UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

L&F BRANDS, INC.,	)	
	)	Case No. 1:19-cv-00134
Plaintiff,	)	
	)	
v.	)	JURY TRIAL DEMANDED
	)	
CROWN VALLEY WINERY, INC.,	)	
	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNTS V, VI, AND VII OF PLAINTIFF'S AMENDED COMPLAINT AND ITS MOTION FOR ATTORNEYS' FEES AND COSTS

COMES NOW Plaintiff L&F Brands, Inc. ("L&F"), by and through undersigned counsel, and for its Memorandum in Opposition to Defendant Crown Valley Winery, Inc.'s Motion to Dismiss Counts V, VI, and VII of Plaintiff's Amended Complaint and Its Motion for Attorneys' Fees and Costs ("Motion to Dismiss"), states as follows:

I. INTRODUCTION

L&F filed its Complaint against Defendant Crown Valley Winery, Inc. ("Crown Valley") on August 12, 2019. *See doc. 1.* On October 7, 2019, L&F filed its First Amended Complaint, bringing claims against Crown Valley for breach of contract (Counts I and II), breach of express warranty (Count III), breach of the implied warranty of good faith (Count IV), fraud (Count V), unjust enrichment (Count VI), and money had and received (Count VII). *See doc. 23.* On October 21, 2019, Crown Valley filed its Motion to Dismiss as to Counts V, VI, and VII only. *See doc. 27.* For the reasons discussed below, the Court should deny Crown Valley's Motion in its entirety.

II. LEGAL STANDARD

"A Rule 12(b)(6) motion to dismiss a complaint should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Schmedding v. Tnemec Co., Inc*., 187 F.3d 862, 864 (8th Cir. 1999). "Thus, as a practical matter, a dismissal under Rule 12(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Id.* The court "must take all factual allegations made by the plaintiff as true when considering a motion to dismiss." *Salau v. Denton*, 139 F. Supp. 3d 988, 997 (W.D. Mo. 2015).

III. ARGUMENT

A. L&F'S CLAIM FOR FRAUD (COUNT V) IS NOT BARRED BY THE ECONOMIC LOSS DOCTRINE.

1. The Economic Loss Doctrine

Crown Valley alleges that L&F has failed to state a claim for fraud because any such claim is barred by the economic loss doctrine. "Under the economic loss doctrine, Missouri courts will bar tort claims that seek to recover for economic losses unless the claims are based on misrepresentations that are independent of the contract." *Nestlé Purina PetCare Co. v. Blue Buffalo Co.*, 181 F. Supp. 3d 618, 638 (E.D. Mo. 2016). However,"[d]ismissal is not warranted on the basis of the economic loss doctrine merely because the subject matter of the misrepresentation is referenced in the parties' contract." *Jacobson Warehouse Co. v. Schnuck Mkts., Inc.*, 2017 U.S. Dist. LEXIS 195795, at *19 (E.D. Mo. Nov. 29, 2017). "Instead, most courts have focused more precisely on whether a contract term conflicts with or contains the alleged misrepresentation . . . ." *Id.* "Where a contract term contains or conflicts with an alleged misrepresentation, the contract term controls, and there is no fraudulent misrepresentation claim." *Id.* at *19-20.

