

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

GRIFFIN'S SPORTS BAR & GRILL OF
COMMERCE, LLC,

Plaintiff/Counter Defendant,

v.

Case No. 2018-170230-CB
Hon. Michael Warren

ON THE DUNES SPORTS BAR, INC,

Defendant/Counter Plaintiff,

and

THOMAS WIDMER, et al,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

At a session of said Court, held in the
County of Oakland, State of Michigan
April 13, 2021

PRESENT: HON. MICHAEL WARREN

INTRODUCTION

ERRORS & PASSED BALLS

But Mousie, thou art no thy lane,
In proving *foresight* may be vain:
The best-laid schemes o' *Mice* an' *Men*
Gang aft agley,
An' lea'e us nought but grief an' pain,
For promis'd joy!

This November 1785 muse by Robert Burns, *To a Mouse*, sums up this case. On
Halloween (October 31), 2017, Plaintiff Griffin's Sports Bar and Grill of Commerce LLC,

a Michigan limited liability company (“Griffin’s”), Defendant On the Dunes Sports Bar, Inc., a Michigan corporation (“On the Dunes”), and non-party On the Dunes Sports Facility, LLC, a Michigan limited liability company, entered into a Restaurant Services Agreement (“RSA”). On the Dunes is a large sports complex offering customers a variety of indoor and outdoor sports activities. The gist of the RSA is that Griffin’s would independently operate a restaurant at the facility. Although the parties undoubtedly had the best laid plans for a fruitful, cooperative, and mutually beneficial business relationship, proving both Burns’ and the date of the RSA prophetic, the RSA devolved into a business nightmare.

On November 30, 2018, Griffin’s sued On the Dunes, Thomas Widmer, Vonda Widmer, and Adam Michael Zimmerman, jointly and severally. Vonda Widmer is the sole owner of the On Dunes. Her husband, Thomas Widmer, is a manager and an officer. Adam Michael Zimmerman is a manager and Vice President. The Plaintiff’s First Amended Complaint, filed March 21, 2020, includes claims for (1) breach of contract, (2) business defamation and product disparagement, (3) tortious interference with business expectancy, (4) conspiracy to commit breach of contract, (5) conspiracy to commit business defamation and product disparagement, and (6) conspiracy to interfere with business expectancy. On the Dunes’ First Amended Counterclaim, filed January 9, 2019, includes claims for (1) declaratory relief, (2) breach of contract, (3) tortious interference with a business relationship or expectancy, and (4) breach of contract - failure to report.

This case has a long and tortuous history, mostly presided over by this Court's predecessor. This Court need not waste additional electrons, paper, and ink on reviewing this history - the record best speaks for itself.

This Court presided over 7 at least partial days of trial. At trial, this Court granted a directed verdict as well a ruling under MCR 2.504(B) dismissing Griffin's defamation claim and the corresponding civil conspiracy claim. Griffin's struck out on three straight pitches there.

The Court also ruled that On the Dunes' attempt to pursue claims related to the failure of Griffin's to pay license fees was not properly before the Court at the trial. On the Dunes was thrown out when attempting to steal home.

The Court issues this Findings of Fact, Conclusions of Law, and Judgment in light of the issues remaining at the end of the trial.

At issue is whether Griffin's can sustain its case when its key witness Scott Griffin was incredible? Because the elements of all of the claims of Griffin's were heavily dependent upon Scott Griffin's credibility, the answer is "no" and Griffin's case is dismissed in its entirety.

Also at issue is whether On the Dunes can sustain the Counterclaim in connection with the Griffin's alleged failure to adequately staff the restaurant or operate it to the satisfaction of On the Dunes when the RSA clearly provides that Griffin's has the sole

control over staffing and management decisions? Because the parties are bound by the clear dictates of the contract they made, the answer is “no,” and such cannot be the basis of liability under the Counterclaim.

In addition, at issue is whether On the Dunes can sustain the Counterclaim in connection with alleged unsanitary conditions in the restaurant (1) when On the Dunes failed to show that such conditions violated the Michigan Health Code and (2) most of the factual basis for this argument occurred well after the Counterclaim was filed and the Court ruled at trial that claims after the filing of the Counterclaim were not properly before the Court at trial? Because these allegations were either not proven (for claims actually pled in the Counterclaim) or fall outside of the issues properly being tried before the Court (for claims not properly pled in the Counterclaim), the answer is “no,” and such cannot be the basis of liability under the Counterclaim.

