

STATE OF MICHIGAN  
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

JABU, CO., d/b/a HORIZEN HYDROPONICS  
AND GROWER'S OUTLET,

Plaintiff/Counter-Defendant,

Case No. 12-10984-CZB

vs.

HON. CHRISTOPHER P. YATES

GRAND RAPIDS HYDROPONICS, INC;  
JOSHUA J. BARNEY; and CHRISTOPHER  
J. NICHOLSON,

Defendants/Counter-Plaintiffs  
and Third-Party Plaintiffs,

vs.

JOHN UJLAKY, II; and BRIDGETTE UJLAKY,

Third-Party Defendants.

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OPINION AND ORDER GRANTING SUMMARY DISPOSITION

In November of 2008, the Michigan electorate approved the Michigan Medical Marijuana Act, MCL 333.26421, *et seq*, see Ter Beek v City of Wyoming, 495 Mich 1, 5 (2014), and, in short order, the hydroponics industry roared to life. But the hydroponics business does not operate on the same model as conventional businesses. For example, traditional businesses often tout their support of law enforcement by proudly displaying the Police Officers Association of Michigan emblem. In contrast, hydroponics businesses shun law enforcement, engage in a myriad of sharp practices, and file lawsuits when their competitors suggest they may be “snitches.” In this odd civil case between hydroponics competitors, the Court concludes that neither side has presented any viable claims.

## I. Factual Background

The Michigan Medical Marihuana Act went into effect on December 4, 2008, and in less than five years, 118,368 Michigan residents registered as patients while 27,046 more Michigan residents registered as “caregivers.” See Michigan Medical Marihuana Act Statistical Report for Fiscal Year 2013 at 5 (LARA December 4, 2013). This breathtaking level of participation concomitantly gave rise to the burgeoning hydroponics industry because, quite simply, the new law permits hundreds of thousands of marijuana plants to be grown legally in the State of Michigan each year. In April 2012, one of the mainstays in the West Michigan hydroponics industry – Plaintiff Jabu, Co. d/b/a Horizen Hydroponics and Grower’s Outlet (“Horizen”)<sup>1</sup> – found itself in stiff competition with an upstart in the business – Defendant Grand Rapids Hydroponics, Inc. (“GR Hydro”).

Defendant GR Hydro not only opened a retail shop near Horizen on Leonard Street in Grand Rapids, but also pioneered a marketing approach that features scantily clad models, rather than the stodgy, scientific information that Horizen uses to market itself.<sup>2</sup> Additionally, GR Hydro competes with Horizen on the basis of price, holding itself out as the lowest-priced option in West Michigan. This marketing pitch has struck a nerve with Horizen, which has asserted several claims predicated upon GR Hydro’s pricing pitch. GR Hydro also rankled Horizen by hiring one of Horizen’s former employees, Defendant Joshua Barney, to work at the GR Hydro outlet on Leonard Street in alleged violation of Barney’s noncompetition obligation to Horizen.

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<sup>1</sup> Most hydroponics businesses possess substantial skills in horticulture, but they seem to lack skills in basic grammar, so the names in the industry tend to be wildly ungrammatical.

<sup>2</sup> Although Plaintiff Horizen has been in business for 15 years, it was thoroughly unprepared for the Wild West competition touched off by enactment of the Michigan Medical Marihuana Act. Indeed, the free-for-all in the marketplace resulting from Michigan’s legalization of marijuana for medicinal purposes apparently has caught most traditional hydroponics businesses flat-footed.

Plainly irked by the business methods of Defendant GR Hydro, Plaintiff Horizen responded by complaining to GR Hydro's suppliers, which prompted at least one supplier to stop selling to GR Hydro. Defendant Christopher Nicholson, the principal of GR Hydro, fired back by embarking upon a strident advertising campaign aimed at Horizen. That prompted Horizen's principals to launch the nuclear weapon in the hydroponics industry by accusing Nicholson of being an agent for the Federal Bureau of Investigation as well as a large-scale marijuana grower (a strange combination, to be sure) and labeling Defendant Barney a "snitch." Then, on November 27, 2012, Horizen filed a complaint against GR Hydro, Nicholson, and Barney. Unsurprisingly, GR Hydro responded with counterclaims and third-party claims against GR Hydro and its principals, John and Bridgette Ujlaky.