"The duty not to fraudulently or negligently make factual misrepresentations to induce another person to form a contract is a duty that exists independently of any contractual obligations ultimately formed." *Elkhart Metal Fabricating, Inc. v. Martin*, 2014 U.S. Dist. LEXIS 89286, at *5-7 (E.D. Mo. July 1, 2014). "Claims about the quality of goods sold may therefore fall within the fraudulent inducement exception if they are nevertheless independent of the contract formed." *Patterson Oil Co. v. VeriFone, Inc.*, 2015 U.S. Dist. LEXIS 141635, at *22-23 (W.D. Mo. Oct. 19, 2015). Moreover, the economic loss doctrine is inapplicable where "[the plaintiff's] claims are dependent on duties that only exist outside of the lease's express and implied terms." *Adbar Co., L.C. v. PCAA Mo., LLC*, 2008 U.S. Dist. LEXIS 776, at *27 (E.D. Mo. Jan. 4, 2008). Thus, the "two critical factors in examining whether a fraud claim is independent of a contract claim under the economic loss doctrine are (1) whether the subject matter of the alleged misrepresentations was incorporated into the parties' contract, and (2) whether the plaintiff suffered additional damages outside the contract as a result of the alleged fraud." *OS33 v. CenturyLink Communs., L.L.C.*, 350 F. Supp. 3d 807, 816 (E.D. Mo. 2018). Because L&F's allegations of fraud are independent of Crown Valley's contractual obligations (as fully discussed below), L&F's fraud claim is not barred by the economic loss doctrine.

2. Summary of Applicable Case Law

The cases of *Elkhart*, *Web Innovations*, and *Superior Edge* demonstrate that L&F's claims are not barred by the economic loss doctrine. In *Elkhart*, the plaintiffs alleged that the defendants made false representations as to the company's records, books, and financial condition to induce the plaintiffs to purchase the assets of the defendant. 2014 U.S. Dist. LEXIS 89286, at *5-6. The District Court for the Eastern District of Missouri explained that factual misrepresentations to induce another person to form a contract constitute "representations of

existing fact," as opposed to representations which "impose[] any future obligation" to perform under a contract. *Id.*, at *6. The court explained that this was true "[e]ven though these alleged misrepresentations were memorialized in the [Asset Purchase Agreement]," as the representations "were not made in direct exchange for anything, and they did not obligate [the defendants] to do anything." *Id.* at *6, 8. The court distinguished between the "failure to perform a contract" and representations "which impose no performance obligations," and held that the fraudulent misrepresentation claims were not barred by the economic loss doctrine. *Id.*, at *6-8.

In *Web Innovations & Tech. Servs. v. Bridges to Dig. Excellence, Inc.*, the plaintiff alleged that the defendant misrepresented its ability to collect and process electronic materials. 69 F. Supp. 3d 928, 932 (E.D. Mo. 2014). The District Court for the Eastern District of Missouri found that although the misrepresentations were related to whether the defendant could perform its obligations under the contract, "the subjects of at least some of the misrepresentations . . . are not contractual terms." *Id.* at 933. The court found that "it cannot be said that that the parties' negotiations fairly accounted for the misrepresentation, and a claim based on the misrepresentation is not barred by Missouri's economic loss doctrine." *Id.*

Finally, in *Superior Edge, Inc. v. Monsanto Co.*, the defendant brought counterclaims against the plaintiff for breach of contract, money had and received, and fraudulent inducement based on the plaintiff's representations that "it had the infrastructure and capacity to develop software satisfying [the defendant's] objectives but failed to develop and deliver that promised software under the agreement." 44 F. Supp. 3d 890, 893 (D. Minn. 2014). The plaintiff argued that the claim for fraudulent inducement was barred by the economic loss doctrine because it was identical to the claim for breach of the contract. *Id.* at 903. Specifically, the plaintiff argued that

"the alleged misrepresentations . . . relate to the subject matter of the [contract] . . . in that they both largely pertain to the nature of the software that [the plaintiff] agreed to develop for [the defendant]." *Id.* at 904.

