IN THE COURT OF COMMON PLEAS
RICHLAND COUNTY, OHIO

CITY OF MANSFIELD,	:	**CASE NO.: 2024 CV 0206**
	:	
Plaintiff,	:	**JUDGE BRENT N. ROBINSON**
	:	
v.	:	**DEFENDANTS PAGE EXCAVATING, INC., JEFF PAGE, AND LANDA PAGE'S MOTION TO DISMISS PLAINTIFF CITY OF MANSFIELD'S COMPLAINT**
PAGE EXCAVATING, LLC, *et al.*,	:	
	:	
Defendants.	:	**(HEARING REQUESTED)**
	:	

Pursuant to Rule 12(B)(6) of the Ohio Rules of Civil Procedure, Defendants Page Excavating, Inc., d/b/a Page Excavating, LLC ("Defendant")[1], Jeff Page, and Landa Page (collectively, the "Defendants"), by and through undersigned counsel, hereby move to dismiss all claims as to all parties. This Motion is supported by the attached Memorandum and incorporated herein. Pursuant to Local Rule 1.01(D), Defendants request a hearing on this Motion.

Respectfully submitted,

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[1] The Complaint names "Page Excavating, LLC" as a defendant in this action, seemingly due to the contract being entered into between the City and Page Excavating, LLC. However, there is not, nor has there ever been, an entity named "Page Excavating, LLC" that was registered to do business in the State of Ohio. Page Excavating, Inc. was the entity that performed the work pursuant to the contract at issue and, for all intents and purposes, the entity that entered into the contract with the City.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

This is a straightforward breach of contract action involving a public owner (the City) who entered into a demolition contract with a contractor (Page Excavating), but now the City claims that the work was not performed as required by the parties' contract. Plaintiff has overcomplicated this case and attempted to strong-arm the individual defendants (Jeff Page and Landa Page) by asserting erroneous tort claims and seeking punitive damages in a case that is the quintessential example of a contract dispute subject to the economic loss doctrine. Plaintiff claims against Jeff Page and Landa Page seek to hold them liable for nothing more than the alleged contract breaches by the company—which is not permissible under Ohio law.[2] Neither Plaintiff's tort claims nor its claims against the individual defendants should survive the pleading stage of this litigation. In fact, none of Plaintiff's claims against any of the Defendants should survive because the conduct forming the basis of Plaintiff's claims was expressly permitted by the Contract.

When you break down each of Plaintiff's claims, they all fail as a matter of law. First, the express terms of the Contract and the economic loss doctrine preclude Plaintiff's tort claims. Second, Plaintiff's fraud claim (Fourth Cause of Action) should be dismissed for failure to plead fraud with particularity in accordance with Civ.R. 9(B). Third, neither Jeff Page nor Landa Page executed Contract as an individual. Nor did they personally guarantee repayment of any principal or interest. Instead, Jeff Page executed the Contract on behalf of Page Excavating, and yet Plaintiff has hauled Jeff and Landa Page before this Court, naming them as individual defendants without any basis in law or fact for doing so, and by making a rote and conclusory claim against them attempting to disregard corporate formalities. Fourth, Plaintiff cannot satisfy the *Belvedere-*

[2] According to the Ohio Secretary of State, Page Excavating, Inc. was dissolved on or about June 29, 2022.

Dombroski test required to pierce the corporate veil because they cannot show that Jeff Page or Landa Page engaged in any conduct that was aimed at committing a *fraud* upon Plaintiff. Fifth, Ohio law does not recognize an independent cause of action for "piercing the corporate veil, and therefore that cause of action fails as a matter of law as to all parties. Lastly, the very conduct of which Plaintiff complains and therefore uses as the basis of all of its claims is expressly authorized by the Contract.

Therefore, Defendants respectfully requests that the Court strike and/or dismiss (1) Plaintiff's claims against the individual Page defendants, in their entirety and with prejudice and (2) Plaintiff's claims against Page Excavating for fraudulent misrepresentation/concealment (Fourth Cause of Action), negligent misrepresentation (Fifth Cause of Action), and "piercing the corporate veil" (Sixth Cause of Action). For the reasons set forth in this Memorandum, Plaintiff's Fourth, Fifth, and Sixth Causes of Action should be dismissed, with prejudice. Only Plaintiff's First, Second, and Third Cause of Action against Page Excavating should survive the pleading stage.

II. FACTUAL AND PROCEDURAL BACKGROUND[3]

On or about September 7, 2018, Plaintiff City of Mansfield, Ohio ("Plaintiff" or the "City") executed a contract with Page Excavating, LLC ("Page Excavating") pursuant to which Page Excavating would demolish a then-existing YMCA building located at 455 Park Avenue West, Mansfield, Ohio (the "Contract"). (Compl., ¶ 9, Ex. A). The Contract was awarded to Page Excavating based on its bid that Plaintiff deemed was lowest and best. (*Id.*, ¶ 10).

[3] Page Excavating, Inc., Jeff Page, and Landa Page vehemently deny any wrongdoing whatsoever and deny the allegations of malfeasance contained in the City's Complaint. Nevertheless, for purposes of this motion only ad as required by Ohio law and the civil rules, Plaintiff's factual contentions are presumed to be true; however, its unsupported conclusions are not. *See e.g., Morrow v. Reminger & Reminger Co., L.P.A.*, 2009-Ohio-2665, ¶7 (10th Dist.) (Citations omitted).

In exchange for a lump-sum payment of $512,000, Page Excavating was required to, among other things, remove the entire structure, including the basement slab, remove all fencing materials along Baldwin Avenue, remove all drives, aprons, and points of ingress/egress along Bartley Avenue and Baldwin Avenue, replace all sidewalks with a new 5-foot wide sidewalk and integral curb, install new curb ramps at the intersections of Baldwin and Bartley Avenues with Park Avenue West, install new curbs and gutters along Park Avenue West, install new catch basins, and install new conduit as directed by the Mansfield City Engineer. (Compl., Ex. A, pp. 1-2).

