IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

CITY OF HUBER HEIGHTS, OHIO Plaintiff, v. DON ALLEN HOLBROOK, LLC Defendant.	CASE NO. 2012-CV-02947 JUDGE MICHAEL TUCKER **MOTION OF DEFENDANT DON ALLEN HOLBROOK, LLC TO DISMISS COUNTS 2, 3, 4, & 5 OF THE COMPLAINT OF PLAINTIFF, THE CITY OF HUBER HEIGHTS, OHIO**

Defendant Don Allen Holbrook, LLC, moves this Court to dismiss Counts 2, 3, 4, and 5 from Complaint of the City of Huber Heights ("City") under Civ.R. 12(B)(6). Briefly, under Ohio law a plaintiff's claim for breach of a written contract in Count 1 and a claim for unjust enrichment in Count 3 are based on the same subject matter and, thus, are mutually exclusive. Also, because the City fails to allege that Don Allen Holbrook, LLC owed it any common law duty of ordinary care, its tort claims in Count 2 for conversion, Count 4 for fraudulent inducement, and Count 5 for negligent misrepresentation are not warranted by existing law. For these reasons, this Court must dismiss Counts 2, 3, 4, and 5 of the Complaint forthwith.

Respectfully Submitted,

s/Sue Seeberger
Sue Seeberger (0059730)
5975 Kentshire Drive, Suite D
Dayton, Ohio 45440-4264
Voice: (937) 291-8646
Fax: (937) 291-8650
sueseeberger@biegeltye.com
Attorney for Defendant Don Allen Holbrook, LLC

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Pursuant to Civ.R. 12(B)(6), Defendant Don Allen Holbrook, LLC ("Don Allen Holbrook, LLC"), moves this Court to dismiss Counts 2, 3, 4, and 5 from the Complaint of Plaintiff, the City of Huber Heights ("City"), for failure to state claims upon which relief can be granted. While Don Allen Holbrook, LLC disputes the allegations in Count 1 of the Complaint for breach of contract, it is filing an answer with respect to that count. Briefly, this Court must dismiss Count 3 for unjust enrichment because Ohio law does not permit a party to plead on the same subject matter (i) a claim for breach of an express contract, as in Count 1; and (ii) the remedy of unjust enrichment as in Count 3.

This Court must also dismiss all of the tort claims in the City's Complaint because the City fails to allege that Don Allen Holbrook, LLC owed any duty of care to the City and is "tortifying" the same subject matter as its claim for breach of an express contract. To be blunt, the City alleges a Complaint for breach of a written Agreement, asking that Don Allen Hobrook, LLC refund previously authorized payments, when the Agreement includes no express terms permitting any refunds. Don Allen Holbrook, LLC seeks in its Counterclaim the final payment due under the Agreement, $12,200.00, in addition to it attorney's fees and reasonable costs and expenses under R.C. 2323.51, based on the City's frivolous conduct in asserting claims not supported by existing Ohio law in Counts 2, 3, 4, and 5. For these reasons, this Court must dismiss Counts 2, 3, 4, and 5 from the City's Complaint.

II. UNDER OHIO LAW, A COURT SHOULD DISMISS COUNTS THAT FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A motion to dismiss for failure to state a claim upon which relief can be granted is merely procedural and tests the sufficiency of the complaint. Slife v. Kundtz Properties, Inc. (1974), 40

Ohio App.2d 179, 182 (Cuyahoga Co.). A motion to dismiss is properly granted when the court accepts all factual allegations in the complaint as true, draws all reasonable inferences in favor of the non-moving party, and still concludes beyond doubt from the complaint that the non-moving party can show no provable set of facts upon which relief is warranted. State ex rel. Midwest Pride IV, Inc. v. Pontious (1996), 75 Ohio St.3d 565. On the other hand, to survive a motion to dismiss under Civ.R. 12(B)(6), a complaint must contain either direct or inferential allegations on all of the material elements of the claims to sustain a recovery under some viable legal theory. Krukrubo v. Fifth Third Bank, Franklin App. No. 07AP-270, 2007-Ohio-7007, ¶ 21. A court need not accept as true, legal conclusions or unwarranted factual inferences. Mitchell v. Lawson Milk Co. (1988), 40 Ohio St.3d 190, 193.