The District Court for the District of Minnesota, applying Missouri law, concluded "that a Missouri court would allow [the defendant's] fraudulent and negligent inducement claims to go forward based on at least some of the misrepresentations alleged in [its] counterclaims." *Id.* at 906. The court explained that although "some of the misrepresentations alleged by [the defendant] were incorporated in the Agreement, . . . other alleged misrepresentations about [the plaintiff's] ability to perform . . . are not memorialized in the Agreement . . . ." *Id.* at 906. The court explained that these latter misrepresentations "are not simply allegations that [the plaintiff] promised it would perform its duties under the contract, and then failed to perform," but rather constitute misrepresentations "made about its abilities, skills, and experience prior to entering into the Agreement." *Id.* at 907. The court concluded that because the defendant alleged that these misrepresentations induced it to enter into a contract with the plaintiff, as opposed to merely alleging that the plaintiff "promised to perform and failed to do so," the defendant sufficiently stated a claim for relief. *Id.*

The *Superior Edge* court set forth guidelines for how to analyze such issues at the motion to dismiss stage. The court first noted that "it need not parse each of [the defendant's] allegations to determine precisely which alleged misrepresentations state a claim and which do not." *Id.* at 908. The court explained:

> It is sufficient at this stage to determine, as the Court has, that some aspects of Monsanto's fraudulent and negligent inducement allegations state a plausible claim for relief and therefore are sufficient to survive a motion to dismiss. Because of the somewhat closely drawn distinctions between claims for fraud arising out of inducement to contract versus performance of that contract, courts have been very reluctant to dismiss when, based on the allegations, it would be possible for a claimant to demonstrate that the misrepresentations related to the inducement. Reducing Monsanto's allegations to those precise misrepresentations which are independent or collateral to the Agreement is a task best undertaken after discovery has occurred — which may lead to the discovery of facts that clarify, provide context for, and/or eliminate Monsanto's claims based on particular misrepresentations.

Id.

3. L&F's Allegations of Fraud are Independent from the Agreements

Here, L&F has alleged that Crown Valley committed fraud in several ways, including (1) fraudulently failing to disclose the misblending or use of incorrect or substitute ingredients in producing the product; (2) falsely representing that Crown Valley could safely and legally add an additional ingredient to a completed batch of product; (3) falsely representing that Crown Valley had produced, and was capable of producing, the products in a clean and sanitary environment; (4) falsely representing that L&F could purchase an additional ingredient from Crown Valley for use in future L&F products; and (5) fraudulently concealing Crown Valley's production and blending mistakes. *Doc. 23* at ¶¶ 75-83. Crown Valley argues that the Manufacturing Agreement and the Coffee Cream Agreement, which were attached as exhibits to L&F's First Amended Complaint, "cover all aspects of this failed fraud claim." *Doc. 27* at 4. However, these alleged misrepresentations are not incorporated into the contract terms, and the three paragraphs of the Manufacturing Agreement cited by Crown Valley do not contain ***any*** of the misrepresentations alleged by L&F (as further detailed below). *Doc. 27* at 4; *see also doc. 23-1* at §§ 5, 9, 11.

Crown Valley relies heavily on the *Nestlé* case to argue that the economic loss doctrine bars L&F's claim of fraud. In *Nestlé*, Diversified brought a fraud claim on the basis that the defendants misrepresented "the type, quality, and characteristics of the chicken and turkey meal" that Diversified purchased from the defendants. 181 F. Supp. 3d at 639. The court found that the fraud claim was barred by the economic loss doctrine because "[t]hese are the same misrepresentations that Diversified alleges as the basis of its contract-based claims," which alleged that the defendants breached the contract by failing to meet the agreed-upon quality and ingredient specifications. *Id.* Under *Nestlé*, claims of misrepresentation ***as to Crown Valley's performance of the contract***, including failure to meet the agreed-upon quality and ingredient specifications, would be barred by the economic loss doctrine. *Id.* at 639. However, *Nestlé* is inapplicable because L&F's fraud claim does not seek damages for Crown Valley's failure to perform its obligations under the contract.