The Contract states, among other things, that "[m]asonry, concrete, concrete block, brick, and stone materials are permitted to be used as fill materials within the demolition site. These types of fill materials shall be acquired from within the demolition site limits only. Materials shall be broken, crushed, and compacted so as to not create any voids." (*Id.*, Ex. A, p. 1). Notwithstanding the above-referenced Contract provision, the "Building and Structure Demolition Specifications," attached to the Contract as "Exhibit A," provided that all demolished materials were to be removed from the site and the contractor was not to burn or bury any materials on site. (*Id.*, Ex. A, p. 13).[4]

The Contract also provided that "[n]o payment shall be due under this Contract until the Contractor has completed the Work in a satisfactory manner, as determined by the City, and Contractor has delivered to the City a complete release of all liens arising out of the Work." (*Id.*). Plaintiff was also permitted under the Contract to withhold payment to Page Excavating "on account of defective Work not corrected to [the] City's satisfaction." (*Id.*).

[4] While the Contract attached to Plaintiff's Complaint as Exhibit A contains a document purporting to be the "Building and Structure Demolition Specifications" that was a part of the Contract, Defendants question whether that document was actually part of the parties' written agreement since the bid documents issued at the time the project was let out to bid contained a similar document containing much different requirements for the demolition project – the same requirements that were set forth on the first page of the Contract. However, for purposes of this Motion only, Defendants presume that the attachment to the Complaint is accurate.

Plaintiff then issued a Notice of Award and a Notice to Proceed, which Page accepted, on or about September 7, 2018, the same day that the Contract was executed. (*Id.*, Ex. A, p. 10). Thereafter, Page Excavating completed the demolition work required under the Contract. After Page Excavating's work was complete, Plaintiff paid Page Excavating, in full, for the work completed. (Compl., ¶ 17). At no point prior to filing its Complaint did Plaintiff claim that Page Excavating's work was incomplete, not performed in a workmanlike manner, or otherwise not completed in accordance with the terms of the Contract.

Plaintiff filed its Complaint on or about April 24, 2024, almost six years after the Contract was executed, and two years after Plaintiff allegedly "discovered" the "contract breach and resulting damages." (Compl., ¶ 22). On August 23, 2024, Defendants, through counsel, filed an appearance and timely obtained an agreed extension of the deadline to respond to the Complaint in accordance with Local Rule 1.07. Defendants now seek dismissal of Plaintiff's Complaint in its entirety.

III. LAW & ARGUMENT

A. Legal Standard

A motion to dismiss under Civ.R. 12(B)(6) tests the sufficiency of the complaint. *Fulton Railroad Co. v. Cincinnati*, 2016-Ohio-3520, ¶6 (1st Dist.), citing *Darby v. Cincinnati*, 2014-Ohio-2426, ¶5 (1st Dist.). A complaint must be dismissed under Civ.R. 12(B)(6) when it appears that the plaintiff can prove no set of facts that would entitle it to relief. *Fulton Railroad*, citing *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. Moreover, unsupported conclusions of a complaint are not considered admitted and are not sufficient to withstand a motion to dismiss. *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490, 633 N.E.2d 1128, 1129, 1994-Ohio-39; *see also Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d

190, 193, 532 N.E.2d 753 (1988) (holding that unsupported conclusions are not sufficient to withstand a motion to dismiss).

A formulaic recitation of the elements of a cause of action is not enough; the plaintiff must allege operative facts. *Fink v. Twentieth Century Homes, Inc.*, 2010-Ohio-5486, ¶24 (8th Dist.) (the claimant's "obligation to provide the grounds of their entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"; the complaint must assert "factual allegations" that demonstrate the claimant's "right to relief"). Under that standard, Plaintiff has failed to state *any* cognizable claims against all Defendants.

B. Plaintiff's Tort Claims (Fourth and Fifth Causes of Action) and Punitive Damages Claims Against All Defendants Are Barred By The Economic Loss Doctrine.

"'[A] breach of contract does not create a tort claim.'" *425 Beecher, L.L.C. v. Unizan Bank, Natl. Assn.*, 186 Ohio App.3d 214, 927 N.E.2d 46, 2010-Ohio-412 (10th Dist.), quoting *Textron Financial Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App.3d 137, 684 N.E.2d 1261, 1270–71 (Ohio App. 9th Dist.1996); *see also Salvation Army v. Blue Cross and Blue Shield of Northern Ohio*, 92 Ohio App.3d 571, 636 N.E.2d 399, 403 (Ohio App. 8th Dist.1993) ("It is not a tort to breach a contract, no matter how willful or malicious the breach); *Teknol v. Buechel*, 1999 WL 33117391 (S.D.Ohio Aug.9, 1999) (same). This is known as the "economic loss rule," the well-settled doctrine which "prevents recovery in tort of damages for purely economic loss." *See Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St.3d 412, 414, 835 N.E.2d 701, 2005-Ohio-5409, ¶6. If a party could simply create a tortious action by alleging that a contracting party never intended to fulfill his promise there would be no effective way of preventing almost any contract case from being converted to a tort action. *See 425 Beecher, L.L.C.*, *supra* at ¶50 (citation omitted).

Indeed, "the **existence of a contract action** generally **excludes** the opportunity to present the same case as **a tort claim**[.]" *Textron* at 151, citing *Wolfe v. Continental Cas. Co.*, 647 F.2d 705, 710 (6th Cir.1981). That "is because where parties have reached an agreement '***protection for economic losses should arise under the bargained-for contract***.'" *Wells Fargo Bank, N.A. v. Fifth Third Bank*, 931 F. Supp. 2d 834 (S.D. Ohio 2013) (applying Ohio law) (emphasis added) quoting *Middleton v. Rogers Ltd., Inc.*, 804 F.Supp.2d 632, 639 (S.D. Ohio 2011) citing *Chemtrol Adhesives, Inc. v. American Mfrs. Mut. Ins. Co.*, 42 Ohio St.3d 40, 537 N.E.2d 624, 630–31 (1989) "Thus, where the gravamen of the complaint is an action for breach of contract, appending tortious language such as 'willful, intentional or malicious' will not transform the breach of contract action into one sounding in tort." *Tripoint, LLC v. Rhein Chemie Corp.*, No. 1:14 CV 360, 2014 WL 3785766 (N.D. Ohio Jul. 31, 2014), quoting *Salvation Army*, 636 N.E.2d at 403 (emphasis added).