Further at issue is whether On the Dunes can sustain allegations in the Counterclaim for breach of contract in connection with a multitude of alleged violations of the RSA and for tortious interference of a business expectancy when On the Dunes presented no credible evidence to support those claims? Because credible evidence is necessary to sustain the allegations, the answer is “no” and those claims are dismissed.

Finally, at issue is whether the On the Dunes can sustain the Counterclaim in connection with an alleged failure of Griffin’s to accurately report its monthly financial conditions and gross sales as reasonably requested by On the Dunes? Because Griffin’s

violated its contractual obligations and failed to cure within the grace period provided in the RSA after being provided proper notice by On the Dunes, the answer is “yes.” Furthermore, because On the Dunes provided an appropriate notice of termination, On the Dunes properly terminated the RSA and Griffin’s has no legal authority to remain on the premises.

In sum, in a pitchers’ duel, On the Dunes scored the sole run.

FINDINGS OF FACT

THE LINEUPS

The Court makes the following General Findings of Fact regarding the credibility, demeanor, veracity, vocal tone and expression, tonality, and honesty of the witnesses and the exhibits before it:

◆ *Adam Michael Zimmerman*. His testimony was forthright, authentic, genuine, and well grounded. He was even-keeled and well-reasoned. Unless otherwise indicated by the Findings of Fact, his testimony is afforded great weight. He was by far the most credible witness in the trial.

◆ *Thomas Whidmar*. At times his testimony was very credible, and other times less so when brimming with personal animosity against Scott Griffin. When his testimony directly aligned with Zimmerman, it was the most credible.

♦ *Michael Burns.* Generally, Mr. Burns' testimony was very credible. When his testimony directly aligned with Zimmerman, it was the most credible.

♦ *Scott Griffin.* Simply put, his testimony was incredible. Across the board, he was unconvincing, unpersuasive, confusing, ambiguous, internally contradictory, and ungrounded. Much of his testimony was based on incomplete information, unjustified arrogance, and personal disdain for the Defendants. Unless otherwise indicated by the Findings of Fact, his testimony is afforded no weight or credibility.

UNSPORTSMANLIKE CONDUCT

The parties spent a considerable amount of time at trial on issues that were immaterial, irrelevant, or subsequent to the issues to be tried. Cutting through this cacophony of stadium heckling, the Court makes the following Specific Findings of Fact by a clear and convincing evidence:

♦ As noted in the first Whereas Clause of the RSA (emphasis in original), On the Dunes "operates a business at 2055 Haggerty Road, Commerce Township, MI 48390 (the "**Complex**" [sic]) offering to the public the opportunity to play golf, volleyball, baseball and hockey, as well as other sports"

♦ As noted in the fourth Whereas Clause of the RSA (emphasis in original), "the Complex includes a full-service restaurant, bar, dining areas, kitchen facilities,

associated service and storage rooms, auxiliary furnishings, furniture, fixtures, dishes, silverware, smallwares, linens and other dining room and kitchen equipment listed or described on the attached Exhibit "A" (the "**Dunes FF and E**"), altogether hereinafter referred to as the "**Restaurant**" and Dunes desires to have Operator operate the Restaurant for the [sic] benefit of Dunes' customers and other customers" As set forth in the first paragraph of the RSA, Griffin's is the "Operator" and "Dunes" is On the Dunes. Exhibit A to the RSA was never created. The first error the parties occurred before the game started.

◆ Section 2 of the RSA provides as follows:

2. RIGHTS OF OPERATOR

a. Dunes grants Operator a License to use the Restaurant in accordance with the terms hereof. Operator shall be the sole provider to operate the Restaurant for the term of the Agreement. Dunes warrants that the Dunes FF and E shall be free from defects in workmanship and materials that make it non-operational, as set forth in Section 9 hereto. Operator shall have the sole control over the menu it offers and shall not be obligated to offer items or services which may result in operational financial losses to Operator.

b. Except as provided in Section 11 below, the License granted shall not be revocable by Dunes.

