on proposed Count II-Unfair Competition. (10/24/12 Order Granting in Part and Denying in Part Defendant's Motion for Leave to File Amended Answer & Counterclaim)

10. On January 14, 2013, Defendant filed its Amended Answer and Counterclaim. (1/14/13 Defendant's Amended Answer and Counterclaim to Plaintiffs' Complaint) On January 22, 2013, Defendant corrected it. (1/22/13 Defendant's Corrected Amended Answer and Counterclaim to Plaintiffs' Complaint)

11. On March 26, 2013, the lower court, Judge Canady, modified its July 25 or 26, 2012 discovery order limiting discovery from after September 1, 2005 to after

January 28, 2005. (3/26/13 Order Regarding Defendant's Motion for Summary Disposition)

12. On July 9, 2013, Defendant moved under MCRs 2.116(C)(4), (C)(5), (C)(7), and (C)(10) for summary disposition on several grounds. (Est 7/9/13 Defendant's Motion for Summary Disposition)

13. On August 14, 2013, the lower court, Judge Canady, granted Defendant's Motion for Summary Disposition only on Plaintiffs' Complaint Count II-Common Law Unfair Competition and Count III-Common Law Unjust Enrichment. Regarding Count II, the lower court granted the motion based on Michigan Uniform Trade Secrets Act [MUTSA] preemption of the claims. (7/24/13 MHT, pp44-45) The lower court gave Plaintiffs until August 21, 2013 to file an Amended Complaint only on the unfair competition claim. (8/14/13 Order Granting in Part and Denying in Part Defendant's Motion for Summary Disposition)

14. On August 14, 2013, the lower court, Judge Canady, granted Defendant's Motion for Partial Summary Disposition on Plaintiffs' Complaint Count II-Unfair Competition that it had taken under advisement on March 26, 2013. The lower court ruled as follows:

“For purposes of Plaintiffs' [breach of contract] claim...for misuse of confidential information pursuant to the [parties'] 2005 Agreement...the `Confidential Information' can only be information `transmitted' by the Plaintiffs to the Defendant after the [September 1, 2005] Agreement[']s effective date...therefore, all information claimed to be `confidential' by Plaintiffs [reference 12/20/11 Plaintiffs' Complaint, paras 14, 18, and 23,] which Defendant may have obtained prior to September 1, 2005 is not `confidential' under Section 17 of the 2005 Agreement. Notwithstanding the foregoing, this Order does not conflict with the [lower court's 3/26/13 Order Regarding Defendant's Motion for Summary Disposition providing] that for purposes of discovery[,], the parties shall be allowed to `relate back' to January 28, 2005.” (8/14/13 Order Granting Defendant's Motion for Partial Summary Disposition)

15. On August 21, 2013, Plaintiffs filed their Amended Complaint including Count I-Breach of Contract claims and Amended Count II-Common Law Unfair Competition Claims. (8/21/13 Plaintiffs' Amended Complaint and Reliance on Jury Demand [**8/21/13 Amended Complaint**])

16. On September 19, 2013, Defendant moved under MCR 2.115 to strike Plaintiffs' Amended Complaint in part and for summary disposition under MCR 2.116(C)(10) for no genuine issues of material fact on Plaintiffs' entire Amended Complaint. (9/19/13 Defendant's Brief in Support of Motion to Strike and for Summary Disposition)

17. On November 14, 2013, Defendant moved for partial summary disposition on its Counterclaim Count I-Breach of Contract. (11/14/13 Motion for Partial Summary Disposition...on Count I of Defendant's Counterclaim for Breach of Contract)

18. On December 23, 2013, the lower court, Judge Canady, granted Defendant's above motion. (12/23/13 Order Granting Defendant's Motion for Partial Summary Disposition...on Count I of Defendant's First Counterclaim for Breach of Contract)

19. On April 9, 2014, regarding various discovery motions, the lower court, Judge Canady, extended the discovery deadline to April 30, 2014. (4/9/14 Order Regarding Discovery Issues and Discovery Deadline)

20. On May 8, 2014, Defendant moved for summary disposition on Plaintiff's Complaint Count I-Breach of Contract. (5/8/14 Defendant's Motion for Summary Disposition Dismissing Plaintiffs' Breach of Contract Claim[**5/8/14 Defendant's Motion for Summary Disposition**])

21. On May 21, 2014, Plaintiffs responded to the above motion. (5/21/14 Plaintiffs' Answer in Opposition to Defendant's Motion for Summary Disposition Dismissing Plaintiffs' Breach of Contract Claim[**5/21/14 Plaintiffs' Motion for Summary Disposition Answer**])

22. **On May 28, 2014, the lower court, Judge Canady, heard and granted Defendant's Motion for Summary Disposition on Plaintiffs' Complaint Count I-Breach of Contract.** (5/28/14 MHT; 5/28/14 Order Granting Defendant's Motion for Summary Disposition as to Count I[**5/28/14 Summary Disposition Order**])**The lower court reasoned that Plaintiffs had not "refuted" Mr. Webster's expert reports stating that Defendant had not incorporated any EPIC components into OMNI, that Plaintiffs had not shown communicated, confidential EPIC information, and that Plaintiffs had not "set forth specific facts...showing" such an issue.** (5/28/14 MHT, pp 55-58)

23. On June 18, 2014, Plaintiffs moved for reconsideration of the above May 28, 2014 Summary Disposition Order based on palpable errors, including judicial estoppel, failure to set an evidentiary hearing on Plaintiffs' allegations that Defendant had tampered with evidence and thus perpetrated a fraud on the lower court, wrongful over-reliance on Mr. Webster's third report, and failure to enforce Defendant's representation that it would respond to all of Plaintiffs' outstanding discovery requests by April 17, 2014. (6/18/14 Motion for Reconsideration)

24. On July 15, 2014, the lower court, Judge Canady, denied Plaintiffs' Motion for Reconsideration of the above May 28, 2014 Order. (7/15/14 Order)

25. On August 13, 2014, the lower court, Judge Canady, granted Defendant's Motion to Strike Plaintiffs' Amended Complaint and reaffirmed its summary disposition order on Plaintiffs' Complaint-Count II-Common Law Unfair Competition, this time based on the three-year unfair competition statute of limitations. The lower court found that Plaintiffs had notice of their unfair competition claims in early 2007, more than three years before the December 20, 2011 Complaint filing date. (8/13/14 Order Granting Defendant's Motion to Strike Amended Complaint and Affirming Summary Disposition as to Plaintiffs' Claims of Unfair Competition[**8/13/14 Strike & Summary Disposition Order**]; 6/25/14 MHT, pp50-52)

26. On April 15, 2015, the lower court, ordered the parties to confer at a September 14, 2015 pretrial conference and set an October 5, 2015 trial date. (4/15/15 Notice of Pretrial and Jury Trial)

27. Before a scheduled July 1, 2015 Pretrial Conference, Defense Counsel wrote the lower court and Plaintiffs' Counsel enclosing his letter to the Nebraska trial court hearing the Nebraska case. (7/08/15 Order, p 5)

28. On July 1, 2015, the lower court, Judge Canady, held a Pretrial Conference, where the lower court stated its intent to dismiss the Michigan case under MCR 2.116(C)(6) for "no genuine issue of material fact that the Nebraska litigation involved the same parties and issues as the present action." Over Defense Counsel's vehement objections, the lower court ruled that it would dismiss the Michigan case for the above reason, except for Defendant's Count III-Wrongful Injunction Counterclaim. (7/1/15 Pretrial Conference Transcript, pp 23-25; 7/08/15 Order, pp 5-7)

29. On July 27, 2015, the lower court, Judge Canady, dismissed the case's last remaining claim. (7/27/15 Order Granting Plaintiffs' Motion for Summary Disposition)

ARGUMENT

I. THIS COURT SHOULD REVERSE THE LOWER COURT'S SUMMARY DISPOSITION ORDER FOR DEFENDANT ON PLAINTIFFS' COUNT I-BREACH OF CONTRACT CLAIMS, BECAUSE PLAINTIFFS HAVE SHOWN GENUINE ISSUES OF MATERIAL FACT ON THE BREACH ELEMENT AT ISSUE.