"A tort exists only if a party breaches a duty which he owes to another independently of the contract, that is, a duty which would exist even if no contract existed." *Id.* quoting *Battista*, 538 F.2d at 117 (emphasis added). "Moreover, 'in addition to containing an independent duty of that created by contract, an action arising out of contract which is also based upon tortious conduct must include actual damages attributable to the wrongful acts of the alleged tortfeasor which are in addition to those attributable to the breach of the contract.'" *Id.* quoting *Textron*, 115 Ohio App.3d at 151; *see also Everstaff, L.L.C. v. Sansai Environmental Technologies, L.L.C.*, 8th Dist. Cuyahoga No. 96108, 2011-Ohio-4824, ¶ 28 (upholding a grant of summary judgment dismissing a plaintiff's claims for fraud when the plaintiff "**failed to allege actual damages beyond the breach of contract**" and that its "only additional damages stemmed from claims for punitive damages") (emphasis added); *Strategy Group for Media v. Lowden*, 5th Dist. Delaware

No. 12 CAE 03 0016, 2013-Ohio-1330, ¶ 33 (same result); *Zoar View Wilkshire, LLC v. Wilkshire Golf, Inc.*, 5th Dist. Tuscarawas County No. 07CA006, 2023-Ohio-2848, ¶¶ 30-37 (same result).

There are few exceptions to the economic loss doctrine, and claims for fraud and negligent misrepresentation can survive dismissal under the economic loss rule in limited circumstances, none of which apply here. *See Santagate v. Pennsylvania Higher Education Assistance Agency*, 2020-Ohio-3153, ¶39 (10th Dist.). "A plaintiff may pursue such a tort claim if it is 'based exclusively upon [a] discrete, preexisting duty in tort and not upon any terms of a contract or rights accompanying privity.'" *Clemens v. Nelson Fin. Group, Inc.*, 10th Dist. No. 14AP-537, 2015-Ohio-1231, ¶36, citing *Corporex* at ¶9; *accord Campbell v. Krupp*, 195 Ohio App.3d 573, 961 N.E.2d 205, 2011-Ohio-2694, ¶25 (6th Dist.) (in determining whether the economic-loss rule applies to tort claims, courts must examine whether the defendant owes any duties to the plaintiff "that [are] imposed by law instead of by contract."). However, "Ohio courts have limited the ability to bring a negligent-misrepresentation tort claim where a contract exists between business entities." *Universal Contracting Corp. v. Aug*, 1st Dist. No. C040114, 2004-Ohio-7133, ¶18, citing *Textron, supra*. Negligent misrepresentation claims are the most limited where, as here, the parties are sophisticated business entities. Indeed, "[w]hen the parties to a transaction are sophisticated business entities who have contracted to protect against economic loss, 'contract principles override * * * tort principles * * * and economic damages are not recoverable except as provided in the contract or by the rules of contract interpretation'" *425 Beecher, L.L.C., supra*, 2010-Ohio-412 at ¶51, quoting *Universal Contracting, supra*, at ¶20.

In *Tripoint, supra,* the plaintiff entered into a contract with the defendant, pursuant to which the defendant agreed to provide specialty chemicals for plaintiff's use. *Id.* at *1. The defendant mislabeled and misrepresented several of the boxes of chemicals as containing what the plaintiff

had ordered, when in fact, those boxes contained a different chemical. *Id.* at *2. The plaintiff asserted four claims against the defendant: negligent misrepresentation, breach of contract/warranty, negligence/Ohio Product Liability Act, and fraud. *Id.* The defendant moved to dismiss the claims for negligent misrepresentation, negligence/Ohio Product Liability Act, and fraud. *Id.* The court granted defendant's motion to dismiss those tort claims, holding as follows:

> Here, **in support of its** negligent misrepresentation, negligence, and **fraud claims**, plaintiff alleges that defendant **sent plaintiff "incorrectly and falsely" labeled boxes** indicating that they contained WBC–41, when in fact they did not. Plaintiff further alleges that defendant failed to use reasonable care in labeling the boxes. According to the complaint, defendant used recycled boxes and failed to remove the old labels in an effort to save cost**. Similarly, with regard to its breach of contract claim, plaintiff alleges that defendant breached the contract by "shipping the [m]islabeled [b]oxes" to plaintiff**. The Court finds that the **allegations supporting the tort claims are covered by the express terms of the contract**. In other words, the gist of all of plaintiff's claims stem from the fact that plaintiff delivered the wrong chemical to plaintiff in an improperly labeled box. (See, Compl. ¶ 33, in support of negligent misrepresentation claim: "[Defendant sent plaintiff ... boxes that were incorrectly and falsely labeled as containing [one chemical], when in fact those boxes did not contain [that chemical].") These **very same allegations support the breach of contract claim**. (*See*, Compl. ¶ 39, "By shipping the Mislabeled Boxes to [plaintiff] ... in response to [plaintiff's] purchase order ... defendant breached its contract and warranty obligations"). Because **no special duty exists** between the parties, plaintiff **cannot create a tort claim out of conduct that would amount to a breach of contract**. *Battista*, 538 F.2d at 118 (no special duty arises in an "ordinary contract between businessmen"). *See also, Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc*., 437 Fed.Appx. 381, 385 (6th Cir.2011) (commercial party cannot argue separate duty where the transaction occurred because it was required by contract). Compare, *Bowman v. Goldsmith Bros*., 109 N.E.2d 556, 558 (Oh.Ct.App.1952) (landlord owed duty of care to keep common areas safe even in face of implied contract). **To hold otherwise would transform a failure to perform under the terms of a contract into a tort claim, which is precluded by *Battista***.

Id. at *4 (emphasis added) (footnote omitted). Thus, where the allegations and damages allegedly supporting a tort claim are the same as those allegedly supporting a breach of contract claim, the tort claim fails as a matter of law. *See also Thornton v. Cangialosi*, No. 2:09-CV-585, 2010 WL 2162905, *2-4 (S.D. Ohio May 26, 2010) (applying Ohio law to grant a motion to dismiss fraud claim, noting that a breach of contract claim cannot coexist with a fraud claim where the

representations on which a plaintiff relies were the same allegedly unfulfilled promises that gave rise to the breach of contract claim); *RAE Assocs., Inc. v. Nexus Commc'ns, Inc*., 2015-Ohio-2166, 36 N.E.3d 757, ¶ 19 (10th Dist.) (affirming trial court's dismissal of fraud claim on grounds that the tort claim asserts no additional ground for recovery beyond that expressed in the claim for breach of contract).

Here, the Contract governs Page Excavating's obligations with respect to its performance on the Project, and the parties expressly agreed that the Contract only consists of the terms and conditions set forth therein, plus the Building and Structure Demolition Specifications, the Site Restoration Specifications, and certain EPA requirements, attached to the Contract as Exhibits A, B, and C, respectively. (Compl., Ex. A, p. 3, Section 2 "Contract"). Therefore, Plaintiff can only assert a breach of contract claim against Page Excavating arising out of Page Excavating's performance of the demolition work contemplated by the Contract.