Don Allen Holbrook, LLC, will show that the City's claim for unjust enrichment must be dismissed under Ohio law because this equitable remedy is based on the same subject matter as the City's claim for breach of an express contract that it attached to its Complaint as Exhibit 1. The City's claims for the torts of conversion, fraudulent inducement, and negligent misrepresentation must also be dismissed because these claims are essentially "tortifying" the City's claim for breach of an express contract, but each of these claims also fails to set forth the material elements of the claims. For these reasons, this Court must dismiss Counts 2, 3, 4, and 5 from the City's Complaint.

III. THIS COURT MUST DISMISS PLAINTIFF'S COUNT 3 FOR UNJUST ENRICHMENT UNDER OHIO LAW BECAUSE IT HAS ALREADY ALLEGED A CLAIM FOR BREACH OF A WRITTEN CONTRACT.

It is well-settled law in Ohio that the equitable remedy of unjust enrichment will not lie when the subject matter of that equitable claim is covered by the subject matter of an express contract. Busch v. Premier Integrated Medical Associates, Ltd., Montgomery App. No. 19364,

2003-Ohio-4709, ¶ 107. In fact, the Second District Court of Appeals has stated that a breach of contract claim and an unjust enrichment claim are "mutually exclusive." Schafer v. RMS Realty, 138 Ohio App.3d 244, 291 (2nd Dist. 2000). When a party asserts a claim for breach of an express contract and unjust enrichment based on the same subject matter as the express contract, a trial court must dismiss a claim for unjust enrichment.

In the Complaint, the City alleges that Don Allen Holbrook, LLC, made a proposal (see Complaint, ¶¶ 4-6), which the City accepted when it unanimously passed Resolution No. 2011-R-5559 and the former City Manager, Gary Adamson, accepted the proposal (see Complaint, ¶¶ 9-10). **The parties entered one contract and only one contract, attached to the Complaint as Exhibit 1,** under which Don Allen Holbrook, LLC, agreed to perform an economic development business case analysis to expand a current project to improve the ability of the City to compete for regional retail and job creation in the region. See Exhibit 1, pp. 1-2.

Notably, the City does not allege that it had or has any separate or different agreements that it entered with Don Allen Holbrook, LLC as a possible basis for a claim of unjust enrichment. See Complaint, ¶¶ 3-10. Because the parties have only one written contract and the City alleges no other agreements of any sort on a different subject matter, the City cannot, as a matter of Ohio law, assert a claim for unjust enrichment based on the same subject matter as its claim for breach of a written contract. Thus, under well-settled Ohio law, this Court must dismiss Count 3.

IV. THIS COURT MUST DISMISS THE CITY'S CLAIMS FOR TORTIOUS CONDUCT BECAUSE THE CITY FAILS TO ALLEGE THAT DON ALLEN HOLBROOK, LLC OWED ANY DUTY OF CARE TO THE CITY AND BECAUSE THE CITY FAILS TO ALLEGE THE MATERIAL ELEMENTS OF ITS TORT CLAIMS.

This Court must dismiss the City's claims for any alleged tortious conduct by Don Allen

Holbrook, LLC in Count 2 for conversion, Count 4 for fraudulent inducement, and Count 5 for negligent misrepresentation **because the City fails to allege and cannot show that Don Allen Holbrook, LLC owes the City any common law duties of ordinary care separate from the contractual duties solely created by the Agreement between the parties**. Also, as will be shown in the allegations of the Complaint, the City also fails to plead the material elements of these causes of action. For these reasons and under well-settled Ohio law, this Court must dismiss the all of the City's tort claims for conversion, fraudulent inducement, and negligent misrepresentation.

Under Ohio law, "a tort claim based upon the same actions as those upon which a breach-of-contract claim is based will exist independently of the contract action '**only if the breaching party also breaches a duty owed separately from that created by the contract, that is, a duty owed even if no contract existed**.'" 425 Beecher, L.L.C. v. Unizan Bank, Nat'l Ass'n, 186 Ohio App.3d 214, 2010-Ohio-412, ¶ 51, quoting Textron Fin. Corp. v. Nationwide Mut. Ins. Co., 115 Ohio App.3d 137, 151 (1996)." Sutton Funding, LLC v. Herres, 188 Ohio App.3d 686 936 N.E.2d 574, 2010-Ohio-3645 (emphasis added) (2nd Dist. 2010). **The Second District Court of Appeals has held that a breach of a private duty imposed by contract is not a tort**. Busch v. Premier Integrated Medical Associates, Ltd., Montgomery App. No. 19364, 2003-Ohio-4709, ¶55. Thus, because the City fails to allege that Don Allen Holbrook, LLC owes it any duties of ordinary care, but only alleges that Don Allen Holbrook, LLC owes it contractual duties arising from the Agreement between the parties, this Court must dismiss all of the City's tort claims for conversion, fraudulent inducement, and for negligent misrepresentation for failure to state a claim upon which relief can be granted.