In opening skirmishes between the parties, the Court cleaned up the pleadings, but left most of the claims for resolution after the close of discovery. Now, both sides have moved for summary disposition pursuant to MCR 2.116(C)(10), so the Court must address the viability of each count in the plaintiffs' first amended complaint, the defendants' third amended counter-complaint, and the defendants' amended third-party complaint. Because this process leads ineluctably to the conclusion that neither side's claims can be sustained, the Court must bring this entire action to a close.

## II. Legal Analysis

Both sides have moved for summary disposition under MCR 2.116(C)(10), which "tests the factual sufficiency of the complaint." Maiden v Rozwood, 461 Mich 109, 120 (1999). In assessing such a motion, "a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." Corley v Detroit Bd of Education, 470 Mich 274, 278 (2004). "Where the proffered

evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.” Id. “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” West v General Motors Corp, 469 Mich 177, 183 (2003). Applying all of these standards, the Court must consider each claim, counterclaim, and third-party claim advanced by the parties in this action.

A. Horizen’s Business-Defamation Claim.

Plaintiff Horizen’s first claim alleges business defamation. “A corporation may successfully assert a cause of action for defamation if it operates for profit ‘and the matter tends to prejudice it in the conduct of its business or to deter others from dealing with it . . . .’” Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc, 213 Mich App 317, 328 (1995). “Also, language which casts an aspersion upon its honesty, credit, efficiency or other business character may be actionable.” Id. Our Supreme Court has explained that “[t]he elements of a defamation claim are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication.” Mitan v Campbell, 474 Mich 21, 24 (2005). Horizen has not adduced evidence to establish that the defendants made false and defamatory statements concerning Horizen.

“To be considered defamatory, statements must assert facts that are ‘provable as false.’” See Ghanam v John Does, 303 Mich App 522, 545 (2014). Moreover, “a defamatory statement . . . must have a specific application to the plaintiff.” Siddiqui v General Motors Corp, No 302446, slip op

at 7 (Mich App Feb 2, 2012) (unpublished ruling), citing McGraw v Detroit Free Press Co, 85 Mich 203, 209-210 (1891). The record contains three documents – Exhibits L, M, and N to Defendants’ Brief in Support of their Motion for Summary Disposition<sup>3</sup> – that allegedly support Horizen’s claim for business defamation. Those documents include criticisms of “a local store in Grand Rapids,” a “local competitor,” a “local Hydroponics store in West Michigan,” and “our competitors,” but none of the documents includes any reference to Horizen by name. Beyond that, a collection of amusing cartoons simply refer to the low prices of Defendant GR Hydro in comparison to the more expensive products offered by fictitious competitors such as “Thumbs down Hydroponics.” Because none of those materials identifies Horizen by name or makes defamatory assertions against Horizen, none of those materials can support a claim for business defamation. The only thinly veiled reference to Horizen states: “The other Companies are trying to force us to raise our prices way over the Horizon . . . . we’re not going to let that happen.” This play on words neither asserts “facts that are ‘provable as false[,]” see Ghanam, 303 Mich App at 545, nor rises to the level of defamation, so the Court must grant summary disposition to the defendants on Horizen’s business-defamation claim.

B. Horizen’s Claim for Tortious Interference with a Business Relationship or Expectancy.

Plaintiff Horizen accuses Defendant GR Hydro of tortious interference with the relationships between Horizen and its customers through “a campaign of making false, wrongful, defamatory, and disparaging statements about Plaintiff” Horizen. See First Amended Complaint, ¶ 41. This claim requires proof that the defendants ““did something illegal, unethical or fraudulent.”” See Dalley v

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<sup>3</sup> Following a complete breakdown in the discovery process, the Court ordered the parties to submit all of the documents that they intend to present at trial. Plaintiff Horizen provided the Court with a binder of Bates-stamped documents. The documents at issue are pages 32 through 45 of that submission.