A. Relevant MCR 2.116(C)(10) Procedural Law.

Michigan appellate courts review trial court summary disposition decisions de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests whether a claim or defense has genuine factual support. *Id.* The court evaluates the admissions, affidavits, depositions, and other documents "then filed in the action or submitted by the parties (the record) to determine whether a genuine issue of material fact is present." MCR 2.116(G)(5). **The court evaluates the record in the light most favorable to the nonmoving party.** *Id.* at 120. **The court "makes all reasonable inferences in the nonmoving party's favor."** *Bertrand v Alan Ford, Inc.*, 449 Mich 606, 618; 537 NW 2d 185 (1995) (our emphasis). **The court gives "the benefit of [any] reasonable doubt to the opposing party."** *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003) (our emphasis).

Michigan appellate courts are liberal in finding genuine issues of material fact. *Lyle v Malady*, 458 Mich 153, 176-177; 579 NW2d 906 (1998), *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008), **The court does not find facts or weigh witness' credibility.** *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994), *Nesbitt v American Community Mutual Insurance Co*, 236 Mich App 215, 225; 600 NW2d 427

(1999). “A genuine issue of material fact exists when the record...leaves open an issue upon which reasonable minds might differ.” *West*, 469 Mich 177, 183.

B. Relevant Breach of Contract and Court-Appointed Expert Principles.

To show breach of contract, the plaintiff must show a valid contract, breach, proximate cause, damages. *Miller-Davis Co v Ahrens Construction, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). A trial court can appoint an expert to advise it on the case factual issues. MRE 706. Before a trial, a court-appointed expert can express his/her opinion on factual issues, including ultimate factual issues. But a court-appointed expert cannot express legal conclusions, tell the trier of fact how to decide the case, or interpret the facts. *Downie v Kent Products, Inc*, 420 Mich 197, 205; 362 NW2d 605 (1984). A trial court cannot use a court-appointed expert’s opinion to foreclose any party from showing genuine issues of material fact and thus to grant another party summary disposition de facto. *See id.*

C. Genuine Issues Of Material Fact On Plaintiffs’ Count I-Breach of Contract Claims Are Present-Part I.

Applying the above MCR 2.116(C)(10) summary disposition procedural law shows that genuine issues of material fact on all four elements are present. The main element at issue is breach. Plaintiffs have presented abundant and specific evidence that Defendant had breached the 2005 Agreement’s Confidentiality provision, by decompiling, disassembling, and reverse engineering EPIC to develop a competing product, OMNI. **From the parties’ contractual relationship, Defendant received Plaintiffs’ EPIC confidential information, including exclusive information. Plaintiffs regularly communicated EPIC computer code and documentation and a fully operational software version to Defendant.** (5/21/14 Plaintiffs’ Motion for Summary

Disposition Answer, Exhibit A, Plaintiffs' Responses to Defendant's Interrogatories, Confidential Version, Responses 1 & 2) **The January 29, 2007 Jiri Sakopaleck-Greg Joyal Email Thread shows Defendant's receipt of, access to, and decompilation of EPIC database files from an operational version of EPIC after September 1, 2005 and from an EPIC operational version that Plaintiffs provided exclusively to Defendant after that date.** Defendant used this information to develop OMNI. (*Id.*, Exhibit B, Sakopaleck-Joyal email thread)

The Jiri Sakopaleck-Brent Kiziuk Email specifies dates when Defendant developed and released OMNI modules. This email shows that Defendant did not develop OMNI primary modules until July 2007 and afterward. This confirms that as of September 1, 2005, Defendant had not developed OMNI modules. These facts show that Defendant used Plaintiffs' confidential information, such as the EPIC database and associated files, to develop OMNI modules after July 2007. (*Id.*, Exhibit C, 7/12 Sakopaleck-Kiziuk email thread) **The EPIC Version History** identifies EPIC new versions' release dates and EPIC changes from release to release. This document shows that Plaintiff created and communicated the EPIC confidential information to Defendant after September 1, 2005. Also, this document shows that Plaintiffs continued changing and improving EPIC after that date. (*Id.*, Exhibit D, EPIC Version History)

Defendant's Employee Time Sheet Database illustrates that Defendant's employees' wrongfully used EPIC confidential information to create OMNI. For example, the time sheet shows Defendant employee John Mowat's reverse engineering of EPIC during the weeks of January 28, 2007, February 4, 2007, and February 11, 2007 to create OMNI. Another exhibit shows Defendant's reverse engineering for this purpose.

(*Id.*, Exhibit E, Defendant Employee Time Sheet Database, Exhibit S, 10/30/13

Deposition of Jiri Sakopaleck, pp 22-30) A third exhibit shows Mowat's February 9, 12, 13, and 16, 2007 updates corresponding to Exhibit E Mowat reverse engineering entries.

(*Id.*, Exhibit Y, Use Cases for Paper Inventory)

Other Answer Exhibits show Defendant employees requesting and receiving, and Plaintiffs communicating, EPIC operational versions, corresponding database files, Visual Fox Pro files associated with EPIC from Melange—all confidential documents and information—after September 1, 2005. (*Id.*, Exhibits L-P, Q-R) Additional Answer Exhibits show Defendant's hiring of employees able to wrongfully use EPIC to develop OMNI. In January 2007, in accordance with the VKGS-Nogales contract's two-year deadline for VKGS to buy Melange or develop an EPIC competitor, Defendant hired Sandra Toews, an IT management and operations specialist with software reverse engineering expertise, as OMNI project manager. (*Id.*, Exhibit W, Toews Resume)

Almost immediately after hiring Jiri Sakopaleck as a developer, Defendant provided him with a copy of EPIC database files and an operational EPIC version (a Winnipeg demo that Plaintiffs created exclusively for and transmitted exclusively to Defendant after September 1, 2005) to enable him to begin developing OMNI modules using the EPIC framework as a model. The email thread shows that he accessed the EPIC database files, and that Defendant's developers took this information and identified specific EPIC characteristics to incorporate into OMNI. (*Id.*, Exhibit B, Sakopaleck-Joyal Email Thread)

Plaintiffs' evidence shows that Defendant wrongfully used EPIC confidential information created and communicated after September 1, 2005 to create specific OMNI

features, modules, and other operational characteristics. Defendant misused EPIC confidential information to create crucial OMNI modules, including **OMNI's Paper Inventory Module** (*Id*, pp 11-15, & Exhibits B, E, Y, Z, AA, BB, D, & CC), **OMNI's Cash Vault Module** (*Id*, pp 15-17, & Exhibits E, DD, EE), **OMNI's Paymaster Module** (*Id* 5/21/14, pp 17-19, & Exhibits E, FF, GG, II), **OMNI's Gift Certificate Module**, (*Id*, pp 19-21, & Exhibits JJ, KK, E, LL, JJ), **Permissions/Security Access Infrastructure Module**, (*Id*, pp 21-22, & Exhibits MM, NN), **OMNI's Omni Reports Module** (*Id*, pp 22-26, & Exhibits EE, OO, PP, QQ, E, RR, SS, TT), **OMNI's Electronic Pull Tabs Module** (*Id*, p 26, & Exhibits D, UU), **OMNI's Custom32.app for Sparks Nugget Module** (*Id*, p 26, & Exhibits VV, WW), and **OMNI's Credit Card Support Module** (*Id*, pp 27-28, & Exhibits D, XX, YY).