A. This Court must dismiss the City's claim for conversion because it is based on the same subject matter as its claim for breach of contract and because the City fails to plead the material elements of a claim for conversion.

The City's claim for conversion is based on the same subject matter as its claim for breach of contract and fails to allege any separate duty that Don Allen Holbrook, LLC owed to the City other than contractual duties. Turning contractually agreed to payments into a claim for conversion changes hundreds of years of the common law of contracts as well as the common law of torts. While Don Allen Holbrook, LLC does not concede that it allegedly breached the Agreement, **this Court should dismiss the City's claim for conversion simply because a plaintiff making payments under the terms of a contract cannot later claim that a defendant "converted" those plaintiff-authorized payments by accepting them**.

As to its material elements, the tort of conversion has been defined as **a distinct act of dominion or control wrongfully exercised over the personal property of another in denial of or under a claim that is inconsistent with the other's rights, resulting in damages**. Ohio Telephone Equip. & Sales, Inc. v. Hadler Realty Co., 24 Ohio App.3d 91, 93 (10th Dist. 1985). Thus, the material elements of a cause of action for conversion are:

> (1) plaintiff has ownership interests or a right to possession of the property **at the time of the conversion**;
> (2) defendant's conversion was by a **wrongful act or disposition of plaintiff's property rights**; and
> (3) damages.

Id. Thus, a plaintiff must allege that it had some form of ownership interests or rights to possession in the allegedly converted property and that the defendant committed some wrongful act in gaining possession or dominion over the property, and, as a result, suffered damages.

As alleged in the City's Complaint, the parties had no dealings with each other outside of the Agreement, meaning that all of the parties' dealings were contractual and were based on the

terms of the Agreement, attached as Exhibit 1 to the Complaint. This Court should note that the City alleges in Paragraph 11 of the Complaint it paid Don Allen Holbrook, LLC, "**under the terms of the contract**":

> "11. Huber Heights paid [Don Allen Holbrook, LLC] the first and second installment payments totaling $23,300.00 and $30,500.00 **under the terms of the contract**. (See Invoices attached as Exhibits 3 and 4)."

Complaint, ¶ 11 (emphasis added). Oddly, the City fails to allege in any of the paragraphs in the Complaint preceding Paragraph 11 that Don Allen Holbrook, LLC had allegedly breached the Agreement before the City made these two payments totaling $53,800.00, disputing the entire basis for the City's Complaint that the first party to breach was allegedly Don Allen Holbrook, LLC. In Paragraph 12 of the Complaint, the City alleges that Don Allen Holbrook, LLC "presented its finished product" (see Complaint, ¶ 12) before the City made the final installment payment. In Paragraphs 12 and 13, the City alleges that the "finished product" "wholly failed to conform to the terms" of the Agreement or conform to "industry standards", without specifying any alleged deficiencies of any nature.

Based on the City's own allegations in the Complaint, Don Allen Holbrook, LLC owes no duties to the City other than private, contractual duties. Based on the City's own allegations in the Complaint, Don Allen Holbrook, LLC completed its performance due under the terms of the Agreement to the best of its ability given that the City failed to meet its own obligations (see Answer and Counterclaim, ¶¶ 12, 13, 43-50) and had not been given any notice by the City of any alleged breach under the terms of the Agreement, when the City refused to make the final payment due under the Agreement (see Exhibit 5, attached to the Complaint). Reading the allegations in the City's claim for conversion, in Paragraphs 19 to 22 of the Complaint, in context of the preceding Paragraphs 3 to 16 of the Complaint, leads to a reasonable conclusion

that the City has no claim for conversion under Ohio law against Don Allen Holbrook, LLC because the City authorized and made the first 2 contractually agreed to installment payments.

Furthermore, the City fails to plead the material elements of a claim of conversion. Under the first element, a plaintiff must allege that it has ownership interests or a right to possession of the property at the time of the conversion. By alleging in Paragraph 11 of the Complaint that the payments the City made to Don Allen Holbrook, LLC, were made "under the terms of the contract", the City fails to plead the first material element of its claim, namely that it had any ownership or possessory rights to the funds representing the first two installment payments for $53,800.00, when the City concedes that those payments were due according to the terms of the Agreement and that it authorized payment according to Exhibits 3 and 4 to the Complaint.