Moreover, Plaintiff's Complaint alleges only economic losses. (*See, e.g.*, Compl., ¶¶ 21, 24, 32, 38, 41, 48, 51). The Complaint alleges no personal injury or property damage (other than the work itself). The fundamental truth is that Plaintiff's only seemingly colorable claim for damages under its Fourth and Fifth Causes of Action are for economic losses as a result of alleged breaches of alleged contractual duties. Plaintiff admits this fact when it alleges that "[t]he damage resulting from the negligence and misrepresentation of the Page defendants includes the cost of removing structures that ***should have been removed pursuant to the Contract***..." (*Id.*, ¶ 21)[5] (emphasis added). Plaintiff further claims that Defendants' alleged conduct was "wrongful and fraudulent in that they knew or should have known at the time of the demolition that the work

[5] Reference to "other materials" and delay in "the development and use of the property for commercial purposes" (Compl., ¶ 21) does not magically create out of whole cloth a new category of damages for personal injury or property damage.

was incomplete and inadequate to ensure and properly warrant that the demolition met all ***contractual*** and governmental requirements." (*Id.*, ¶ 25) (emphasis added).

Despite Plaintiff's attempt to disconnect Defendants' alleged conduct from mere compliance with the Contract, the only duties at issue in Plaintiff's Complaint were those that required Page Excavating to perform the demolition work in accordance with the terms of the Contract and to perform the demolition work in a workmanlike manner. Either way, the Complaint fails to allege any personal injury or property damage that should survive this Motion under the economic loss rule.

Finally, Plaintiff failed to plead any duty that the Page Excavating (or that Jeff Page and Landa Page) owed to Plaintiff separate from those included in the Contract. In other words, Plaintiff did not plead the existence of any duty, or breach thereof, that the Defendants owed even if the Contract did not exist. *See Textron Fin. Corp.*, 115 Ohio App.3d at 151.

Plaintiff alleges that it justifiably relied on Page Excavating's alleged misrepresentations as to their experience, ability, and performance of the incomplete demolition work, paying Page Excavating pursuant to the Contract for work inadequately performed. (Compl., ¶ 47). Plaintiff also alleges that the manner in which Page Excavating "buried and covered the undemolished structures and other material prevented Plaintiff inspectors from discovering the ***contract breach*** and failure of the defendants to ***abide by the terms and conditions of the Contract***." (*Id.*, ¶ 19) (emphasis added). Plaintiff further asserts that "[t]he land at issue is prime real estate in the City, and was designated for sale and use when it was discovered that the demolition was not completed ***pursuant to the Contract terms***." (*Id.*, ¶ 20) (emphasis added). Fatal to Plaintiff's tort claims is the fact that Page Excavating already had a duty under the Contract to perform the entire scope of work in accordance with the terms of the Contract, and it already undertook the

obligation to perform all construction work under the Contract in a workmanlike manner. (Compl., Ex. A, p. 5, Section 14. "Conduct of Work").

With respect to Page Excavating's experience and abilities, it represented *in the Contract*, that it was "in the business of demolishing buildings and appurtenances on real estate" and "was qualified and willing to perform the demolition work desired by [the] City." (Compl., Ex. A, p. 2).[6] In short, the duties and alleged breaches identified in Plaintiff's tort claims were the same duties undertaken by Page Excavating under the terms of the Contract itself. The Court should not entertain Plaintiff's attempt to stretch a garden variety breach of contract claim into a series of tort claims aimed at manifesting liability in the individual shareholders of the company.

Based on the foregoing, the economic loss rule bars Plaintiff's claims for fraudulent misrepresentation/concealment (Fourth Cause of Action) and negligent misrepresentation (Fifth Cause of Action), and the Court should strike and/or dismiss those claims.

C. Plaintiff's Fraudulent Misrepresentation/Concealment Claim (Fourth Cause of Action) Should Be Dismissed For Failure to Meet the Rule 9 Heightened Pleading Standard.

Even if the Court finds that Plaintiff's tort claims are not barred by the economic loss rule, Plaintiff's fraudulent misrepresentation/concealment claim should be dismissed for failure to plead with particularity. As argued below, the Complaint falls woefully short of adequately pleading its allegations of fraud against the Defendants; and therefore, Plaintiff's fraudulent misrepresentation/concealment claim should be dismissed.

The Ohio Rules of Civil Procedure require a plaintiff to plead fraud with particularity. Civ.R. 9(B) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."). The pleading must contain allegations of fact which tend to

[6] This quoted portion of the Contract is contained in the Contract recitals, which were incorporated into the Contract by reference. (Compl., Ex. A, p. 2, "Recitals").

show each and every element of a cause of action for fraud, and "'failure to specifically plead the operative facts constituting an alleged fraud presents a defective claim that may be dismissed.'" *Hoague v. Cottrill Servs., LLC*, 5th Dist. Delaware No. 22 CV C 07 0341, 2024-Ohio-531, ¶ 57 (affirming dismissal of fraud claim on the pleadings), citing *Zoar View Wilkshire, LLC v. Wilkshire Golf, Inc*., *supra*, 2023-Ohio-2848, ¶ 31. Plaintiff failed to meet this heightened pleading standard.

The Ohio Supreme Court set forth the elements of fraud as: (a) a representation or, where there is a duty to disclose, concealment of a fact; (b) which is material to the transaction at hand; (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (d) with the intent of misleading another into relying upon it; (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance. *Boehnlein-Pratt v. Ventus Corp*., 5th Dist. Holmes No. 14CA011, 2015-Ohio-2795, ¶ 33, citing *Cohen v. Lamko, Inc*., 10 Ohio St.3d 167, 169, 462 N.E.2d 407 (1984), quoting *Friedland v. Lipman*, 68 Ohio App.2d 255, 429 N.E.2d 456 (8th Dist.1980), paragraph one of the syllabus.

The Fifth District has consistently held that "'[t]he circumstances constituting fraud include the time, place, and content of the false representation; the fact misrepresented; the identification of the individual giving the false representation; and the nature of what was obtained or given as a consequence of the fraud.'" *Schmiedebusch v. Rako Realty, Inc*., 5th Dist. Delaware No. 04CAE08062, 2005-Ohio-4884, ¶¶ 24, 31 (affirming judgment dismissing fraud claim because the complaint did not "state the time or place of the alleged false representations nor identify the individual giving the false representation."), citing *Advanced Production Center, Inc. v. Emco Maier Corp*., 5th Dist. Delaware No. 2003CAE03020, 2003–Ohio–6206, ¶ 15; *Aluminum Line Prod. Co. v. Brad Smith Roofing Co*., 109 Ohio App.3d 246, 671 N.E.2d 1343 (8th Dist. 1996).

