

**STATE OF MICHIGAN
IN THE 44TH CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON**

SHIRLEY BARTHOLD,

Plaintiff,

v

Case No. 2023-31937-CB

Hon. Michael P. Hatty

WILLIAM SMALL, KAREN SMALL,
STERLING COMMERCIAL CREDIT –
MICHIGAN LLC, MICHIGAN
COMMERCIAL CREDIT LLC,
STERLING COMMERCIAL CREDIT
LLC, BRIAN JENKS, AND GREG BOLLER,

Defendants.

**OPINION AND ORDER RE:
DEFENDANT SMALL’S MOTION FOR SUMMARY DISPOSITION OF FIRST
AMENDED COMPLAINT UNDER MCR 2.116(C)(7) AND (8)**

At a session of court held in the courthouse
in the City of Howell, County of Livingston,
State of Michigan, on the **21st day of December, 2023.**

**PRESENT: HONORABLE MICHAEL P. HATTY
BUSINESS COURT JUDGE**

THIS MATTER HAVING COME BEFORE THE COURT upon Defendant Small’s Motion for Summary Disposition of First Amended Complaint under MCR 2.116(C)(7) and (8), and the Court having reviewed the filings in this case and the record, and the parties having appeared by and through their respective counsel on November 9, 2023, and the parties having each presented their oral arguments, and the Court being otherwise fully advised in the premises, the Court now issues this Opinion and Order **DENYING** Defendant Small’s Motion for Summary Disposition of First Amended Complaint under MCR 2.116(C)(7) and (8) for the reasons set forth below.

I. BACKGROUND

Defendants are the majority shareholders (except Greg Boller, who owns 10% of the companies) of three business entities:

- SCC Holdings LLC
- Sterling Commercial Credit – Michigan

- SCC Services LLC

SCC Holdings is in the business of commercial loans. The other two entities are essentially dormant. Mr. William Small owns 30% of each of the three businesses. William Small's ex-wife, Karen, owns 30% of each of the three businesses. Mr. Jenks also owns 30%. Greg Boller owns the last 10% of each company.

Plaintiff is a minority shareholder in Sterling Commercial Credit LLC (hereinafter "the LLC"). On or about July 27, 2011, she invested \$80,000 in the entity. She received letters showing her quarterly interest income, and she received annual K-1 schedules listing her as a partner, and showing income, deductions, credits, and the like.

On July 12, 2023, Plaintiff filed the Complaint initiating this case, alleging that in mid-2021, Plaintiff requested to withdraw her investment in the LLC, and while Defendants paid her the accrued interest, Defendants refused to return the principal investment amount. Then in February 2022, and without Plaintiff's approval, Defendants approved the sale of 80% ownership interest in the several LLCs to Great Elm Capital Corp, and Great Elm paid the several LLCs \$7.54 million for that interest. Plaintiff continues that on March 25, 2022, Defendant Jenks took unilateral control of decision-making authority of the businesses and further, he transferred \$600,000.00 out of the businesses between March 25, 2022 and January 2023 to persons other than members or investors.

This Court does note that William and Karen Small sued Brian Jenks over the same alleged actions of Mr. Jenks in March 2022 in Case No. 2023-031755-CB, which this Court compelled to attend arbitration in May of 2023 via summary disposition under MCR 2.116(C)(7).

Plaintiff's First Amended Complaint (filed August 16, 2023) contained the following counts:

- I. Common Law Conversion (on the basis that Plaintiff's \$80,000 investment should have been returned to her, and she didn't realize she was purchasing a membership interest)
- II. Statutory Conversion under MCR 600.2919a (same basis as Count I)
- III. Breach of Fiduciary Duties (on the basis that Defendants are controlling members of the LLCs and they failed to keep Plaintiff informed of the activities of the LLC, failed to inform Plaintiff of the sale of Great Elm, failed to disgorge dividends, failed to provide documentation regarding financials to Plaintiff)
- IV. Minority shareholder oppression under MCL 450.4515 (same basis, and also failing to return Plaintiff's investment)

In lieu of first responsive pleading, Defendant William Small has filed this present motion for summary disposition, arguing that the claims for conversion fail as a matter of law because Plaintiff has failed to allege facts showing that she was entitled to a return of her investment, and the conversion claims are also time-barred because Plaintiff made her investment in 2011. Defendant Small also asserts that he should be dismissed entirely from the lawsuit, as none of the allegations against him set forth the elements of any cause of action.

