UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiff/Counter-Defendant,

Case No. 21-10499
Hon. Matthew F. Leitman
Mag. Patricia T. Morris

vs.

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

Defendants/Counter-Plaintiffs.

HELLO FARMS TRIAL BRIEF

STATEMENT OF THE ISSUES PRESENTED

1. Defendants agreed to purchase two cannabis harvests, from Hello Farms. ECF No. 1-1, PageID.29-38. Defendants told Plaintiff they can arrange the product for pick up in Lots in a manner where Plaintiff can control potency and therefore predict price under the contract. Plaintiff did nothing less than Defendants instructed. Yet, when the market prices fell, Defendants refused to pick up and pay for any more than 2,000 pounds of the 16,000 total pounds harvested in 2020. Are Defendants liable for contract damages?

Hello Farms says: Yes.

2. The implied covenant of good faith and fair dealing is a promise that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. Defendants do not identify any damage for their implied covenant claim or right under the contract that was destroyed or impaired by Hello Farms, and to allow the claim to proceed would require overriding express contract terms. Are the Defendants without a viable breach of contract claim based on the implied covenant?

Hello Farms says: Yes.

3. Under Michigan law, a plaintiff must prove goods did not conform to a warranty at the time of sale or within the time covered by the warranty. Here, all 2,000 pounds of product that Defendants picked up and paid for were tested and satisfied the contract's testing requirements that apply to heavy metals, additives and pesticides prior to delivery. Defendants consumed those entire pounds and identified no damages in resales of the product. Should the Court dismiss Defendants' breach of warranty claims that a portion of the product was defective before trial since Defendants will not be able to present admissible evidence for that claim?

Hello Farms says: Yes.

4. Are Defendants liable to place Hello Farms in the same position it would have been had all of the product from the 2020 and 2021 harvests been purchased at the contract price?

Hello Farms says: Yes.

INTRODUCTION

On October 5, 2020, GR Vending or "one of its affiliates" ("Curaleaf") agreed to purchase a minimum of two annual cannabis harvests (2020 and 2021) from Hello Farms "Original Agreement." **Ex. 2** to Pl. MSJ, ECF No. 128-3. Curaleaf affiliate Cura MI guaranteed those obligations. *Id.* at 5. The price was $2,100/pound for "A" buds, $1,000/pound for "B" buds, and $500 for "trim." For 2021, these prices could adjust, but only +5% to -15% depending on State reported average retail prices. *Id.* at 3.

Immediately after signing the Original Agreement, cannabis prices began to drop significantly. On October 23, 2020, a little over two weeks after signing the Original Agreement, Curaleaf decided it needed to "renegotiate." On November 23, 2020, the parties signed an Amended and Restated Purchase Order Agreement ("Agreement"). **Ex. 3** to Pl. MSJ, ECF No. 128-4. Under the amended Agreement, the product was no longer separated between "A" buds, "B" buds, and "trim." *Id.* at 1. It was "blended" together, not remediated, and sold as "Biomass." *Id.* The product no longer required passing State microbial tests, but it still had to pass for heavy metals, additives, and pesticides (each such passing test, a "Passing COA"). *Id.* at 1-2. The price was reduced to $1,000/pound and scaled down if THC potency decreased below 12% per "Lot."

Delivery was to be in Lots, consisting of between 500 and 1,000 pounds. *Id.* at 3. Each 50 pounds within a Lot was called a "Batch." Each Batch needed a Passing COA. *Id.* Curaleaf was required to pay within seven days of receipt of a Passing COA and an invoice.

Curaleaf purchased the first 2,000 pounds of the 2020 harvest. ECF No. 36, PageID.2814 at ¶¶ 46-47. But when Curaleaf realized the ongoing market slide meant it was going to lose money, Curaleaf stopped buying. *See id.* at ¶¶ 48, 52. In January 2021, Curaleaf again asked to modify the Agreement by decreasing the price, this time from $1,000 to $400/pound and to extend the time to pay by 14 weeks. Curaleaf also suggested the parties "revisit market prices" for the 2021 harvest "and agree on a new cost/pound schedule based on then current market rates." There was no suggestion Hello Farms breached the Agreement.

Hello Farms declined a second reduction. Only then did Curaleaf hire counsel and allege Hello Farms "first" breached, alleging that Hello Farms did not deliver in a reasonable amount of time and that the cannabis was not merchantable. *Id.* at Counterclaim ¶¶ 51-63, PageID.2844-46. But those assertions are demonstrably false, not serious, and after-the-fact attorney inventions, as detailed below. Curaleaf breached because the market continued its nosedive and there were cheaper supplier options elsewhere. Curaleaf's breach caused Hello Farms injury in excess of $34,000,000.