Therefore, Plaintiffs have presented sufficient evidence to create a genuine issue of material fact on their breach of contract claim's breach element. The lower court's and Defendant's contrary position ignores the above specific and substantial evidence. The lower court's reasoning that Plaintiffs had not "refuted" Mr. Webster's expert reports stating that Defendant had not incorporated any EPIC components into OMNI (5/28/14 MHT, pp 53-54) overlooks that to show breach, Plaintiffs need not show Defendant incorporation of EPIC components into OMNI. The lower court's conclusion that Plaintiffs had not shown communicated, confidential EPIC information (5/28/14 MHT, pp 51-53) ignores all the above evidence specifying such information. The lower court's conclusion that Plaintiffs had not "set forth specific facts...showing" a genuine issue of material fact on breach (5/28/14 MHT, p 57) overlooks the above referenced exhibits and specific evidence establishing a genuine issue of material fact.

The lower court's contrary conclusions and reasoning ignore MCR 2.116(C)(10) summary disposition procedural law. The lower court's finding that Defendant never received any Plaintiffs' confidential information after September 1, 2005(5/28/14 Summary Disposition Order, p 2) is an improper factual finding. The finding also overlooks Plaintiffs' evidence that under the earlier agreements, all communicated EPIC documents and information were confidential. Likewise, the lower court's finding that Defendant never misused Plaintiffs' confidential documents and information in violation of the 2005 Agreement (5/28/14 Summary Disposition Order, p 2) is an improper factual finding. The finding also overlooks Plaintiffs' evidence that under the 2005 Agreement's Defendant-drafted Confidentiality provision, all EPIC documents and information were confidential.

Rather than reading the record in the light most favorable to non-moving Plaintiffs, the lower court read the record in the light most favorable to moving Defendant. Far from making all reasonable inferences in the nonmoving Plaintiffs' favor, the lower court made no inferences—reasonable or otherwise—in Plaintiffs' favor. Instead of giving the benefit of any reasonable doubt to the nonmoving Plaintiffs, the lower court gave no such benefit, even when evidence of reasonable doubt was clear, plentiful, and specific. Accordingly, Plaintiffs have presented sufficient evidence to create a genuine issue of material fact on breach. Thus, in granting Defendant summary disposition on Count I-breach of contract, the lower court committed reversible error.

D. Genuine Issues Of Material Fact On Plaintiffs' Count I-Breach of Contract Claims Are Present-Part II.

In granting summary disposition, the lower court over-relied on the court-appointed expert witness, Mr. Webster's, opinions. In his opinion, Plaintiffs had not

communicated any EPIC confidential information used to develop OMNI, and EPIC and OMNI differed enough to make misuse of confidential information, and thus breach of contract and unfair competition, improbable. (10/18/12 First Report of Findings to Date[**10/18/12 Webster First Report**]; 7/23/13 Review of Parties' Expert Reports[**7/23/12 Webster Second Report**; Est 5/28/14 Statement to the Court [**5/28/14 Webster Third Report**])

But the lower court forced Mr. Webster to operate in an unjustified restrictive environment. In appointing him, the lower court restricted his investigation time period to "between September 1, 2005 and the present[.]" (7/6/12 Expert Appointment Order, p 3) He filed his expert reports under this "stricture[.]" (10/18/13 Webster First Report, p 3. *Accord*, 7/2/13 Order Re Court Expertp 2) Thus, the lower court prevented him from evaluating any confidential EPIC information communicated before September 1, 2005 and used to develop OMNI. This restriction is contrary to the 2005 Agreement's Confidentiality provision covering all EPIC information transmitted to Defendant at any time. Therefore, Mr. Webster's reports are confined to the lower court's unjustified time period restriction, thus making the lower court's over-reliance on his opinions unjustified.

As Plaintiffs' Counsel emphasized, **Defendant was "asking the [lower court] to determine that Mr. Webster is the judge, Mr. Webster is the trier of fact. That is something more than a person with an opinion....But he is not the trier of fact."** (7/24/13 MHT, p 19) (our emphasis) The lower court's characterization of "Mr. Webster" as "really the only person we have at this time, that has presented, ... a report that testimony could be taken from" (5/28/14 MHT, p 51) is an impermissible witness

credibility finding. Though a court-appointed expert, Mr. Webster remains a witness. As with any other witness, in deciding an MCR 2.116(C)(10) summary disposition motion, the lower court cannot determine his credibility. But the lower court has done so here.

The lower court's adoption of Mr. Webster's opinion that "the [EPIC and OMNI] programs were different" (5/28/14 MHT, p 52) is impermissible factfinding. The lower court's contention that Plaintiffs had not produced any evidence rebutting this finding (*Id*, p 53) overlooks that these differences do not foreclose misuse of confidential information. The lower court's adoption of Mr. Webster's opinion that it is all right to look at competitors' software (*Id*, p 53) overlooks that Defendant went far beyond looking. Plaintiffs furnished confidential information under the 2005 Agreement's Confidentiality provision exclusively to Defendant. The lower court's adoption is also impermissible factfinding. The lower court's statement that it had not received anything from Plaintiffs contradicting Mr. Webster's opinion (*Id*, p 52) is impermissible factfinding and untrue. Also, the lower court's statement that any EPIC material forwarded to Defendant was not confidential and "in the public domain" is impermissible factfinding and untrue. Moreover, the lower court read the record for Defendant and failed to give Plaintiffs the benefit of any reasonable doubt. Therefore, under MCR 2.116(C)(10), a genuine issue of material fact on Plaintiffs' Complaint Count I-Breach of Contract is present.

II. THIS COURT SHOULD REVERSE THE LOWER COURT'S DENIAL OF PLAINTIFFS' MOTION FOR RECONSIDERATION, BECAUSE IN DENYING THE MOTION, THE LOWER COURT COMMITTED REVERSIBLE ERRORS OF LAW AND ABUSED ITS DISCRETION BASED ON PALPABLE ERRORS.

A. Motion for Reconsideration Legal Principles.

Michigan appellate courts review trial court motion for reconsideration decisions

for abuse of discretion. *Luckow Estate v Luckow*, 291 Mich App 417, 423; 805 NW2d 453 (2011). But trial court decisions on issues of law within such decisions are subject to de novo review. *Id.* To prevail on a motion for reconsideration, “[t]he moving party must demonstrate a palpable error by which the court the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.” MCR 2.119(F)(3). A palpable error is a clear error. *Id.* As a rule, the trial court will not grant a motion for reconsideration presenting the same issues previously decided. But the trial court has “considerable discretion” to revisit an issue to correct an error. *Macomb County Department of Human Services v Anderson*, 304 Mich App 750, 754; 849 NW2d 408 (2014).

B. Judicial Estoppel Bars The Lower Court’s Summary Disposition Order.

Judicial estoppel’s purpose is to protect the judicial process’ integrity. *Opland v Kiesgan*, 234 Mich App 352, 365; 594 NW2d 505 (1999). “Under this doctrine, a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.”

Under the "prior success" model, the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true. Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent.” *Paschke v Retool Industries*, 445 Mich 502, 509-510; 519 NW2d 441 (1994).

