UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

— — —

HELLO FARMS LICENSING MI, LLC, a Michigan limited liability company,

Plaintiff,

v.

GR VENDING MI, LLC, a Michigan limited liability company, and CURA MI, LLC, a Michigan limited liability company,

Defendants.
_____/

Case No. 21-10499

Hon. Matthew F. Leitman

MOTIONS FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE MATTHEW F. LEITMAN
United States District Judge

Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Monday, July 29, 2024

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EXHIBITS: Offered Received

(No exhibits offered)

Detroit, Michigan
Monday, July 29, 2024
at about 9:26 a.m.

— — —

(Court and Counsel present.)

THE LAW CLERK: All rise.

The United States District Court for the Eastern District of Michigan is now in session, the Honorable Matthew F. Leitman, United States District Judge, presiding.

You may be seated.

The Court calls Case No. 21-10499, Hello Farms Licensing, LLC v. GR Vending Michigan, LLC, et al.

Counsel, please state your appearances for the record.

MR. LANNEN: Good morning. Patrick Lannen for the plaintiff.

MR. JOHNSON: Eric Johnson for plaintiff.

THE COURT: Good morning.

MR. BERNDT: Good morning, Your Honor. Will Berndt for the defendants.

THE COURT: Good morning. Thank you all for joining me. This is a continuation of a hearing we had before on cross motions for summary judgment.

Last time we were together I asked the parties to file supplemental briefs on the issue of whether the parties'

contract is enforceable or not enforceable under the Doctrine of Illegality, and the parties have filed those briefs.

And so what I want to do today is finish up all of the summary judgment motions, and I'm going to give you oral rulings, because we've been going quite a while and this is a 2021 case. We took a timeout for some settlement efforts. We took a timeout for supplemental briefs. And while I could write a book on this, we need a ruling, so I'm going to give you a ruling.

I want to start with the defendants' motion for summary judgment, and I want to give you my ruling on the first issue raised in the motion, which is whether the contract is unenforceable on the basis that the conduct at issue in the contract violates the Controlled Substances Act. This is the issue that you guys have briefed a lot. With respect to that part of the motion, I'm going to deny it, and let me give you my reasoning for that.

The argument here that the defendants make, as I noted, is that the conduct called for under the contract violates the Controlled Substances Act and, therefore, under the doctrine of what's called illegality, that contract is not enforceable.

I think this is a very serious argument that the defendants make. There is language in some Supreme Court decisions, including language that I quoted last time we were

together, that forms a reasonable basis for this argument. The type of language I'm thinking about here is language found in cases like *McMullen v. Hoffman*, 174 U.S. 639, at page 654, and also *Continental Wallpaper v. Voight & Sons*, 212 U.S. 227, page 263. The language is to this effect; the court in both of these cases said the authorities, from the earliest time to the present, unanimously hold that no court will lend its assistance, in any way, towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, the courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract.

Here there's no doubt that the contract calls for conduct that is unlawful under the Controlled Substances Act, the growing and sale of marijuana. Indeed, what makes this such a difficult case is that the core of this contract lies at the core of the Controlled Substances Act. This isn't a case where the contract is a lease, to lease space for the sale of a marijuana business or insurance or something that's on the fringes of marijuana, this gets to the core of the Controlled Substances Act. So under a straightforward application of the rule I just quoted, there's a very serious argument to be made that this contract is not enforceable.

But there are arguments against that reading or that conclusion, that I ultimately find more persuasive, even though I think this is, again, a very, very close issue.

In my view, the best way to think of this illegality defense, as set forth in the Supreme Court cases, including the ones that I cited, is really in the nature of what I would call public policy defense. As I see it, the theory underlying this defense is that courts don't enforce contracts that are against public policy, and the law sets forth the public policy, and that's the reason that courts don't enforce contracts that violate the law.

The Supreme Court, itself, offered some language that I think helps me understand the rule, as based in public policy. This was found in the *Continental Wallpaper* case, 212 U.S. 27, at page 262, and the court said the following: "In such cases" -- and it's talking about cases of illegality. The court says, "In such cases, the aid of the court is denied not for the benefit of the defendant, but because public policy demands that it should be denied, without regard to the interests of individual parties. It is of no consequence that the present defendant company had knowledge of the alleged illegal combination and its plans, or was directly or indirectly a party thereto. Its interests must be put out of view, altogether, when it is sought to have the assistance of the court in accomplishing ends

forbidden by the law."

And the court continued by quoting from one of its earlier decisions, in *Hanover v. Donn*, where it said, "The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. It is certainly contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew his money was borrowed, for the purpose of being employed in the commission of a criminal act."

So the key part of that quote was that this doctrine rests, in my view, on public policy. And this view of the Illegality Doctrine is not mine alone. Farnsworth and Williston, in their treatises, both say that this defense of illegality really is better called a public policy defense. Farnsworth says that in Contracts Third Edition, Section 5.1. And in Williston on Contracts, in the Fourth Edition, Section 12.1. And I note that the restatement of contracts don't use the term, "illegality," but also refers in various places to public policy.

So why it is important that we're talking about public policy instead of laws? It seems to me it's particularly important here, because when I'm trying to discern what is the relevant public policy with respect to marijuana, it's more complicated than looking, in my view, only at the Controlled Substances Act.

As the plaintiff sets forth in great detail in their supplemental brief, for many years, including those covering the negotiations and the performance of the parties's contract here, Congress passed appropriation riders that barred the DOJ from spending funds to prosecute marijuana offenses where the conduct would have been lawful under state medical marijuana laws.

Now, these riders are additional acts of Congress that help to make up, in my view, what is the whole of the congressional policy with respect to marijuana. And while these riders do not technically legalize marijuana, in my view, they do evidence a meaningful and material policy shift by Congress, and, again, this doctrine, in my view, is grounded in, what is the policy?

Usually it is easy to discern the policy, because you have a single law and it reflects a policy, and you don't have to do a lot of reading of the tea leaves to figure out the policy. What makes this more confusing is that we have one law, the CSA, the Controlled Substances Act, that points one way, and these funding riders that point the other way. And the policy, in my view, that these funding riders support is one that effectively allows states to develop medical marijuana markets and to permit medical marijuana treatment.

I'm not alone in my view of these riders. Justice Thomas observed in his dissent from the denial of

certiorari and the standing in the *Kimbrough* case, that at an absolute minimum, in light of these riders, there's no longer a clear federal policy against allowing states to develop medical marijuana markets.

And in my view, given the lack of such a clear policy, the case for declining to enforce contracts for the sale of medical marijuana that would be legal under state law does not carry the day. That case is not as persuasive as it would be without these riders, because, again, I think the riders help us understand what is the relevant federal policy here. We don't just have a single law pointing in one direction; we have a law and then we have additional congressional acts, and those make up the entirety of the policy.

Now, my view that this contract should be enforced, notwithstanding what is called the Illegality Doctrine I think is an especially appropriate conclusion here given the disfavored nature of the illegality defense.

The Supreme Court said again in *Continental Wallpaper* that this defense, it has often been stated in similar cases that the defense is a very dishonest one and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public consideration and in order to better secure the public against dishonest transactions.

And in my view, as I indicated with Mr. Berndt last

time we were here, if there was ever a case in which this defense, in the words of the Supreme Court, lies ill in the mouth of the defendants, this is it. As I understand the record, the defendants' entire business here is medical marijuana, and perhaps other marijuana, but certainly medical marijuana. Yet, in my view, for the purpose of prevailing in this single piece of litigation, the defendant takes the position that the contract or contracts here are unlawful, even though its own witnesses testify that they expected that these would be enforced and even though this defendant must be a party to other similar contracts or at least other similar transactions that would run afoul of the CSA in the exact same way as this contract here.

In my view, the position taken by the defendants in this case, given their business and what I understand of them, is really, it seems to me, to be hypocrisy and illegal gamesmanship. And I don't direct that toward Mr. Berndt. It is your job as a lawyer to raise any appropriate defense, but it's directed squarely at the client here, the defendants here, and to me, that's all the more reason not to bar enforcement of this agreement under the Illegality Doctrine.