Here, Plaintiff's fraud claim (Fourth Cause of Action) falls woefully short of the Rule 9(B) heightened pleading standard. Plaintiff did not make any allegation whatsoever as to who said what to whom, when it was said, how the representations were made, or any other circumstances surrounding the alleged fraudulent statements. (*See* Compl., ¶¶ 42-48). Instead, Plaintiff merely alleged that Defendants "misrepresented their experience and abilities to perform the required demolition" and that Defendants "also misrepresented the actual work performed, hiding demolished debris and incomplete removal of existing structures that were required to be removed pursuant to the Contract." (*Id.*, ¶¶ 43-44).

Plaintiff also attempted to plead fraud by alleging Defendants "had a duty to reveal their lack of expertise and ignorance about the proper disposal of debris and removal of existing structures." (*Id.*, ¶ 46). That allegation is simply the inverse of the allegation accusing Defendants of affirmatively misrepresenting their experience and abilities (*id.*, ¶ 43), but they are effectively one in the same.

Regarding the fifth element of a fraud claim, the Complaint fails to plead with particularity Plaintiff's justifiable reliance on Page Excavating's alleged "incomplete removal of existing structures." (*Id.*, ¶ 44). Plaintiff readily admits that it inspected the Project upon completion of the demolition work. (*Id.*, ¶ 18). In fact, the Contract specifically conditioned payment on completion of the work "in a satisfactory manner, as determined by the City…" (*Id.*, Ex. A., p. 3, Section 4(d)). Plaintiff could not have justifiably relied on Defendants' alleged misrepresentations regarding the completeness of the demolition work when Plaintiff itself inspected the work and confirmed that it was complete in accordance with the terms of the Contract by virtue of the fact that Plaintiff paid Page Excavating in full. (S*ee* Compl., ¶ 17). The conclusory allegation that the "manner in which the Page defendants buried and covered the undemolished structures and other material prevented

the City inspectors from discovering the contract breach…" does not save Plaintiff's fraud claim. (*Id.*, ¶ 19). Plaintiff simply failed to plead, with particularity, the supposed "manner" in which Defendants allegedly "buried and covered" anything.

Plaintiff's "fraudulent misrepresentation/concealment" claim (Fourth Cause of Action) does not come close to meeting the heightened pleading standard imposed by Ohio law. For that reason alone, in addition to the fact that Plaintiff's tort claims are merely repackaged breach of contract claims (*see* Section III.B, *supra*) it should be dismissed, as against all Defendants, with prejudice.

D. All Claims Against Jeff Page and Landa Page Individually Should Be Dismissed Because They Are Not Parties to The Contract And All of Plaintiff's Claims Arise From Duties Allegedly Owed Under The Contract.

After failing to submit a claim for Page Excavating's alleged defective work for nearly six years, Plaintiff attempts to bring claims against Jeff and Landa Page personally. Plaintiff asserts that "Jeff Page was acting as the alter ego of Page Excavating, which had no separate identity, and thus Jeff Page signed the Contract also in his personal capacity and is individually bound by the terms and conditions of the Contract as are all owners of Page Excavating, including Landa Page." (Compl., ¶ 11). Plaintiff also asserts, in a conclusory fashion, that "Jeff and Landa Page were the alter egos of Page Excavating and the entity was not operated as a true corporate entity." (*Id.*, ¶ 26). Plaintiff also asserts that "[a]ll representations, actions and activities of the Page defendants were declared by Jeff and Landa in their individual and personal capacities, and no documents were provided indicating that any agreement was entered into between the parties was authorized [sic] by resolution by Page Excavating." (*Id.*, ¶ 27). None of these allegations, or any other allegation contained in the Complaint, state a claim against the individual Page defendants upon which relief may be granted.

Plaintiff's first and third causes of action sound in contract. (Compl., pp. 6, 7). To recover on a breach-of-contract claim, a plaintiff must prove (1) the existence of a contract, (2) performance by the plaintiff, (3) breach by the defendant, and (4) damage or loss to the plaintiff. *Jarupan v. Hanna*, 2007-Ohio-5081, 173 Ohio App. 3d 284, 878 N.E.2d 66, ¶ 18 (10th Dist.), citing *Powell v. Grant Med. Ctr*., 2002-Ohio-443, 148 Ohio App.3d 1, 771 N.E.2d 874 (10th Dist.). Here, Plaintiff cannot state a claim for breach of contract against Jeff and Landa Page personally because, even assuming the allegations in the Complaint are true, Plaintiff cannot prove the first element—the existence of a contract between Plaintiff and the individual Page defendants.

The Contract is the only instrument that can form the basis for Plaintiff's first and third causes of action. What is fatal to Plaintiff's claims against Jeff and Landa Page personally, however, is the simple fact that neither Jeff nor Landa Page executed the Contract in their personal capacity. Jeff Page executed it on behalf of Defendant Page. (*See* Compl., Ex. A at p. 9). Jeff and Landa Page are not personally parties to the Contract, the Contract does not contain any personal guarantee on behalf of the individual Page defendants and, based upon what is contained within the four corners of the Contract, Jeff and Landa Page have no personal obligation to perform any part of the Contract. (*See generally*, Compl., Ex. A).

In order to recover against Jeff and Landa Page for breach of contract (First Cause of Action) and breach of express warranty (Third Cause of Action), Plaintiff must prove that a contract between Plaintiff and the individual Page defendants existed. Even assuming the allegations contained in the Complaint are true, Plaintiff cannot do that. Accordingly, Plaintiff's first and third causes of action for breach of contract and breach of express warranty, respectively, against Jeff and Landa Page should be dismissed with prejudice.

Plaintiff's claim against the individual Page defendants for breach of implied warranties (Second Cause of Action) also fails as a matter of law. Plaintiff seeks to recover against Jeff and Landa Page personally for failure to perform the Contract demolition in a workmanlike manner and failure to deal with Plaintiff fairly and perform the Contract in good faith.[7] (Compl., ¶ 34).