Rather, L&F's allegations of fraud are wholly independent from the agreements formed between the parties, as L&F's claim is in no way directed at Crown Valley's failure to perform its duties under the Manufacturing Agreement.[1] First, L&F does not even mention or refer to the Manufacturing Agreement (or, for that matter, the Coffee Cream Agreement) in Count V. Second, the fraudulent representations occurred after the Manufacturing Agreement had been entered into by the parties, as L&F alleges that these misrepresentations caused L&F to (1) distribute the defective products in the marketplace and (2) enter into future agreements with Crown Valley, including later purchasing an additional ingredient from Crown Valley. *See doc.*

[1] The Manufacturing Agreement sets forth the general terms and conditions for a business relationship between Crown Valley and L&F regarding the production of alcoholic beverages. *See doc. 23-1*. The Manufacturing Agreement provides that upon L&F placing a purchase order, Crown Valley must produce the product according to the terms and conditions set forth in the Agreement. *See doc. 23-1* at §§ 2, 3. The Agreement does not, however, provide for the details of the purchase orders, which include the quantity of the product, the requested delivery date, and the purchase price. *See doc. 23-1* at § 3. Thus, the Agreement is dependent upon a business relationship between L&F and Crown Valley in which the parties reach future agreements as to the details of purchase orders.

23 at ¶ 84. Finally, L&F alleges that the fraudulent representations "substantially interfered with L&F's business of operating marketing, selling, and distributing adult beverage or alcoholic products and damaged L&F's reputation," causing L&F to request damages for "loss of sales and/or profit, loss of good will, and harm to its reputation." *See id.* at ¶¶ 86, 88. Notably, L&F does not seek any damages in Count V for Crown Valley's failure to perform its obligations under the Manufacturing Agreement. *See id.* at ¶¶ 86, 88.

A closer look at each of L&F's fraud allegations demonstrates that they are not duplicative of its claims for breach of contract. First, L&F alleges that Crown Valley committed fraud not by misblending or using incorrect ingredients in producing the product,[2] but by ***failing to disclose and deceptively concealing*** that mistake. *See doc. 23* at ¶¶ 75, 76, 83. Second, L&F alleges that ***after*** producing a defective batch of product, Crown Valley misrepresented that it could fix its mistakes by adding additional ingredient after the fact (so that the product could be distributed in the marketplace). *See id.* at ¶¶ 77, 78. Third, L&F alleges that ***after*** producing a defective batch of product, Crown Valley misrepresented that it had produced the product (and could produce future products) in a sterile environment. *See id.* at ¶¶ 79, 80. Fourth, L&F alleges that Crown Valley fraudulently induced L&F to enter into the Coffee Cream Agreement (*see doc. 23-2*) by misrepresenting that it had additional ingredient for sale, when in fact it had no ability to provide that ingredient to L&F. *See id.* at ¶¶ 81, 82.

As L&F's claim of fraud alleges that Crown Valley acted fraudulently through a pattern of misrepresentations designed to cover up its past mistakes and induce L&F to enter into

[2] Crown Valley repeatedly mischaracterizes L&F's allegations regarding the misblending and use of an incorrect ingredient by stating that L&F was required under the Manufacturing Agreement to supply the ingredients. *See doc. 27* at 1-2. L&F does not allege that the wrong ingredients were supplied. Rather, L&F alleges that despite supplying the correct ingredients to Crown Valley, Crown Valley used incorrect or substitute ingredients in at least one batch of product. *See doc. 23* at ¶¶ 16, 40, 42. Regardless, this factual dispute is not before the Court at this Motion to Dismiss stage.

additional agreements with Crown Valley (including the Coffee Cream Agreement), the allegations in L&F's fraud claim are wholly independent from those in L&F's breach of contract claims. *See, e.g., Bus. Men's Assurance Co. of Am. v. Graham*, 891 S.W.2d 438, 453 (Mo. App. W.D. 1994) (a party may bring an action in tort "if the party sues for breach of a duty recognized by the law as arising from the relationship or status the parties have created by their agreement"); *Patterson Oil*, 2015 U.S. Dist. LEXIS 141635, at *22 ("[C]laims that the plaintiff was fraudulently induced to enter the contract are widely interpreted to present an exception to the economic loss doctrine."); *Jacobson*, 2017 U.S. Dist. LEXIS 195795, at *20 (E.D. Mo. Nov. 29, 2017) ("[C]laims based on misrepresentations going to one party's ***ability*** to perform under a contract . . . have been found not to implicate the economic loss doctrine.").