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II. APPLICABLE LAW

A. Summary Disposition under MCR 2.116(C)(7)

A motion for summary disposition may be brought under MCR 2.116(C)(7) on the ground that entry of judgment, dismissal of the action, or other relief is appropriate “because of release, payment, prior judgment, immunity granted by law...”

MCR 2.116(C)(7) motions include those brought on the basis that the claim is barred by an applicable statute of limitations. *Estate of Jesse v Lakeland Specialty Hosp at Berrien Ctr*, 328 Mich App 142, 145 (2019). The burden of establishing the bar imposed by a statute of limitations is normally on the party asserting the defense. *Kuebler v Equitable Life Assurance Soc’y of the United States*, 219 Mich App 1, 5 (1996). “In the absence of disputed facts, whether a cause of action is barred by a statute of limitations is a question of law.” *Trentadue v Gorton*, 479 Mich 378, 434–435 (2007). However, summary disposition is inappropriate if application of the statute of limitations involves an underlying factual dispute. See *Huron Tool & Eng’g Co v Precision Consulting Servs*, 209 Mich App 365, 377–378 (1995).

Evidentiary support is only required for a motion brought under MCR 2.116(C)(7) “when the grounds asserted do not appear on the face of the pleadings.” MCR 2.116(G)(3)(a). The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant.”). Notwithstanding, a party may wish to submit affidavits, depositions, admissions, or other documentary evidence in support of a motion seeking dismissal on one of the grounds listed in MCR 2.116(C)(7). MCR 2.116(G)(2). Affidavits and other documentary evidence offered in support of or in opposition to such a motion may be considered only to the extent that its content or substance would be admissible as evidence to establish or deny the grounds stated in the motion. MCR 2.116(G)(6).

B. Summary Disposition under MCR 2.116(C)(8)

MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff’s claim and results in a determination whether the plaintiff’s allegations are sufficient to establish a prima facie case. *Maiden v Rozwood*, 461 Mich 109, 119 (1999). The motion should be granted if the claim is so clearly unenforceable that no factual development could justify the plaintiff’s claim for relief. *Maiden*, 461 Mich at 119. A motion brought under MCR 2.116(C)(8) is decided on the pleadings alone; no other evidence may be considered. MCR 2.116(G)(5). However, in an action based on a contract, the court may examine the contract. *Woody v Tamer*, 158 Mich App 764, 770 (1987).

When deciding a motion under MCR 2.116(C)(8), the court must accept as true all factual allegations contained in the complaint as well as any reasonable inferences that may be drawn from those allegations. *Singerman v Municipal Serv Bureau*, 455 Mich 135, 139 (1997). The court may not consider the merits of the plaintiff’s factual allegations, *Mieras v DeBona*, 452 Mich 278, 291 (1996), and it must construe those allegations in the plaintiff’s favor. *Wortelboer v Benzie Cty*, 212 Mich App 208, 217 (1995). Mere conclusory statements, however, without supporting allegations of fact are insufficient to state a cause of action.

III. ANALYSIS

A. Motion for Summary Disposition under MCR 2.116(C)(7) --- only as to Counts I and II (conversion)

Defendant William Small's motion for summary disposition of the conversion claims on statute of limitations grounds is that Plaintiff concedes in her Complaint that she invested her \$80,000 in 2011 – some twelve years ago. Specifically, she admits she received K-1 schedules 2011 through 2022, which named her as a partner in the businesses. She either did or should have known when she first began receiving K-1 schedules that her \$80,000 was for membership and that Defendants would not return the funds to her.

Plaintiff responds that the statute of limitations has not elapsed, because she remains unaware of what Defendants have done with her “investment” monies. She states her monies may have been part of the 2022 transaction that sold 80% of the interest in the several LLCs to Great Elm, but she is not sure because the several Defendants have not provided her with an accounting.