I recognize, plain and well, that the Supreme Court said, even though it lies ill in the mouth of the defendant, we still apply the Illegality Doctrine, but for all the reasons I said earlier, I think, under Supreme Court

precedent, it does apply, given the policy shifts here, as reflected in the different congressional actions, but especially because it lies ill in the mouth, given the policy shift, and this would not be the type of case to invoke the Illegality Doctrine.

But to me, it is not just Supreme Court precedent that weighs against invoking the Illegality Doctrine here, it is also Sixth Circuit case law. The Sixth Circuit case law that I'm referring to here is the Jackson Purchase *Rural Electric Co-Op v. Local Union 816*, 646 F.2d 264, at page 267. In that case, the court said the following: "That generally one who has, himself, participated in an illegal act cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction."

The court added though, "However, it is not the case that all unlawful agreements are ipso facto void. If the denial of relief is disproportionately inequitable, the right to recover would not be denied."

And the court added that, "Factors a court should consider in performing this balancing include the justified expectations of the parties, the forfeiture that would result from non-enforcement of the agreement, any special interest in enforcement, the strength of the public policy that the agreement violates, as shown by legislation or court decision, the likelihood that refusal to enforce would

further that policy, and the seriousness of the misconduct."

Here, when I apply those factors, I come to the same conclusion, that this contract should be enforced and that the Illegality Doctrine should not bar enforcement.

Here's how I see the factors applying here. I think that the parties did have justified expectations that the contract here would be enforced. I think those expectations were justified in light of the Michigan law regarding medical marijuana, the fact that the contract specifies Michigan law will govern, and in light of the changes in federal policy that I mentioned, the appropriation riders, it seems to me that both sides could justifiably expect and, indeed, I think both sides did expect that this contract would be enforced, given the state of both federal policy and state law at the time the contract was entered into. And while I understand that they should have been on notice about the counter-arguments under the CSA, I think it was not -- it still was reasonable to expect that this would be enforced.

The next factor is, would the forfeiture from the non-enforcement be large? Here it would be very large and have serious consequences if this contract is not enforced.

The next factor is, is there a special interest -- special public interest in enforcement of the agreement? And this is an unusual circumstance. I think

there is an interest in enforcement of the agreement. It's an interest that is derived from state law. The State of Michigan has expressed a view that there is a public interest in having a medical marijuana market. And I want to be crystal clear, I'm not saying that the state law is in any way supreme to the federal law, I'm just saying when trying to assess whether anybody has an interest in enforcement of this contract, I think the State of Michigan's interest is relevant and tells us that there is a public benefit from enforcing the contract.

The next factor is, what is the strength of the policy that would weigh against enforcement of the contract? And here, as I indicated earlier in my discussion of how federal policy has changed, I think the federal policy with respect to marijuana -- medical marijuana here, is, at best, muddled, given the appropriations riders and the CSA and what the president has done as well. And given that the policy is so muddled, that, to me, weighs heavily in favor of enforcement. This contrasts sharply with a case where we have a clean, clear law that unambiguously expresses a policy that was enacted by the legislature and signed by a president. We have a muddled set of policies here and so there's not a strong policy that weighs against enforcement.

The next factor is, how would refusal to enforce the agreement have an impact on the policy? Even assuming

that there was a policy against enforcement of marijuana contracts, refusing to enforce this contract would not go a long way toward furthering that policy. There was and is a huge amount of medical marijuana transactions in Michigan, and the policy was already being substantially undermined to the extent that there was any policy against enforcing these contracts, and declining to enforce this one contract, seems to me, will hardly provide important enhancement for whatever the policy against marijuana contracts is, if there is one.

And finally, is the nature of the alleged misconduct. Here, to the extent there was any misconduct, in my view, it wasn't serious. That is indicated quite clearly by the fact that, first, that it's lawful under Michigan law; and, second, the fact that it's been carved out from federal prosecution for years. The fact that it has been carved out from federal prosecution is a clear indicator from the federal folks that this type of conduct, even if it violates the CSA, is not regarded as serious misconduct that ought to be prosecuted.

So that's how I see the balancing of the factors under the Sixth Circuit's test, so if that's the governing test, I would still hold that this contract is enforceable and it's enforcement is not barred by the Illegality Doctrine. So for those reasons, I will deny the motion to the extent it argues the contract is unenforceable under the

Illegality Doctrine.

The next argument that the defendants make is that the damages for both 2020 and 2021 are limited, as a matter of law, to the $2 million deposit.

Mr. Berndt, do you mind coming to the podium? I just had a couple quick questions on that.

MR. BERNDT: Yes, Your Honor.

THE COURT: Just give me one second.

Okay. Are you aware of any case applying Michigan law that has found a payment like the -- I used the term $2 million, it was 20 percent, it's just a little more than $2 million. Are you familiar with any case under Michigan law that has found upfront payment like that to be liquidated damages, where the contract didn't use the word liquidated damages?

MR. BERNDT: Your Honor, off the top of my head, I cannot recall a case. I know *Malone v. Levin*e talks about rule generally, but I believe that court may have used the term.

THE COURT: So the contract in *Malone* did use the term, "liquidated damages." It said, paragraph 10 of the contract referred to the sum of $5,000 as liquidated damages. And then there was another Supreme Court case that you cited, it was -- I think it was the Kern case, I think that also used the term, "liquidated damages." Yeah, it did, also in

paragraph 10.

But are you familiar with any case that found a payment like this to be liquidated damages in a contract that didn't use that term?

MR. BERNDT: Not that I can recall, off the top my head, Your Honor, and I think what's important is the structure of this up-front payment and consequences if there is a breach, which is forfeiture; and under *Malone* and under Williston, the section cited by plaintiff, the structure of this payment necessarily imports the intent to treat that deposit as liquidated damages, Your Honor.

THE COURT: Why do you say that? Why couldn't it be that this is a down payment and if your guys don't to go through with the contract, the plaintiff gets to keep it, because it wants, at a minimum, that level of security and protection, but it also would have a right to go after your guys for more?

MR. BERNDT: Well --

THE COURT: Can you help me reason through that?

MR. BERNDT: Of course, Your Honor. First, that would be contrary to the stated law of Michigan, as in *Malone*, which talks about --

THE COURT: So, look, one of the things that -- when I was law clerk and I would bring cases to my judge and I'd say, look, this says a rule. He would always

say to me, what are the facts of the case? Is it actually finding this on the facts? And importantly, he sat on the Michigan Supreme Court, so he was influential in how I think about Michigan law.

I see the general statement of the rule. Is there anything beyond the general statement of the rule, like you were telling me that you view the operation of this as necessarily liquidated damages. Can you help me understand that?

MR. BERNDT: Correct, Your Honor. I think that there's basically two purposes for an upfront payment like this. One is setting up a fund that could be used as liquidated damages and the other is security. That's what Williston talks about, in the provision cited by the plaintiff. If it's a security payment to secure a future obligation of the other contracting party, there's a right to reclaim some portion, if the damages do not exceed that amount. That's foreclosed by this agreement.

What this agreement says is, if there is a breach, the deposit is retained, and so what that suggests is it must be liquidated damages. Because, for example, what it says, in particular, it clearly fails to decide, for whatever reason, to not purchase the agreed biomass, the deposit would be forfeited.

So there is a small portion of the agreed biomass

at the end of the agreement, and Curaleaf decided not to take that up, that they would forfeit that amount, they don't get to re-claim that, that amounts to liquidated damages, not a deposit, not security. So under the structure of this agreement and these particular circumstances, it must connote liquidated damages.

THE COURT: Why would it have to be exclusive liquidated damages, even if it was some form of liquidated damages? In other words, if it happens early in the contract and there's still more owing, why does this have to be the exclusive remedy?

MR. BERNDT: Because the very concept of liquidated damages connotes an exclusive remedy, and we cited a number of cases for that provision. But essentially, Your Honor, the very purpose of liquidated damages is to allow the parties to stipulate as to the amount of damages that will be owed in the event of a breach, without further litigation, without further dispute. That's what the parties did here.

THE COURT: Was didn't -- so was this drafted by the lawyers?

MR. BERNDT: Lawyers were involved in this, Your Honor.

THE COURT: I mean, there would be a lot clearer way to say this is liquidated damages than this, wouldn't there?

MR. BERNDT: I think that they could have used different language, certainly, Your Honor. I think that the intent of this provision, though, is clear.