Under the second element, a plaintiff must allege that the defendant's conversion was by a wrongful act or disposition of plaintiff's property rights. Instead, in Paragraphs 19, 20, and 21 of the Complaint, the City alleges that it demanded a refund, that Don Allen Holbrook, LLC refused to refund the payments, and that refusal to refund is the wrongful action allegedly constituting conversion. First of all, this Court should note that the City does not cite to any "refund" language in the Agreement, because there is none. Thus, even if the City demanded a refund at any time before Don Allen Holbrook, LLC delivered its "finished product", refusing to give the City a refund would not constitute a breach of the Agreement because there is no such language in the Agreement. Second, all of the alleged "conversion" conduct is within the subject matter of a breach of contract claim and does not rise to the level of an intentional tort. As alleged by the City in Paragraph 11 of the Complaint, these payments were made "**under the terms of the contract**" (emphasis added), meaning that when the City paid these 2 installment

payments, the City authorized the transfer of the money and so had no further "ownership" over those funds and that Don Allen Holbrook, LLC, when it accepted payment of the first two installment payments, was lawfully possessing those payments. This Court must dismiss the City's claim for conversion and its request for an award of punitive damages and attorney's fees because the claim for conversion is not warranted under Ohio law since it is premised on the same subject matter as the City's breach of contract claim and because the City fails to plead the material elements of a claim for conversion.

B. This Court must dismiss the City's claim for fraudulent inducement because the City fails to allege any conduct separate from the alleged conduct in its breach of contract claim, fails to plead the material elements of the claim, and fails to plead the material elements with particularity.

This Court must also dismiss the City's claim for fraudulent inducement. The Supreme Court has held that a claim of fraud in the inducement "arises when a party is induced to enter into an agreement through fraud or misrepresentation. 'The fraud relates not to the nature or purport of the [contract], **but to the facts inducing its execution** . . . ." ABM Farms, Inc. v. Woods, 81 Ohio St.3d 498, 502, quoting Haller v. Borror Corp., 50 Ohio St.3d 10, 14 (1990) (emphasis added). "A classic claim of fraudulent inducement asserts that a misrepresentation of facts outside the contract or other wrongful conduct induced a party to enter into the contract." ABM Farms, 81 Ohio St.3d at 503. Claims for fraudulent inducement must be pled with particularity under Civ.R. 9(B). Frazier v. Kent, 11th Dist. No. 2004-P-0077, 2005-Ohio-3897, ¶ 17. Ohio courts have held that the "particularity" condition of Civ.R. 9(B) may be satisfied by meeting the following requirements: (1) a plaintiff must specify the statements claimed to be false; (2) the allegations in the complaint must state the time and place where the statements were made; and (3) a plaintiff must identify the defendant claimed to have made the statements. Korodi v. Minot, 40 Ohio App.3d 1, syllabus (10th Dist. 1987). In Paragraphs 28 through 30 of

the Complaint, the City fails to specify any particular alleged statements it claims to be false and fails to state the alleged times and places where the alleged statements were made. This Court must dismiss the claim for fraudulent inducement and its request for punitive damages and attorney's fees because the claim is a re-hash of the breach of contract claim, because the City fails to plead the material elements of a claim for fraudulent inducement, and because the City fails to plead its allegations with particularity.

"The elements of fraudulent inducement are: (1) an actual or implied false representation concerning a fact or, where there is a duty to disclose, concealment of a fact; (2) which is material to the transaction; (3) knowledge of the falsity of the representation or such recklessness or utter disregard for its truthfulness that knowledge may be inferred; (4) intent to induce reliance on the representation; (5) justifiable reliance; and (6) injury proximately caused by the reliance." Bealer v. Randall Mortgage Services, Inc., 2nd Dist. No. C.A. 2010 CA 30, 2011-Ohio-1394, ¶ 32. A classic example of fraudulent inducement cited by courts is where an exterminator signs a homeowner to a contract for extensive termite-control measures, following an inspection of the premises, upon a **factual misrepresentation** that the house is infested with termites when, in fact, there is **no termite infestation in the home**. Wall v. Planet Ford, Inc., 159 Ohio App.3d 840, 2005-Ohio-1207, ¶ 35 (2nd Dist.). Thus, the fraud does not reside in the contract itself, but in the representations made by the exterminator that induced the homeowner to sign the contract.