Dykema Gossett PLLC, 287 Mich App 296, 324 (2010). Nothing in the public pronouncements of GR Hydro even approaches that standard. Indeed, as the Court has already explained, GR Hydro has not even mentioned Horizen by name in any of its on-line marketing efforts or on social media sites. Beyond that, if “the defendant’s actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.” Dalley, 287 Mich App at 324. GR Hydro set out to position itself as the lowest-priced alternative in the Grand Rapids hydroponics industry. Its marketing efforts aimed at reinforcing that position manifestly “were motivated by legitimate business reasons,” so “its actions would not constitute improper motive or interference.” Id. As a result, the Court must award summary disposition to the defendants on Horizen’s claim for tortious interference with a business relationship or expectancy.

C. Horizen’s Unfair-Competition Claim.

Plaintiff Horizen’s unfair-competition claim includes the heading “Predatory Conduct,” and the allegations in that count accuse all of the defendants of “selling competing products at or below cost[,]” see First Amended Complaint, ¶ 54, “selling competing products below the manufacturers’ suggest[ed] retail prices[,]” see id., ¶ 55, and “selling competing products in violation of supplier policies.” See id., ¶ 56. In other words, Horizen argues that the defendants are charging prices that are too low. But the United States Supreme Court has repeatedly observed that “[c]utting prices in order to increase business often is the very essence of competition.” Pacific Bell Tel Co v Linkline Comm, Inc, 555 US 438, 451 (2009). “Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.” Id. As a result, “to prevail on a predatory pricing claim, a plaintiff must demonstrate that: (1) ‘the prices

complained of are below an appropriate measure of its rival's costs'; and (2) there is a 'dangerous probability' that the defendant will be able to recoup its 'investment' in below-cost prices." Id. In this case, Horizen has made no such showing, so its predatory-pricing claim is unsustainable. See ETT Ambulance Service Corp v Rockford Ambulance, Inc, 204 Mich 392, 399 (1994) (affirming summary disposition on predatory-pricing claim).

Plaintiff Horizen also asserts that some customers have mistakenly reached out to Horizen when they meant to contact Defendant GR Hydro. To be sure, Michigan recognizes a common-law unfair-competition claim applicable to situations where one competitor creates confusion by trying to pass itself off as another competitor. See Schwannecke v Genesee Coal & Ice Co, 262 Mich 624, 627 (1933). But the record in this case clearly establishes that GR Hydro has diligently endeavored to distinguish itself from its competition, including Horizen. Thus, Horizen's unfair-competition claim cannot survive the defendants' motion for summary disposition under MCR 2.116(C)(10).

D. Horizen's Claims for Concert of Action and Civil Conspiracy.

In Counts Four and Five of the first amended complaint, Plaintiff Horizen sets forth claims against all of the defendants for concert of action and civil conspiracy. "[T]o establish a concert-of-action claim, a plaintiff must prove 'that all the defendants acted tortiously pursuant to a common design' that caused harm to the plaintiff." Urbain v Beierling, 301 Mich App 114, 132 (2013). In similar fashion, a civil-conspiracy claim requires proof of "a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." See id. at 131. "For both civil conspiracy and concert of action, the plaintiff must establish some underlying tortious conduct." Id. Horizen has built both

claims upon Defendant Barney's alleged breach of his noncompetition agreement with Horizen, see First Amended Complaint, ¶¶ 75-89, but that alleged action by Barney would constitute a breach of contract, as opposed to a tort. Accordingly, because Horizen has not identified "some underlying tortious conduct" supporting its claims for concert of action and civil conspiracy, the defendants are entitled to summary disposition under MCR 2.116(C)(10) on both of those claims. See Urbain, 301 Mich App at 132.