THE COURT: Well, what do you say -- so when I read this provision and then I read the case that you guys talk about a fair bit on both sides, this *Atlas* case from the Sixth Circuit.

MR. BERNDT: Yes.

THE COURT: It's somewhere in my pile.

MR. BERNDT: It's *Atlas Noble v. Krizman*, Your Honor.

THE COURT: I might have left it on my desk. Here it is. *Atlas Noble v. Krizman* Enterprises, 692 Fed.Appx. 256, a Sixth Circuit case that is applying Ohio law.

So the Sixth Circuit is looking at a provision that has some similarity here. It says -- I just want to make sure I get to the right language here. So the Sixth Circuit says that this Section 6.2 of the parties' agreement provided that if the -- I guess the agreement provided that if the deal failed for any reason other than those contained in 6.2, these escrowed funds that had been paid up front went to the *Krizman*. Do you see that part?

MR. BERNDT: Yes.

THE COURT: So, they were trying to figure out, is

that a liquidated damages provision or is that this type of earnest money deposit? And they went through the District Court's analysis, and they said this is a damn close question here in this case, whether -- which way we go with this provision. Ultimately, the District Court was persuaded that it was a liquidated damages provision when it was read in conjunction with another provision of the agreement, that was a very broad waiver of other remedies.

And ultimately, it seemed to me like the Sixth Circuit said, when you read those two together, that allows the conclusion, as a matter of law, that this is liquidated damages, but it seemed to suggest that if you didn't have both of those, the question couldn't have been resolved, as a matter of law, as one for liquidated damages.

Do you share that reading of *Atlas,* and does that reading apply here?

MR. BERNDT: So, Your Honor, I agree with you on the first part of that analysis; it did look at both of those provisions of the agreement. I must respectfully disagree with the second part. I think that getting back to this concept of, was this earnest money or was it a liquidated damages provision, what the Sixth Circuit looked at, also, was the amount of the payment and said, if interpreted as liquidated damages provision, the amount is reasonable and enforceable, that 20 percent. And that's precisely the same

percentage we have here, it is spelled out in the agreement. So combine all of that together, the amount of the deposit, the nature of the forfeiture in the event of a breach, those two, together, the structure of this provision must be construed as liquidated damages provision.

THE COURT: The part they said 20 percent, isn't that just saying 20 percent is reasonable, we are not going to find that this is a penalty? In other words, why does that support their view as to -- that might have helped the conclusion that once they determined it was liquidated damages, it could be reasonable or -- or -- but did that suggest to them, between the two, that it had to be liquidated damages because it was 20 percent?

MR. BERNDT: I think, Your Honor, it is an interesting question. I think, ultimately, the court looked at it and said 20 percent, in light of the law surrounding liquidated damages provision, where essential parties look at, before a relationship is entered, what's a reasonable approximation of damages that can step in as a stipulated amount in the event of a breach, and determined that a 20 percent number was a reasonable amount for liquidated damages, generally. And I think it is telling that this agreement, it actually spells out 20 percent, the deposit is 20 percent, in the first line under "deposit" on page 1 of the agreement.

THE COURT: Why would 20 percent be a sensible prediction of damages under the agreement?

MR. BERNDT: I think, in this case, because it is a substantial amount of money, it's 20 percent of harvest, and it is $2.2 million. And it is an agreement by both sides that that would be the amount that would qualify as liquidated damages in this case.

THE COURT: What do you say to the defendants' argument that the concept of liquidated damages is generally one that we apply when the parties don't know what the damages are going to be, and they might be hard to quantify when we get to that point. The defendants say here, there's mathematical formulas and there was no need to be liquidating anything, everybody knew if we ever got to a breach and to a jury, it would just be doing some math, so they wouldn't be liquidated. What do you say to that?

MR. BERNDT: I would say this case is a good example of why that simple mathematical calculation does not actually have the circumstances of the dispute could arise. So in this case, for example, there is a serious dispute about the timing of testing and delivery of certain aspects of the harvest that I think could be brought out over a large portion of the harvest; there could be disputes about the quality of the cannabis being produced, there could be disputes about the potency of the THC contents in the

harvest, there could be numerous disputes about a very large number of aspects of performance by the parties, so idea that it's a simple mathematical calculation, it doesn't correspond to this agreement, which includes a number of particular obligations of both parties.

THE COURT: Can you help me understand how this -- how the function of the deposit works? The deposit is referenced at two separate points in the agreement; one where your client agrees to pay it, and then there is this later provision that says Hello Farms shall retain the deposit for the harvest until 80 percent of the harvested biomass has been purchased and picked up; thereafter, upon invoicing, Curaleaf will send its written confirmation that the deposited funds shall be credited against the remaining purchases of the harvested biomass. In the event that any amount of the deposit remains after all harvested biomass has been paid for and picked up, Curaleaf may request a refund of the deposit or apply the amount to the following year's harvest deposit.

Does that have any relevance to the issue we are looking at here, do you think?

MR. BERNDT: I don't believe it has direct relevance to the issue we are talking about. I know the provision that you are talking about, where essentially, Your Honor, as you get close to the end of any payments that

could be due for a particular harvest, the deposit could be essentially drawn down, but that means it had to be kept by them during that period of time and it also meant that the deposit still could be forfeited in the event of an issue or a breach.

THE COURT: In that section, though, that I read you, doesn't that look like a down payment? At least -- I've got to tell you, the reason I asked about who drafted this thing is because I'm struggling with trying to understand it. I -- I was even -- I just read you those words, but sometimes in my life, I read words, but I don't really know what they mean. Does this -- it looks to me kind of like this part suggests that it's a down payment.

MR. BERNDT: Your Honor, I don't know quite how to respond to that. I mean, I think that the forfeiture language makes it not a down payment. A down payment is something different, as talked about under Williston, it is security. This is not security, that's the way I think our client viewed this provision, and that's the way the provision reads under Williston and Michigan law.

THE COURT: Okay. Anything else you want to tell me on this?

MR. BERNDT: On this particular argument, no, Your Honor. I assume you want to address the other argument later?

THE COURT: Yes, please.

MR. BERNDT: Thank you.

THE COURT: Mr. Lannen, what's the best argument that this is not a liquidated damages provision? And let me ask you first to address what is, arguably, Mr. Berndt's strongest argument, that if you guys complete 79 percent of the work and there's a breach, the entire things gets forfeited.

MR. LANNEN: A number of strong ones. I would take you to -- if you are looking at the contract -- I would ask the Court to follow me along in the contract.

Right above signature block --

THE COURT: Hold on. Where is the -- I was just looking at the excerpts of it. Is the -- I'll pull it up on ECF. Can you give me a docket number?

MR. LANNEN: Sure, it's 80-2.

THE COURT: Do you have a pageID. where you want me to look?

MR. LANNEN: 3715.

THE COURT: Okay.

MR. LANNEN: Right above the signature blocks the agreement reads, "This agreement is binding upon the parties, their successors and assigns, as to the 2020 and 2021 harvests, regardless of when and whether a deposit is made by Curaleaf."

If the agreement is to be binding whether or not a deposit is paid, it's obviously not intended that the deposit could satisfy all of the damages in the event of a breach.

THE COURT: Why couldn't it just be that the agreement is still binding, but the deposit is still the measure of damages?

MR. LANNEN: Because if the agreement is binding and then someone breaches, that would have no bearing on the amount of money we're talking about. It's not an expression that this is intended to identify that this is a good measure of the amount of money we're talking about. This is -- in my estimation, you read that language and you say, okay, so you cannot make a deposit -- capital D deposit -- and you still have to perform in full.

THE COURT: Why isn't that just saying the making of a deposit is not a condition precedent to the obligations in this agreement being binding?

MR. LANNEN: Because, if you only gave that simplistic of a reading, that would suggest that you have -- the agreement is binding on you to buy the balance of 50,000 pounds, at close to a thousand dollars a pound, and yet we are still agreeing that's a fair measure of your damages. If that was the goal, you would need a lot more, in my opinion.

THE COURT: Okay. What's your next argument?

MR. LANNEN: Our next argument is, first and foremost, there are no terms "sole and exclusive remedy" in the agreement whatsoever. If that's what was intended for there to be no factual dispute, then the parties would have had to have said that.