Using this example of a contract fraudulently induced by a factual misrepresentation of a termite infestation, under the first element, the actual misrepresentation of a fact, namely a termite infestation in the home, relates not to the nature or content of the contract, but to the misrepresentation of a fact that induced the homeowner to enter the contract because there was

no actual termite infestation. Under the second element, that factual misrepresentation is material to the transaction. Under the third element, the exterminator has actual knowledge that the representation of a termite infestation is false. Under the fourth element, the exterminator intended to induce the homeowner to sign a contract for extermination services. Under the fifth element, the homeowner justifiably relied on the factual misrepresentation of a termite infestation in signing the contract. The factual misrepresentation is not at variance with the terms of the contract and the parties are in complete agreement as to the express terms of the contract, namely, certain extermination services are be performed in exchange for the payment of money. But the contract, the terms of which are not in dispute, was induced by the seller's fraudulent representation of a fact that the house was infested with termites, when there was no termite infestation.

In the case before this Court, the City fails to allege that Don Allen Holbrook, LLC made either (i) an actual or implied false representation concerning **a fact** that induced the City to sign the Agreement; or, (ii) had any duty to disclose, but that Don Allen Holbrook concealed a fact that induced the City to sign the Agreement. In Paragraph 28 of the Complaint, the City alleges that Don Allen Holbrook, LLC was "ready, willing and able to provide Plaintiff with a finished product that would substantially conform" to the Agreement, with the intent of inducing the City to contract for its services. Complaint, ¶ 28. Being "ready, willing and able" is **not a fact**, but is instead a state of mind and whether or not Don Allen Holbrook, LLC provided a "finished product" has nothing to do with a claim for fraudulent inducement and only to do with whether or not Don Allen Holbrook fulfilled its Agreement. The City fails to plead the first material element of a claim of fraudulent inducement by failing to allege any factual misrepresentation by by Don Allen Holbrook, LLC that induced the City to enter the Agreement.

Under the second element of a claim of fraudulent inducement, the City fails to allege how any actual or implied false representations concerning **a fact**, or concealment of a fact, was material to the transaction. The allegations in Paragraph 28 of the Complaint that the "finished product [] would substantially conform to the terms of Exhibit 1 [the Agreement] with the intent of inducing Plaintiff to contract for its services" not only fail the particularity test, the allegations in Paragraph 28 of the Complaint fail to state how any alleged representations were allegedly "material" to the transaction. The City fails to plead the second material element of a claim of fraudulent inducement.

Under the third element for a claim of fraudulent inducement, the City fails to include any allegation at all that Don Allen Holbrook, LLC had knowledge of the alleged falsity of any alleged false representations or allege that Don Allen Holbrook, LLC had such recklessness or utter disregard for its truthfulness that knowledge may be inferred. Under the fourth element for a claim of fraudulent inducement, the City fails to allege with any particularity that Don Allen Holbrook, LLC allegedly intended to induce the City's reliance on the alleged false representation, but instead generally alleges in Paragraph 30 that Don Allen Holbrook, LLC "has failed to honor the representations made", which goes to the City's allegation that Don Allen Holbrook, LLC did not fulfill the contract, but says nothing about fraudulent inducement. Finally, the City alleges that it incurred expenses in the amount of $53,800.00 that it would not have incurred but for the still generally alleged "fraudulent misrepresentations and inducements" made by Don Allen Holbrook, LLC.

Under the fifth element, the City fails to allege with any particularity that its alleged reliance on the generally alleged "false representations" amounted to justifiable reliance. Finally, under the sixth element, instead of alleging any injury proximately caused by the alleged

justifiable reliance, the City alleges the same damages as its damages in its breach of contract claim, namely, $53,800.00. Given that the City fails to allege any of the material elements of the claim of fraudulent inducement, the City has no cognizable claim for punitive damages or attorney's fees. For these reasons, this Court must dismiss the City's claim for fraudulent inducement and dismiss any claim for punitive damages or claim for recovery of attorneys' fees and costs thereunder.

C. This Court must dismiss the City's claim for negligent misrepresentation because the City fails to plead the material elements of the claim, fails to allege any affirmative false statement allegedly made by Don Allen Holbrook, and fails to allege any conduct separate from the alleged conduct in its breach of contract claim.

As with the previous two tort claims, this Court must also dismiss the City's tort claim for negligent misrepresentation because it is based on the same subject matter as the City's claim for breach of contract and the City fails to allege any duty of ordinary care that Don Allen Holbrook, LLC owed to it. Under Ohio law, the elements of a claim for negligent misrepresentation are as follows:

> "[o]ne, who in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information."