Further, L&F pled that it suffered additional damages outside the contract, such as that the fraudulent misrepresentations caused L&F to suffer monetary damage, loss of sales and/or profit, loss of good will, and harm to its reputation. *Doc. 23* at ¶ 88. The damage to L&F's reputation was not caused by Crown Valley's breach of its obligations under the agreements, but rather from Crown Valley's misrepresentations which caused L&F to distribute the defective product to wholesale distributors for purposes of ultimate distribution to the general public. *See doc. 23* at ¶¶ 20-22. Because L&F alleges damages independent from those caused by Crown Valley's failure to perform its obligations under the contract, the Court should deny Crown Valley's Motion to Dismiss Count V.[3] *See, e.g., Westfield, LLC v. IPC, Inc.*, 2012 U.S. Dist.

[3] Even assuming *arguendo* that certain of L&F's allegations of fraud may be barred by the economic loss doctrine (which L&F denies), dismissal of L&F's fraud claim is not warranted at this stage of litigation. *See Web Innovations & Tech. Servs. v. Bridges to Dig. Excellence, Inc.*, 69 F. Supp. 3d 928, 934 (E.D. Mo. 2014) ("Parsing which misrepresentations will fail under the doctrine of economic loss is a task best undertaken after discovery."); *Patterson Oil Co. v. VeriFone, Inc.*, 2015 U.S. Dist. LEXIS 141635, at *22-23 (W.D. Mo. Oct. 19, 2015) ("Given the stage of the litigation it is premature to dismiss [the plaintiff's] fraudulent omission claim.").

LEXIS 50779, at *6-8 (E.D. Mo. Apr. 11, 2012) (economic loss doctrine does not apply where the plaintiff "alleges damage to property other than that sold").

Finally, Crown Valley also argues that the terms of the Manufacturing Agreement prohibit any recovery of punitive damages or loss of sales or profit. *Doc. 27* at 5. Crown Valley accurately quotes the Manufacturing Agreement's clause stating that "[i]n no event shall [Crown Valley] be liable for any special, indirect, incidental, or consequential damages, including but not limited to, loss of profits, or punitive damages." *Id.*; *doc. 23-1* at § 10. Viewed in context, however, it is clear that this clause only applies to "[Crown Valley's] legal liability ***under or resulting from this Agreement***." *Doc. 23-1* at § 10 (emphasis added). As discussed above, L&F's allegations of fraud are wholly independent of the contract and any performance thereof, and this clause (as well as the other provisions of § 10 of the Manufacturing Agreement) does not limit the damages available for L&F's fraud claim. The Court should deny Crown Valley's request that the Court strike L&F's allegations including punitive damages or any damages beyond those provided in the Manufacturing Agreement, as L&F's allegations of fraud do not assert Crown Valley's liability "under or resulting from" the Agreement.[4]

B. L&F'S CLAIMS FOR UNJUST ENRICHMENT (COUNT VI) AND MONEY HAD AND RECEIVED (COUNT VII) ARE PERMISSIBLE AS ALTERNATIVE THEORIES TO L&F'S BREACH OF CONTRACT CLAIMS.

1. Alternative Theories of Recovery

Crown Valley relies on a theory of recovery, not a theory of pleading, to argue that L&F's claims of unjust enrichment and money had and received should be dismissed. *See doc. 27* at 5-6. "Claims for money had and received and unjust enrichment are both founded upon

[4] In addition, the Manufacturing Agreement's limitation of liability specifically does not apply to "liability as a result of the willful misconduct of the winery." *Id.* L&F alleges that Crown Valley's conduct constitutes "willful, wanton, outrageous, and malicious behavior," and therefore the contractual limitation of liability would not bar L&F from recovering punitive damages for Crown Valley's fraudulent conduct. *See doc. 23* at ¶ 88.