STATEMENT OF FACTS

A. Original Agreement.

On August 26, 2020, Curaleaf increased the offer to $700/pound for "A" buds and $500/pound for "B" buds and "trim." **Ex. 8** to Pl. MSJ at 3, ECF No. 128-9. Curaleaf tried to convince Hello Farms to take the deal by emphasizing this was a two-year commitment, which is "incredibly important" because it fixes a right for Hello Farms to sell "future biomass at an agreed upon price." *Id.* at 1. Sciarrone warned cannabis markets that transition from medicinally legal to recreationally legal "see massive price decreases for wholesale biomass within 12 months of initiation." *Id.* He warned "Michigan is indeed headed in that exact direction." He attached a chart of California, Oregon, and Nevada showing a 26% price drop because of additional supply and "increased competitiveness." *Id.*

Sciarrone put into bold and italics that "***[w]e are committing to take that fear off the table for you for potentially 24 months of harvest***." *Id.* He "hope[d] Hello Farms consider the gravity of this commitment, and the potential impact to the future of" its business. *Id.* Negotiations continued.

By October 3, 2020, Curaleaf circulated proposed "final versions." **Ex. 26** to Pl. MSJ, ECF No. 128-27. The Parties signed the Original Agreement on October 5, 2020. **Ex. 27** to Pl. MSJ, ECF No. 128-28.

B. Buyer's Remorse.

Curaleaf soon became aware that the retail price for flower had fallen to $2,400-$2,600/pound at best, far below the $3,700/pound price point Curaleaf internally projected. **Ex. 37** at 1, to Pl. MSJ, ECF No. 128-38. Curaleaf COO Davidson realized Curaleaf will not make money if it is purchasing "A" buds from Hello Farms at $2,100/pound but the market prices for Curaleaf to sell were down to $2,400-$2,600/pound. *Id.* at 1. By October 28, 2020, Matt Darin (Curaleaf's Vice-President of Strategy and CEO following Bayern's departure) and Sciarrone were tasked to renegotiate with Hello Farms. **Ex. 42** to Pl. MSJ, ECF No. 128-43.

C. Amended Agreement.

On October 29, 2020, Curaleaf asked Hello Farms for a large price decrease to $1,000/pound for "A" buds and $750/pound for "B" buds. **Exs. 44 & 45** to Pl. MSJ, ECF Nos. 128-45 & 46. By November 11, 2020, Curaleaf's offer became an "all Biomass" restructure combining "A" buds, "B" buds, and "trim," (defining it together as "Biomass") and paying $1,000/pound for product testing at 12% THC potency or greater. **Ex. 46** to Pl. MSJ, ECF No. 128-47. Hello Farms expressed concern about mixing the product adequately across the harvest to ensure it averaged 12% THC, because up until that point the harvest had been separated into A buds, B buds, and trim. **Ex. 47** to Pl. MSJ, ECF No. 128-48. Curaleaf then suggested a rebate to Hello Farms in the event the harvest averaged below 12%. **Ex. 48** to Pl. MSJ, ECF

No. 128-49. Negotiations became tense at times and communications about the harvest slowed. **Ex. 49** to Pl. MSJ, ECF No. 128-50.

On November 13, 2022, Hello Farms held a recorded call with Conroy and Sciarrone to try to iron out terms of the amended Agreement. **Ex. 50** to Pl. MSJ, ECF No. 128-51. Near the end of the call, Sciarrone told Farah that Hello Farms can rest assured the harvest will have average 12% THC potency across the whole harvest and each Lot because Hello Farms is allowed to perform an amalgamation of the COAs. Sciarrone states:

> **You're** gonna be the one with eyes on the potency levels of <u>each batch</u>, not the lab.

Id. at 20:4-5.

He adds:

> Like I said before, <u>it's an amalgamation of the COA's **you perform**</u> that generates the potency for the whole harvest, not what our lab does.

Id. at 20:5-8.

> It's gonna be calculated before it even gets there – all of the harvest even gets there."

Id. at 20:8-9.

Farah responded: "Yeah, I'll agree with that." *Id.* 20:10. He adds, "I want to get you guys **one massive lot** at this point." *Id.* at 20:12-13. Sciarrone responds: "**We are ready**. We're excited, we're ready." *Id.* at 20:16-18.

Bayern agreed with Sciarrone's oral direction. He was asked:

Q: You don't have to assemble the lot exactly in accordance to how the batches came back from the lab?"

A: Right. And it wouldn't make sense to do that. Because again, the pricing is by THC level. *I would imagine that you would want to amalgamate the COAs by THC so you can get consistent lots.*"

Ex. 1 at 109:4-11, to Pl. MSJ, ECF No. 128-2.

On November 17, 2020, Hello Farms sent Curaleaf a draft of the proposed amended Agreement consistent with the call from November 13, 2020. **Ex. 53** to Pl. MSJ, ECF No. 128-54. It was for two years' harvests. The "Deposit" was still for only one harvest at a time. As before, there was no deadline for deliveries. As before, Hello Farms was required to select a lab to be approved by Curaleaf.

The testing requirement was the same, except microbials are removed ("Passing COAs"). That Hello Farms would prepare Lots and Batches was the same. Biomass was now defined as unremediated. There was no distinction between "A" buds, "B" buds, or "trim." *Id.* The biggest difference was the addition of the sliding scale on price for Biomass testing below 12%.

Darin testified Curaleaf proposed these renegotiations because it thought it could still make money at $1,000/pound. **Ex. 5** at 210:1-4, Pl. MSJ, ECF No. 128-6. Though the proposal involved turning the entire harvest into oil, Curaleaf anticipated it could still make an $8.2 Million profit. *Id.* at 211:4-22; *see also* **Ex. 61** to Pl. MSJ, ECF No. 128-62.