A contract to perform construction work creates an implied warranty that the contractor will perform the work in a workmanlike manner. *See, e.g., Point E. Condo. Owners' Assn. v. Cedar House Assoc.*, 104 Ohio App. 3d 704, 663 N.E.2d 343 (1995 8th Dist.). When a party contracts for the future construction services, *the contract* includes the implied duty to perform in a workmanlike manner. Consequently, if a contractor breaches that implied duty, it is liable *in contract*, not tort. *Jarupan v. Hanna*, 2007-Ohio-5081, 173 Ohio App. 3d 284, ¶ 18, n.1 (10th Dist.) (noting that the contract at issue was for future services and, therefore, plaintiff's claims for breach of contract and breach of implied warranty to build in a workmanlike manner were the same claim even though they were pleaded separately), citing *Barton v. Ellis*, 34 Ohio App. 3d 251, 518 N.E.2d 18 (1986) (10th Dist.); *Kishmarton v. William Bailey Constr., Inc*., 2001-Ohio-1334, 93 Ohio St.3d 226, 228-29 (holding that claims for failure to perform in a workmanlike manner for future construction services are *ex contractu*). Because Plaintiff's claim that the individual Page defendants failed to perform in good faith or in a workmanlike manner relate to future performance, such a claim is sounding in contract. And because Jeff and Landa Page are not parties to the Contract, Plaintiff's second cause of action against them should be dismissed, with prejudice.

[7] The City also claims that all Defendants breached the following alleged implied duties: (i) That the demolition would allow the property to be further developed without any necessary preparation which was the intended purpose of the demolition, (ii) that the demolition would be performed pursuant to the contract specifications would meet industry standard [sic], and (iii) that after the demolition was completed the land would be merchantable and commercially useful. Ohio law recognizes none of these "implied warranties."

Similarly, Plaintiff's fourth and fifth causes of action relate to the demolition work Page was to perform *under the Contract*. Plaintiff alleges that the Page defendants "misrepresented the actual work performed, hiding demolished debris and incomplete removal of existing structures that were required to be removed ***pursuant to the Contract***." (Compl., ¶ 44) (emphasis added). Plaintiff alleges in the alternative that "the Page defendants' work was performed in a negligent manner and as such breached the defendant's duty of care to properly perform the work services." (*Id.*, ¶ 50). The "work" referred to in Plaintiff's fourth and fifth causes of action relate to the work that Page performed *under the Contract*.

In short, the allegations contained in Plaintiff's fourth and fifth causes of action relate to the Contract and the work performed under the Contract. Because Jeff and Landa Page are not parties to the Contract, Plaintiff's fourth and fifth causes of action against the individual Page defendants should be dismissed, with prejudice.

E. Plaintiff's Sixth Cause of Action Should Be Dismissed As Against All Defendants Because "Piercing The Corporate Veil" Is Not Recognized Under Ohio Law As An Independent Cause of Action.

Plaintiff's sixth cause of action seeks "the right to pierce the corporate veil, and hold Jeff Page and Landa Page individually and personally liable for all conduct of Page Excavating…" (Compl., ¶ 63). Plaintiff further asserts that Jeff and Landa Page "are jointly and severally liable for all damages arising out of their conduct as set forth" in the Complaint. (*Id.*).

Ohio Courts routinely dismiss claims that do not state an independent cause of action, particularly as they relate to piercing the corporate veil and/or alter ego liability. As the Eighth District Court of Appeals succinctly held, "[p]iercing the corporate veil or alter ego liability is a remedy, not an independent cause of action….Accordingly, there can be no "claim" for alter ego liability, ***and the trial court properly dismissed this allegation under Civ.R. 12(B)(6)***." *Graham v. City of Lakewood*, 113 N.E.3d 44, 2018-Ohio-1850, ¶ 25 (8th Dist.) (emphasis added); *see also*

Ball v. Octopus Construction, LLC, 10th Dist. Franklin No. 22AP-780, 2023-Ohio-2596, ¶ 19 ("Under Ohio law, piercing the corporate veil is not an independent cause of action….Rather, it is a remedy encompassed within a claim. It is a doctrine wherein liability for an underlying tort may be imposed upon a particular individual."); *Fast Tract Title Servs., Inc. v. Barry*, 8th Dist. Cuyahoga No. 110939, 2022-Ohio-1943, ¶ 17 (reversing trial court's denial of defendant's motion to dismiss under Rule 12(B)(6) stating, "Significant to this case, under Ohio law, piercing the corporate veil is not an independent cause of action.").

Plaintiff's sixth cause of action fails as a matter of law because piercing the corporate veil is a remedy, not a cause of action. Plaintiff attempts to haul the individual Page defendants before this Court to obtain a judgment against them personally under an alleged right to pierce the corporate veil, which Ohio law does not recognize as an independent cause of action.

For the foregoing reasons, Plaintiff's sixth cause of action seeking to pierce the corporate veil should be dismissed, with prejudice, against all parties.

F. All Claims Against Jeff Page and Landa Page Should be Dismissed Because Plaintiff Cannot Satisfy The *Belvedere-Dombroski* Test Required To Pierce The Corporate Veil.

In *Fast Tract Title*, the Eight District reversed the trial court's denial of the defendant's motion to dismiss the plaintiff's fraud claim under Civil Rule 12(B)(6) because the plaintiff failed to plead fraud with particularity. 2022-Ohio-1943, ¶ 22. The plaintiff in that case argued that it was not really a fraud case, but rather it was "attempting to pierce the corporate veil to find Barry personally liable for Fast Track's judgment against 1229 Summit," a claim that the plaintiff asserted was adequately pled in its complaint. *Id.* at ¶ 14. The problem, the court noted, was that the plaintiff was indeed asserting a fraud claim against the defendant, despite the actual allegations contained in the complaint. *Id.* And for that reason, the trial court erred when it denied the defendant's Rule 12(B)(6) motion to dismiss.

The court explained that there may be circumstances under which the law will disregard the corporate form. *Id.* at ¶ 15. But to do so, a plaintiff must meet the following three-prong test set forth by the Ohio Supreme Court:

> (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own; (2) control over the corporation by those to be held liable was exercised in such as manner as to commit fraud or an illegal act or a similarly unlawful act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong.

Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., 67 Ohio St.3d 274, 617 N.E.2d 1075 (1963), paragraph three of the syllabus, as modified by *Dombroski v. Wellpoint, Inc*., 119 Ohio St.3d 506, 2008-Ohio-4827, 895 N.E.2d 538, ¶ 16.

