STATE OF MICHIGAN

IN THE OAKLAND COUNTY CIRCUIT COURT

ADVANCED PHARMACY, LLC,
A Michigan Limited Liability Company, and
SANJAY PATEL,

Plaintiffs,

THE HON JAMES ALEXANDER

CASE NO 2014-145168-CK

VS

BEST VALUE PHARMACY, LLC,
A Michigan Limited Liability Company,
ADVANCED SENIORS HEALTH
CARE GROUP, INC.,
A Michigan Corporation,
AVINASH RACHMALE, and
DEEPAK BHALLA, Jointly and Severally,

Defendants.
_____/

BROWN & BROWN, PLC
By: Mathew C. Brown (P40078)
By: Matthew J. Brown (P73030)
Co-Counsel for Plaintiffs
838 West Long Lake Road, Suite 100
Bloomfield Hills, Michigan 48302
(248) 454-1120
mattbrownatty@gmail.com
matthew.brown.j@gmail.com

LEDERMANLAW PC
By: Howard Yale Lederman (P36840)
Co-Counsel for Plaintiffs
838 West Long Lake Road, Suite 100
Bloomfield Hills, Michigan 48302
(248) 639-4696
hledermanlaw@gmail.com

MICHAEL J. LEBOW NBTA PLC
By: Michael J. Lebow NBTA (P33734)
Co-Counsel for Plaintiffs
838 West Long Lake Road, Suite 100
Bloomfield Hills, Michigan 48302
(248) 419-1994

mjl@lebowgerlach.com

SARAH C ARNOLD (P52470)
Attorney for Defendants
7310 Woodward Avenue, Suite 500
Detroit, Michigan 48202
(313) 989-4141/(313) 265-2976
saraharnold@comcast.net
sarah.arnold@gccorp.com

C. William Garratt (P13858)
Garratt & Bachand, PC
Co-Counsel for Defendants Best Value Pharmacy
and Avinash Rachmale
74 West Long Lake Road, Suite 200
Bloomfield Hills, Michigan 48304
(248) 645-1450
thefirm@garrattbachand.net
_____/

MOTION FOR RECONSIDERATION

PLAINTIFFS ADVANCED PHARMACY, LLC AND SANJAY PATEL**[PLAINTIFFS]**, by their undersigned counsel, move for reconsideration of the Court's February 17, 2016 Opinion and Order Re: Summary Disposition (Exhibit 1) on Count I-Breach of Contract of their Complaint as follows:

1. This Court should reconsider its decision and deny Defendants' summary disposition motion under MCR 2.116(C)(10), because in deciding the motion, the Court committed palpable error.

2. This Court should reconsider its decision and deny Defendants' summary disposition motion under MCR2.116(C)(10), because as toPlaintiffs' Count I-Breach of Contract claims, genuine issues of material fact on the enforceable contract and breach elements are present.

3. This Court should reconsider its decision and deny Defendants' summary

disposition motion under MCR2.116(C)(10), because indeciding the motion, the Court wrongfully found facts regarding the parties June 5, 2008 Memorandum of Understanding's**[MOU's]**enforceability.

THEREFORE, PLAINTIFFS ADVANCED PHARMACY, LLC AND SANJAY PATEL respectfully request this Court to:

A. Reconsider its MCR 2.116(C)(10) decision.

B. Deny Defendants' MCR 2.116(C)(10) Motion for Summary Disposition with prejudice.

C. Grant Plaintiffs further relief in accordance with principles of equity and justice.

Dated: March 2, 2016 /s/ Howard Yale Lederman

LEDERMANLAW PC
By: Howard Yale Lederman (P36840)
Co-Counsel for Plaintiffs
838 West Long Lake Road, Suite 100
Bloomfield Hills, Michigan 48302
(248) 639-4696
hledermanlaw@gmail.com

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

INTRODUCTION

In granting Defendants Motion for Summary Disposition on Plaintiffs' Complaint Count I-Breach of Contract, the Court wrote:

"The MOU is simply a preliminary agreement that provides that the parties will review and execute an Operating Agreement. The duty to draft the same did not fall on either party. This isn't ambiguous. The parties simply didn't agree that any particular party would be so obligated. And Plaintiffs cannot found a breach of contract claim on a nonexistent contractual obligation—as they attempt in their Count I."