On November 23, 2020, Hello Farms signed the "final," "clean" proposed Amended Purchase Order Agreement from **Ex. 60**; *see also* **Ex. 62** & **63** to Pl. MSJ, ECF Nos. 128-63 & 64. On November 24, 2020, Curaleaf returned the fully signed Agreement. **Ex. 64** to Pl. MSJ, ECF No. 128-65. Curaleaf signed the Agreement recognizing there were variables to the dates of delivery and without any contractual expectation to extract oil from Hello Farms material in the fourth quarter of 2020. **Ex. 1** at 97:8-22, **Ex. 13** at 149:17-25, 150:1-20, 161:6-25, 162:1, 182:1-25, 183:1-13, 184:11-25, 185:1-16, **Exs. 54**, **55**, **56,** Pl. MSJ, ECF Nos. 128-2, 14, 55-57. Curaleaf's own records show it knew that the plan was to *begin* the COA testing on Tuesday, November 24, 2020, the day after the Agreement was signed. It cannot be disputed that there is an unknown length of time to obtain test results, prepare Lots and receive state authorization to transport, and to pay, before there could be receipt.

D. Hello Farms's Performance.

On November 24, 2020, the first samples for testing were collected and sent to an independent laboratory, Infinite Chemical Analysis Labs, LLC ("Infinite CAL"). **Ex. 68** at 131:19-25 and 132:1-19,Pl. MSJ, ECF No. 128-69. Ramos was present for Curaleaf. **Ex. 65** to Pl. MSJ, ECF No. 128-66. By November 27, 2020, the day after Thanksgiving, Infinite Cal had sampled 106 batches, or 4,770 pounds of Biomass. The 2020 total harvest weight was 16,316 pounds. **Ex. 69** to Pl. MSJ, ECF No. 128-70; *see also* **Ex. 68** GR Vending 30(b)(6) at 179:25 and 180:1-2; **Ex.**

70 Cura MI 30(b)(6) at 5:17-25, 6:1-25, and 7:1-10; **Ex. 71** (confirming text messages between the Parties), to Pl. MSJ, ECF Nos. 128-69, 71, & 72.

The Agreement provides Hello Farms the right and obligation to select the lab to test and issue the test results.

Defendants do not dispute that Infinite CAL issued Passing COAs for the entire 2020 harvest. Answer ¶¶ 72, ECF No. 36, PageID.2819; *see also* **Ex. 75** at 200:14-15, **Ex. 5** at 241:4-6 and 258:13-23; **Ex. 4** at 71:8-10; **Ex. 13** at 165:8-14; **Ex. 6** at 284:13-16 and 107:12-21, Pl. MSJ, ECF No. 128-5, 6, 7, 14, & 76.

On Friday, December 4, 2020, Hello Farms received the first round of COAs from Infinite CAL, all of which were Passing COAs. **Ex. 73** at 2, Pl. MSJ, ECF No. 128-74. Farah immediately sent the results to Ramos. **Ex. 80** at 2, Pl. MSJ, ECF No. 128-81. He specified "these are not in order of how they will be received in lots." *Id.* That is consistent with direction from Sciarrone and supported by Bayern. **Ex. 56** at 20:1-5, and **Ex. 1** at 109:4-8, Pl. MSJ, ECF Nos. 128-2 & 57.

Ramos's email account with Defendants, however, was too small to receive the attachments of results. **Ex 75** at 192:12-25, to Pl. MSJ, ECF No. 128-76. On December 5, 2020, Farah and Ramos then used Ramos's personal account and they arrived. **Ex. 74** at 2, Pl. MSJ, ECF No. 128-75. Chris Mastro, one of Curaleaf's Directors of Cultivation, agreed the results were what he would expect. **Ex. 75** to Pl. MSJ, ECF No. 128-76. He stated, "with size, Curaleaf wins." *Id.*

Infinite CAL's sampling completed on or about December 7, 2020. **Ex. 76** to Pl. MSJ, ECF No. 128-77. On December 9, 2020, Hello Farms sent another set of COAs. **Ex. 77** to Pl. MSJ, ECF No. 128-78. On December 11, 2020, Farah sent Curaleaf a third round of COAs on December 11, 2020. **Ex. 78** to Pl. MSJ, ECF No. 128-79. By December 14 "or" 15, 2020, Curaleaf, confirmed Hello Farms delivered Passing COAs for the entire harvest to Curaleaf showing above 12% THC average per Lot. **Ex. 75** at 200:14-15, 189:20-23, and 131:1-4, to Pl. MSJ, ECF No. 128-76.

Also on December 14, 2020, Curaleaf just started onboarding Hello Farms as a new vendor. **Ex. 68** at 226:16-20; *see also* **Ex. 80** (sending onboarding form to Hello Farms), Pl. MSJ, ECF Nos. 128-69 & 81.