◆ Section 3 of the RSA provides, among other things, that Griffin's "shall be responsible for the operation of the Restaurant, including . . . (iii) hiring, training, and maintaining a service staff" and "(i) providing menu selections and variety, utilizing the Dunes FF and E and the Operator's FF and E. Dunes shall have the right to provide

input and reasonable requests related to menu selections and variety, subject to the constraints and capabilities of the available kitchen equipment.”

◆ There is no credible evidence that the parties agreed that the dining areas or seating areas of the Restaurant must not change or could not be reduced. As the Restaurant was a portion of the Complex, the parties understood at the time of the RSA that the Restaurant was to serve the entire Complex and adjustments to the layout, floor plan, and how service was to be provided by the Restaurant was flexible and would be adjusted as business needs evolved.

◆ Section 6a. of the RSA provides that Griffin’s was to operate the Restaurant in full compliance with applicable laws and regulations:

6. COMPLIANCE WITH LAWS AND REGULATIONS

a. Operator shall comply with all applicable laws, ordinances, orders, directives, statutes, and other rules of any Federal, State, or local governmental agency, bureau, or department having jurisdiction over the preparation and serving of food and beverages at the Restaurant. . . . Without limiting the foregoing provisions of this Section 6(a), Operator shall comply with all (i) statutes and ordinances, and (ii) rules, regulations and interpretations of the Michigan Liquor Control Commission, that are applicable to the sale, serving, or storage of beer, wine, and/or alcoholic beverages (the “**MLCC Laws and Regulations**”).

◆ Section 6a. of the RSA provides that Griffin’s was to operate the Restaurant in full compliance with applicable laws and regulations:

◆ Section 7e. of the RSA details an exhaustive requirement for Griffin's to provide various accounting and financial information to On the Dunes in exacting detail:

Operator shall prepare and keep full, complete and proper books and source documents, in accordance with generally accepted accounting principles, of the Gross Sales, where for cash, credit or otherwise, of each separate department at any time operated in the Restaurant and the operations of each person or entity conducting business in the Restaurant and shall require and cause all such parties to prepare and, keep books, source documents, records and accounts sufficient to substantiate those kept by Operator. The books and source documents to be kept by Operator shall include, without limitation, . . . records of inventories and receipts of merchandise, daily receipts from all sales and other pertinent original sales records and records of any transactions conducted in or from the Restaurant by Operator and any other persons or entity conducting business in or from the Restaurant. Pertinent original sales shall include, without limitation: (1) cash register tapes, including tapes from temporary registers and joint of sales records; (2) serially prepared sales slips; (3) the original records of all mail and telephone orders at and to the Restaurant; (4) settlement report sheets of transactions with any person or entity conducting business in the Restaurant; (5) detailed original records of any exclusions or deductions from Gross Sales; (6) sales tax records; and (7) such other sales records, if any, which would normally be examined by an independent accountant pursuant to accepted auditing standards if performing an audit of Operator's sales. Operator shall record at the time of each sale or other transaction, in the presence of the customer, all receipts from such sale or other transaction, whether for cash, credit or otherwise, in a cash register or cash registers having a cumulative total which shall be stored in a manner approved by Dunes and which shall possess such other features as shall be reasonably required by Dunes. To the extent allowed by law, all books and records of Operator in the possession of Dunes, its designee, its agents, or contractors shall be kept confidential.

◆ Section 7f. of the RSA provides that Griffin's was to provide monthly and annual reports to On the Dunes:

f. Operator shall furnish to Landlord within fifteen (15) days after the expiration of each calendar month of an Operational Year and within thirty (30) days after the expiration of an Operational Year a complete statement, showing in all reasonable detail the amount of such Gross Sales made by the Operator from the Restaurant during such Operational Year. Such statements shall be in such form and style and contain such details and breakdown as Dunes or its designee may reasonably require. Operator shall require and cause any person or entity other than Operator conducting business in the Restaurant to furnish statements at the times and in the form and content specified in this Section, relating their operations within the Restaurant.