(Exhibit 1, 2/17/16 Opinion and Order Re: Summary Disposition, p 4. See also, Exhibit 2, 6/5/08 MOU).

Thus, the Court found that the MOU was a nonbinding, unenforceable preliminary agreement as a fact. This factfinding was improper. In deciding an MCR 2.116(C)(10) motion for summary disposition, the trial court cannot find facts. Rather, the trial court's role is limited to determining whether genuine issues of material fact are present. But here, the Court went beyond doing so.

Furthermore, the Court overlooked applicable Michigan law. If a preliminary agreement like the MOU here includes all essential terms, it can be an enforceable agreement. *Opdyke Investment Co v Norris Grain Co,* 413 Mich 354, 359; 320 NW2d 836 (1982). Michigan courts determine the parties' mutual intent and assent to contract using an objective standard, evaluating the parties "`express words and visible acts[.]'" *Calhoun v Blue Cross Blue Shield of Michigan,* 297 Mich App 1, 13; 824 NW2d 202 (2012), *lv den* 493 Mich 917; 823 NW2d 603 (2012), quoting *Heritage Broadcasting Co v Wilson Communications, Inc,* 170 Mich App 812, 818; 428 NW2d 784 (1988) (further citation omitted) (our emphasis). By their words and deeds, the parties considered the MOU an enforceable agreement. Defendants stated that they were acting under the MOU. Plaintiffs and Defendants carried out almost all its provisions. Therefore, the MOU was an enforceable preliminary agreement based on mutual assent and conduct. Thus, a genuine issue of material fact on the MOU's enforceability does exist. Accordingly, reconsideration of the Court's MCR 2.116(C)(10) decision and denial of the MCR 2.116(C)(10) Motion for Summary Disposition are in order.

STATEMENT OF FACTS

See Exhibit 3, 2/3/16 Plaintiffs' Response to Defendants' Motion for Summary Disposition as to Count I of Plaintiffs' Verified Complaint, Brief in Support, Statement of Facts, and above Introduction.

THIS COURT SHOULD RECONSIDER ITS DECISION AND DENY THE MOTION UNDER MCR 2.116(C)(10), BECAUSE AS TO PLAINTIFFS' COUNT I-BREACH OF CONTRACT CLAIMS, GENUINE ISSUES OF MATERIAL FACT ON THE ENFORCEABLE CONTRACT AND BREACH ELEMENTS ARE PRESENT, BECAUSE IN DECIDING THE MOTION, THE COURT WRONGFULLY FOUND FACTS REGARDING THE PARTIES' JUNE 5, 2008 MEMORANDUM OF UNDERSTANDING [MOU], AND BECAUSE IN DECIDING THE MOTION, THE COURT COMMITTED PALPABLE ERROR.

A. Applicable Summary Disposition and Reconsideration Legal Principles.

The court evaluates the record in the light most favorable to the nonmoving party.*Allison v AEW Capital Management, LLP,*481 Mich 419, 425; 751 NW2d 8 (2008),*Corley v Detroit Board of Education,* 470 Mich 274, 278; 681 NW2d 342 (2004), *Maiden v Rozwood,* 461 Mich 109, 120; 597 NW2d 817 (1999).**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). *Accord*, *Ritchie-Gamester v City of Berkley,* 461 Mich 73, 91; 597 NW2d 517 (1999).**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). *Accord*,*Bertrand*,449 Mich 606, 618.