The period of limitation for a claim of conversion is three years. *See* MCL 600.5805(2); *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 49–50 (2007). The period begins to run from the date that the defendant exercised wrongful dominion over the personal property. *See* MCL 600.5827; *see also, e.g., Brennan v Edward D Jones & Co*, 245 Mich App 156 (2001).

No evidence has been produced regarding the conversion claims, other than Plaintiff's affidavit which basically restates the allegations in the Complaint. In her Complaint, Plaintiff states in support of her conversion claims that she entrusted \$80,000 to the several Defendants on July 27, 2011, and she believed it to be an investment. She states at Paragraph 27 that the several Defendants never informed her that her monies were to purchase a membership interest. At Paragraph 29, she states that she asked for return of her investment in 2021, and then at Paragraphs 33-36, she alleges that her prior attorney sent a formal demand letter for the investment monies on October 11, 2022, and the several Defendants wrote back October 18, 2022, refusing to refund her.

When the defendant had the initial right to possess the property, a demand letter becomes a prerequisite to bringing a conversion lawsuit – because it is the withholding of the demanded property that constitutes the exercise of “wrongful dominion.” *See Trail Clinic, PC v Bloch*, 114 Mich App 700, 706 (1982); *see also Thoma v Tracy Motor Sales, Inc*, 360 Mich 434, 438 (1960) (holding conversion may be committed by “refusing to surrender a chattel on demand.”) Here, what Plaintiff has alleged is that she turned over the monies to the several Defendants to hold and invest in the company, and the conversion occurred when she demanded a refund and the Defendants refused. Plaintiff has pleaded that claim unartfully, but reading the Complaint as a whole, that is her claimed basis.

Since the demand letter (attached to the Complaint) is from October 11, 2022, the statute of limitations has not run on Plaintiff's conversion claims. Only 267 days elapsed between when the Defendants refused to the demand (October 18, 2022) and when Plaintiff filed this suit (July 12, 2023). The motion for summary disposition under MCR 2.116(C)(7) must be DENIED. The statute of limitations has not passed, and the claim is not time-barred.

B. Motion for Summary Disposition under MCR 2.116(C)(8) as to Counts I and II (conversion)

Defendant William Small also argues that the conversion claims brought by Plaintiff should be dismissed under MCR 2.116(C)(8). Specifically, Plaintiff concedes in her Complaint numerous times that she is a member of the LLC. Indeed, her minority shareholder oppression claim and her breach of fiduciary duty claim rely upon her being a member of the LLC. Thus, Plaintiff has effectively admitted that her \$80,000 was for purchase of her membership interest.

Plaintiff responds with a collection of highly technical arguments:

- That Defendant William Small never served Plaintiff with a separate document entitled “motion”, but instead just the brief and praecipe, so his motion should be disregarded;
- Plaintiff filed an Amended Complaint that moots the arguments in Defendant Small’s summary disposition motion;
- Defendant William Small cited unpublished cases but failed to attach them with an explanation why unpublished cases were being cited;
- Defendant William Small failed to provide any documentary support that Plaintiff became a member of the LLC or that her claims lie in a breach of contract action rather than in tort; and
- Plaintiff has only her K-1 schedules which might not be accurate because perhaps Defendants have been choosing to share inaccurate information with the IRS.

This Court notes that it never received a separate “motion” either – just the brief, praecipe, notice of hearing, and exhibits. So it may be that Defendant William Small did not comply with the letter of the Court Rules about the precise format and titling of filings. However, review of the record reveals that nothing is actually missing from the summary disposition brief, praecipe, notice of hearing, and exhibits that were served on Plaintiff. Plaintiff received all the substance that was brought before the Court.

Furthermore, Defendant William Small withdrew his prior summary disposition motion that addressed the original Complaint, and filed this new one after Plaintiff filed the Amended Complaint. Therefore, Plaintiff’s arguments about the First Amended Complaint mooting this instant summary disposition motion are inapposite.

This Court notes that, estimating generously, perhaps a dozen times in the last five years has moving counsel actually provided copies of unpublished cases as attachments to a motion citing them. And never once, not a single time, has any movant actually followed the letter of MCR 7.215(C)(1) and provided an explanation why the unpublished case was being cited over published authority. This Court is willing to disregard any unpublished cases cited by Defendant William Small in his motion for summary disposition. The failure to attach unpublished cases as exhibits is not a substantive defect, as this Court routinely does its own research.