THE COURT: Why is that? Let's take a hypothetical that is not this case. You and I make a contract and we say liquidated damages are $10, and we both agree that's binding, we swear a blood oath and we actually have lawyers that do the drafting and they draft it real clear, so there is no dispute about the meaning. Isn't it just basic understanding of liquidated damages that if the damages are liquidated, those are the number?

MR. LANNEN: I don't believe so, no, I would take great issue -- premise -- the whole premise of your question is that liquidated necessarily means that -- automatically means sole and exclusive; that's not true. There is no legal proposition, no binding one, that suggests that if we liquidate damages, that must be sole and exclusive.

THE COURT: Do you have a case that says that where there's a liquidated damages provision that's really clear, that a party has been able to sue for the liquidated damages and/or something more than the liquidated damages and compensatory damages?

MR. LANNEN: I don't have that, but it is not my

burden.

THE COURT: One sec.

Mr. Berndt, you told me that you had some authority for the proposition that the nature of liquidated damages is inherently exclusive. What were you referring to there?

It seems to me that *Kern v. Williams* says that, at least, to some extent. When it is describing what the nature of liquidated damages are, it says, among other things, that the law permits the parties to ascertain for themselves, and to provide in the contract itself, the amount damages -- and here is the key -- which shall be paid for the breach.

I'm not saying this is liquidated damages. I'm saying -- I'm asking, if it is, isn't the idea of liquidated damages that is the damage, that is the compensatory number? And the court says the whole point of liquidated damages is sometimes they are more, so the plaintiff wins, sometimes they are less and the plaintiff loses, but we're going to allow this ex-ante determination and we're going to live with that. Isn't that the nature of these things?

MR. LANNEN: No, it doesn't have to be, and that is exactly why lawyers use the words, "sole and exclusive." And as the Court noted, this was drafted by counsel on both sides of the equation, and they didn't use those words.

I want to answer your question further, if you just indulge me in two ways. Number one, the best argument is the

one you already alluded to; it's not a liquidated damages provision. We address this squarely in the response. It is called a deposit, it is a deposit. It's applied on the balance of the harvest if there's still 20 percent to be performed. That's an estimate.

THE COURT: But what do you say to Mr. Berndt's point that it's not applied one for one? Sometimes you guys may get to keep more and -- you know, he said it better than I do. You understand the argument that he was making?

MR. LANNEN: Yes, I understand the argument.

THE COURT: What's the best response to it?

MR. LANNEN: That nowhere in the negotiations, which I've detailed at granular level, was it ever discussed that this was intended to capture the concept of, here's the amount that will be owed in the event of a breach, because it would be very difficult to ascertain? That -- that rule similar to how you trace the origin and meaning of the term, "illegality," the whole concept of liquidated damages is that it will be difficult to ascertain and that the moving party would have to prove that there is no dispute of material fact; as a matter of law, it's clear that this is to be treated as a measure of damages because it's going to be difficult to ascertain in the event of a breach. There's not an e-mail, not a phone call. We have profiled in our exhibits, ECF No. 128, hundreds of e-mails, and not one time

did these parties suggest that the deposit was to be used as liquidated damages. Never was it going to ascertain an amount. It was an estimate of production of one year. If it was to be liquidated damages, a deposit was also owed in the second year. There's just no spirit leading up to, during, in, or after that ever suggested that would be the entirety of the damages award.

THE COURT: What do you say it is if it's not liquidated damages?

MR. LANNEN: It's not liquidated damages. It's a security deposit, in the most ordinary sense. It's the same thing as an apartment; if I damage my apartment greater than the amount of the security deposit, of course the landlord gets to keep the money and he can sue me for the amount of additional damages, if I've damaged the physical property in excess and beyond the terms of the lease of ordinary wear and tear and in excess of the amount of the security deposit. It's not a cap. That's exactly why it also says --

THE COURT: But what if you -- if we use your example and you damage your apartment so you breach your lease, and your security deposit was a thousand, and your breach is you put up a nail in the wall and it was -- the actual damage was five bucks. In your security deposit example, the landlord doesn't get to keep the whole thing, it corresponds to the actual loss, so it's not liquidated

damages. Isn't your security deposit example not a fit for what's happening here, because the 2 million, you guys sometimes get to keep it when it does correspond to your actual loss?

MR. LANNEN: We get -- no, the answer is no. If -- and this is on page 29 of our response brief as to why it is not a liquidated damages provision. Let's say our damages were only $1 million, then I understand the agreement would purport -- say there's 10 percent of the harvest remaining in year one, and this whole thing is also subsumed by the argument, that there's two years of deposit called for. But to answer the question we're talking about, the law -- the contract says if they perform 95 percent and don't buy the balance, we get to keep the whole deposit, that's what the agreement says, and I'm with you, but that's not true. The law is, at that level, we would have to refund the deposit to the extent it exceeded the amount of our damages.

THE COURT: Why is that? Mr. Berndt is saying -- I think he's saying, today, that you wouldn't.

MR. LANNEN: Because he didn't read page 29 of our brief citing Williston, quoting the Michigan Supreme Court in *Atlas Noble*, answering that exact question.

THE COURT: Hold on one sec. But the language here, of this contract, doesn't purport to allow for this sort of calculation of -- it says if they don't buy the

harvest, it's forfeited. And so what Mr. Berndt would say is, of course, there can be a deposit for security where you do this actual calculation, but the security deposit -- going back to your lease -- doesn't say if there's one iota of a breach, your landlord gets to keep the entire amount, it's forfeited. It contemplates this sort of dollar-for-dollar reconciliation. Mr. Berndt says the plain language of this contract doesn't call for a reconciliation, it just says, forfeited, that's it.

MR. LANNEN: It also says that if there's 20 percent remaining, you can use it to apply it to the balance of the purchase, no less of a provision, no less of a meaning, and at worst, you have two provisions suggesting different things. Then you would compare that against two outcome determinative issues. Number one --

THE COURT: Can you stop for a second?

Mr. Berndt, let me ask you a question. What happens if the contract is going along, the deposit has been paid in full for 2020, 90 percent of the harvest has been picked up, and so you send them notice that says, start applying the deposit, and then you breach? The idea of liquidated damages, how do you intelligently apply it at that point?

In other words, at that point, the 2 million isn't available as some sort of a damage number, in the abstract,

it's already been drawn down for other purposes. So it -- if the idea -- if the idea is to liquidate damages for any breach, the idea is for a breach, that entire amount should be available, but this contract calls for that amount, the deposit, to be drawn up and applied in your favor. So if you breached at 90 percent performance, in a real liquidated damages number, the number would be the liquidated number, but here, they wouldn't be getting the full value of the liquidation, because they would have applied some portion of the deposit to your benefit. What do you say to that?

MR. BERNDT: I think, Your Honor, that presupposes what this agreement doesn't suggest and what Counsel is suggesting would somehow occur, which is some kind of reconciliation. I agree there would be only -- if 90 percent of the harvest is left and there's only a million dollars left, or something small left at the end of the day, that would be the maximum amount of damages, it would still be liquidated damages. If Curaleaf decided not to pick up the rest of it, there would not be a fight about what is the value of the remainder that they decided not to pick up, the remainder of the deposit would be gone.

THE COURT: But why isn't it -- I mean, my understanding of liquidated damages is that if you liquidate, you are arriving at a fixed number, the number doesn't change. Isn't that the concept of liquidated damages? It's

ex-ante, it's determined as the damages for a breach, full stop.

MR. BERNDT: Your Honor, I'm not sure that I have seen case law suggesting that it must be what a liquidated damages provision has to be. And I think in this circumstance, what it is, is it's a sliding scale, as Your Honor showed, but it is also what the parties agreed would be the deposit and would be the amount of the forfeiture. And at any time that occurred, the important fact is there's no need for any further dispute, there's no need for any further reconciliation, forfeiture is the remedy.

THE COURT: So and you would add in the idea forfeiture of the remainder -- I mean, deposit is a defined term, it's an amount of money, right? And if the breach happens at 90 percent performance, that some portion of the deposit is available, but the deposit, as a defined term, is not available. The agreement refers to this deposit amount is subject to refund and forfeiture, but this deposit amount wouldn't be available at the 90 percent mark, in the hypothetical I have given, because it would have been drawn down, right?

MR. BERNDT: Well, Your Honor, not to quibble with the language, but just to clarify, it says the deposit would be forfeited, not this deposit amount.