The lower court’s failure to recognize that judicial estoppel barred Defendant from asserting Michigan litigation positions inconsistent with its Nebraska litigation positions is palpable error. In the Michigan case, Defendant argued since it did not exist

until January 28, 2005, Plaintiffs could not have transmitted EPIC confidential information to it before that date. Accepting Defendant's argument, the lower court ruled that nothing that Plaintiffs transmitted to Defendant before that date was confidential, and that discovery could only go back to that date. (6/18/14 Motion for Reconsideration, p 6) In the Nebraska case, Defendant argued that its predecessor, "Video King," existed long before that date and had a business relation with Plaintiff Melange since 2000. (*Id.*, p 7)The Nebraska Supreme Court adopted Defendant's position. (*Id.*, p 7, quoting *VKGS*, 285 Neb 599, 609)Then, the Nebraska trial court denied VKGS' Motion to Dismiss Planet Bingo's and Melange's Amended Answer & Amended Counterclaim based on VKGS' "clearly inconsistent position" between the Nebraska and Michigan courts on VKGS' existence and the parties' business relation.(Est 6/24/15 Plaintiffs' Renewed Motion for Summary Disposition, Exhibit K, 10/27/14 Nebraska trial court Order on Plaintiff's [VKGS's] Motion to Strike & Dismiss, etc., p 5) The lower court used Defendant's Michigan case January 28, 2005 corporate existence position to restrict discovery and its expert's investigation. Thus, Plaintiffs meet the wholly inconsistent and earlier case court acceptance judicial estoppel requirements. Therefore, in granting Defendant summary disposition, while ignoring judicial estoppel, the lower court committed a palpable error of law. If the lower court had applied the above judicial estoppel law, its decision would have been different, because judicial estoppel would have barred Defendant's above Michigan corporate existence position.

C. The Lower Court's Failure To Hold An Evidentiary Hearing On Plaintiffs' Fraud On The Court Allegations Made Summary Disposition Reversible Error.

When one party alleges that another party has committed fraud on the court,

before determining whether such fraud has occurred, the trial court must hold an evidentiary hearing. *Rapaport v Rapaport*, 185 MichApp 12, 16; 460 NW2d 588 (1990). If the trial court has not done so, as a rule, it has abused its discretion. *Id.* Before the lower court's May 28, 2014 summary disposition hearing and decision, Plaintiffs alleged that Defendant had tampered with evidence. (6/18/14 Motion for Reconsideration, p 10 & Exhibit B, 5/27/14 Motion to Adjourn Trial, paras 65-68) Additionally, the evidence was part of the summary disposition motion evidence that Plaintiffs presented. Moreover, these materials were going to go to Mr. Webster for his review. Thus, before deciding the summary disposition motion, the lower court had a duty to hold an evidentiary hearing. In failing to do so, the lower court committed palpable error and abused its discretion.

D. The Lower Court's Over-Reliance On Mr. Webster's Third Report Was Unjustified, Because The Lower Court's Impression That He Had Received All Necessary Materials And Had Enough Time To Review Them Was Erroneous.

On April 17, 2014, 13 days before the discovery deadline, Defendant finally forwarded to Plaintiffs some but not all the outstanding discovery materials. From these, Plaintiffs discovered that the Defendant employee time sheet database, supposedly a listing of every employee and what he/she did on OMNI, is materially different from what Defendant had provided in response to a similar documents request (5/28/14 MHT, pp 20-21) Also, these materials were not complete. (5/27/14 Motion to Adjourn Trial, paras 33-42) Not having received or being able to review these materials intime, Plaintiffs had no opportunity to forward them to Mr. Webster, before he prepared and filed his thirdreport. Furthermore, Plaintiffs had adjourned his deposition pending receipt of these materials. As of May 28, 2014, Plaintiffs had not received all the materials. Thus, Plaintiffs could not complete his deposition. When Plaintiffs moved to compel production

of Defendant's discovery materials, the lower court stated that "I am not here to referee this dispute between the parties..." (4/9/14 MHT, p 77) The lower court referred the motion to compel discovery to Discovery Mediator Judge Michael Harrison, who ordered Defendant to produce them. (4/9/14 Order Regarding Discovery Issues and Discovery Deadline) But Plaintiffs never received them before the May 28, 2014 summary disposition motion hearing.(5/27/14 Plaintiffs' Motion to Adjourn Trial, paras 7-8, 40-45). As a result, the lower court's over-reliance on Mr. Webster's incomplete Third Report as his final report was erroneous and impacted on the decision's outcome.

E. The Lower Court's Grant of Summary Disposition Was Premature, Because Discovery Was Incomplete, And Requested Further Discovery Stood A Fair Chance Of Producing Evidence To Support Plaintiffs' Position.

Summary disposition under MCR 2.116(C)(10) before the discovery deadline is premature, as a rule, if further discovery stands a fair chance of producing evidence to support the nonmoving party's position. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009), *lv den* 485 Mich 1013; 775 NW2d 773 (2009). A party claiming that summary disposition is premature must specify a disputed issue and support that issue with independent evidence. *Id.* That party must offer an MCR 2.116(H) "affidavit[] with the probable testimony to support its contentions" *Id* at 292-293. But Michigan courts must construe the Michigan Court Rules "to ensure the...just determination of every action and to avoid the consequences of error that does not affect the [parties'] substantial rights[.]" MCR 2.105. "[W]hile rules of practice give direction to the process of administering justice and must be followed, their application should not be a fetish to the extent that justice in a particular case is not done." *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571

(1990).

Summary disposition was premature. As outlined above, Plaintiffs could not complete Mr. Webster's deposition without reviewing Defendant's forwarded discovery materials and receiving the outstanding discovery materials. These included Defendant-described "thousands of emails, including design information for its 'Omni' system." (6/18/14 Motion for Reconsideration, p 12 FN4) Likewise, Plaintiffs could not complete other depositions. Moreover, although Plaintiffs had successfully moved to compel discovery several times well before the above summary disposition hearing date, many Defendant discovery responses remained incomplete. (5/27/14 Plaintiffs' Motion to Adjourn Trial, eg, paras 4, 6, 8, 13-15, 29, 34, 35 39-40, 42; 4/9/14 Order Regarding Discovery Issues and Discovery Deadline)

But the lower court failed to hear or decide the motions before the above hearing date. If the lower court had deferred ruling on the summary disposition motion until after Defendant had responded to Plaintiffs' discovery requests completely, and after Plaintiffs had reviewed the discovery materials, forwarded them to Mr. Webster, and incorporated them into their summary disposition motion response, the outcome would have been different. Plaintiffs would have been able "to adequately address and refute the transcript citations...that Defendant set forth[,] and that [the lower court] relied on in granting [summary disposition]." (6/18/14 Motion for Reconsideration, p 12 FN4)

The affidavit's absence should not foreclose the conclusion that summary disposition was premature, because Plaintiffs provided the functional equivalent. Plaintiffs detailed Defendant's prolonged, over 24-month history of obstructing Plaintiffs' discovery. (5/27/14 Plaintiffs' Motion to Adjourn Trial, eg, paras 5-6, 8, 11, 13, 21, 26,

29,33, 35-36, 39-42, 44, 50, 65-69, 71)Furthermore, Plaintiffs emphasized that “the countless emails and documentation” unfurnished would enable Plaintiffs to provide further responsive summary disposition motion exhibits. If Defendant had provided these documents on time, Plaintiffs’ depositions of Defendant’s employees “would have led to other documentation [defeating] Defendant’s Motion for Summary Disposition[.]” (5/27/14 Plaintiffs’ Brief in Support of Motion to Adjourn Trial, p 4) Plaintiffs’ detailed Defendant discovery history and its impacts thus override the affidavit’s absence.

F. The Lower Court’s Reconsideration Denial Reasons Are Unjustified.

The lower court’s statement that Plaintiffs’ Motion for Reconsideration involves Defendant actions relating to information “that this Court has deemed...irrelevant to whether Defendant[] breached the...September 1, 2005 Confidentiality Agreement” (7/15/14 Order, p 3) overlooks that Plaintiffs presented specific, substantial information on Defendant’s misuse of EPIC confidential information communicated to Defendant after that date. The lower court’s assertion that Plaintiffs cannot use “discovery...to develop their claim” (*Id*, p 3) ignores that claim development is a well-recognized major discovery purpose. The lower court’s position that its “reliance on Bruce Webster’s Third Report did not constitute palpable error because...[his] opinion has remained unchanged” (*Id*, p 3) does not account for the unfurnished and incomplete Defendant discovery materials’ probable impact on his Third Report and his inability to consult with Plaintiffs before preparing and filing it. For these reasons, in denying reconsideration, the lower court committed palpable errors of law and abused its discretion.