◆ Section 9 of the RSA specifies the following default notice and cure procedures:

9. BREACH

a. In the event of a failure by Operator to pay to Dunes any amounts due under Section 7 hereof, or in the event that Operator shall fail to comply with the laws, regulations and ordinances applicable to the sale of alcoholic beverages at the Restaurant, Dunes shall have the right to revoke the license granted to the Operator hereunder and bar Operator from the Complex and Restaurant, unless Operator cures any such defaults or failures within seven (7) days after Dunes delivers written notice of such default or failure to Operator.

b. In the event of a failure by either party to perform an obligation hereunder or a breach of this Agreement by either party, except a default or failure addressed in the preceding sentence, or in the event the Dunes receives notice or becomes aware of a violation or violations of the MLCC Laws and Regulations by Operator or its employees or contractors, the aggrieved party ("**Aggrieved Party**") shall give the other party ("**the Breaching Party**") written notice specifying the failure or breach in detail and specifying the expected cure or remedy. The Breaching Party shall have thirty (30) days after receipt of such notice (the "**Cure Period**") to cure or remedy the failure or breach. If the Breaching Party does not cure or remedy such failure or breach within the Cure Period, the then Aggrieved Party shall have the option to terminate this Agreement on thirty (30) days written notice, including, if the Aggrieved Party is Dunes, the revocation of the license granted to Operator hereunder.

◆ The signing date of Halloween was vatic. Over time, the parties' business relationship devolved into personal animus, filled with spite and disdain. The modus operandi between the parties was to treat each other with personal insults, arrogance, gamesmanship, and blame-shifting. Often email became the primary mode of communication.

◆ Despite this, none of the Defendants at any time interfered with potential customers of Griffin's with malice and in a manner unjustified in law for the purpose of invading Griffin's contractual rights or business relationships. To the contrary, when On the Dunes engaged Griffin's potential, current, and past customers, it was with the intention of providing better customer service. Each of the Defendants was seriously concerned about the quality of service, number of staff, and menu items at Griffin's because of obvious lapses in those areas, not because of malice. None of the Defendants engaged in per se wrongful conduct.

◆ Likewise, despite the personal animosity between the parties, Griffin's at no time interfered with potential customers of On the Dunes with malice and in a manner unjustified in law for the purpose of invading Griffin's contractual rights or business relationships. To the contrary, when Griffin's engaged On the Dunes' potential, current, and past customers, it was with the intention of providing better customer service. Griffin's was seriously concerned about the quality of service of On the Dunes

because of its heavy dependence on On the Dunes for customers. Griffin's did not engage in per se wrongful conduct.

◆ Unsatisfied with Griffin's branding efforts, in written correspondence dated June 28, 2018, On the Dunes asked to end the relationship. Griffin's seriously disagreed with the premise of On the Dunes' notice and sent back a detailed response on July 18, 2018.

◆ In compliance with Section 9B of the RSA, dated October 10, 2018, On the Dunes sent a letter to Griffin's specifying a number of alleged violations of the RSA (the "October 2018 Notice of Breach"). Those claims related to understaffing, cleanliness, cleanliness of the kitchen, and the failure to clean a cooking hood. The letter also explained that the RSA was violated because of Griffin's failure to provide financial records in the format form, style, details, and breakdown as On the Dunes reasonably required. Because of changes in the reporting system used by Griffin's, On the Dunes reasonably requested monthly gross sales reports, month to date gross sales reports, daily sales reports for each month, hourly sales and labor report for each month, and daily comparative employee sales report for each month. The October 2018 Notice of Breach provided Griffin's 30 days to provide a plan and cure all the violations.

◆ At least two of the breaches described in the October 2018 Notice of Breach were well grounded in fact. Griffin's kitchen was unclean and required remediation. The financial reports requested were reasonable and were not provided. Griffin's did not cure these two breaches within the 30-day grace period. The kitchen remained materially unclean. The financial reports were not provided as reasonably requested.

◆ More than after a week after the 30 day grace period ended in connection with the Notice of Breach, on November 19, 2018, in compliance with Section 9B of the RSA, On the Dunes sent Griffin's a notice of termination under the RSA, providing as required under Section 9A thirty days notice (the "November 2018 Termination Letter"). Griffin's responded by filing the instant lawsuit.