Finally, no documentary support is to be considered with a summary disposition motion brought under MCR 2.116(C)(8), and there is no basis for Plaintiff’s wild speculation that the several Defendants have been submitting false K-1 schedules to the IRS.

The elements of common law conversion are:

- The plaintiff owns or has a qualified interest in identifiable personal property.¹
- The plaintiff has possession of the property or the right to immediate possession.²
- The defendant wrongfully exerted dominion over the property in denial of or inconsistent with the plaintiff's rights.³
- The plaintiff suffered actual damages.

See e.g., Thoma v Tracy Motor Sales, Inc, 360 Mich 434, 438 (1960).

The elements of statutory conversion are:

- Either
 - the defendant stole or embezzled personal property or converted personal property as defined under the common law and put the converted property to their own use, or
 - the defendant bought, received, possessed, concealed, or aided the concealment of stolen, embezzled, or converted personal property and knew that the personal property was stolen, embezzled, or converted when they did so,⁴
- The plaintiff suffered actual damages.⁵

To be liable for statutory conversion under Michigan law, plaintiff must show that defendant employed converted property for some purpose personal to defendant's interests, even if that purpose is not object's ordinarily intended purpose. *See Hunt v Hadden*, 127 F Supp 3d 780 (E.D.Mich.2015). In order to prevail on a claim for statutory conversion under Michigan law, a plaintiff must satisfy the elements of a common law conversion claim, as well as demonstrate that the defendant had actual knowledge of the converting activity. *See Nedschroef Detroit Corp. v. Bemis Enterprises LLC*, 106 F.Supp.3d 874 (E.D.Mich.2015).

To support an action for conversion of money, a defendant must have an obligation to return the specific money entrusted to their care. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111–112 (1999); *see also Warren Tool Co v Stephenson*, 11 Mich App 274 (1968) (same principle). A claim of conversion of monies also cannot be sustained when the defendants had an obligation to return a sum of money equal to an amount inappropriately withdrawn from an account, but no obligation to return that specific cache of monies. *See AFSCME v Bank One*, 267 Mich App 281, fn6 (2005). *See also Lawsuit Financial LLC v Curry*, 261 Mich App 579, 591 (2004) (holding that to support an action for conversion of money, the defendant “ ‘must have obtained the money without the owner's consent to the creation of a debtor-creditor relationship’ ” and “must have had an obligation to return the specific money entrusted to his care.”); *see also*

¹ *See Hance v Tittabawassee Boom Co*, 70 Mich 227, 231 (1888) (stating that plaintiff must prove ownership, absolute or qualified, in personal property at issue and noting that it is not enough to present evidence that defendant likely converted some property).

² *See Thomas v Watt*, 104 Mich 201, 207 (1895).

³ *See Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 497 Mich 337, 352 (2015).

⁴ *See Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 197–198 (2005) (holding that mere constructive knowledge that property had been stolen, embezzled, or converted was insufficient to impose liability against recipient of stolen goods).

⁵ *See Alken-Ziegler, Inc v Hague*, 283 Mich App 99, 103–104 (2009).

Citizens Ins Co of America v Delcamp Truck Center Inc., 178 Mich App 570 (1989) (same principle).

In her First Amended Complaint, Plaintiff asserts the following material allegations relative to Counts I and II: that she transferred \$80,000 to the Defendants in 2011 (¶14), and she was informed it would be an investment (¶15). She received letters showing her quarterly interest income (¶20) and K-1 schedules showing she is a partner in the LLC (¶21, 22, 24). She does not know if the monies she paid went towards making her a partner (¶25). Defendants William Small, Karen Small, Boller, and Jenks owe her a fiduciary duty because they are managing members of the LLC (¶71). Defendants William Small, Karen Small, Boller, and Jenks are abusing their positions as controlling members of the LLC by failing to keep Plaintiff informed of the activities of the LLC (¶88-91) and by interfering with Plaintiff's interests (¶94). She admits further that she signed some agreement when she transferred the monies, but she did not receive a copy of said agreement back after signing.