III. THIS COURT SHOULD REVERSE THE LOWER COURT’S SUMMARY DISPOSITION ORDERFOR DEFENDANT ON PLAINTIFFS’ COUNT II- UNFAIR COMPETITION CLAIMS, BECAUSE THE MICHIGAN UNIFORM TRADE SECRETS ACT [MUTSA] DOES NOT PREEMPT PLAINTIFFS’

CLAIMS.

A. Applicable Legal Principles.

A common law unfair competition claim “prohibits a party from engaging in unfair and unethical trade practices...harmful to his or her competitors or the general public.” *Dana Ltd v American Axle &Mfg Holdings, Inc*, 2011 WL 4954061, 2011 US Dist Lexis 119469 (WD Mich 2011) *9, citing *Clairol, Inc v Boston Discount of Berkley, Inc*, 608 F2d 1114, 1118 (CA 6, 1979) (further citations omitted). “The term ‘unfair competition’ may encompass any conduct that is fraudulent or deceptive and tends to mislead the public.” *ATCO Industries, Inc v Sentek Corp*, UnpubOpin of the Michigan Court of Appeals, Docket Nos 232055, 235398,2003 WL 21582962, 2003 Mich App Lexis 1670 (July 10, 2003) *9, citing *Clairol*, 608 F2d 1114, 1118 &*Hayes-Albion v Kuberski*, 421 Mich 170; 364 NW2d 609 (1984) (further citations omitted).

In contrast, the Michigan Uniform Trade Secrets Act [MUTSA] is more limited: It provides for statutory claims only for misappropriation of trade secrets. The phrase “misappropriation of trade secrets” includes “the disclosure or use of a trade secret without consent.” *CMI International, Inc v Internet International Corp*, 251 Mich App 125, 132; 649 NW2d 808 (2002).*Accord*, MCL 445.1902(b)(ii). Further, MUTSA preempts only “conflicting tort, restitutionary, and other [Michigan] law...providing civil remedies for misappropriation of a trade secret.” MCL 445.1908(1).**MUTSA “displaces claims...`based solely upon the misappropriation of a trade secret”** *Wysong v M I Industries, Inc*, 412 F Supp 2d 612, 623 (ED Mich 2005), quoting *Bliss Clearing Niagara, Inc v Midwest Brake Bond Co*, 270 F Supp 2d 943, 946 (WD Mich 2003) (our emphasis). *Accord*, *American Furukawa, Inc v Hossain*, 103 F Supp 3d 864, 884 (ED

Mich 2015). **But MUTSA does not displace “claims based upon wrongful conduct independent of the misappropriation of trade secrets[.]”** *Wysong*, 412 F Supp 2d 612, 623, quoting *Bliss Clearing Niagara*, 270 F Supp 2d 943, 950 (our emphasis). **“In determining whether a claim is displaced, courts generally examine whether the claim is based solely upon the misappropriation of a trade secret.”** *Wysong*, 412 F Supp 2d 612, 623, quoting *Bliss Clearing Niagara*, 270 F Supp 2d 943, 946 (our emphasis). *Accord*, *American Furukawa*, 103 F Supp 3d 864, 884. *See also*, *Frantz v Johnson*, 116 Nev 455; 999 P2d 351, 357 FN1 (Nev 2000) (Nevada’s Uniform Trade Secrets Act and Uniform Trade Secrets Act do not “provide[] a blanket preemption to all claims that arise from a factual circumstance possibly involving a trade secret.”).

“MUTSA does not displace a common law unfair competition claim where the plaintiff alleged misconduct[,]. . . could be deemed unethical or unfair irrespective of whether trade secrets are involved.” *Dana Ltd v American Axle & Mfg Holdings, Inc*, 2011 WL 4954061, 2011 US Dist Lexis 119469 (WD Mich 2011) *9, citing *Bliss Clearing Niagara*, 270 F Supp 2d 943, 950 (holding that to the extent the plaintiff claimed that the defendant marketed the plaintiff’s product using the plaintiff’s trademark and name independent of any trade secrets misappropriation claim, MUTSA did not preempt the unfair competition claim), *Kovesdy v Kovesdy*, 2010 WL 3619826, 2010 US Dist Lexis 100940 (ND Cal 2010) *3 (holding that where the plaintiffs claimed that the defendant unfairly solicited and misled the plaintiff’s clients, MUTSA did not preempt the unfair competition claim), *Wysong*, 412 F Supp 2d 612, 623 (holding that where the plaintiff claimed that the defendant sold confusingly similar products, MUTSA did not preempt the unfair competition claim).

B. MUTSA Does Not Preempt Plaintiffs' Complaint Count II-Unfair Competition Claims.

Plaintiffs' unfair competition claims are based not on misappropriation of trade secrets, but on de facto tortious interference with contractual relations, business defamation, injurious falsehoods, and related fraudulent, unethical, and unfair misconduct. Such misconduct is unfair competition. Even interpreting Plaintiffs' unfair competition claims as based partly on misappropriation of trade secrets, MUTSA does not preempt them. These claims are not based solely on such misappropriation.

The heart of Plaintiffs' unfair competition claims is de facto tortious interference, with contractual relations, business defamation, injurious falsehoods, and related fraudulent, unethical and unfair conduct. Misuse of confidential information is only a part. Under the September 1, 2005, earlier, and later agreements, Defendants agreed to collaborate in good faith and protect Plaintiffs' confidential information. But Defendants competed with Plaintiffs unfairly. Defendants used Plaintiffs' EPIC-related confidential information to build a competing product, OMNI. (3/30/12 Defendant's Motion for Preliminary Injunction Opposition, Exhibit 1, 2/24/12 White Affidavit, para 8) Further, Defendant marketed OMNI based on tortious interference with contractual relations, deception, business defamation, and related unethical conduct. For example, "in at least one instance[,] Defendant has falsely represented to a potential customer that a second hall was already using OMNI when, in fact, that hall was using EPIC." (12/20/11 Complaint, para 27). As another example, in early 2012, though knowing that Planet Bingo had a contract with Muscogee Casino, Defendant intentionally and wrongfully "persuaded [a Planet Bingo customer] Muscogee...to...replace E[PIC]...with...O[MNI]" effective "April 10, 2012" and contract with Defendant. (3/29/12 Supplemental Affidavit

of Rick White in Support of Plaintiffs' Motion for Preliminary Injunction[3/29/12 **White Supplemental Affidavit**], para 2&8/25/14 Plaintiff's Motion for Summary Disposition, Exhibit A, 4/1/12 Deposition of Rick White [**White Dep**], pp261-264). In 2011, though knowing that Planet Bingo had a contract with Soaring Eagle Casino, Defendant intentionally and wrongfully persuaded Soaring Eagle to terminate its contract with Planet Bingo and contract with Defendant. (3/29/12 White Supplemental Affidavit, para 3; 8/25/14 Plaintiff's Motion for Summary Disposition, Exhibit A, White Dep, pp 264-266) Likewise, Defendant solicited other Planet Bingo customers to persuade them to break their contracts with Planet Bingo. (3/29/12 White Supplemental Affidavit, para 4)In addition, Defendant spread false rumors about other Planet Bingo products constituting business defamation and injurious falsehoods for the same objective. (2/24/12 Plaintiffs' Motion for Preliminary Injunction, Exhibit 1, 2/24/12 White Affidavit, para 12; 7/16/13 Plaintiffs' Opposition to Defendant's Motion for Summary Disposition, Exhibit 4, paras 7, 8) Therefore, Plaintiffs' unfair competition claims are independent of any trade secrets misappropriation claim.