E. Horizen's Claim for Breach of Defendant Barney's Noncompetition Agreement.

Plaintiff Horizen's final claim alleges that Defendant Barney breached his noncompetition obligation to Horizen, and that somehow that breach obligates *all* of the defendants to compensate Horizen. In advancing this claim, Horizen relies exclusively upon a provision in its policy manual, as opposed to a contract between itself and Barney. Moreover, Horizen alleges that it "terminated Defendant Barney as an employee" on April 9, 2009, see First Amended Complaint, ¶ 122, and that Defendant GR Hydro did not open for business until April 1, 2012, see id., ¶ 124, but Barney should nonetheless be held accountable for engaging in business with GR Hydro because he was barred for five years from competing with Horizen. The Court concludes that this claim is riddled with fatal flaws.

The noncompetition clause set forth in the "Horizen Hydroponics Employee Policy Manual" states as follows:

**Non-Competition:** Employees of HH agree not to open a competing store within 50 miles of HH's retail branches for a minimum of 5 years from the date employment terminated. Employees may also not be concurrently employed with a company that is in competition with HH in any manner.

See Defendants' Brief in Support of Motion for Summary Disposition, Exhibit K. "Agreements not

to compete are permissible under Michigan law as long as they are reasonable.” Thermatool Corp v Borzym, 227 Mich App 366, 372 (1998). Whether a noncompetition agreement is “reasonable” depends upon “its duration, geographical area, and the type of employment or line of business.” See MCL 445.774a(1). “To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.” Id. Here, several aspects of the noncompetition agreement – including its five-year duration and its origin in a policy manual – render the provision suspect. But even if the Court were to enforce the noncompetition provision as written, Horizen still could not prevail on its claim because the record does not demonstrate that Defendant Barney violated the terms of the noncompetition clause.

The noncompetition provision constitutes, at most, Defendant Barney’s agreement “not to open a competing store within 50 miles” of Plaintiff Horizen’s business and not to “be concurrently employed with a company that is in competition with [Horizen] in any manner.” See Defendants’ Brief in Support of Motion for Summary Disposition, Exhibit K. By all accounts, Barney did not work for GR Hydro “concurrently” with his employment at Horizen. Indeed, Horizen’s amended complaint makes clear that GR Hydro did not even open for business until approximately three years after Barney left Horizen. See First Amended Complaint, ¶¶ 103-105. Accordingly, Horizen must present evidence that Barney violated the language of the noncompetition provision that forbade him “to open a competing store within 50 miles” of Horizen’s business. Barney has supplied an affidavit stating that “[a]t no point in time did I have any ownership interest in” GR Hydro. See Defendants’ Brief in Support of Motion for Summary Disposition, Exhibit H (Affidavit of Joshua Barney, ¶ 14). Barney “simply managed the store as an employee and did as directed” while Defendant Nicholson

served as “the owner/operator of [GR Hydro] and was [in] charge of opening his new business.” Id. Similarly, Nicholson has supplied an affidavit explaining that he is “the sole owner of Grand Rapids Hydroponics,” id., Exhibit B (Affidavit of Christopher Nicholson, ¶ 3), and that he “hired Joshua J. Barney to manage the store.” Id. (Affidavit of Christopher Nicholson, ¶ 6). Horizen has presented no admissible evidence to refute these fundamental assertions,<sup>4</sup> so the defendants must be awarded summary disposition under MCR 2.116(C)(10) on Horizen’s claim for breach of the noncompetition provision applicable to Barney.

F. The Counterclaim and Third-Party Claim for Defamation.

Count One of the defendants’ third amended counter-complaint and the amended third-party complaint accuse Plaintiff Horizen and its principals, John and Bridgette Ujlaky, of defamation. The elements of such a claim are: “(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication.” Mitan, 474 Mich at 24. In order to be “considered defamatory, statements must assert facts that are ‘provable as false[,]’” Ghanam, 303 Mich App at 545, and “a defamatory statement . . . must have a specific application to the plaintiff.” Siddiqui, No 302446, slip op at 7 (Mich App Feb 2, 2012) (unpublished ruling).

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<sup>4</sup> The only evidence offered by Plaintiff Horizen to support its claim that Defendant Barney opened a competing store takes the form of a Facebook post by Barney stating: “I knew this would happen I got f\*\*\*ed out of my store I’ll live On to new and better things...” See Memorandum of Law in Opposition to Defendants’/Counter-Plaintiffs’/Third Party Plaintiffs’ Motion for Summary Disposition, Exhibit A. Although this assertion might well be admissible as the statement of a party opponent, see MRE 801(d)(2)(A), the Facebook post fails to create a genuine issue of material fact as to Barney’s ownership interest – or the lack thereof – in Defendant GR Hydro, especially in light the sworn statements of Barney and Nicholson on that point.