No where in the Original Complaint nor in the First Amended Complaint has Plaintiff alleged that the Defendants obtained her monies without her consent or created a debtor-creditor relationship. Plaintiff also failed to allege that the \$80,000 she invested in the LLC was ear-marked specifically as a cache of monies owned by Plaintiff. These are key elements of a claim for conversion of monies, and Plaintiff has failed to include them in her pleading not once, but twice. Taking all her allegations in the First Amended Complaint as a whole, it appears that Plaintiff would be unable to truthfully allege the foundational elements of a claim for conversion of monies – because Plaintiff paid that \$80,000 and became a member of the LLC, and she expected a high return on her purchase of a membership interest, but now she has not received such a return. She is a disappointed investor, and those basic facts cannot support a conversion claim.

In short, Plaintiff's claims for conversion must fail because they are all based on the investment monies that Plaintiff paid to purchase ownership interests in the LLC, and Plaintiff still owns her interest in the LLC. Thus, she got what she bargained for. Furthermore, Plaintiff has no claim to those specific dollars so those dollars could not have been converted. Counts I and II must be DISMISSED under C(8).

C. Summary Disposition Motion under MCR 2.116(C)(8) – Count III

As to Plaintiff's Count III – breach of fiduciary duty – Defendant William Small argues that Plaintiff has failed to state a claim because she failed to state allegations in support of a conclusion that she suffered damages from any of the activities carried out by the Defendants. In addition, Defendant William Small asserts that the First Amended Complaint names Brian Jenks as the person who inappropriately transferred funds after the sale to Great Elm, so no cause of action has been stated against William Small.

To make a claim for breach of fiduciary duty, Plaintiff must plead the following elements:

- the Defendants are directors or officers of the Company in which Plaintiff is a shareholder
- Defendants have not discharged their statutory duties under MCL 450.1541a
 - Of dealings in good faith
 - Of conducting affairs of the business with the care of an ordinarily prudent person

- Of conducting affairs of the business in a manner he reasonably believes to be in the best interests of the Company
- OR Defendants have not discharged their common law fiduciary duties of:
 - Good faith
 - Loyalty
 - Avoidance of self-dealing
- Harm occurred to the shareholder/minority shareholders/the Company

See, e.g., Production Finishing Corp v Shields, 158 Mich App 479, 486 (1987); *Berger v Katz*, Nos 291663, 293880 (Mich Ct App July 28, 2011) (unpublished); *see also Blankenship v Superior Controls, Inc*, 135 F Supp 3d 608, 618 (ED Mich 2015).

In her First Amended Complaint, Plaintiff alleged that she is a partner or member of the LLC (¶20-24). However, without informing her, the Defendants approved the sale of some 80% ownership interest in the LLC to Great Elm in February 2022 (¶37-39) and the Great Elm stock produced \$240,000 in dividends (¶44). Plaintiff continued that the Defendants are members and are in control of the LLC (¶63-64 as to William Small), that William Small owes her a fiduciary duty (¶71-72), and that William Small breached said duty by failing to keep Plaintiff informed of the activities of the LLC, failure to provide her with documents requested, and failure to provide her with her portion of the dividends from the Great Elm stock (¶73-77). At ¶78 Plaintiff states that she has been harmed by these breaches of fiduciary duties.

“Michigan is a notice-pleading state.” *Johnson v QFD, Inc*, 292 Mich App 359, 368 (2011). A complaint must contain a “statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend[.]” MCR 2.111(B)(1). *See also Weymers v Khera*, 454 Mich 639, 655 (1997). Pleadings that contain “only conclusory assertions, contained in broad, generalized sentences and unsupported by factual allegations” are “therefore insufficient to state a claim on which relief could be granted.” *Ypsilanti Fire Marshal v Kircher*, 273 Mich App 496, 544 (2007). Rather, “the complaint must be sufficiently specific so that the defendant may adequately prepare his defense.” *Stanke v State Farm Mut Automobile Ins Co*, 200 Mich App 307, 318 (1993).