equitable principles whereby the law implies a contract to prevent unjust enrichment." *Lowe v. Hill*, 430 S.W.3d 346, 349 (Mo. App. W.D. 2014). L&F does not dispute that "a plaintiff cannot ***recover*** under an equitable theory when she has entered into an express contract for the very subject matter for which she seeks to recover." *Id.* (emphasis added). Notably, however, Crown Valley fails to identify a single case in which a court has dismissed claims of unjust enrichment or money had and received simply because the plaintiff has also brought claims of breach of contract. *See Grisham v. Mission Bank*, 531 S.W.3d 522, 538 (Mo. App. W.D. 2017) (holding that trial court erred in ***entering judgment for [the plaintiff]*** on her unjust enrichment claim); *Dubinsky v. Mermart, LLC*, 2009 U.S. Dist. LEXIS 31992, at *16 (E.D. Mo. Apr. 15, 2009) (explaining that the plaintiff "is certainly entitled to bring an unjust enrichment claim as an alternative ground for relief" to a breach of contract claim).

Under Rule 8, "[a] party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones." FED. R. CIV. P. 8; *see also* MO. SUP. CT. R. 55.10. Specifically, "it is well-established that a party may plead claims both for breach of contract, and on equitable theories which are only available in the absence of a contract." *Steelhead Townhomes, L.L.C. v. Clearwater 2008 Note Program, LLC*, 537 S.W.3d 855, 863 (Mo. App. W.D. 2017); *see also Joseph C. Sansone Co. v. Dow Corning Corp.*, 2006 U.S. Dist. LEXIS 28237, at *1 (E.D. Mo. May 4, 2006) ("In Missouri, a party may plead both breach of contract and quantum meruit.").

In *Owen v. GMC*, for example, the defendant moved to dismiss the plaintiff's unjust enrichment claim "on the grounds that Missouri law does not permit recovery on a quasi-contract theory when a valid, express contract governs the subject matter of the parties' dispute." 2006 U.S. Dist. LEXIS 70466, at *5 (W.D. Mo. Sep. 28, 2006). The District Court for the Western

District of Missouri noted, however, that "[a]ll the cases cited by [the defendant] . . . involve procedural postures much later in the litigation cycle." *Id.* The court denied the motion to dismiss the unjust enrichment claim because "[t]he fact that a plaintiff cannot simultaneously recover damages for both breach of an express contract and unjust enrichment does not preclude that plaintiff from pleading both theories in her complaint." *Id.* at *5-6.

Likewise, in *Superior Edge*, the plaintiff moved to dismiss the defendant's counterclaim of money had and received on the basis that "the claim is based on nothing more than the existence of the written contract between the parties, the obligation to perform under the contract, and monies paid pursuant to the contract." 44 F. Supp. 3d at 899. The court, applying Missouri law, explained that "federal courts in Missouri have consistently denied motions to dismiss quasi-contract claims even where the pleading also alleges the existence of an express contract." *Id.* at 900. The court denied the motion to dismiss the counterclaim of money had and received because "[a]lthough [the plaintiff] is correct that [the defendant] **will** be required to plead and prove damages outside the scope of the contract to recover on its money had and received theory, it is not required to do so at this motion to dismiss stage." *Id.* at 900-01 (quotations and citations omitted).

Following the rules set forth in *Owen* and *Superior Edge*, L&F can proceed on theories of breach of contract, unjust enrichment, and money had and received. Even if L&F cannot simultaneously recover under all of these theories, L&F has sufficiently pled each of these claims and should be permitted to proceed on alternative theories of recovery at this stage.[5]

[5] Crown Valley also argues that L&F's claim for money had and received should be dismissed because the "allegations for that claim mirror those of unjust enrichment." *Doc. 27* at 6. As explained *supra*, L&F is entitled to bring alternative claims of relief even if it cannot simultaneously recover on all of its claims. *See Superior Edge, Inc. v. Monsanto Co.*, 2006 U.S. Dist. LEXIS 70466, at *5-6 (W.D. Mo. Sep. 28, 2006). Again, Crown Valley has cited to no case in which a claim for money had and received is dismissed simply for mirroring the allegations of an accompanying claim of unjust enrichment, and the Court should therefore reject Crown Valley's argument.