The defendants' defamation claim rests upon the forthright admissions of John Ujlaky that he has been involved in a campaign to characterize Defendant Barney as a "snitch" and Defendant Nicholson as a Federal Bureau of Investigation agent, see Defendants' Brief in Support of Motion for Summary Disposition, Exhibit A (Deposition of John Ujlaky at 102-103), as well as Bridgette Ujlaky's statement to Grand Rapids Police Detective Ruth Walters in an e-mail that Nicholson is a "known large MJ [marijuana] grower[.]" See id., Exhibit G. Although "the uttering or publishing of words imputing the commission of a criminal offense" can constitute defamation *per se* pursuant to MCL 600.2911(1), see Ghanam, 303 Mich App at 545, Michigan law provides that "information given to police officers regarding criminal activity is absolutely privileged." See Hall v Pizza Hut of America, Inc, 153 Mich App 609, 619 (1986). Accordingly, Bridgette Ujlaky cannot be subject to civil liability for the e-mail she sent to Detective Walters. Likewise, John Ujlaky cannot be held civilly responsible for defamation based upon his statements that Barney and Nicholson had ties to law enforcement. "The population of right-thinking persons unambiguously excludes 'those who would think ill of one who legitimately cooperates with law enforcement.'" Michtavi v New York Daily News, 587 F3d 551, 552 (2d Cir 2009). Thus, as then-judge (and later United States Attorney General) Michael Mukasey observed in considering whether falsely accusing one of acting as an informant can be defamatory: "So far as I can tell, every other court to have considered the question, save one, has held, as a matter of law, that such a statement cannot be defamatory, the sole exception being the Scottish court in the nineteenth-century case of *Graham v. Ray*." See Agnant v Shakur, 30 F Supp 2d 420, 424 (SDNY 1998). Because this is neither Scotland nor the nineteenth century, the Court must award summary disposition to John Ujlaky under MCR 2.116(C)(10) with regard to the defamation claim against him.

G. The Counterclaim and Third-Party Claim for Injurious Falsehood.

The defendants' counterclaim and third-party claim for injurious falsehood is quite similar to their defamation claim.<sup>5</sup> That is, the defendants allege that Horizen and the Ujlakys intentionally published false communications pertaining to the defendants' business that they knew would likely have an adverse impact on the defendants' business. Our Court of Appeals has set forth the elements of injurious falsehood in the following language:

One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if

(a) he intends for publication of the statement to result in harm to the interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and

(b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.

Kollenberg v Ramirez, 127 Mich App 345, 352 (1983).

Just like the defendants' defamation claim against Bridgette Ujlaky, their injurious-falsehood claim against her fails because her communication to a Grand Rapids Police detective enjoys the full protection of absolute privilege under Michigan law. See Hall, 153 Mich App at 619. Moreover, Bridgette Ujlaky's communication to the Grand Rapids Police referred to Defendant Nicholson – as opposed to Nicholson's business – as “a known large MJ [marijuana] grower[.]” See Defendants' Brief in Support of Motion for Summary Disposition, Exhibit G. That communication seems much

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<sup>5</sup> In simple terms, defamation typically addresses harm to an individual, whereas injurious falsehood ordinarily involves “disparaging communications regarding the title to property” or some type of business. See Kollenberg v Ramirez, 127 Mich App 345, 350-351 (1983). As our Court of Appeals has explained: “A false statement that casts aspersion upon both an individual personally and upon that individual's tangible or intangible property interest may result in damages to either the individual's reputation or his or her pecuniary interests or both.” Id. at 353. In such cases, “the torts of injurious falsehood and defamation may overlap.” Id.

better suited to a defamation claim by Nicholson than an injurious-falsehood claim by his company, Horizen, see Kollenberg, 127 Mich App at 353, so the Court shall award summary disposition under MCR 2.116(C)(10) to Bridgette Ujlaky on the defendants' injurious-falsehood claim.