Looking at the First Amended Complaint as a whole, this Court is satisfied that Plaintiff has met the low threshold of notice-pleading. She was specific about the breaches of duty that form the basis of her claims. How she has been harmed can be inferred from the factual allegations in the First Amended Complaint that she had no chance to opine on the sale and she did not receive any portion of the dividends from the Great Elm stock. The precise dollar figure of how much she has been harmed will be sussed out in discovery. Summary disposition as to Count III under C(8) is DENIED.

In addition, this Court finds that Plaintiff has certainly included allegations against Defendant William Small throughout her First Amended Complaint, so he cannot be dismissed from the lawsuit on C(8).

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D. Motion for Summary Disposition under MCR 2.116(C)(8) – Count IV

As to Count IV – minority shareholder oppression – to establish oppression, the minority shareholder plaintiff must show the following elements:

1. they were shareholders of the corporation;
2. defendants were “directors” or “in control” of the corporation;
3. defendants engaged in acts; and
4. those acts were “illegal, fraudulent, or willfully unfair and oppressive” to the corporation or to them as shareholders.

See, e.g., Franks v Franks, 330 Mich App 69, 99 (2019).

When the plaintiff alleges that the defendants’ acts were unfair and oppressive (not illegal or fraudulent), the plaintiff must also prove that “the acts amounted to a ‘continuing course of conduct or a significant action or series of actions that substantially’ interfered with their interests as shareholders and that defendants took those acts with the intent to interfere with their interests as shareholders.” *Id.* at 99–100.

Common examples of shareholder oppression include, but are not limited to, oppressive refusals to issue dividends and distributions, withholding information, denying access to corporate books and records, terminating employment, removing minority shareholders from positions in management, squeezing or freezing the shareholder out of the company, prohibiting a shareholder from voting their shares at meetings, holding meetings without the shareholder’s knowledge, unfair redemption offers, diverting corporate opportunities and assets to other entities, diluting minority equity interests, pursuing investments deemed not to be in the corporation’s best interest, and treating shareholders of the same class differently. *See, e.g., Bromley v Bromley*, No 05-71798 (ED Mich Oct 4, 2006) (unpublished).

In her First Amended Complaint, Plaintiff alleged that she is a partner or member of the LLC (¶20-24). However, without informing her, the Defendants approved the sale of some 80% ownership interest in the LLC to Great Elm in February 2022 (¶37-39) and the Great Elm stock produced \$240,000 in dividends (¶44). Plaintiff continued that the Defendants are members and are in control of the LLC (¶80-81 as to William Small), and that Defendant William Small is abusing his position as a member in control of the LLC by failing to keep Plaintiff informed of the activities of the LLC, failure to provide her with documents requested, failure to allow her to withdraw funds, and failure to provide her with her portion of the dividends from the Great Elm stock (¶88-93). At ¶94-95, Plaintiff states that the Defendants are intentionally interfering with her interests, and she has been harmed.

Her pleading states all the necessary elements on Count IV, and so summary disposition is not appropriate under MCR 2.116(C)(8). Defendant William Small cites to *Franks v Franks*, *supra*, but apparently without consideration that Plaintiff’s allegations are basically a recitation of the elements with the language pulled directly from *Franks*. Summary disposition as to Count IV under MCR 2.116(C)(8) is DENIED.

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IV. CONCLUSION

The Court having reviewed the pleadings of the parties, along with the filings submitted relative to this motion for summary disposition, and the Court having further considered the oral arguments presented by the parties, and the Court being fully advised in the premises, and the Court having set forth its reasoning in great detail above, **NOW THEREFORE IT IS ORDERED AND ADJUDGED** as follows:

1. Defendant William Small's motion for summary disposition under MCR 2.116(C)(7) is DENIED;
2. Defendant William Small's motion for summary disposition under MCR 2.116(C)(8) is GRANTED as to Counts I and II;
3. Plaintiff is not entitled to amend Counts I and II as any such amendment would be futile;
4. Defendant William Small's motion for summary disposition under MCR 2.116(C)(8) as to Counts III and IV is DENIED; and
5. No costs or fees arising from this motion or the response/reply thereto are awarded to any party.

IT IS SO ORDERED.

/s/ Hon. Michael P. Hatty

Hon. Michael P. Hatty (P30990)
Business Court Judge