THE COURT: But the deposit is a defined term for this deposit amount, capital D, in the part I'm looking at.

MR. BERNDT: Yes, it does.

THE COURT: So what is forfeited is a specified amount of money, and it doesn't seem to me that you would -- that amount of money is not even going to be there anymore, at the 90 percent mark. I mean, under your view of the world, if you guys had done 99.999 percent of the harvest and picked it up and gotten it back and there was one leaf of marijuana that somehow got screwed up, what I'm saying is if this is liquidated damages, presumably 20 percent would be available for that breach too. It doesn't -- you don't do a calculation if it's truly liquidated, but here that amount is going down. I'm just having a little trouble following that.

MR. BERNDT: I understand Your Honor's question. I disagree with the idea that liquidated damages must always be an absolute, fixed amount. I don't think we have seen any case law suggesting that. I think what is important is the nature of the forfeiture and the nature of if there's 20 percent left, if there's 10 percent left, and here, Curaleaf says I'm not picking anything else up, they are liable for the full amount of the deposit that remains, without any reconciliation, without trying to go through receipts and deal with the security deposit, in Mr. Lannen's example, it is just a set amount that is done, and that's

what we have here, forfeiture is the key.

THE COURT: Okay. I understand your point.

MR. BERNDT: And, Your Honor, if I could briefly -- the case that you asked about earlier, the *Worley* case and the *WXON-TV* case, which basically talked about --

THE COURT: By the way, did you happen to see who the lawyer was in *WXON*?

MR. BERNDT: I did not, Your Honor.

THE COURT: It was my dad.

MR. BERNDT: Well, Your Honor, both those cases found what is a fairly settled area of law, parties may decide, in advance, to limit the damages or to stipulate to the amount of damages they have done here.

Thank you, Your Honor.

THE COURT: Okay.

MR. LANNEN: It is exactly true parties can agree to do that, so when they do, they have to say that. I will extend the Court's metaphor, if you will indulge me. Under the scenario, let's assume, for example, of the conversation that the defendant actually picked up and paid for the entire first year, there's no deposit remaining, and now the new deposit, which is not due until the following September, never gets made. Let's pretend the defendants disappear and breached after the conclusion of year one, do we get damages then? There is no deposit remaining. In fact, the other

provision says we could apply it at the end of year one purchase. We would get zero dollars under that scenario, if this was a true argument.

THE COURT: Okay. Anything else?

MR. LANNEN: I would just add, Judge, that I really think the restatement and Williston are both incredibly clear on this point, it has to be negotiated, because it is hard to ascertain, and then it has to be so stated, neither of which is proven here.

THE COURT: Okay. I got the point.

Anything else, Mr. Berndt, on this argument?

MR. BERNDT: No, Your Honor.

THE COURT: All right. I think this is another serious argument by the defendants, but the question as posed in their motion is, is it appropriate to conclude, as a matter of law, that the deposit provision is both liquidated damages provision and the exclusive liquidated damages provision, and I'm not prepared to conclude, as a matter of law, that the deposit provision is a liquidated damages provision.

It doesn't use the term, "liquidated damages" I'm not saying that something absolutely has to use those magic words, but certainly the absence of those words is relevant. Mr. Berndt was candid that he hadn't pointed me to other cases finding a deposit to be liquidated damages under

Michigan law without those words. So the absence of those words is one factor that I consider, but just the overall wording of the provision, it is not sufficiently clear to me that this is or was intended to be a liquidated damages provision, for all the reasons I was exploring in my back-and-forth with both counsel.

I do think the *Atlas Noble* decision is instructive, that I talked about the structure of an agreement with a similar deposit term, where the court was looking for some other provision that gave a pretty clear indication that a deposit was liquidated damages, and I don't see a provision like that here. So that, plus the absence of the reference to liquidated damages, plus my general view that this just is not sufficiently clear the way it is worded and the way it operates, for me to conclude, as a matter of law, that it is liquidated damages. In my view, it's ambiguous on that point, which means that it would be an appropriate question for the jury.

And the arguments that you make, Mr. Berndt, I think, as with most of the positions you have taken here, are reasonable, and I can certainly see a jury reaching that conclusion, but I can't find that conclusion, as a matter of law, which I would have to grant summary judgment on that argument, so I'm going to deny the motion to the extent that it is based on this liquidated damages argument.

Next argument is the argument by the defendants that summary judgment is warranted because the plaintiff did not test the product for 2021. This is aimed only at the 2021 harvest.

Mr. Berndt, is there anything that you want to say on this, beyond what's in the briefing?

MR. BERNDT: Well --

THE COURT: Let me try to help with a question here.

MR. BERNDT: Sure.

THE COURT: You cite *Lingham v. Eggleston* from 1873, which was a good year for the Michigan Supreme Court. You cited a general rule here, that where you have to meet a standard, you got to test in order to show that the standard is met, to get the damages. I understand that as a general principle.

Here, though, the plaintiffs are suggesting that there are a number of other doctrines that come to bear on this, like preexisting breach, repudiation, anticipatory breach, all the stuff that gave me nightmares before my law school contracts exam. Why aren't they right that, as a matter of law, I can't rule in your favor on this doctrine? Again, that this is something that you could certainly present to a jury, but, as a matter of law here, there seems to be some things before we get to this question, that would

preclude summary judgment on this basis. What do you say to that?

MR. BERNDT: Well, I don't think any of those issues address the Court's efficiency here, which is they have a damages claim for the 2021 harvest and they bear the burden to show what those damages are. In order to recover anything under the contract for the 2021 harvest, they have to show that the cannabis that they were selling would pass, for example, heavy metals. They did basically no coordinated testing of the 2021 harvest. The handful of tests they did do, certain of those tests failed for heavy metals. But having not tested the 2021 harvest, there is no way for them to establish a price of any kind for that harvest.

And they come back and say there should be -- they should be given the benefit of the doubt, it should be mitigation, all of those things, but it doesn't get to the core question, which is, they have a burden to present to the Court a coherent theory of how they can calculate damages for that harvest, and they simply can't do it. They decided to effectively destroy that harvest by processing it into oil, without testing it first.

THE COURT: Let me go back and just offer a hypothetical.

Let's say we're heading towards the 2021 planting season, it hasn't even gotten here yet, and we're operating

under the parties' contract, and there has been this problem with 2020, these disagreements have arisen, and in my hypothetical, you say to them, we don't care what you're doing, we're not buying. And I want you to assume that that's an anticipatory breach.

Is it your view that in order to sue you and recover damages, they would have been obligated, first, to plant an entire crop and then, second, to go through all the testing that they normally would have done if you were ready, willing and able to buy?

MR. BERNDT: In order to determine an amount of damages, they would have had to do all of those things, yes, Your Honor, because there just cannot be an assumption that whatever amount they say they grew and whatever the quality of that product they say they were, they still bear the burden to show that that actually was what it was.

THE COURT: Again, I'm going back to my hypothetical.

MR. BERNDT: Yes.

THE COURT: So in my hypothetical, let me make it a little more exciting. You call them up -- not you, because you're too nice, but your client calls them up in February of 2021 and says, go screw yourself, do whatever you want. And, again, is it your position that the tough choice they face there is, unless they plant and test, they're just totally

out of luck, they you can't sue you at all?

Let me make the hypothetical harder. Okay. You represent a grower with a contract that's exactly like the one here. The buyer calls in February of 2021 and says, we don't want anything to do with you, see you. Is that person completely out of luck, unless they actually go out, buy the seed, pay the labor, plant, and pay for testing?

MR. BERNDT: In this case, Your Honor, you know, for every contract breach, you have to establish what the damages would be. In a typical widget case, you could say I would have sold creative widget, would have cost me this much, and I would have sold it for that much. That's a thing we can determine from markets, generally.

This is not a widget case. This is not a completely fungible product they that could say, I would have grown this many plants, I would have done this, I would have done that. It is not the way this process work.

THE COURT: So why isn't there evidence, other than actual testing, that -- other than an actual test result that could be used to support a finding? For instance, why couldn't they use information from the 2020 harvest, coupled with their knowledge as growers, to say this is what we did in 2020, we used this patch of land, which is the same patch we would have used for 2021, we used this type of fertilizer in 2020, and we would have used that same thing in 2021.