◆ Sometime before May 17, 2019, On the Dunes reduced dedicated dining seating and replaced it with various sports attractions. Nearly six months after the lawsuit had been filed, on May 17, 2019, Scott Griffin sent an email to Adam Zimmerman, of which pertinent part states: "Since we have signed the RSA, we have lost 50% of our 2 year-round bars, over 50% of our dining areas, and the majority of our banquet areas. We need to talk about a 50% reduction in rent. This nonsense has to stop. And I am NOT deflecting." There is no credible evidence that the Griffin ever sent a notice of termination under the RSA based on this notice of breach and demand for remedy. There is no credible evidence that the RSA established a "lease" - rather it was a license. There is no credible evidence that the parties agreed that the On the Dunes could not alter the seating used by Griffin's.

◆ Griffin's attempt to establish damages for its alleged breaches is not credible. None of the methodology, rationale, and data upon which it is based (which was clearly manipulated) supports an award for damages of any kind whatsoever.

◆ On the Dunes and the State of Michigan Department of Licensing and Regulatory Affairs Liquor Control Commission ("MLCC") entered into a Stipulation for Negotiated Settlement dated April 14, 2020 for selling alcohol to a minor on November 10, 2018 (the "MLCC Negotiated Settlement").¹ On the Dunes sent several notices of default and termination of the RSA in light of the purported MLCC violations. However, none of them relate to incidents prior to the filing of the Counterclaim. In addition, On the Dunes failed to prove that any of these asserted MLCC related violations actually occurred.

◆ As the factual allegations of the parties are numerous and varied, unless otherwise indicated above, the party seeking to prove alleged breaches of the RSA has failed to prove the same.²

¹ Although there are three additional similar Stipulations for Negotiated Settlement, they all occurred after the filing date of the Counterclaim and were not properly before the Court at trial.

² Although there are some exceptions to the rule in the Specific Findings of Fact involving particularly heated areas of controversy, generally the Court finds there is no value to be added to this already protracted litigation to list all the allegations the parties failed to prove.

CONCLUSIONS OF LAW

THE RULES OF THE GAME

I

Law Regarding Breach of Contract

The essential elements of a contract are (1) parties competent to contract; (2) proper subject matter; (3) legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation. *McInerney v Detroit Trust Co*, 279 Mich 42, 46 (1937). Accordingly, to prevail on a breach of contract claim, a plaintiff must prove the following elements: (1) a contract exists between the parties; (2) the terms of the contract require performance of a certain action; (3) a breach of the contract; and (4) the breach caused injury to the other party. *Miller-Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 71 (2012). A breach of contract can be demonstrated by a refusal to perform or by nonperformance of a duty due under a contract. See e.g., *Woody v Tamer*, 158 Mich App 764, 771-772 (1987). A contract is “a bargained exchange of obligations entered into by choice and requiring mutual assent or a ‘meeting of the minds’ on all essential terms.” *Ford Motor Co v Bruce Twp*, 264 Mich App 1, 12 (2004) (citations omitted), rev’d on other grds *Ford Motor Co v Woodhaven*, 475 Mich 425 (2006) (reversing upon finding mutual mistake of fact).

“[O]ne who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform.” *Flamm v Scherer*, 40 Mich App 1, 8-9 (1972), citing 5 Callaghan’s Michigan Civil Jurisprudence, Sec. 249, pp.

820–821. See also *Verran v Black lock*, 60 Mich App 763, 768 (1975). However, this rule only applies when the initial breach is “substantial.” *Michaels v Amway Corp*, 206 Mich App 644, 650 (1994) (citation omitted). A “substantial breach” occurs “where the breach has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible, such as the causing of a complete failure of consideration.” *McCarty v Mercury Metal Co*, 372 Mich 567, 574 (1964).