Defendants' relied-on cases below are distinguishable from the instant case Unlike *Bliss*, Plaintiffs asserted only unfair competition claims. In contrast to *Bliss*, Plaintiffs' claims were, to a large extent, independent of trade secret misappropriation claims. *Hayes-Albion*, *CMI International*, and *Frantz*, 116Nev 455, are distinguishable, because unlike those cases' plaintiffs, Plaintiffs did not claim mainly trade secrets misappropriation, but mainly tortious interference type unfair competition.

The lower court's contrary position is erroneous. The lower court's conclusion that Plaintiffs' unfair competition claims are subject to MUTSA preemption overlooks

that Plaintiffs' unfair competition claims are not based mostly on trade secrets misappropriation, but mostly on de facto tortious interference with contracts, business defamation, and injurious falsehoods. The lower court's conclusion that Plaintiffs' unfair competition claims are untimely overlooks the relation back doctrine and the unfair competition events occurring on or after December 20, 2008. Thus, the claims are timely. As a result, the lower court's summary disposition order on these claims is reversible error.

IV. THIS COURT SHOULD REVERSE THE LOWER COURT'S ORDER STRIKING PLAINTIFFS' AMENDED COMPLAINT AND AFFIRMING SUMMARY DISPOSITION ON PLAINTIFFS' COUNT II-UNFAIR COMPETITION CLAIMS, AND BECAUSE THE AMENDED COMPLAINT'S NEW FACTUAL ALLEGATIONS POSTDATING THE ORIGINAL COMPLAINT'S DECEMBER 20, 2011 FILING DATE ARE NEITHER MOOT, FUTILE, NOR UNFAIRLY PREJUDICIAL.

A. Applicable Legal Principles

Michigan appellate courts review trial courts' motion to strike pleading decisions for abuse of discretion. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 469; 666 NW2d 271 (2003) "[A]mendment is generally a matter of right, rather than grace." *Lane v Kindercare Learning Centers, Inc.*, 231 Mich App 689, 697; 588 NW2d 715 (1998) (our emphasis). *Accord, Ben B Fyke & Sons v Gunter*, 390 Mich 649, 659; 213 NW2d 134 (1973). As a rule, "leave [to amend a pleading] shall be freely given when justice so requires." MCR 2.118(A)(2) (our emphasis). *Accord, Id, Lane*, 231 Mich App 689, 696. "A motion to amend ordinarily should be granted" and should be denied only for particularized reasons, such as undue delay, dilatory motive, repeated failure to cure deficiencies by amendments allowed before, undue prejudice to the opposing party,

and futility. *Id.* (our emphasis). *Accord, Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007), *Ben B Fyke & Sons*, 390 Mich 649, 656.

Unless a party will suffer actual prejudice to its ability to obtain a fair hearing on the merits of its claims or defenses, delay is not a sufficient reason to deny leave to amend. *Weymers*, 454 Mich 639, 659. “Prejudice” in this context does not mean that allowance of the proffered amendment may cause the opposing party to ultimately lose on the merits.” *Id. Accord, Ben B Fyke & Sons*, 390 Mich 649, 657. **Instead, prejudice means that allowance of the proposed amendment would prevent the opposing party from receiving a fair hearing on the merits.** *Weymers*, 454 Mich 639, 659, *Ben B Fyke & Sons*, 390 Mich 649, 663.

B. The Amended Complaint’s Post-December 20, 2011 New Factual Allegations Are Not Moot, Futile, Or Unfairly Prejudicial, And Summary Disposition on Amended Complaint Count II-Unfair Competition Is Unjustified.

As outlined above, summary disposition on Plaintiffs’ unfair competition claims is unwarranted. Amended Count II pleads allegations and facts making MUTSA preemption inapplicable, including many allegations and facts not involving trade secrets, thus making Amended Count II independent of MUTSA. The lower court ostensibly granted Plaintiffs restricted leave to amend Count II-Unfair Competition to avoid MUTSA preemption. **Plaintiffs’ Amended Count II does so. Thus, it is not futile.** Nevertheless, the lower court still wrongfully held that MUTSA preempts Plaintiffs’ Amended Count II. Further, Amended Count II was not moot. Only due to the lower court’s unjustified one-year delay in ruling on Defendant’s Motion to Strike and unjustified summary disposition decision did the lower court make Plaintiffs’ Amended Complaint moot.

Nor is Amended Count II futile based on the statute of limitations. Amended Count II-Unfair Competition arose from the same general misconduct as Original Count II-Unfair Competition. The main differences are more background Melange-Video King relationship facts and more specific events not involving trade secret misappropriation. Most such events occurred close to the Original Complaint's December 20, 2011 filing date. Further, Amended Count II relates back to the Original Complaint's filing date. So, the 3-year unfair competition statute of limitations does not bar Amended Count II. As a result, it is not futile.

In addition, Amended Count II is not unfairly prejudicial. Its more detailed parties' relationship background allegations and facts are well within Defendant's knowledge. Indeed, in opposing Plaintiffs' Motion for Preliminary Injunction, Defendant's Chief Financial Officer, Russell Morin, referred to some of these. (3/30/12 Defendant's Motion for Preliminary Injunction Opposition, Exhibit1, 3/30/12 Morin Affidavit, paras 7 (1997 Melange-Video King Agreement), 8 (1997-2005 increasing Melange-Video King collaboration), and 9 (Video King's negotiations to acquire Melange)The Amended Complaint's earlier 1999 and 2002 agreements attached as Exhibits 1-4 feature Defendant's present executives' signatures. Also, the Amended Complaint's post-December 20, 2011 allegations and facts are close to that date. **From the Amended Complaint's August 21, 2013 filing date to the lower court's April 30, 2014 discovery deadline, Defendant had over 8 months to discover documents and information related to both sets of allegations and facts.** (See 4/9/14 Order Regarding Discovery Issues and Discovery Deadline) So, Defendant had ample time to meet the Amended Complaint's Count II Unfair Competition allegations and facts. They were not

unfairly prejudicial, because they did not deprive Defendant of a fair hearing on the merits. For these reasons, in striking Plaintiffs' Amended Complaint, the lower court abused its discretion.

The lower court's contrary determination was neither principled nor reasonable. The lower court's conclusion that the Amended Complaint would unfairly prejudice Defendant due to "the need to adhere to then-existing deadlines regarding discovery and progression of the case" (8/13/14 Order Granting Defendant's Motion to Strike Amended Complaint and Affirming Summary Disposition as to Plaintiffs' Claims of Unfair Competition[8/3/14 Strike & Summary Disposition Order], p 3) ignores the above liberal pleading amendment rule and policy, the lowercourt's discovery deadline extensions, the new allegations' and facts' nature and time proximity, and nonexistent negative effects on Defendant's right to a fair hearing on the merits. The lower court's summary disposition decision ignores Plaintiffs' successful pleading of unfair competition claims not subject to MUTSA preemption. Therefore, in striking Plaintiffs' Amended Complaint, the lower court abused its discretion, and in reaffirming summary disposition, the lower court committed reversible error.

V. THIS COURT SHOULD REVERSE THE LOWER COURT'S PARTIAL SUMMARY DISPOSITION ORDER FOR DEFENDANT ON ITS COUNT I-BREACH OF CONTRACT COUNTERCLAIM AND GRANT PLAINTIFFS SUMMARY DISPOSITION ON THIS COUNTERCLAIM, BECAUSE GENUINE ISSUES OF MATERIAL FACT ON BREACH AND PROXIMATE CAUSE ARE ABSENT.