On December 15, 2020, Hello Farms sent Ramos Invoice No. 1001 for Lots 1 and 2. **Ex. 81** to Pl. MSJ, ECF No. 128-82. The Invoice shows Lot 1 and Lot 2 and the Batches that make up each Lot by each "Metrc tag number." *Id.* at 2-5; *see also* ECF No. 25-5, PageID.1545-1548. On December 16, 2020, Curaleaf internally circulated Invoice No. 1001 for Lot 1 and Lot 2. **Ex. 83** to Pl. MSJ, ECF No. 128-84. Ramos confirmed the 16,000 pounds and Agreement price. **Ex. 84** to Pl. MSJ, ECF No. 128-85.

On December 17, 2020, Farah sent Ramos Invoice No. 1002 for Lots 3 – Lot 13. **Ex. 85** to Pl. MSJ, ECF No. 128-86; *see also* ECF No. 25-7, PageID.1553-1569, Invoice 1002. Curaleaf admits the first 13 Lots, or 13,000 pounds, was available for

pickup by December 17, 2020. **Ex. 86** at 306:1-8, Pl. MSJ, ECF No. 128-87. Also on December 17, 2020, Ramos quoted the Agreement to his colleagues and noted Hello Farms has allowed delivery of one Lot before payment, but that the Agreement requires payment prior to pick up. **Ex. 87** to Pl. MSJ, ECF No. 128-88.

E. Cura decides to breach.

Strikingly, Ramos suggested Curaleaf renegotiate or "exit" the Agreement because it could buy oil on the market for $20 per gram. He warned, given the $1,000/pound Hello Farms contract price, Curaleaf was paying $31 per gram for oil. *Id.* He did not assert any breach or provide any reason other than price to "exit." *Id.*

On December 18, 2020, Hello Farms shipped the first Lot and Curaleaf accepted it, and then paid late. **Ex. 88** to Pl. MSJ, ECF No. 128-89. Also on December 18, 2020, Curaleaf confirmed internally that it should finally pay Hello Farms for Lot 1 because it had received the entire harvests' Passing COAs "for sure." **Ex. 89** to Pl. MSJ, ECF No. 128-90**.**

On December 23, 2020, Farah sent Sciarrone and Darin Invoice 1003. **Ex. 92** to Pl. MSJ, ECF No. 128-93; *see also* ECF No. 25-9, PageID.2331-2335. Thus, within 30 days of signing the Agreement, the entire 2020 harvest was tested, passed testing, prepared into Lots, invoiced, and available for pickup. Not only was this timing consistent with the Agreement terms and discussions, expert Bartek Kupczyk testified that this period is "very reasonable." **Ex. 93** at 68:3-5, Pl. MSJ, ECF No.

128-94. Curaleaf did not offer any primary expert report or rebuttal to this opinion on reasonableness of delivery timing.

F. Curaleaf's Documents Confirm Intentional Breach Because of Price Drop.

During negotiations between contracts, Curaleaf was preparing to receive no product from Hello Farms in 2020. Instead, it was shopping for other potential oil suppliers. On December 23, 2020, Ramos received a quote from proposed processor Trucenta about supplying Curaleaf oil. **Ex. 91** at 4, Pl. MSJ, ECF No. 128-92. Ramos was asked to, and did, project what the Hello Farms Biomass would produce in oil so that Curaleaf could analyze the Trucenta offer.[1] *Id.* at 2-3.

Brian Kiniry, Curaleaf SVP of Operations, observed that, with Ramos's projections, Curaleaf had enough oil for the first quarter of 2021, and asked if this purchase was intended for quarters two and three of 2021. *Id.*

Instead of answering, Ramos again identified market price decline and availability of cheaper options as the purpose of his proposal to buy from a supplier other than Hello Farms. *Id*. Ramos suggested his point to his colleagues was to "determine if there is ample supply in MI, under $32 [per gram], to better our margins and increase our selling rate, wherein, we do not purchase the Hello Farms material **due to its nearly double *market* cost**." *Id.* at 2.

[1] Trucenta is a processor that can distill Biomass into Oil.

In discovery, Plaintiff's counsel asked Ramos whether there was any reason, other than price, that Curaleaf was considering not paying for the Hello Farms 2020 product. He testified: "**I'd say it's the pricing**." **Ex. 68** at 319:10-16; *see also* **Ex. 70** at 5:20-25 and 6:1-3 (same for Cura MI), Pl. MSJ, ECF Nos. 128-69 & 71.

On December 30, 2020, in an email chain in which Ramos was suggesting Curaleaf "not purchase Hello Farms material due to its nearly double market cost," Darin answered what Ramos should tell Hello Farms: "**I would keep them warm for now but say we can't commit until after we get thru the new year**." **Ex. 94** at 1, Pl. MSJ, ECF No. 128-95. Darin did not claim Hello Farms was in breach. Only after this case was filed did Darin admit in his deposition that, had he been Hello Farms in this scenario, he would have wanted to know Curaleaf was concealing that it did not intend to pay. **Ex. 5** Darin Dep. at 137:8-11 and 142:15-19, Pl. MSJ, ECF No. 128-6.

G. Curaleaf Again Asks for a Price Reduction.

On January 8, 2021, Sciarrone emailed Hello Farms and proposed dropping the price from $1,000/pound to $400/pound "for the Biomass as stipulated in the agreement." **Ex. 95** to Pl. MSJ, ECF No. 128-96.