II

Law Regarding Tortious Interference with Business Expectancy

“One who alleges tortious interference with a contractual or business expectancy must allege the intentional doing of a per se wrongful act or the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiff’s contractual rights or business relationship.” *Feldman v Green*, 138 Mich App 360, 369 (1984) (emphasis supplied). “If the defendant’s conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference.” *CMI Int’l, Inc v Internet Int’l Corp*, 251 Mich App 125, 131 (2002), citing *Feldman*, 138 Mich App at 369-370 and SJI2d 125.04 (emphasis supplied). Improper motives include motives that are illegal, unethical, or fraudulent and without justification. *Formall, Inc v Community National Bank of Pontiac*, 166 Mich App 772, 779 (1988); *Dolenga v Aetna Cas & Sur Co*, 185 Mich App 620, 626 (1990). “Mere interference

for the purpose of competition is not enough.” *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 377 (1984). Nevertheless,

[a] defendant may not, with impunity, sabotage the contractual agreements of others, and that defendant’s cry that its actions were motivated by purely business interests cannot, standing alone, operate as a miracle cure making all that was wrong, right. On the contrary, the defendant’s motive is but one of several factors which must be weighed in assessing the propriety of the defendant’s actions. Such factors include (1) the nature of the defendant’s conduct, (2) the nature of the plaintiff’s contractual interest, (3) the social utility of the plaintiff’s and the defendant’s respective interests, and (4) the proximity of the defendant’s conduct to the interference.

[*Jim-Bob, Inc v Mehling*, 178 Mich App 71, 96-97 (1989).]

III

Law Regarding Civil Conspiracy

“A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means. However, a claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort.” *Advocacy Organization for Patients & Providers*, 257 Mich App 365, 384-385 (2003), quoting *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 632 (1986).

THE FINAL SCORE:	
GRIFFIN'S	0
ON THE DUNES	1

**GRIFFIN'S BOX SCORE:
SHUT OUT**

I

The Plaintiff's Claims Fall Because There is No Credible Evidence of a Breach of the Contract, Tortious Interference of a Business Expectancy, or Damages

A

There is No Credible Evidence of Breach of the Contract or Damages

Griffin's argues that the RSA was breached by the Defendants when half of the space dedicated to the dining areas of the Restaurant was eliminated. However, those arguments are completely undermined by the Findings of Fact. First, there was no contractual agreement that the dedicated seating area would not be reduced. *Miller-Davis Co*, 296 Mich App at 71. Second, even if there was a breach of the RSA by On the Dunes (and there was none), the claim must fall because there is no credible proof of damages. *Id.* at 71.

B
**There is No Credible Evidence of
Tortious Interference of a Business Expectancy**

Griffin's argues that the RSA was breached by the Defendants by way of customer interface and service of the customers of the Restaurant. Again, those arguments are completely undermined by the Findings of Fact. First, none of the Defendants possessed the state of mind necessary to fulfill the first element of the tort. *CMI Int'l, Inc*, 251 Mich App at 131 (2002). In fact, quite to the contrary, the Defendants motives were not illegal, unethical, or fraudulent, but for the purpose of improving the business for both the Defendants and the Plaintiff. *Formall, Inc*, 166 Mich App at 779. In essence, the Defendants engaged in *anti-tortious interference* with a business expectancy. Second, even if there was a tortious interference with a business expectancy (and there was none), the claim must fall because there is no credible proof of damages.

C
**Without an Underlying Tort,
the Claim for Conspiracy Must Fall**

Without an underlying tort, the civil conspiracy claim must be dismissed. *Early Detection Center, PC*, 157 Mich App at 632.

Simply put, Griffin's was shutout.

**ON THE DUNES BOX SCORE:
A SOLO HOME RUN WINS THE GAME**

**A
Declaratory Relief**

Count I of the Counterclaim seeks Declaratory Relief as follows (emphasis in original):

ORDER THAT THE RSA BETWEEN THE PARTIES HAS BEEN
IRREPRABLY [SIC] BREACHED, AND THAT PARAGRAPH a. OF THE
RSA IS APPLICABLE, HAS BEEN BREACHED BY
PLAINTIFF/COUNTER DEFENDANT AND THIRD-PARTY
DEFENDANT IN ORDER TO PROTECT THE DEFENDANT/COUNTER
PLAINTIFFS [SIC] LIQUOR LICENSE

In particular, On the Dunes asks this Court to find that Griffin's violated the RSA by "negligently or intentionally allow[ing] a multitude of instances involving illegal alcohol activities to take place under its supervision and/or with its specific approval . . ." Counterclaim ¶ 32. More specifically, On the Dunes alleges such breaches "including, but not limited to" as follows:

- a. Liquor being sold for use off premises, despite having only a class C license;
- b. Operating a beer pong tournament (outside permissible RSA events);
- c. Failure to legally identify (i.e. card) for proper age when it has held events that have been advertised as 21 and over (also outside the scope of the RSA);
- d. Failure to card for proper age to participate in illegal beer pong tournament.