Michigan appellate courts are liberal in finding genuine issues of material fact.*Lytle v Malady,* 458 Mich 153, 176-177; 579 NW2d 906 (1998),*Livonia v Dept of Social Services,*423 Mich 466, 529-530; 378 NW2d 402 (1985),*Jimkoski v Shupe,* 282 Mich App 1, 5; 763 NW2d 1 (2008), *Benton v Dart Properties, Inc,* 270 Mich App 437, 444; 715 NW2d 335 (2006). **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.

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 "`[e]asily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest.'" *Luckow Estate v Luckow,* 291 Mich App 417, 426; 805 NW2d 453 (2011), quoting *Stamp v Mill Street Inn,* 152 Mich App 290, 294; 393 NW2d 614 (1986), *lv den* 426 Mich 882 (1986). As a rule, the trial court will not grant a motion for reconsideration presenting the same issues that the trial court had 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. Applicable Contract Law Principles.

"A contract to make a subsequent contract is not per se unenforceable; in fact, itmay be just as valid as any other contract."*Opdyke Investment Co,* 413 Mich 354, 359,citing 1 *Corbin, Contracts,* Sec 29 (our emphasis). "Like any other contract, a contract to make a contract can fail for indefiniteness if the trier of fact finds that it does not include an essential term to be incorporated into the final contract." *Id,* citing *Socony-Vacuum Oil Co, Inc v Waldo,* 289 Mich 316, 323; 286 NW 630 (1939). "Similarly, if the agreement is conditioned on the happening of a future event that, through no fault of the parties, never

happens, liability does not attach." *Opdyke Investment Co,* 413 Mich 354, 359, citing *Professional Facilities Corp v Marks,* 373 Mich 673, 678; 131 NW2d 60 (1964).

"`We must not jump too easily to the conclusion that a contract has not been made from the fact of apparent incompleteness. People do business in a very informal fashion, using abbreviated and elliptical language. A transaction is complete when the parties mean it to be complete. It is a mere matter of interpretation of their expressions to each other, a question of fact.'" *Opdyke Investment Co,* 413 Mich 354, 360, quoting 1 *Corbin, Contracts,* Sec 29 (our emphasis).

"Whether the parties intend to be bound only by a formally written and executed final document is a question of fact, not a question of law; in most cases, the question is properly left to the jury."*Id,* citing 1 *Corbin, Contracts,* Sec 30 (our emphasis).

An enforceable contract requires agreement or "a meeting of the minds" on all essential terms. *Fisk v Fisk,* 328 Mich 570, 574; 44 NW2d 184 (1950), *Erdmans v Maki,* 226 Mich App 360, 364; 573 NW2d 329 (1997), *Heritage Broadcasting Co v Wilson Communications, Inc,* 170 Mich App 812, 818; 428 NW2d 784 (1988). Whether there was a meeting of the minds between the parties is a question of fact. *Martin v DeYoung,* 232 Mich 112, 118; 205 NW 142 (1925). **Michigan courts judge "`[a] meeting of the minds…by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind.'"***Calhoun v Blue Cross Blue Shield of Michigan,* 297 Mich App 1, 13; 824 NW2d 202 (2012), *lv den* 493 Mich 917; 823 NW2d 603 (2012), quoting *Heritage Broadcasting Co,* 170 Mich App 812, 818 (further citation omitted) (our emphasis).Thus, the parties can express their mutual assent orally, in

writing, or by their conduct. *Ludowici-Celadon v McKinley*, 307 Mich 149, 153; 11 NW2d 839 (1943). **Manifestations of assent sufficient to form a contact can operate as a contract, even though the parties intend to prepare and sign a formal contract, unless the circumstances show that the oral agreements were mere preliminary negotiations.** *Remark, LLC v Adell Broadcasting Corp*, 702 F3d 280, 283 (CA 6, 2012) (interpreting and applying Michigan law), Restatement (Second) of Contracts, Sec 27.

The material terms necessary to make "an agreement become[] enforceable are generally the identification of the parties, the property, and the consideration." *Kajaian v Ernst*, 177 Mich App 727, 731; 442 NW2d 286 (1989).