Leal v. Holtvogt, 123 Ohio App.3d 51, 61-62 (2nd Dist. 1998), citing Textron Fin. Corp. v. Nationwide Mut. Ins. Co., 115 Ohio App.3d 137, 149 (1996). **Moreover, a claim for negligent misrepresentation does not lie for omissions, but must allege some affirmative false statement**. Leal, 123 Ohio App.3d at 62 (citations omitted). The City fails to allege any affirmative false statement allegedly made by Don Allen Holbrook, LLC anywhere in Paragraphs 32 to 38 in its Complaint. The City alleges that the parties had an Agreement

between them, but under Ohio law, the City must base tort claims for conversion, for fraudulent inducement, and for negligent misrepresentation upon allegations that Don Allen Holbrook, LLC owed duties of reasonable and ordinary care to the City entirely separate from any express contractual duties. The City fails to do this.

In the case before this Court, the City fails to allege material elements of a claim for negligent misrepresentation and fails to allege any duty of care owed by Don Allen Holbrook, LLC to the City, but only alleges contractual duties owed. The City alleges in Paragraph 33 that Don Allen Holbrook, LLC is "in the business of supplying information and consulting services", which, as the City alleged in Paragraphs 4 through 10, was supplied to the City solely pursuant to a written Agreement.

In Paragraph 34, the City alleges that Don Allen Holbrook, LLC "had a pecuniary interest in Plaintiff **contracting** for its services" (emphasis added), again pursuant to a written Agreement. The Agreement expressly states that the City agreed to pay Don Allen Holbrook, LLC a total of $66,000.00 for its consulting services, which it failed to do.

In Paragraph 35, the City alleges:

> "35. Defendant intentionally or negligently supplied false and misleading information to Plaintiff regarding the necessity of, and quality of, the services and/or products identified in [**the Agreement] Exhibit 1**."

Emphasis added. Nowhere in Paragraph 35 of the Complaint does the City allege what "false and misleading information" Don Allen Holbrook, LLC allegedly supplied to the City. Nowhere in Paragraphs 33 to 37 in its claim for negligent misrepresentation does the City identify any alleged affirmative false or misleading statements made by Don Allen Holbrook, LLC to the City and on which the City allegedly justifiably relied.

In fact, in Paragraph 37 of the Complaint, the City alleges that "Plaintiff justifiably relied

on Defendant's guidance and advice **in entering into a contract** with Defendant." Emphasis added. This allegation leads to the reasonable conclusion that the City's claim for negligent misrepresentation is allegedly about entering the Agreement in the first place, and is not alleging that the City had any dissatisfaction with the consulting work itself. Based on its failure to allege any duty of care that Don Allen Holbrook, LLC owed to the City and its failure to allege the material elements of the claim, this Court must dismiss the City's claim of negligent misrepresentation and its request for an award of punitive damages and its attorney's fees.

V. CONCLUSION

For the foregoing reasons, this Court must dismiss Counts 2, 3, 4, and 5 from the City's Complaint. The City's claim for unjust enrichment must be dismissed because it is based on the same subject matter as the City's claim for breach of a written contract and, under Ohio law, a claim for breach of an express contract and the remedy of unjust enrichment are mutually exclusive. Finally, this Court must dismiss all of the City's tort claims because (1) they are also based on the same subject matter as the breach of contract claim; and (2) the City fails to allege that Don Allen Holbrook, LLC owed any common law duties of ordinary care to the City that would give rise to such tort claims. Thus, the City has failed to allege claims upon which this Court can grant relief under Civ.R. 12(B)(6). This Court must dismiss Count 2 for conversion, Count 3 for unjust enrichment, Count 4 for fraudulent inducement, and Count 5 for negligent misrepresentation from the Complaint and the requests for punitive damages and attorney's fees under the unwarranted tort claims.

Respectfully Submitted,

s/Sue Seeberger
Sue Seeberger (0059730)
5975 Kentshire Drive, Suite D
Dayton, Ohio 45440-4264

Voice: (937) 291-8646
Fax: (937) 291-8650
sueseeberger@biegeltye.com
Attorney for Defendant Don Allen
Holbrook, LLC

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by the Court's e-filing system on this 29th day of May, 2012, upon the following:

L. Michael Bly
Joshua Kin
Pickrel, Schaeffer & Ebeling
2700 Kettering Tower
Dayton, Ohio 45423

s/Sue Seeberger