Here is Michigan's weather, generally. The results from 2021, at least it would not be unreasonable, as a matter of law, for a jury to find that the stuff for 2021 could have been passing, based on what happened in 2020.

MR. BERNDT: Because I think that gives far too much credit to just allowing them what is, essentially, speculation. And here is a good example; they now claim they grew three times as much in 2021 as in 2020, they claim it is all the highest price possible, they claim it all would have passed for heavy metal. There is no evidence for any of those things, and that evidence was available to them. They chose not to preserve that evidence for this Court or for the parties in this case. That was a decision that they elected to make, and that decision has consequences here. They don't have the evidence to meet their burden to prove the price that they should be owed for that 2021 harvest.

THE COURT: Did you say to them, hey, hang on to that marijuana, we want to test it as part of our defense of a legal claim?

MR. BERNDT: Your Honor, we made frequent and repeated requests for discovery about the 2021 harvest.

THE COURT: I'm not talking about discovery in the litigation. I'm talking about, at the relevant time of the 2021 harvest, or was the litigation going at that point?

MR. BERNDT: The litigation was going at that

point. They filed in February of 2021.

THE COURT: And did you say, before the 2021 harvest was passed, where it could have been tested, we want to test it?

MR. BERNDT: Your Honor, we -- to say we want to test, no. Did we say we want you to preserve all evidence relating to 2021 harvest, we want information about how you're growing, how it is being tested, how it's being sold, how it's being marketed, of course. Did they have an obligation at the litigation holding place for that kind of information, of course. It's a decision that they made, not to test it, and the dollar amount is big enough.

THE COURT: Hold on. I understand you there, but one of the things you said was depriving you of an opportunity to test.

MR. BERNDT: Correct.

THE COURT: I mean, there's a whole crop sitting there. Everybody knows crops go bad. If you didn't make a request to test, at least with respect to whether they deprived you of an opportunity, didn't you miss that window when you didn't ask to test it when it was there?

MR. BERNDT: No, Your Honor. First of all, I don't think it is our obligation to test it ourself. It is their obligation to get the price --

THE COURT: I hear what you're saying. I'm

asking -- I will come back to that.

You are making two points. One, they are the plaintiff and you are telling me they have to affirmatively test it. I will come back to that in a second.

But the other thing you're saying, I understand to be an additional point, which is, not only did they fail to do their own testing, they deprived you guys of the opportunity to test it, kind of like a spoliation point.

MR. BERNDT: Yes.

THE COURT: But this is a crop that could go bad. You guys are in the marijuana business, I mean, it can't be, it would seem to me, that their obligation is to just hold it and wait to see, years down the road, whether you want to test it, if you haven't made the choice. If they don't test, maybe they are assuming a risk that they lose on the argument that they should have tested, but how do they lose on the argument that they deprived of you an opportunity to test, when you didn't ask to test during the timeframe that the crop would reasonably be available for testing?

MR. BERNDT: Well, Your Honor, I think that that comes up all the time in product liability cases, that's a known. You know, you have a quantity of steel that fails for certain things; usually what the parties do is they said, we are going to sell, we are going to dispose of this steel, you can come and test it, here it is -- and that didn't occur

here. So I think that the premise of this needs to be that it was their obligation. They are the ones who brought the claim, they are the one that's seeking damages. It was their obligation to tell us, hey, we're going to destroy this unless you come and test it. That communication didn't occur. That was a decision they made.

THE COURT: Weren't you guys aware they were selling it, the 2021, that they were disposing of it?

MR. BERNDT: Selling it does not presuppose that they were going to sell it without testing it first, by any means. They, obviously, had the opportunity to do that.

THE COURT: Look, this is what I'm trying to get at. Again, I see two separate issues and I'm only focusing on one, and we will come back to the first.

The first, I understand your point saying they didn't test, they can't carry their affirmative burden. But you are kind of weaving into that, and I'm not being critical here, but you are weaving into another related point, maybe that they spoliated evidence. That they prevented you guys from doing your own testing so that you could rebut their evidence at trial. And I understand you to be saying an additional point, that because they deprived you of the opportunity to test, it would be fundamentally unfair to allow them to seek damages at all. Are you making that point or am I imagining it.

MR. BERNDT: I'm making that point.

THE COURT: Okay. So on that limited point, why isn't the answer that you guys didn't request -- it's a crop, it's not steel that can last for a while, you guys are familiar with it, that the idea is, if you wanted to test it, you could have and should have asked. What do you say to that point?

MR. BERNDT: I would say that wouldn't be our obligation to do it, Your Honor. And we had no assumption, based on how they had previously dealt with this, that they would simply process it without testing it. And they were frankly, Your Honor, very cagy about what was going on with the 2021 harvest to begin with. I believe the amended complaint they filed in this case suggested that that harvest was going to be 60,000 pounds -- or was 60,000 pounds. That turned out not to be accurate, but we got information about the 2021 harvest after all of this stuff had occurred. So the idea that we knew that they were going to be processing without testing it first, we simply didn't know that, Your Honor.

THE COURT: Okay. Going back to what I'm calling the first argument, that they can't possible establish damages without testing it, help me, again, understand why this other type of evidence wouldn't be competent to support a finding? I understand you're using the word,

"speculation," I don't know anything about marijuana growing. Why -- how can I conclude, today, that it is mere speculation to say that the same seeds grown in the same patch of land with the same chemicals by the same farmer, would be meaningfully different with respect to its characteristics in 2021, as opposed to 2020?

MR. BERNDT: Your Honor, I think that the nature of this agreement, whereby the price is very specific to the amount of THC and whereby it has to pass these Michigan testing guidelines, those are very specific requirements.

THE COURT: No. Let me just interrupt for a second. So I understand you to be making two arguments. One, they can't get any damages, at all, because they didn't test for the lead, or whatever those bad chemicals are. But, two, they can't get a higher price because they didn't get the THC level, and the agreement was driven by THC levels, right?

MR. BERNDT: Yes.

THE COURT: Why are those necessarily the same? In other words, I get your point about the THC levels being different, and I at least understand the point that it would be unfair to allow them to assume that they get the highest level, but maybe they've got some evidence that could support that. How can I make the conclusion as a district judge with no information about marijuana stuff? Yes, the agreement

calls for testing, but if, hypothetically, there is another thing that is a substantial equivalent to testing or that people in the industry would agree could get you the same basic information, like past performance, same chemicals, something like that, how do I know that, sitting here today, to be able to knock them out at this point?

Isn't the right thing here to wait and hear what comes in at the trial and then, after they present their case, you may say to me, Judge, you didn't hear a damn thing about how they were going to come up with their damages. Isn't that the right way to handle this?

MR. BERNDT: Your Honor, I just don't think it is. I think --

THE COURT: For instance, I could have imagined -- I'm not being critical -- a summary judgment motion that says, step one, they didn't test. Step two, here's our expert that says testing is the only way to do this to support a finding that a particular batch of marijuana doesn't have these bad chemicals and does have this THC, and then put the burden on them.

But at this point in the process, I'm concerned about saying there's no way they could -- that their evidence is insufficient to support a finding about 2021, when their evidence could be the type of evidence that I talked about, and sitting here, I have no idea if that's sufficient

evidence to support a finding that it was clear of the bad stuff and had enough of the good stuff.

MR. BERNDT: I understand what Your Honor is saying. I would say, under this agreement, they had an obligation to prove, in order to get a particular price, that the THC potency level and passing grade for heavy metals and other contaminants, and they simply didn't do that. They had a choice. By not doing that, they cannot meet their burden. And I think that -- I think Your Honor can find that as a matter of law. I understand your point -- your point of view, but I think any other result here, now or at trial, would essentially be speculation, because they had an opportunity to get actual evidence on the point and, instead, they are falling back on speculation as to what the amount would be and whether or not this would be commerciable.

And from our perspective, frankly, it looks like they elected to do this because they looked at the initial test results they got back in the 2021 harvest, some of those samples failed for heavy metals contaminants, some of them had fairly low THC contents, and they made a choice not to test the rest, or rather just process it all. And that hurts the Court, it hurts us, and it was a decision that they made.