The plaintiff has the burden of proving the existence of the contract that he/she/it seeks to enforce. *Kamalnath v Mercy Memorial Hospital Corp,* 194 Mich App 543, 549; 487 NW2d 499 (1992).

C. Relevant Limited Liability Company Law.

The Michigan Limited Liability Act, MCL 450.4101 et seq, does not require a limited liability to have an operating agreement to be duly organized, registered, or otherwise legal. *See* MCL 450.4102(r) (an operating agreement includes any articles of organization provision relating to the limited liability's affairs and conduct of business), MCL 450.4209(1)(e), MCL 450.4708(1)(c).*See also,* MCL 450.4306, MCL 450.4402, MCL 450.4502, MCL 450.4505, MCL 450.4506, and MCL 450.4508(all recognizing situations, where an operating agreement is alternative or optional).

D. Palpable Error Regarding The Court's MCR 1.116(C)(10) Summay Disposition Decision Are Present, And Genuine Issues Of Material Fact On Whether The MOU Is An Enforceable Agreement Are Present.

By finding the MOU a nonbinding preliminary agreement, the Court stepped

beyond its limitedsummary disposition role. **The Court wrongfullyfound a material fact for Defendants. Whether the MOU is binding is not a summary disposition decision, but an issue of fact for the trier of fact (here jury) to decide.**The error is clear, obvious, plain, and visible. For this reason, the Court committed palpable error.

Sufficient evidence of genuine issues of material fact on the Count I-Breach of Contract, enforceable contract element, is present. **The MOU contains the three above material terms necessary to make itenforceable and more.** It defines the parties (introductory paragraph), the property (a new limited liability company), and consideration (50% interest, meaning 50% profits division, a deferred compensation provision providing that the business manager will only receive a salary after the new entity becomes profitable). Beyond these provisions, the MOU contains provisions defining their roles, their obligations to repay all AHG advances before any profits distribution, their joint obligations to repay any outside source's loans to the new entity, and AHG's veto powers and control over financial matters (Exhibit 2, 6/5/08 MOU). The MOU did not leave any essential terms for future negotiations. Though a preliminary agreement contemplating a more detailed Operating Agreement,the MOU is notunenforceable. Instead, the MOU is enforceable.

The parties' post-contract actions reinforce this conclusion: **They implemented the MOU's provisions.**The parties prepared and forwarded Best Value Pharmacy's **[BVP's]** Articles of Incorporation and obtained the state's approval (Exhibit 4, 5/30/08 BVP Articles of Organization; Exhibit 5, 7/3/08 Emails; Exhibit 10, 7/17/08 Modified Articles of Organization). In 2008-2009, Defendant Rachmale recognized Plaintiff Advanced

Pharmacy's 50% interest (Exhibit 5, 7/3/08 Emails; Exhibit 6, Unilateral 5/27/08 Operating Agreement Excerpt, Exhibit A).

Defendant AHG carried out MOU paragraph 4, by assisting BVP in obtaining financing immediately (Exhibit 7, 10/2/15 Deposition of Avinash Rachmale **[Rachmale Dep]**, p 58). Defendant Rachmale also loaned his own funds in BVP (Exhibit 7, Rachmale Dep, pp 59-60; Exhibit 8, 10/2315 Deposition of Deepak Bhalla **[Bhalla Dep]**, p 89). BVP reimbursed Plaintiff Patel and others for expenses (Exhibit 7, Rachmale Dep, pp 63-64; Exhibit 9, 10/1/15 Deposition of Sanjay Patel **[Patel Dep]**, p 128). As business manager, Plaintiff Patel received no salary, and BVP never paid him any salary (Exhibit 7, Rachmale Dep, p 63; Exhibit 8, 10/2315 Bhalla Dep, p 24; Exhibit 9, 10/1/15 Patel Dep, p 53).Referencing the MOU, BVP adhered to that provision rigorously. Defendant Bhalla, BVP's Chief of Operations (Exhibit 8, 10/23/15 Bhalla Dep, pp 27-28), emphasized:**"No, he wouldn't [be getting any BVP salary. The Memorandum of Understanding was very clear: Until the operations are profitable, he will not get anything."** (Exhibit 8, Bhalla Dep, p 24) (our emphasis).