He did not suggest Hello Farms had breached. He also asked to extend the time to pay by 14 weeks, and "revisit market prices" for the 2021 harvest "and agree

on a new cost/lb schedule based on then current market rates." *Id.* Hello Farms declined.

H. The 2021 Harvest.

For 2021, the parties agreed the price would be no less than $850 per pound where average THC levels were 12% and greater. ECF No. 1-1 -Agreement at PageID.32, 35. Like the 2020 harvest, 2021 was to include "no less than the entire plantable land of the outdoor grow facility in Au Gres, Michigan." *Id.* at PageID.29. Hello Farms' 2021 harvest was over 37,000 pounds and was sold for about $2.2 Million, a figure Kupczyk opined was reasonable. **Ex 93** at 64:9-22 and 202:5-6, to Pl. MSJ, ECF No. 128-94.

I. Defendants Admitted their Defenses Are Untenable.

Defendants' defense is that Hello Farms should have prepared at least one Lot for pickup on or about December 8, 2020, since it had Passing COAs for at least one Lot on that date. **Ex. 68** at 203:6-11, to Pl. MSJ, ECF No. 128-69. Defendants then contradict themselves as to the importance of that date and simply state that "mixing and matching" the COAs to prepare Lots from an amalgamation of Batches (and therefore different COAs) is the breach of the Agreement. It did not necessarily first accrue on December 8, 2020 (but not before then either, *id.* at 210:16-19), yet no other date was specified by Curaleaf's Rule 30(b)(6) representative, *id.* at 199:15-19, 201:25 to 202:1, 203:2-11.

Curaleaf never asked Hello Farms to send an invoice so that the Biomass could be picked up more quickly, as the Agreement requires, **Ex. 68** at 149:1-25 and 150:1-6, to Pl. MSJ, ECF No. 128-69.

Other undisputed facts are:

- Passing COAs for the entire harvest were delivered no later than December 15, 2020, **Ex. 68** at 200:14-15, 189:20-23, and 131:1-4, Pl. MSJ, ECF No. 128-69;
- The first 13,000 pounds were available for pickup by December 17, 2020, **Ex. 68** 306:1-8, Pl. MSJ, ECF No. 128-69;
- Hello Farms asked Darin to explain his conclusion that Hello Farms first breached the Agreement. He responded: "I don't have a further answer to that question." **Ex. 5** at 275:20-23, Pl. MSJ, ECF No. 128-6;
- He admitted there had been no discussion within Curaleaf that Hello Farms had "first" breached the Agreement until after payments were past due. *Id.* at 280:23-24 and 281:1-3;
- Darin testified he had "no reason" payments were not made to Hello Farms within one week of the invoice dates. *Id.* at 281:6-9;
- He has "no reason" to dispute that the Passing COAs delivered were consistent with the requirements of the Agreement. *Id.* at 281:20-22 and 282:1.

When asked if price had anything to do with why Curaleaf did not pay for the entire 2020 harvest, Darin testified "I don't – I don't have a position on that – on that." *Id.* at 284:11-16. He conceded that he instructed Sciarrone as late as January 8, 2021, to try to purchase the entire 2020 harvest but for only $400/pound, with no mention of any defect to it or breach of any kind by Hello Farms. *Id.* at 286:21-24 and 287:1-22; *see also* **Exs. 5** and **95** to Pl. MSJ, ECF No. 128-6 & 96.

Darin admits the Hello Farms product Curaleaf purchased was processed into oil, turned into finished goods, and sold at Curaleaf's retail stores or to wholesale customers, without a loss. **Ex. 5** 143:1-2, Pl. MSJ, ECF No. 128-6.

Hello Farms asked Conroy: "Whether it's fair that Hello Farms could not sell the 2020 product [to third parties] for the prices Curaleaf agreed to pay?" She testified: "**No**." **Ex. 4** at 109:1-18 and 110:1-15, Pl. MSJ, ECF No. 128-5. She also testified there is massive oversupply in Michigan. *Id.* at 97:11-13. Conroy does not know why Curaleaf breached the Agreement by not paying Hello Farms as required before receiving the Biomass. *Id.* at 100:1-4, 2-25, and 17-21. But that is not unusual for Curaleaf, she testified. *Id.*

ARGUMENT

A. Breach of Contract

Hello Farms seeks judgment in its favor on Counts I and II of its Am. Comp. for breach of contract and breach of guaranty and dismissal of Curaleaf's contract

claim. To prevail on a breach of contract claim, the plaintiff must establish (1) the existence of a valid contract, (2) the terms of the contract, (3) that the defendant breached those terms, and (4) that the plaintiff was injured as a result. *In re Brown*, 342 F.3d 620, 628 (6th Cir. 2003) (interpreting Michigan law).