The defendants' claim for injurious falsehood against John Ujlaky and his company, Horizen, requires a bit more analysis. Although the defendants have broadly alleged that Ujlaky and Horizen "have been spreading false information about [GR Hydro], Barney, and Nicholson[,]” see Amended Third-Party Complaint, ¶ 9, the defendants have presented no admissible evidence in support of that claim. The defendants have presented the Court with admissions from John Ujlaky that he “spread rumors that Nicholson was working for various police agencies and Barney was an informant for the police,” see id., ¶ 10; Defendants' Brief in Support of Motion for Summary Disposition, Exhibit A (Deposition of John Ujlaky at 102-103), but those statements attributed to Ujlaky refer to Nicholson and Barney, rather than Horizen. Accordingly, those statements can, at most, support a defamation claim, rather than an injurious-falsehood claim. See Kollenberg, 127 Mich App at 353. Moreover, the Court seriously doubts that the defendants can predicate an injurious-falsehood claim upon the statement that Nicholson and Barney assisted law-enforcement authorities. Consequently, the Court shall award summary disposition to John Ujlaky and Horizen on the injurious-falsehood claim.

#### H. The Counterclaim and Third-Party Claim for Tortious Interference.

In their final counterclaim and third-party claim, the defendants present a claim bearing the title “Tortious Interference.” Michigan law recognizes two separate theories for tortious interference “with a contract or contractual relations” and “with a business relationship or expectancy.” Health Call of Detroit v Atrium Home & Health Care Services, Inc., 268 Mich App 83, 89-90 (2005). The

counterclaim and third-party claim indicate that the defendants have chosen to pursue relief under both theories, albeit lumped into a single count. In order to prevail on a claim of tortious interference with a contract, which “is an intentional tort[,]” the defendants must establish that Horizen and the Ujlakys engaged in the “intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law . . . .” Knight Enterprises, Inc v RPF Oil Co, 299 Mich App 275, 280 (2013). Similarly, to support their claim for tortious interference with a business relationship, the defendants must demonstrate that Horizen and the Ujlakys “did something illegal, unethical or fraudulent.” Dalley, 287 Mich App at 324. The defendants have utterly failed to meet this burden. At best, the defendants have provided inadmissible hearsay statements attributed to the Ujlakys on the subject of the defendants’ business practices. Even if the Ujlakys registered complaints with the defendants’ suppliers on subjects such as the defendants’ pricing policies, such acts do not rise to the level of per se wrongful, unlawful, illegal, unethical, or fraudulent. Accordingly, the Court must grant summary disposition under MCR 2.116(C)(10) to Horizen and the Ujlakys on the defendants’ tortious-interference claim.

### III. Conclusion

Since the inception of the specialized business docket, the Court has seen in stark relief the cutthroat nature of the hydroponics business in West Michigan. Although the Court stands ready to enforce contractual rights and provide relief for any wrongful dispossession of property or legitimate trade secrets, the Court should not insert itself into every garden-variety business dispute involving the use of sharp elbows or sharp practices among competitors. Here, neither Plaintiff Horizen nor any of the defendants has presented any viable claims. Consequently, the Court must grant summary

disposition under MCR 2.116(C)(10) on each and every claim, counterclaim, and third-party claim at issue in this lawsuit.<sup>6</sup>

IT IS SO ORDERED.

**This is a final order that resolves the last pending claim and closes the case.**

Dated: June 30, 2014



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HON. CHRISTOPHER P. YATES (P41017)  
Kent County Circuit Court Judge

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<sup>6</sup> Both the third amended counter-complaint and the amended third-party complaint include a claim entitled “Frivolous Lawsuit” as Count Four, but the parties agreed that that claim should be dismissed in favor of a request for sanctions following resolution of the case. Given the fact that the Court has now resolved the parties’ competing claims *in toto*, both sides may request sanctions. This statement should not be taken as an invitation to submit such a request or an assurance that the Court will award sanctions in response to such a request.