Plaintiff Patel established the Oxford Pharmacy, hired pharmacists and other employees for it, and performed many other services not related to the Oxford Pharmacy (Exhibit 9, 10/1/15 Patel Dep, pp 29-32, 43-45, 50-52, 54, 61). For example, Plaintiff Patel was involved in the closed door pharmacy's establishment:

"The initial startup only of the closed door pharmacy…then, of course, jointly, because of his experience with…the distributors of medication, McKesson…[and] Amerisource Bergen. So we met with their agents, negotiated the deal, the discount, etcetera they presented to us….He presented those people to me." (Exhibit 8, Bhalla Dep,

pp97-98). To help BVP get its essential pharmacy license, Plaintiff Patel arranged for BVP to use his wife's pharmacy license (Exhibit 8, Bhalla Dep, p 97; Exhibit 9, Patel Dep, p 55). In 2008 and 2009, he attended many BVP meetings (Exhibit 8, Bhalla Dep, p 58; Exhibit 9, Patel Dep, pp 61-62).

Accordingly, Plaintiffs have presented sufficient evidence to create a genuine issue of material fact on the MOU's enforceability. Based on the above analysis, the parties by word and deed, recognized the MOU as an enforceable agreement. It included all essential terms. The terms were definite enough. Before and after signing it, the parties implemented its provisions. The position that the MOU was a mere nonbinding preliminary agreement or "agreement to agree," and that only the contemplated Operating Agreement would be binding overlooks the parties' treatment of the MOU as binding in word and deed. As an enforceable agreement, the MOU created binding contractual obligations, and the parties carried them out. In concluding the contrary, the Court committed palpable error. Correcting the error leads to a different MCR 2.116(C)(10) decision: Genuine issues of material of fact on MOU enforceability and breach are present.Therefore, a genuine issue of material fact on the MOU's enforceability is present.

This situation makes the present case similar to *Opdyke Investment Co,* 413 Mich 354, where the Michigan Supreme Court recognized that a genuine issue of material fact on a preliminary agreement's enforceability was present. There, On March 11, 1977, the parties signed a Letter of Intent "to jointly develop the [Olympia II hockey] arena" on the plaintiff's property. The plaintiff claimed that the defendants breached the Letter of Intent, which the plaintiff claimed was a binding contract, by abandoning the project. *Id* at 358. When the plaintiff sued the defendants for breach of contract, the defendants moved for

summary disposition based on no genuine issues of material fact. They argued that the Letter of Intent was not a binding contract. The trial court granted the motion, concluding that the Letter of Intent was not an enforceable contract. The Michigan Court of Appeals affirmed.

Reversing, the Michigan Supreme Court held that in granting and upholding summary disposition, the lower courts had committed reversible error. The Court concluded that the plaintiff had presented sufficient evidence to show a genuine issue of material fact on the binding contract issue. The Court explained that the evidence conflicted: "The fact that the parties...expressly left certain matters to be negotiated in the future is some evidence that the memorandum of March 11, 1977 was not intended to be a binding contract. The tentative language of the letter might also convince a rational factfinder that the letter contains mere expectations or intentions[,] rather than contractual promises and undertakings. Each party may have intended to proceed at its own risk[,] should the other party unilaterally decide to abandon the project before a legally binding final contract was executed. On the other hand, the parties may have intended to create a series of increasingly detailed contracts as the project progressed, with each contract legally binding and protecting each party's interest in the arena project should the other party withdraw. **The fact that additional contracts may have been contemplated and mentioned in the letter does not invalidate any agreement actually reached."***Opdyke Investment Co*, 413 Mich 354, 359-360 (our emphasis).