In *Fast Tract Title*, the Eighth District held that, because the plaintiff failed to plead fraud with particularity, the plaintiff's complaint failed the *Belvedere-Dombroski* test. 2022-Ohio-1943, at ¶¶ 17-18, 21 (citations omitted). Therefore, the Court of Appeals vacated the judgment and held that the trial court should have dismissed the plaintiff's fraud claim because "piercing the corporate veil is not an independent cause of action." *Id.* at ¶ 17.

Here, Plaintiff's Sixth Cause of Action should be dismissed for the same reason. The following are the only allegations in the Complaint that refer to Jeff and Landa Page personally:

- "Defendants, Jeff Page and Landa Page are the putative owners, vice president and president, respectively, Page Excavating but also in truth operate as the alter egos of the limited liability company. The defendants will he collectively referred as the Page defendants." (Compl., ¶ 3).

- "The Contract was signed by the Page defendants by Jeff Page in his claimed capacity as vice president of Page Excavating. The City asserts that Jeff Page was acting as the alter ego of Page Excavating, which had no separate identity, and thus Jeff Page signed the Contract also in his personal capacity and is individually bound by the terms and conditions of the Contract as are all owners of Page Excavating, including Landa Page." (*Id.*, ¶ 11).

- "At all times material, Jeff and Landa Page were the alter egos of Page Excavating and the entity was not operated as a true corporate entity." (*Id.*, ¶ 26).

- "All representations, actions, and activities of the Page defendants were declared by Jeff and Landa in their individual capacities, and no documents were provided indicating that any agreement [that] was entered into between the parties was authorized by resolution by Page Excavating." (*Id.*, ¶ 27).

- "At all times material, Jeff and Landa Page were the putative owners of Page Excavating, but the entity failed in every instance to operate as a separate entity under Ohio law." (*Id.*, ¶ 61).

- "In particular, Jeff Page acted as the alter ego of Page Excavating and acted with full capacity as if he was a sole proprietor without any separation between his personal conduct, and the conduct of the entity. Upon information and belief, Landa Page, as the designated president of the entity, knew, accepted and authorized all of Jeff Page's actions." (*Id.*, ¶ 62).

- "As a direct and proximate result of Jeff Page and Landa Page's failure and the failure of Page Excavating to operate as a proper limited liability company under Ohio law, City requests the right to pierce the corporate veil, and hold Jeff Page and Landa Page individually and personally liable for all conduct of Page Excavating based upon Jeff Page and Landa Page's failure and the failure of Page Excavating to follow Ohio law and proper corporate regulations which would distinguish the Page Excavating activity from the individual activity of Jeff Page, whose conduct, upon information and belief, was known, accepted and authorized by Landa Page. The City asserts Jeff Page and Landa Page and Page Excavating are jointly and severally liable for all damages arising out of their conduct as set forth herein." (*Id.*, ¶ 63).

To survive dismissal, Plaintiff must allege that control of Page Excavating by Jeff and Landa Page individually was exercised in such a manner to commit fraud or "an illegal act or a similarly unlawful act." *Fast Tract Title*, 2022-Ohio-1943, at ¶ 16, citing *Dombroski*, 2008-Ohio-4827, at syllabus. Plaintiff's entire Complaint fails to allege ***any*** fact that, if proven, would entitle Plaintiff to pierce the corporate veil. Plaintiff simply made conclusory allegations regarding Page Excavating's experience, expertise, and abilities, the work performed under the contract, and an alleged breach of a duty of care with respect to the work performed under the Contract. (*See* Compl. at ¶¶ 43-47, 50).

Plaintiff then attempts to use those allegations to somehow support Plaintiff's claim that Page Excavating "failed in every instance to operate as a separate entity under Ohio law," that "Jeff Page acted as the alter ego of Page Excavating as if he was a sole proprietor without any

separation between his personal conduct, and the conduct of the entity," and that "Landa Page, as the designated president of the entity, knew, accepted and authorized all of Jeff Page's actions." (*Id.* at ¶¶ 61-62). There is no factual basis for Plaintiff's allegations and such unsupported conclusions are not sufficient to withstand a motion to dismiss. *See Mitchell v. Lawson Milk Co*., 40 Ohio St.3d 190, 193, 532 N.E.2d 753 (1988) (noting that a court need not consider as true unsupported conclusions that a party committed a tort).

In reality, Plaintiff is attempting to hold the individual Page defendants liable for a mere breach of contract by Page Excavating. However, Ohio courts have consistently held that "'[a] simple breach of contract, in the absence of a more substantial factual predicate indicative of some corporate malfeasance, with direct bearing on the plaintiff's injury, is insufficient to meet the second prong of the *Belvedere* test. To decide otherwise, would completely vitiate the holding in *Belvedere*.'" *Dana Partners, L.L.C. v. Koivisto Constructors & Erectors, Inc.*, 11th Dist. Trumbull No. 2011-T-0029, 2012-Ohio-6294, ¶ 60, quoting *Connolly v. Malkamaki*, 11th Dist. No.2001–L–124, 2002–Ohio–6933, ¶ 34.

Thus, Plaintiff's claims that Page Excavating breached the Contract (First Cause of Action), failed to complete the demolition in a workmanlike (Second Cause of Action), and/or breached an express warranty (Third Cause of Action) cannot serve as valid legal bases to pierce the corporate veil. *See Dana Partners*, 2012-Ohio-6294, ¶ 60. Nor can Plaintiff's tort claims (Fourth and Fifth Causes of Action) serve as valid bases either. As the court in *Dana Partners* explained, "mere negligent behavior is not sufficient to establish fraud for purposes of piercing the corporate veil," and, with respect to Plaintiff's fraud claim as it relates to the *Belvedere* test, "the decision to pierce the corporate veil cannot be based solely on the failure to comply with a term of a contract." 2012-Ohio-6294, ¶¶ 58-59.

For the foregoing reasons, Plaintiff has failed to state *any* claim against Jeff Page or Landa Page that should survive this Motion.

G. Plaintiff's Claims Against All Defendants Should Be Dismissed Because The Plain Language Of The Contract Provides That Demolition Materials Could Be Used As Fill Materials On Site.