THE COURT: Let me go back to my litigator hat here for a second. Sometimes, when I was sitting in your seat, there were certain things that I would want in the case. So

you have cast what's going on here with the testing as -- I'm going to use the term technically -- funny business. Those are my words. You were saying, look, here's what happened here, Judge, they couldn't meet it, they knew it, and this was an effort to manipulate and drive up their damages, when, if they had grown and tested, they never could have gotten there. These people are dishonest. These are -- that's essentially the positions, and maybe I said it stronger than you did, but that is -- isn't that basically the idea here, that at least this was manipulation?

MR. BERNDT: Your Honor, it could be construed as that, yes.

THE COURT: Why wouldn't you want to present that to the jury, to use it as a club on their whole case? Some parts of their case are going to be stronger. You would have the ability to say to the jury, the same people that told you A, B and C were trying to sell you a bill of goods on the testing, and so aren't I doing you a favor if I leave this in?

So if I leave it in, you've got two options. One, you can use it as club, and, two, you could make a rule -- a motion for directed verdict on this. So if I don't rule for you now, you don't necessarily lose this issue, as a matter of law, you can still raise it again. Want me to sidestep this motion, so you can use it as club? You can think about

it while I hear from Mr. Lannen.

MR. BERNDT: Let me say one quick response to that, Your Honor. If Your Honor would like supplemental briefing on this issue, which we think might be necessary based on this discussion, we could bring this, potentially, as effectively a Daubert motion, which they have an expert, which I think doesn't have any basis for this.

What is hard to get away from, Your Honor, is the fact that at the end of the day, it is pure speculation when the contract requires a very particular thing to be brought forward. So if Your Honor would want to withhold --

THE COURT: Let me give a hypothetical, okay?

MR. BERNDT: Uh-huh.

THE COURT: Take this exact same contract, but say there was an expert who would testify that I'm -- I've been a marijuana scientist for 50 years now and I'm telling you that if you plant the same seeds in the same dirt and you use the same chemicals from year to year, you can reasonably conclude that a very substantial percentage of the marijuana will be in the same range from year to year, with respect to these things. If there was that expert, wouldn't that be enough?

MR. BERNDT: I just don't think so, Your Honor. I mean, I think they had an opportunity to test the actual evidence and they decided not to, and they destroyed it. And the idea they want to say, we can go in and do this separate

way of doing it, it's not fair. That's the ultimate thing, Your Honor.

And I think, Your Honor, to Your Honor's point about do you want to withdraw it, Your Honor, we could potentially enter and continue this part of the motion to Daubert motions, if Your Honor wishes to do that, and wants to hear more about this from our point of view.

THE COURT: Okay. Thank you.

MR. BERNDT: Thank you.

MR. LANNEN: The defendants aren't going to try to use it as a club at trial, because it is blatantly contradicted by the fact that our evidence. The witness, Ms. Conroy, testified, of course we knew you were going to grow your land, that's why it says in plantable land; we knew it was going to be significantly bigger, that's why we came to you, we wanted to lock up a long-term, big-supply deal. So the trimming of the volume is a total misnomer totally in favor of the plaintiff.

THE COURT: I wasn't focused on that part. Why isn't he right that if you don't test, maybe that doesn't bar your entire claim, but how is it fair to allow you to seek the highest value dollar on the assumption that it would have been the highest THC count?

MR. LANNEN: Because the law is about fairness. That's exactly why I cited *Krizman* in the first place. To

your scenario, I'm not sure why this is so difficult, it is very simple. If there is an anticipatory repudiation or, say, a material breach, we don't even have to plant the second year. These two gentlemen would have easily preferred to stay home and watch CNN, if they could have. They planted because they needed the money to stay alive. There is no legal obligation whatsoever. They could have planted not at all. That's exactly why *Noble* says what it says. They have to --

THE COURT: All right. So, look, let's say for the sake of argument only, I agree with you on that point, that they didn't have an obligation to plant. Okay. So they can still bring a suit. They have a suit.

But now we get to the damages part. With respect to damages, if they haven't tested, how is that intelligently and fairly factored in, if there's not a test?

MR. LANNEN: Because you are not substituting your opinion for that of the jury, so with all due respect to Mr. Berndt, the reason defendants are saying this is because plaintiff actually assembled experts who routinely tested that this must have been great oil that you sold in year two, because you got an incredible market price for it. That's evidence.

The witnesses, as the Court has already alluded, the blueprint at trial is of course we are going to parade on

the witnesses, of course they are going to testify same staff, same employees, same better fertilizer. We learned from the first year. We improved production. We improved yield. We had better results. We had better standard operating procedures.

THE COURT: What about Mr. Berndt's point that the limited testing that was done in 2021 he says was not favorable?

MR. LANNEN: Yeah, that's also a misstatement of the actual truth. Here's the actual truth. There is a huge cost to test. There was a major hullabaloo about that in the first version. We ended up embracing that cost, in the matter of getting the contract done, to the tune of $250,000; it would have been $750,000 the second year. We don't have to incur that cost under the first point that you made.

As to the second point, of course our past performance is going to be the evidence at trial, that we would have satisfied, otherwise the *Noble* case is wrong and you are ruling against the Sixth Circuit.

And on top of all of that, the contract here, not only did the defendant contribute to the term not being satisfied, because we didn't have to do it anymore, we don't have to do it as a matter of regulations, the small number of R&D we pulled -- of course, Counsel doesn't tell you the exact truth -- actually were six, and five of them were

passed, and that's without further remediation, all of which is authorized by statute, all of which happened under the first deal, all of which the defendants knew about. Of course the evidence is going to show that we would have gotten the same, in fact, a better price on the market the second year. That's why we have an expert that says that, and that's why the defendant doesn't have an expert to oppose that testimony.

THE COURT: Okay. Anything else?

MR. LANNEN: No.

THE COURT: All right. With respect to this part of the motion, I'm going to deny it for the reasons that I expressed in my colloquy with both counsel. Essentially, I understand Mr. Berndt's point. Again, this is a serious argument and I think that is one that is well suited for resolution at trial. There are these issues of anticipatory breach and first breach, that, if found by the jury, it seems to me, could exclude the growing and testing requirement for 2021.

But then there's a separate issue of what impact does that have on damages, and Mr. Berndt says they can't prove damages without testing. As I sit here today, on this record, I don't think I can reach that conclusion. Mr. Lannen has made representations about expert witnesses and past practice, and it seems to me that is a reasonable,

possible path forward. I don't have evidence, today, that solely contradicts Mr. Lannen's path forward, that I could find, as a matter of law, today, that without testing, they couldn't prove the amount of damages they seek. These will be interesting issues for trial, in terms of what those proofs are and whether they can establish the amount of damages they are seeking, and whether they can establish anticipatory repudiation.

So in -- with that ruling, I think that disposes of the defendants' motion. It was a serious motion, but for the reasons I have given, collectively, here, I'm going to deny the motion in its entirety.

I want to turn to the plaintiff's motion here, and I only have questions on a couple narrow points here.

Mr. Berndt, do you mind coming up for a minute?

Given my ruling on the illegality issue of the contract, it is my understanding that in light of that, you would agree to dismiss the conversion counterclaim; is that correct?

I thought I understood you to say in your papers you had pled, that in the alternative, and you understood that under Michigan law where the parties duties are governed by contract, there is no separate claim for tort. Maybe I misread your response, but I thought I understood you to say that -- I can point to exactly what I was thinking about, if

you want me to.

MR. BERNDT: No. I understand what Your Honor is referencing. I think that was the primary ground of the contract is not illegal, and we would have the alternative conversion claim. I hesitate to just dismiss without thinking further, because I think there are certain other grounds, with certain aspects of the contract could be held illegal or against public policy at trial, for example.

THE COURT: Hold on. Let me just read you what I have read, so we are on the same page.

MR. BERNDT: Sure.

THE COURT: Docket No. 134, pageID.7249, this was your response to their summary judgment motion, and it reads as follows. You captioned the argument section, "Defendants' Alternative Conversion Claim." And you say, "Hello Farms seeks summary judgment on defendants' conversion claim on the grounds that this claim is not distinguishable from defendants' breach-of-contract claim.

Defendants assert a conversion claim as an alternative to their breach of contract claim. Defendants have raised this claim as an alternative and only to the extent the Court holds, A, the November agreement cannot be enforced because it is illegal, and, B, the parties can still maintain equitable causes of action.