Due to its strong similarities to the instant case, *Opdyke Investment* governs here. As in *Opdyke Investment*, the parties signed a preliminary agreement contemplating a more detailed and formal agreement. Like the *Opdyke Investment* parties, the parties wanted to

create their new entity as rapidly as possible. Like the *Opdyke Investment* parties, before signing the MOU, the parties had negotiated all essential terms. Like the *Opdyke Investment* parties, the parties left less important terms for later, more precise specification. As in *Opdyke Investment,* all parties never signed the detailed, formal agreement.

As in *Opdyke Investment,* the parties acted and moved forward based on the MOU. Indeed, far more than the *Opdyke Investment* parties, the parties have implemented the MOU provisions. Also, far more than the *Opdyke Investment* preliminary agreement language, the MOU language is not tentative, but binding. Like the *Opdyke Investment* plaintiffs, Plaintiffs are suing based on breach of a preliminary agreement. Like the *Opdyke Investment* defendants, Defendants assert that the MOU is unenforceable. These similarities far outweigh any differences. Indeed, this case is more compelling than *Opdyke Investment.*As a result, *Opdyke Investment* strongly supports reconsideration and denial of Defendants' MCR 2.116(C)(10) summary disposition motion based on a genuine issue of material fact on the MOU's enforceability.

Thus, Plaintiffs have shown the palpable error required for MCR 2.119(F)(3) reconsideration. In concluding the contrary, correcting the error leads to a different MCR 2.116(C)(10) decision: Genuine issues of material of fact on MOU enforceability and breach are present. Plaintiffs have shown genuine issues of material fact on the MOU's enforceability and, as their Response outlines, on breach. Since the MOU is binding, its contractual obligations are binding. So, in breaching the MOU, Defendants did not breach a nonexistent contractual obligation. Rather, they breached a binding contractual obligation. Accordingly, MCR 2.116(C)(10) summary disposition on Plaintiffs' Complaint, Count I, is

unjustified. Instead, MCR 2.119(F)(3) reconsideration is justified, and denial of Defendants' MCR 2.116(C)(10) Motion for Summary Disposition is in order.

CONCLUSION

A. Reconsider its MCR 2.116(C)(10) decision.

B. Deny Defendants' MCR 2.116(C)(10) Motion for Summary Disposition with prejudice.

C. Grant Plaintiffs further relief in accordance with principles of equity and justice.

Dated: March 2, 2016

/s/ Howard Yale Lederman
LEDERMANLAW PC
By: Howard Yale Lederman (P36840)
Co-Counsel for Plaintiffs
838 West Long Lake Road, Suite 100
Bloomfield Hills, Michigan 48302
(248) 639-4696
hledermanlaw@gmail.com

PROOF OF SERVICE

LIST OF EXHIBITS

Exhibit 1, 2/17/16 Opinion and Order Re: Summary Disposition.

Exhibit 2, 6/5/08 Memorandum of Understanding **[MOU]**.

Exhibit 3, 2/3/16 Plaintiffs' Response to Defendants' Motion for Summary Disposition as to Count I of Plaintiffs' Verified Complaint, Brief in Support.

Exhibit 4, 5/30/08 BVP Articles of Organization.

Exhibit 5, 7/3/08 Emails.

Exhibit 6, Unilateral 5/27/08 Operating Agreement Excerpt w/ Exhibit A.

Exhibit 7, 10/2/15 Deposition of Avinash Rachmale **[A Rachmale Dep]** Excerpts.

Exhibit 8, 10/23/15 Deposition of Deepak Bhalla **[D Bhalla Dep]** Excerpts.

Exhibit 9, 10/1/15 Deposition of Sanjay Patel **[Patel Dep]** Excerpts.

Exhibit 10, 7/17/08 Modified Articles of Organization.

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