To show breach of contract, the plaintiff must show a valid contract, breach, proximate cause, damages. *Miller-Davis Co*, 495 Mich 161, 178. A breaching party is not liable for damages not proximately resulting from the breach. *Sullivan Industries, Inc v Double Seal Glass Co*, 192 Mich App 333, 347; 480 NW2d 623 (1991), *lv den* 441 Mich

930; 498 NW2d 737 (1993).

Defendant has failed to show any genuine issue of material fact on breach or proximate cause. Defendant has not presented any evidence that the alleged Plaintiffs' breaches of the 2005 Agreement caused Defendant any injury. Defendant has not identified any confidential information that Plaintiffs misused under the 2005 Agreement. Defendant has not identified any proximately resulting damages. The lower court ruled that Plaintiffs' information communicated to Defendant before that date was not confidential. (8/14/13 Order Granting Defendant's Motion for Partial Summary Disposition) Since Defendant claimed that Melange transmitted confidential information to Planet Bingo on Planet Bingo's July 17, 2006 acquisition of Melange, the only confidential information that Defendant can claim is information communicated to Melange from September 1, 2005 to July 17, 2006. Moreover, in the 2007 amendment, Defendant recognized Melange's 2005 Agreement assignment to Planet Bingo. Accordingly, Defendant cannot show genuine issues of material fact on breach and proximate cause.

Defendant's Chief Financial Officer, Russell Morin, testified that after Planet Bingo acquired Melange, Defendant never directed or identified any information that the parties could not use within their relationship. As a result, summary disposition for Defendant is reversible error, and summary disposition for Plaintiffs is in order. (8/25/14 Plaintiff's Motion for Summary Disposition as to Count I of Defendant's Counterclaim[**8/25/14 Plaintiff's Motion for Summary Disposition**], Exhibit C, 4/23/14 Morin Dep, pp 560-561) Even more damning was Defendant CEO Tim Stuart's contradictory testimony on what he believed was confidential and thus protected under

the 2005 Agreement and not confidential and thus not confidential under the 2005 Agreement. At first, he testified that if information was in the marketplace, it was not confidential. But he also acknowledged that when a Defendant salesperson was trying to convince casino operators to buy Defendant's products, the casino operators would tell the salespersons what they were paying for their present products. (*Id*, Exhibit B, 4/23/14 Stuart Dep, p 382) But when asked how he believed that Defendant (in light of its 245 replacements of EPIC with OMNI) could do so without using confidential information, he replied, "we're in the locations together, we—each customer knew and each of us knew what the other one was getting." (*Id*, Exhibit B, 4/23/14 Stuart Dep, pp 394-395) This testimony illustrates that any pricing-related information was in the marketplace and thus was not confidential within the lower court's parameters. For these reasons also, Defendant cannot present a genuine issue of material fact on breach.

Nor can Defendant establish what confidential information Plaintiffs allegedly misused. Defendant has only presented conclusory statements. Morin testified only that Defendant had "lost all this business." (*Id*, Exhibit C, 4/23/14 Morin Dep, p 529) The lost business specifics remained undefined. Stuart testified only that based on unidentified distributors' hearsay, Melange had taken away unidentified accounts. (*Id*, Exhibit B, 4/23/14 Stuart Dep, p 431) For summary disposition purposes, and trial purposes, hearsay, subject to irrelevant exceptions, is not admissible evidence. *Maiden*, 461 Mich 109, 125 (opposing summary disposition), MRE 802 (trial). Stuart added that he had not met with any unidentified distributors or unidentified bingo hall representatives. (*Id*, Exhibit B, 4/23/14 Stuart Dep, p 431) Though claiming that undefined emails would support his testimony, Defendant failed to provide any such

emails. (*Id.*, Argument, p 8 FN14) Defendant identified 11 casinos where Planet Bingo had supposedly “used confidential pricing information to take accounts away from [it].” (*Id.*, pp 9-20, Exhibit C, 4/23/14 Morin Dep, pp 612-613) But on each casino, Defendant failed to present any evidence or anything more than conjecture and speculation. (*Id.*, pp 9-20)

VI. THIS COURT SHOULD REVERSE THE LOWER COURT’S ORDER RESTRICTING DISCOVERY TO NO EARLIER THAN THE SEPTEMBER 1, 2005 AGREEMENT DATE, BECAUSE THE LOWER COURT’S OVER-RESTRICTIVE ORDER AROSE FROM AN ERROR OF LAW AND AN ABUSE OF DISCRETION.

A. Applicable Legal Principles.

Michigan appellate courts review trial court discovery decisions for abuse of discretion. *Baker v Oakwood Hospital*, 239 Mich App 461, 478; 608 NW2d 823 (2000). But a court rule’s proper interpretation and application are subject to de novo review. *Henry v Dow Chemical Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). This issue inherently involves MCR 2.302’s interpretation and application. For discovery purposes, the scope of discovery and thus relevancy is broad: “**Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party....**” MCR 2.302(B)(1) (our emphasis). *Accord, Bauroth v Hammoud*, 465 Mich 375, 381; 632 NW2d 496 (2001), (emphasizing this broad relevancy standard). “**This state has a strong historical commitment to far-reaching, open and effective discovery practice.**” *Dorris v Detroit Osteopathic Hospital Corp*, 460 Mich 26, 36; 594 NW2d 455 (1999) (our emphasis).

Until 2000, the federal courts used the above “relevant to the subject matter involved in the pending action” standard. *Amendments to Federal Rules of Civil Procedure, et al*, 192 FRD 340, 389 (2000). Thus, their interpretation of this standard is on point. **They have interpreted this standard as going beyond issues that the pleadings contain or raise.** “The key phrase in this definition -- ‘relevant to the subject matter involved in the pending action’ -- has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” Thus, “discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.” *Oppenheimer Fund, Inc v Sanders*, 437 US 340, 351; 98 S Ct 2380; 57 L Ed 2d 253 (1978). This broad standard does not encompass “irrelevant discovery.” *Cabrera v Ekema*, 265 Mich App 402, 407; 695 NW2d 78 (2005).

Even without an express confidentiality provision, the courts recognize an implied duty from the parties’ relation and surrounding circumstances to keep confidential information confidential. *Eg, Rockwell Graphic Systems, Inc v DEV Industries, Inc*, 924 F2d 174, 177 (CA 7, 1991), *Jones v Ulrich*, 342 Ill App 16, 25-26; 95 NE2d 113 (1950), *Kamin v Kuhnau*, 232 Ore 139; 374 P2d 912, 917 (1962), *Classic Instruments, Inc. v VDO-Argo Instruments, Inc.*, 73 Ore App 732, 752-754; 700 P2d 677 (1985), *Henkle & Joyce Hardware Co. v Maco, Inc.*, 195 Neb 565, 572-573; 239 NW2d 772 (1976), *L J Kuttan & Frederic M Wilf*, 1 *Computer Software* (Thomson Reuters 2015), Sec 4:12. Joint venturers are fiduciaries and thus owe fiduciary duties, including good faith and

loyalty, to each other. *Van Stee v Ransford*, 346 Mich 116, 125-126; 77 NW2d 346 (1956), *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 583; 458 NW2d 659 (1990), *lv den* 437 Mich 878 (1990). Every contract contains the implied covenant of good faith and fair dealing, “an implied promise[,]”barring each contract party from acts “hav[ing] 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, 151-152; 483 NW2d 652 (1992).*See also, Paradata Computer Networks, Inc v Telebit Corp*, 830 F Supp 1001, 1005 (ED Mich 1993) (interpreting and applying Michigan law) (When a party makes contract performance a matter of its own discretion, the law implies that a party exercising such discretion must do so in good faith).