There is no dispute that there is a valid contract between the Parties. The terms required Curaleaf to purchase Hello Farms' entire 2020 and 2021 cannabis harvests at a set price for all Biomass with Passing COAs. Hello Farms harvested over 16,000 pounds of Biomass in 2020, with Passing COAs, within weeks of signing the Agreement. Hello Farms invoiced Curaleaf on December 15, 17, and 23. The Agreement required Curaleaf to pay the invoices within seven days. It paid Invoice 1001, late by agreement, and Curaleaf never paid Invoices 1002 and 1003, which were due to be paid on December 24 and 30, respectively. Curaleaf first breached the Agreement when it refused to pay for Invoice 1002 on or before December 24, 2020. Hello Farms was injured when it had to sell its 2020 and 2021 harvests for less than the amount Curaleaf committed to paying for those harvests in the Agreement.

Curaleaf's main "defense" to Hello Farms's claim that Curaleaf failed to pick up and pay for the entirety of the 2020 harvest is that they are "excused" because of alleged breaches by Hello Farms. ECF No. 36, PageID.2842, ¶¶ 38-48, 71. Defendants say the Agreement required delivery of Lots on a "rolling basis," and that "lots were ready for pick-up," but that Hello Farms "delayed" delivery of test-

results and cannabis for "weeks." *Id.* These "actions" were allegedly performed in "bad-faith" and "deprived" Defendants of the Agreement's benefits. *Id.* Defendants conclude the "delay" of the deliveries was "unreasonable." *Id.*

Defendants also make fledgling reference in Counterclaim Count I (and II and III) that they independently tested Hello Farm's Biomass and that it was unmerchantable. *Id.* at ¶¶ 59-65, (Count II and III at ¶¶ at 83-86, 91-92). There is no chain of custody, and Defendants admit that the samples Defendants rely on for these assertions were destroyed without an opportunity to cross-examine or test. That is aside from the fact that Curaleaf also admitted it has no damages based on the allegedly "unmerchantable product." **Ex. 68** at 263:18-24, 264:1-16, 298:21-22, Pl. MSJ, ECF No. 128-69. Finally, Defendants make passing reference to the implied covenant and return of deposit based only on the prior timing and merchantability assertions. These positions are untentable.

The question Curaleaf presents is whether Hello Farms breached the Agreement by failing to prepare lots "during the November 2020 harvest season" (ECF No. 36, ¶ 71.a), failing to "notify that lots of harvested biomass were ready for pickup" (*id.* ¶ 71.b), and failing to "perform its obligations under the Agreement within a reasonable time" (*id.* ¶ 71.c). None of these questions deserve a trial.

"A duty is a legal obligation that is owed or due to another and that needs to be satisfied. And a contractual duty is a legal obligation to do a certain thing."

Nichols v. STAT Radiology Med. Corp., No. 19-cv-11398, 2021 WL 1837749, at *4 (E.D. Mich. May 7, 2021) (citations and internal marks omitted) (Leitman, J.). "[A] contract is an agreement between parties for the doing or not doing of some particular thing and derives its binding force from the meeting of the minds of the parties ...."*SL Town Ctr. Realty, LLC v. Midwest Veterinary Partners, LLC*, No. 361664, 2023 WL 4835517, at *3 (Mich. Ct. App. July 27, 2023) (quoting *In re Mardigian Estate*, 312 Mich. App. 553, 562; 879 N.W.2d 313 (2015)). As stated by the Sixth Circuit, "[i]t is a basic tenet of contract law that a party can only advance a claim of breach of written contract by identifying and presenting the actual terms of the contract allegedly breached." *Northampton Rest. Grp., Inc. v. FirstMerit Bank, N.A.*, 492 F. App'x 518, 522 (6th Cir. 2012).

Curaleaf cannot identify a duty breached for timing of delivery. Curaleaf's defense is not based on any actual term of the Agreement. In fact, there are only two express "deadlines," i.e. duties, regarding release of cannabis and they rested not on Hello Farms, but on Curaleaf: (a) each installment of product must be paid for by Curaleaf within seven days of Hello Farms issuing an invoice and a Passing COA; and (b) each Lot had to be picked up *by Curaleaf* within 60 days. PageID.31.

Even though the only delivery deadline in the Agreement requires Curaleaf to pick up all Lots within 60 days of receiving Passing COAs and Invoices, Curaleaf alleges Hello Farms waited an "unreasonable" time to make the Lots available.

"Under the Michigan Commercial Code . . . the default time for performance, when not otherwise specified, is 'a reasonable time.'" *Skyline Prod., Inc. v. Posen Const., Inc.*, 430 F. App'x 485, 494-95 (6th Cir. 2011) (citing § 440.2309(1)). Hello Farms' delivery was objectively reasonable. Hello Farms made the first 2,000 pounds of Biomass available on December 15, 2020, with fully Passing COAs, within three weeks of executing the Agreement.

Curaleaf asserts that Hello Farms delayed delivery in order to guarantee each Lot exceeded 12% THC potency. That's false because Sciarrone specifically told Hello Farms that it could perform an amalgamation of the COAs (it is undisputed each COA correlates to a Batch) for the purpose of being able to see the "potency for the whole harvest." *Id.* at 4-8. There is no way Hello Farms could do that without reviewing each Passing COA. Of the 260+ Passing COAs, many show "completion" date of December 11, 2020. *See* ECF No. 12-8, PageID.266, as just one example. Some were "completed" as late as December 14, 2020. The first invoice was issued the following day, on December 15, 2020.