Even if the Court determines that Plaintiff's tort claims are not barred by the economic loss rule (Section III.B, *supra*), that Plaintiff pled fraud with particularity (Section III.C, *supra*), and that Plaintiff can sustain claims against Jeff and Landa Page personally (Sections III.D and III.E, *supra*), the entire Complaint should still be dismissed based upon the express terms of the Contract. Plaintiff's entire case rests upon the notion that Page Excavating is liable for breach of contract for "failing to ensure that all the demolition materials were removed from the site and that all structures were demolished and removed…" (Compl., ¶ 31). Each and every allegation contained in the Complaint can be tied back to this general allegation—that Page Excavating failed to completely remove all demolished materials from the project site. The Complaint's operative allegations to this effect include the following:

- "[T]he Page defendants were required to demolish and remove all structures, 'including footings, foundation, floors, concrete slabs, walls, roof contents…and remove all demolished materials from the site' (Exhibit A, 'Building and Structure demolitions specification [sic]…do not burn or bury any materials on site')." (Compl., ¶ 15).

- "This deceptive conduct by the Page defendants and their agents was designed, in part, to allow the defendants to bu***ry certain material or undemolished remnants of the large building*** without detection." (*Id.*, ¶ 16) (emphasis added).

- "The site also contained ***demolished material that was to be removed from the site***." (*Id.*, ¶ 18) (emphasis added).

- "The manner in which the Page defendants ***buried and covered the undemolished structures*** and other material prevented the City inspectors from discovering the contract breach and failure of the defendants to abide by the terms and conditions of the Contract." (*Id.*, ¶ 19) (emphasis added).

- "The land in issue is prime real estate in the City, and was designated for sale and use when it was discovered that the ***demolition was not completed pursuant to the Contract terms***. (*Id.*, ¶ 20) (emphasis added).

- Plaintiff's alleged damages consist of "the cost of ***removing structures that should have been removed pursuant to the Contract terms***." (*Id.*, ¶ 21) (emphasis added).

- Defendants' failed to perform in a workmanlike manner by ***failing to ensure that all the demolition materials were removed*** from the site and that all structures were demolished and removed; instead the Page defendants buried portions of the undemolished building along with demolition debris." (*Id.*, ¶ 31) (emphasis added).

Each and every claim asserted in the Complaint alleges that Page Excavating failed to comply with the terms of the Contract because Page Excavating did not remove material that, in Plaintiff's view, should have been removed. The Contract, however, provides the following:

> 3. Masonry, concrete, concrete block, brick, and stone materials are permitted to be used as fill materials within the demolition site. These types of fill materials shall be acquired from within the demolition site limits only. Materials shall be shall be broken, crushed, and compacted so as not to create any voids.

(Compl., Ex. A at p. 1).

Courts must apply and "defer to the express terms of the contract and interpret it according to its plain, ordinary, and common meaning." *Hoffer v. Hoffer*, 5th Dist. Muskingum No. CT2023-0081, 2024-Ohio-2655, ¶ 17; *Brooksedge Homeowners Ass'n, Inc. v. Stafford*, 2023-Ohio-2660, 222 N.E.3d 186, ¶ 41 (5th Dist.) ("Where a contract's terms are clear an unambiguous, its interpretation is a matter of law, not fact…."). Further, "[i]t is well established where there is ambiguity in a contract, ***it must be strictly construed against the party who prepared it***." *Crickets of Ohio, Inc. v. Hines Invests., L.L.C.*, 5th Dist. Fairfield No. 05CA80, 2006-Ohio-2901, ¶10 (emphasis added).

Plaintiff's entire Complaint rests on the allegation that Page Excavating buried demolished material when, in fact, the Contract explicitly allowed Page Excavating to do just that. The Contract specifically permitted Page Excavating to use demolished materials as fill for the

demolition site. Plaintiff's breach of contract claim (First Cause of Action), alleging that Page Excavating failed to "ensure that all demolition materials were removed" and buried "demolition debris," should be dismissed based on the plain terms of the Contract. Plaintiff's breach of implied warranties claim (Second Cause of Action) should be dismissed for the same reason.

As for Plaintiff's claim for breach of express warranties (Third Cause of Action), Plaintiff's Complaint also fails as a matter of law. To succeed on a breach of express warranty claim, a plaintiff must allege and prove that (1) a warranty existed; (2) the product failed to perform as warranted; (3) plaintiff provided the defendant with reasonable notice of the defect; and (4) plaintiff suffered injury as a result of the defect. *Bd. of Educ. of Tuslaw Loc. Sch. Dist. v. CT Taylor Co., Inc*, 2019-Ohio-1731, 135 N.E.3d 1162, ¶ 29 (5th Dist.).

The Complaint fails to allege even the existence of an express warranty other than the warranty to perform the demolition in a workmanlike manner. Plaintiff merely alleges that Defendants "breached several express warranties including but not limited to the warranties of their expertise, warranties that they would follow and did follow the demolition and removal of debris so that the property could be further commercially developed." (Compl., ¶ 40). Plaintiff failed to allege any warranty existed with respect to the future development of the land or that it provided Page Excavating with reasonable notice of the defects. In fact, Plaintiff sat on its rights for nearly four years before doing anything about the alleged defects and nearly six years before filing this lawsuit. (*See* Compl., ¶ 22).

Accordingly, Plaintiff's Complaint fails to state a claim upon which relief may be granted because nothing in the Complaint alleges Defendants did anything other than what they were permitted to do under the express terms of the Contract and should, therefore, be dismissed, with prejudice, in its entirety.

IV. CONCLUSION

Plaintiff's Complaint falls flat in its entirety. Plaintiff's weakest claims are the tort claims for fraudulent and/or negligent misrepresentation that have no basis outside of the alleged breach of contract allegations littered throughout the complaint, and therefore those claims must be dismissed as to all defendants under the economic loss doctrine. This is a breach of contract case; nothing more. Similarly weak and without basis are Plaintiff's claims for piercing the corporate veil which seek to hold Jeff and Landa Page individually liable for the alleged breach of contract by Page Excavating. Plaintiff asserts a remedy as a cause of action, which is appropriately dismissed. Furthermore, Plaintiff cannot satisfy the *Belvedere-Dombroski* test because it cannot assert an independent cause of action for fraud that stands independently from its contract claims, which is required to hold Jeff Page and Landa Page personally liable for the actions of Page Excavating. Finally, all of Plaintiff's claims fail as a matter of law because the Contract specifically authorizes the burial of construction debris and materials as a part of Page Excavating's performance of its work on the Project, which is the very thing that forms the basis of all of Plaintiff's claims.

Based on the foregoing, Defendants respectfully request that the Court dismiss, with prejudice, all claims as to all Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 18, 2024, a copy of the foregoing Notice of Appearance was served via electronic mail upon the following:

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