At trial, On the Dunes focused most of its proofs on incidents after the Counterclaim was filed. None of the pled incidents were the subject of a proper notice of default under Section 9A or 9B of the RSA. Because On the Dunes did not comply with the notice provisions of the RSA, On the Dunes has waived or otherwise forfeited its right to complain. In any event, On the Dunes failed to prove that these four alleged violations actually happened.

B

Breach of Contract

On the Dunes alleges two separate breach of contract counts in its Counterclaim. The first involves a long laundry list of alleged complaints including (1) violating MLCC laws, (2) violating Michigan Health Codes and refusing to supply reports from the Oakland County Health Department, (3) violating Fire Code Ordinances, (4) violating Commerce Township Building and Improvement Ordinances, (5) failing to provide adequate staffing, (6) interfering with On the Dunes sports activities, (7) changing the hours of food and beverage services, (8) failing to bus tables and provide cleaning services, (9) lack of reporting of gross sales, and (10) failure to pay invoices due under the NCR computer program policy and failing to allow access to the program.

On the Dunes failed to prove that Griffin's violated (1) MLCC laws, (2) Michigan Health Codes or that Griffin's withheld Oakland County Health Department reports,³ (3) Fire Code Ordinances, or (4) Commerce Township Building and Improvement Ordinances. Because the RSA provides that Griffin's controlled its staffing and Restaurant Operations, Griffin's did not violate the RSA by (5) failing to provide adequate staffing, (7) changing the hours of food and beverage services, and (8) failing to bus tables and provide cleaning services. Likewise, On the Dunes failed to prove that Griffin's violated the RSA by (6) interfering with On the Dunes sports activities or (10) by failing to pay invoices due under the NCR computer program policy and failing to allow access to the program.

Which leaves a single proven allegation with a consequence - the failure to provide reasonable reports as required under Section 7e and 7f. That issue was properly raised in the October 2018 Notice of Breach and the November 2018 Termination Letter. It is also pled in the Counterclaim. As such, that issue is properly before the Court and the RSA was appropriately terminated. This solo home run wins the game.

C

Tortious Interference with a Business Relationship or Expectancy

On the Dunes argues that the RSA was breached by the Griffin's by way of customer interface and service of the customers of the On the Dunes. Again, those

³ Although the kitchen was unclean, the Counterclaim specifically alleges a breach of contract for violating the Michigan Health Code. This was not proven by On the Dunes.

arguments are completely undermined by the Findings of Fact. First, the Plaintiff did not possess the state of mind necessary to fulfill the first element of the tort. *CMI Int'l, Inc*, 251 Mich App at 131 (2002). In fact, quite to the contrary, the Griffin's motives were not illegal, unethical, or fraudulent, but for the purpose of improving the business for both Griffin's and On the Dunes. *Formall, Inc*, 166 Mich App at 779. Second, even if there was a tortious interference with a business expectancy (and there was none), the claim must fall because there is no credible proof of damages.

JUDGMENT

In light of the foregoing Findings of Fact and Conclusions of Law, a Judgment is hereby entered in favor of the On the Dunes in connection with Counts II and IV (Breach of Contract) of the Counterclaim and the Court FINDS the RSA was properly terminated by On the Dunes. All other claims by Griffin's and On the Dunes and all claims for damages by Griffin's and On the Dunes are without merit and hereby DISMISSED.

**THIS RESOLVES THE LAST PENDING CLAIM, CLOSES THE CASE,
AND ENDS THE BALLGAME.**

/s/ Michael Warren

**HON. MICHAEL WARREN
CIRCUIT COURT JUDGE**