2. Sufficient Pleading of Damages

Crown Valley also argues that L&F failed to adequately plead damages in that L&F did not indicate "the amount of enrichment which would be unjust for the defendant to retain." *See doc. 27* at 6. However, L&F specifically pled in its unjust enrichment claim that it paid $112,151.04 to Crown Valley, that Crown Valley accepted and appreciated the benefit, and that it would be unjust for Crown Valley to retain that full amount. *See doc. 23* at ¶¶ 89-100. As L&F has sufficiently pled (1) that Crown Valley was enriched by the receipt of a benefit, (2) that the enrichment was at the expense of L&F, and (3) that it would be unjust to allow Crown Valley to retain the benefit, Crown Valley's Motion to Dismiss should be denied as to L&F's unjust enrichment claim. *See id; see also Exec. Bd. of the Mo. Baptist Convention v. Windermere Baptist Conference Ctr.*, 280 S.W.3d 678, 697 (Mo. App. W.D. 2009).

Likewise, Crown Valley argues that L&F does not seek relief on its money had and received claim. *See doc. 27* at 6. However, L&F specifically pled that it is entitled to monetary damages in the amount of $112,151.04 on its claim for money had and received. *Doc. 23* at ¶¶ 101-110. As L&F has sufficiently pled (1) that Crown Valley received L&F's money, (2) that Crown Valley thereby appreciated a benefit; and (3) that Crown Valley's acceptance and retention of the money was unjust, Crown Valley's Motion to Dismiss should be denied as to L&F's claim for money had and received. *See id; see also Ward v. Luck*, 242 S.W.3d 473, 476 (Mo. App. E.D. 2008).

C. CROWN VALLEY IS NOT ENTITLED TO ATTORNEY FEES.

Crown Valley additionally states that it seeks entitlement to attorney fees and costs pursuant to the Manufacturing Agreement, Missouri statute, and Missouri Supreme Court Rule 77.01. Section 26 of the Manufacturing Agreement allows recoupment of reasonable attorney fees and costs by the "prevailing party." *See doc. 23-1* at § 26. Likewise, Rule 77.01 states that

"[i]n civil actions, the party prevailing shall recover his costs against the other party . . . ." MO. SUP. CT. R. 77.01. Even assuming *arguendo* that both provisions are valid and applicable in this case, Crown Valley cannot recover attorney fees and costs as part of a partial motion to dismiss. Crown Valley brings this Motion to Dismiss only as to Counts V, VI, and VII, and therefore would not constitute the "prevailing party" for purposes of Section 26 and Rule 77.01 even if the Motion were to be granted. Therefore, the Court should deny Crown Valley's premature request for attorney fees and costs.

IV. CONCLUSION

L&F has sufficiently stated a claim for fraud (Count V), unjust enrichment (Count VI), and money had and received (Count VII), and the Court should deny Crown Valley's Motion to Dismiss in its entirety.

WHEREFORE, for the reasons stated herein, Plaintiff L&F Brands, Inc. respectfully requests that the Court deny Defendant Crown Valley Winery, Inc.'s Motion to Dismiss Counts V, VI, and VII of Plaintiff's Amended Complaint and Its Motion for Attorneys' Fees and Costs, and for such other and further relief as this court deems just and proper under the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2019, I filed a true and correct copy of the foregoing document with the United States District Court, Eastern District of Missouri, by using the CM/ECF system. Participants in this case, who are registered CM/ECF users, will be served by the CM/ECF system.

/s/ Timothy W. Rudolph