There is no unique "time is of the essence" provision here. Just the opposite. Curaleaf never attempted to pay and had to be reminded that Hello Farms released Biomass early, *before payment*, as an accommodation. **Ex. 88** to Pl. MSJ, ECF No. 128-89. It took weeks for Cannalicious to process (a period outside the parties' control) and months to receive processed oil back. **Ex. 97** to Pl. MSJ, ECF No. 128-

98. Every single witness also testified timing was impossible to predict because it is farming. Curaleaf was even prepared to source from other suppliers in December 2020. There was no agreement to prepare Lots that coincide with batches that reflect the first round of test results as soon as they were received. With no timing demands to the contrary, as a matter of law, the delivery was reasonable, in fact fast, and wholly consistent with the negotiations and direction given by Curaleaf.

Failing all else, the Agreement had no timing requirements on delivery. Expert Bartek Kupczyk testified the timing of delivery is "very reasonable." **Ex. 93** at 68:3-5, Pl. MSJ, ECF No. 128-94. Curaleaf did not and cannot rebut that position.

Likewise, there is no fact question that Hello Farms did not breach any duty to release test results more quickly. First, there is no such duty. For that reason alone, the Counterclaim and defense should fail. Regardless, the samples were taken the first date possible, November 24, 2020, the week of Thanksgiving, and Defendants knew that was happening and were present for the sampling. **Ex. 75**, 131:19-25 and 132:1-19 and **Ex. 71,** Pl. MSJ, ECF No. 128-70 & 76. On Friday, December 4, 2020, Hello Farms forwarded all Passing COAs from Infinite CAL to Curaleaf. **Ex. 80** at 2, Pl. MSJ, ECF No. 128-81. Hello Farms specified "these are not in order of how they will be received in lots." *Id.* That is consistent with direction from Sciarrone and supported by Bayern, who was "ready" for one massive Lot, not a "rolling basis." **Ex. 56** at 20:4-5 and **Ex. 1** at 109:4-6, Pl. MSJ, ECF Nos. 128-2 & 57.

B. Curaleaf Does Not Have a Viable Breach of Warranty Claim for Non-conforming Goods.

Curaleaf alleges that Hello Farms breached the Agreement by delivering Biomass with unacceptable levels of heavy metals, organic matter, and other contaminants. Countcl. ¶ 71.d to ¶71.2. The Court found that this is better understood as a breach of warranty claim. ECF No. 145 at PageID.8301.

Breach of warranty remedies are detailed in Mich. Comp. Laws § 440.2714 (breach in regard to accepted goods) and are only available after goods have been finally accepted. The Michigan the Supreme Court has noted the rule that damages calculations under a breach of warranty action "presumes that the purchaser will retain title to the goods." *Davis v. Forest River, Inc*., 485 Mich. 941, 941 (2009).

There is no dispute Curaleaf accepted the first 2,000 pounds of Biomass. Curaleaf admits it consumed the 2,000 pounds picked up and has no damages from the alleged breach of warranty. Curaleaf identifies no damages based on "unmerchantable product." **Ex. 68** at 263:18-24, 264:1-16, 298:21-22, Pl. MSJ, ECF No. 128-69. To the contrary, Hello Farms's product was "incredible." **Ex. 96** to Pl. MSJ, ECF No. 128-97; *see also* **Ex. 67** at ¶¶ 5-7, 9, Pl. MSJ, ECF No. 128-68.

Additionally, Curaleaf does not dispute that it failed to preserve the allegedly defective Biomass. The destruction was an exercise of ownership over the Biomass and failure to hold the Biomass with reasonable care at Hello Farms's disposition for a time sufficient to permit the seller to remove the Biomass. Curaleaf picked up

Lot 1 on December 18, 2020, and it picked up Lot 2 by January 4, 2021. But it did not allegedly send any portion for testing until January 14, 2021, *after* it failed to timely make payment for the balance of the 2020 harvest by Christmas Eve, and *did not* receive its alleged independently tested sample results until January 22, 2021.

Curaleaf then destroyed or failed to preserve the allegedly unmerchantable product, thereby impairing Hello Farms's ability to examine and test the sample or any portion of the 2,000 pounds. That destruction also inhibits Curaleaf from proffering evidence that it was Curaleaf's Biomass that was tested, or that the alleged results are accurate. And Curaleaf does not even allege that it properly preserved the Biomass between delivery and the alleged testing. Under these circumstances, Curaleaf has not alleged, and will never be able to prove, a breach of warranty. The warranty claims must be dismissed. *Austin*, at 513; *Gregory v. Cincinnati, Inc.,* 450 Mich. 1, 13 n.10 (1995); *Moisenko v. Volkswagenwerk Aktiengesellschaft*, 100 F. Supp. 2d 489, 493 (W.D. Mich. 2000).