B. In Restricting Discovery To The January 28, 2005 and September 1, 2005 Dates, The Lower Court Committed A Reversible Error Of Law And Abused Its Discretion.

In so restricting discovery, the lower court necessarily applied the above MCR 2.302(B)(1) relevancy standard. Only by doing so could the lower determine whether information exchanged before the above discovery restriction dates was relevant and discoverable. Thus, the lower court necessarily erred in interpreting and applying the MCR 2.302(B)(1) relevancy standard. Accordingly, the lower court committed an error of law, and de novo review applies.

At its heart, this action’s subject matter is exchange and misuse of confidential information. The Complaint, the Amended Complaint, and the Counterclaim include allegations of both. Further, the parties have presented evidence of 1997, 1999, 2002, 2003, and 2004 Agreements showing that their relation far predated the lower court’s above discovery restriction dates. The evidence at issue involves information exchanged

before the 2005 Agreement and under the above pre-2005 Agreements. For discovery purposes, whether Defendant misused Plaintiffs' EPIC confidential information to build OMNI and whether Defendant incorporated EPIC components into OMNI before 2005 is relevant to whether Defendant did so after 2005. Likewise, whether Plaintiffs misused Defendant's confidential information before 2005 is relevant to whether Plaintiffs did so after 2005. Accordingly, the discovery at issue is relevant to the subject matter at the heart of this action.

Even applying the less broad "relevant to any party's claim or defense," the discovery at issue is relevant to this action's subject matter. For example, in their Complaint, Plaintiffs claim: "Pursuant to a series of agreements beginning in 2001, Melange and Video King established a relation whereby, among other things, the parties will cooperate to facilitate the placement in bingo halls of EPIC together with Video King electronic business devices." (12/20/11 Plaintiffs' Complaint, Common Allegations, para 9) Also, in their Amended Complaint, Plaintiffs claimed: "Plaintiff Melange and Defendant Video King **and its related predecessor entities** have a long-standing relationship, which has spanned over 15 years." (8/21/13 Plaintiffs' Amended Complaint, para 10) (our emphasis) Plaintiffs also claimed: "Pursuant to a series of contracts beginning in 1997, Melange and Video King (**and related predecessor entities of Video King**) established a relationship where among other things, the two companies would facilitate to the placement in bingo halls of EPIC together with Video King electronic bingo devices." (*Id.*, para 23) (our emphasis) Plaintiffs further claimed: "**By virtue of the agreements between Melange and Video King**, Video King enjoyed, subject to a confidentiality clause, unrestricted access to the inner workings of the EPIC software

itself, as well as a highly confidential understanding of how the software integrated with the electronic software of a bingo hall itself.” (*Id.*, para 24) (our emphasis)

Moreover, Plaintiffs claimed: “Due to the historical relationship between Melange and Video King, **which well predated 2005 and began around 1997**, Video King enjoyed full access to a full working program of Melange’s EPIC software program....”

(*Id.*, para 28) (our emphasis) Additionally, Plaintiffs claimed: “Defendant’s executive and software specialist, Dan Free, had actually received shipments of the functioning EPIC software **as early as 1998 and/or 1999.**” (*Id.*, para 29) (our emphasis) To their Amended Complaint, Plaintiffs attached the May 14, 1997, March 24, 1999, and April 23, 1999 Agreements as exhibits. (*Id.*, para 10) Thus, the pre-2005 discovery at issue correlates with the Complaint and the Amended Complaint. Therefore, it is relevant to this action’s subject matter.

During their relationship, the parties were at least de facto joint venturers. They worked together towards common goals. But they did not surrender their independence. Thus, the fiduciary duties of good faith and loyalty applied to them. Despite one agreement’s disclaimer, the implied good faith covenant applied to them. Exchanging confidential information gave each party some discretion on how to use it. The covenant obligated each party to exercise that discretion so as not to deprive the other party of their agreement’s benefits. Doing so meant not misusing confidential information. If a party did so, the other party would lose any agreement benefits, because potential or actual competitors would gain access to that party’s confidential information and destroy its marketplace position. The covenant did not contradict or even restrict any agreement

provision. Therefore, the implied good faith covenant obligated the parties not to misuse each other's confidential information.

The lower court's contrary position contradicts the broad MCR 2/302(B)(1) relevance standard. The lower court's position that any pre-2005 confidentiality obligations and information were nonexistent overlooks these provisions, the parties' joint venture status, and the implied good faith covenant. The lower court's position that since present Defendant VKGS did not exist before January 28, 2005, thus making all discovery before that date irrelevant and nondiscoverable(8/14/13 Order Granting Defendant's Motion for Partial Summary Disposition) contradicts MCR 2.302(B)(1)'s broad relevance standard. The lower court's position also ignores the strong predecessor- and successor-in-interest relations among Stuart Entertainment, Bingo King, BKE Entertainment, Video King, and VKGS. In addition, the lower court's position also ignores these entities' strong executive continuity featuring Dan Free, Russell Morin, and Timothy Stuart as these entities' top executives. Furthermore, the lower court's position that before January 28, 2005, neither party could transmit confidential information ignores that the parties' joint venturers status and the implied good faith covenant made the information exchanged confidential. Any argument that pre-2005 discovery is excessive overlooks the discovery at issue's strong relation to the heart of this case. As a result, the lower court's decision violates the broad MCR 2.302(B)(1) relevance standard. For these reasons, the lower court's January 28, 2005 and September 1, 2005 discovery restrictions are an error of law and an abuse of discretion and thus reversible error.

VII. THIS COURT SHOULD REVERSE THE LOWER COURT'S INVOLUNTARY MCR 2.116(C)(6) DISMISSAL, BECAUSE IT VIOLATES THE RULE'S POLICY AND MCR 1.105'S LETTER AND SPIRIT.

A court rule's proper interpretation and application are subject to de novo review. *Henry*, 484 Mich 483, 495. Summary disposition under MCR 2.116(C)(6) is warranted only when "[a]nother action has been initiated between the same parties involving the same claim." MCR 2.116(C)(6). The subrule's purpose is to stop parties from endlessly litigating matters involving the same claims, defenses, and issues as those presented in pending litigation between the same parties. *Rowry v University of Michigan*, 441 Mich 1, 20-21; 490 NW2d 305 (1992) (Riley, J, concurring), *Fast Air, Inc v Knight*, 235 Mich App 541, 546; 599 NW2d 489 (1999). The Michigan Court Rules are to be construed "to ensure the just, speedy, and economical determination of every action..." MCR 1.105.

The lower court's sua sponte arbitrary dismissal of this action violates MCR 2.116(C)(6)'s and MCR 1.105's letter and spirit. The lower court's use of this subrule to dismiss this action after over 3 ½ years of extensive and expensive litigation costing all parties tremendous time, money, and effort violates the subrule's purpose of saving all parties time, money, and effort. The lower court had every opportunity to dismiss this action under this subrule in 2013. Defendant moved for dismissal under this subrule twice. (2/13/12 Defendant's Motion for Summary Disposition; 5/9/12 Defendant's Renewed Motion for Summary Disposition). The lower court denied the first motion and failed to rule on the second. After this tremendous expenditure, the parties have a legal and moral right to a final decision on the merits. To let this dismissal stand disavows any idea of interpreting the rules to encourage just, speedy, and economical resolutions of actions. To let this dismissal stand is to approve a decision promoting their very opposites. For these reasons, the lower court's arbitrary dismissal violates MCR 2.116(C)(6)'s and MCR 1.105's letter and spirit. Accordingly, reversal is in order.

CONCLUSION

THEREFORE, PLAINTIFFS PLANET BINGO, LLC AND MELANGE COMPUTER SERVICES, INC. respectfully request this Court to reverse the Ingham County Circuit Court's above orders and remand this case to that court for further proceedings on the merits.

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