To be certain, the case law is clear that even

equitable remedies are precluded by illegality defense. This claim is thus asserted only to preserve the argument to the extent the Court rules otherwise. "

So it seems to me that you're saying there, that given my ruling that the agreement is enforceable, notwithstanding the illegality defense, you wouldn't be proceeding on the conversion claim; is that correct?

MR. BERNDT: Yes, Your Honor.

THE COURT: Okay. Then I will grant their motion to the extent that it seeks summary judgment on the conversion claim.

The only other question I had for you is, they make the argument that your breach-of-contract claim for nonconforming -- that's my word now -- marijuana, in their view, may proceed, if at all, only as a breach of warranty claim. And they set forth a pretty lengthy discussion of the difference between a warranty and a contract claim and the import of acceptance under the UCC, in terms of which of those theories you can proceed under. And they referred me to a law review article in Baylor Law Review. I didn't realize so much could be written about this distinction, but I actually found that to be quite helpful.

In response, you guys cited to a single Michigan Court of Appeals case, I think from the '80s, that had a passing reference to this, but it didn't seem to me like it

was dealing with this precise issue here.

Do you have any stronger authority that says you can proceed under a contract theory instead of a warranty theory?

MR. BERNDT: Not as I stand here today, Your Honor. I think the warranty is incorporated in the contract. It is essentially the breach of contract and breach of warrant sort of go together, so --

THE COURT: Well, they have -- they have a theory that says there is a difference here between the two, that it affects the type of remedies you can ultimately seek. So I am not one to hide the ball. It struck me, after reading all of their stuff and looking at this claim, that it does sound in a breach of warranty rather than breach of contract. Did you have anything else that you wanted to say on that?

MR. BERNDT: No, Your Honor.

THE COURT: Okay. All right. Thank you.

Mr. Lannen, I don't have any questions for you.

Okay. So, look, I've read the plaintiff's motion carefully and I've dived into the factual record, and I'm going to grant the motion in part and deny it in part. I'm going to grant it to the extent it seeks dismissal of the conversion counterclaim. I'm going to grant it to the extent that it seeks dismissal of the breach of contract counterclaim on the basis that the claim is, in reality, a

breach of warranty counterclaim, and I will allow the claim to proceed as a breach of warranty claim.

With respect to the remainder of the motion, I don't need to do a deep dive here. I'm going to deny it. I think there are a myriad of factual issues that permeate all of the other arguments that the plaintiff has raised. So that will be my ruling with respect to the plaintiff's motion to grant it in part and deny it in part.

I'm going to terminate as moot, the rest of the pending motions here, the docket has a bunch of things that still show as active motions, specifically the motion to remand, because I have found the contract to be enforceable, and anything else that is on the docket, I'm going to terminate as moot.

Now, a couple points. Mr. Berndt, you had talked about a Daubert motion. I don't have my scheduling order in front of me, but usually the deadline for Daubert motions is the same as the summary judgment motion. Is that what I did in this case?

MR. BERNDT: I don't believe so, Your Honor. And, Your Honor, I just want a clarification on your ruling on their motion for summary judgment. There's the aspect of the contract claims that go to the timing of how they performed. Is Your Honor dismissing those contract claims as well?

THE COURT: No. What I'm --

MR. BERNDT: Thank you, Your Honor.

THE COURT: Hold on. I just want to be clear. The only part of their motion that I'm granting is seeking to dismiss your conversion claim, and to the extent that you are proceeding on a breach of contract theory, I'm saying the only thing you can proceed on there is breach of warranty.

Is the issue that's raised -- it's number 2 in their statement of the issues presented. This is where you have a claim that's based on the alleged defective product that you picked up, and to the extent that your counterclaim is based on that, I'm going to treat it as a breach of warranty claim and not a breach of contract claim. Other than that, the motion is denied.

MR. BERNDT: Thank you, Your Honor. I understand.

THE COURT: But I want to ask about the schedule and talk about what's next. I haven't done a deep dive in the docket.

Mr. Berndt, do you have any opinion as to whether the expert witness deadline has -- oh, I guess I would have to do a careful look in here. Well, I can look later.

Did you have a view as to whether there's still Daubert motions?

MR. BERNDT: We believe there are.

THE COURT: Mr. Lannen, do you?

MR. LANNEN: I don't know the answer. I think you

terminated certain deadlines. I don't know what was included, at that moment.

THE COURT: Do you want to file Daubert motions?

MR. LANNEN: No, we don't need to file any Daubert motions. I mean, if you give us the opportunity, we will, but we are fine if that deadline has passed past.

THE COURT: Well, look, I haven't done a deep dive into it, but my initial case management order couples the dispositive motion and challenges to experts together, and puts a deadline in there. It looks like some of the later stipulations used the term, "dispositive motion cutoff," and didn't capture challenges to experts. But it is not clear to me, which way that cuts. That may mean the expert deadline expired a hell of a long time ago. I can tell you I keep these two together on purpose. So my sense is there's no more Daubert challenges, that ship has sailed, but I haven't focused on that.

Why don't you guys have a seat for a minute. I want to talk to you for a minute about what makes sense for next steps.

I know there has been a lot of discussion in terms of trying to resolve this, and last time you were with Mr. Pozza. Is that correct, Mr. Lannen?

MR. LANNEN: Yes, sir.

THE COURT: Was that, at all, productive?

MR. LANNEN: No, notwithstanding Mr. Pozza did a nice job.

THE COURT: Did anything that happened today make a reinstituting of settlement discussions, from your perspective, worthwhile, including a possible settlement conference with me or one of the other district judges here.

MR. LANNEN: I suspect so.

THE COURT: Mr. Berndt?

MR. BERNDT: I suspect so, Your Honor.

THE COURT: How far apart were you guys with Mr. Pozza, without telling me whose number?

MR. LANNEN: Extremely.

THE COURT: Has anybody considered a settlement here, along the lines of some sort of a win/win settlement, where the parties resume a business relationship so that it can be a lot less in terms of cash and everybody profits. Mr. Lannen?

MR. LANNEN: The plaintiff has considered it. I don't think the defendant has considered it. The defendant has, in fact, left the Michigan market.

MR. BERNDT: Your Honor, we certainly made numerous offers along those lines early on in this case, before and after it was --

THE COURT: Is there any reason -- we can go off the record for this, Rob.

(An off-the-record discussion was held at 11:01 a.m.)

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(Court reconvened at 11:06 a.m.; Court, Counsel and all parties present.)

THE COURT: Okay. We had a good discussion off the record. Thank you for that. We talked about a possible path forward. The parties are going to talk to their clients and talk to each other. The options we are exploring are reconvening the facilitation with Mr. Pozza, in light of these rulings, to see if that shakes thing loose. Possible settlement conference with me presiding or a possible settlement conference with Magistrate Judge Morris or a possible settlement conference, if I can beg one of my district court colleagues to do it, which I -- I don't want anybody to put false hope into that. They are as busy as I am and they are not looking for somebody else's case to do a settlement conference on, but it is, at least theoretically, possible.

So I will ask my staff to reach out to you guys and find a time for this video conference in not sooner than a week, but talk to your clients and talk to each other. What I don't want to do is -- I want to underscore this, especially if I'm presiding over one -- is waste time. If you guys talk to your clients in light of the rulings, you

know where you were and you both say there's meaningful room on both sides, or a meaningful willingness to consider some sort of alternative solution, which is always my favorite, then let's do it. I'm willing to do it. I'm willing to ask one of my colleagues, but I will tell you if I show up and you're multiple, multiple million dollars apart and no one is willing to make serious movement, or even worse I ask one of my colleagues to do that, I think the technical term is, I'm going to be pissed. So let's avoid that, if there is not a real appetite to have serious settlement discussions. Nobody is going hurt my feelings; they are paying me to try cases, so we can do that, but that's what I will be looking for is honest report from you guys in a little bit over a week.

Anything else, Mr. Lannen?

MR. LANNEN: No, sir.

THE COURT: Mr. Berndt?

MR. BERNDT: No, sir.

THE COURT: Okay. Thank you very much.

THE LAW CLERK: All rise. Court is in recess.

(Proceedings concluded at 11:22 a.m.)

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C E R T I F I C A T I O N

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of Hello Farms vs. GR Vending, Case No. 21-10499, on Monday, July 29, 2024.

s/Robert L. Smith
Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 08/15/2024
Detroit, Michigan