1. Express Warranty

Even if the above defenses were not available, the warranty claims fail. A contract or warranty must be evaluated under the terms of the Uniform Commercial Code ("UCC"). MCL 440.1101 *et seq*. To maintain a claim for breach of an express warranty Curaleaf has the burden of proving a fact question:

(1) that Hello Farms made an express warranty, and

> (2) that the goods did not conform to the warranty at the time of sale or within the time period covered by the warranty, and
> (3) that Curaleaf notified Hello Farms of the nonconformity within a reasonable time after it discovered or should have discovered the nonconformity, and
> (4) that as a result of the nonconformity the Curaleaf sustained damages.

See Mich. Comp. Laws §§ 440.2313, 440.2607. Here, Curaleaf has failed to show any evidence for the second, third, and fourth elements.

Curaleaf cannot succeed on its claim. First, Curaleaf has no damages evidence as noted above. **Ex. 68** at 263:18-24, 264:1-16, 298:21-22, Pl. MSJ, ECF No. 128-69. Second, the evidence is incontrovertible the product was merchantable. *See* **Ex. 67** at ¶¶ 5-7, 9, **Ex. 90**, **Ex. 96,** Pl. MSJ, ECF No. 128-68 & 91. Third, there is no reasonable dispute that the Biomass was merchantable at the time of pick up. Generally, to be merchantable, the goods must "pass without objection in the trade under the contract description;" be "fit for the ordinary purposes for which such goods are used; and "run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved. *See* Mich. Comp. Laws § 440.2314(2) (defining merchantable under Article II of the UCC).

Curaleaf required Passing COAs at the time of pickup in December 2020. At the time of pick up, Curaleaf admits that Hello Farms provided Passing COAs for each and every Batch in the Lots delivered. Per the Agreement description, the Biomass would pass without objection in the trade, it was fit for its ordinary purpose,

and it ran within the variations permitted in the Agreement among all units involved. Curaleaf has no evidence to the contrary.

Further yet, for the spoilation reasons stated above, Curaleaf cannot rely on test results that Plaintiff cannot cross-examine. Curaleaf deprived Hello Farms "the fair opportunity to investigate and prepare for litigation." *Am. Bumper & Mfg. Co. v. Transtechnology Corp.*, 252 Mich. App. 340, 347 (2002) (explaining the purpose of the notice requirement under the UCC); *see also Austin v. Mitsubishi Elecs. Am., Inc.*, 966 F. Supp. 506, 511 (E.D. Mich. 1997). ("'[T]he defendant may be entitled to judgment as a matter of law because the plaintiff is unable, due to the unavailability of the evidence and negative inferences to offer evidence sufficient to support its case.'" (quoting *Beil v. Lakewood Engineering and Manufacturing Company,* 15 F.3d 546, 553 n.1. (6th Cir. 1994)).

Moreover, the assertions of unacceptable levels of metals, coliforms, organic matter, and yeast and mold are betrayed by the Passing COAs. Plus, microbial levels, which include yeast, mold, and coliforms,[2] were specifically excluded in the definition of Passing COA. Agreement at PageID.29-30.

Additionally, Hello Farms warranted that the Biomass was merchantable *at the time of delivery* to Curaleaf. Testing *weeks later by Curaleaf* (who owed

[2] There is no designation for organic compounds, outside of microbials, in Infinite CAL's COAs.

millions), says nothing about the merchantability at time of delivery, and nothing about the remaining 16,000 pounds, or worse yet the 37,000 pounds from 2021.

2. Implied Warranty

"To establish breach of implied warranty, the plaintiff must show that a defect in the product, attributable to the manufacturer, caused [the harm]." *Severstal N. Am., Inc. v. N. Am. Refractories, Co.*, No. 06-CV-10202, 2009 WL 1620115, at *13 (E.D. Mich. June 9, 2009) (quoting *Hartford Fire Ins. Co. v. Walter Kidde & Co. Inc.*, 120 Mich. App. 283 (1982)). "In a claim of breach of implied warranty, the product's lack of fitness for its intended use amounts to an actionable defect." *Kenkel v. Stanley Works*, 256 Mich. App. 548, 557 (2003). The implied warranty allows "the purchaser of defective goods [to] recover the benefit of the bargain (the difference between the value of the goods as delivered and the value the goods would have had they complied with the warranty)." *Neibarger v. Universal Cooperatives, Inc.*, 439 Mich. 512, 519-20 (1992).

For the same reasons set forth in breach of contract and express warranty sections, Curaleaf's claim for breach of an implied warranty should also be denied. The Biomass was merchantable at the time of pick up. Passing COAs were delivered. Curaleaf processed all 2,000 pounds of Biomass into oil without issue—and then sold it. Curaleaf has no damages.

D. Declaratory Judgments

Under the Declaratory Judgment Act, 28 U.S.C. § 2201, "[i]n a case of actual controversy within its jurisdiction . . . , any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." The Declaratory Judgment Act does not create an independent cause of action, but merely offers another form of relief. *Heydon v. MediaOne of Se. Mich., Inc.*, 327 F.3d 466, 470 (6th Cir. 2003) (citing *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 241 (1952)). Because Curaleaf's other claims fail, Curaleaf cannot maintain a declaratory judgment claim. They, therefore, should be dismissed.

CONCLUSION

For the reasons stated above, Hello Farms' claims are irrefutable and Curaleaf's claims fail as a matter of law.

Respectfully Submitted,
PLUNKETT COONEY

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