STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

CARY TILDS,

Plaintiff,

v **Case No. 20-182911-CB**
Michael Warren

DEALERDIRECT, LLC,

Defendant.
_____/

OPINION AND ORDER GRANTING
DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court, held in the
County of Oakland, State of Michigan
February 9, 2021.

PRESENT: HON. MICHAEL WARREN
_____/

OPINION

I
Overview

Plaintiff Cary Tilds's employment was terminated without cause by the Defendant in February 2020 pursuant to a Separation Agreement and Release.[1] At the center of this dispute is the "'DealerDirect Long-Term Incentive Plan (as Amended and Restated Effective January 1, 2018)" (the "Plan").[2] The Plaintiff alleges that she is entitled to certain "Annual Distributions" under the Plan that the Defendant "wrongly claims that it is not required to pay." In particular, she claims she is entitled to either (1) "the most recent

[1] The Separate and Release Agreement is not attached to the Complaint. Rather, this Agreement is attached to the Defendant's Motion for Summary Disposition as MSD Ex A.

[2] Attached to the Complaint as Ex A, and Defendant's Motion as MSD Ex 4.

Annual Distribution based on the 2019 Plan Year because [Plaintiff's] employment terminated before the Annual Distribution was paid in 2020,"[3] or (2) "a prorated allocation for the 2020 Plan Year."[4] The Plaintiff additionally alleges that the Defendant's interpretation of the Plan is inconsistent with the plain meaning and purpose of the Plan;[5] "irrational and absurd, places undue significance on the date the distribution checks are cut, and provides no logical support for treating [Plaintiff] the same as someone who was fired without cause on December 31, 2019;"[6] renders "nugatory" a certain material phrase contained in Section 5.05(b) of the Plan;[7] and "provides the company an incentive to deprive [Plaintiff] and all other similarly situated employees of their Annual Distributions by firing them without cause the day before the arbitrarily-selected day on which the checks are handed out."[8] In other words, the Plaintiff essentially alleges that the Defendant's interpretation and application of the Plan was unreasonable, arbitrary, and capricious.

Before the Court is the Defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(8) seeking dismissal of the Plaintiff's single count Complaint for breach of contract. The Plaintiff seeks counter relief under MCR 2.116(I)(2) "if the Court determines that the Plan unambiguously supports [her] interpretation."[9] Oral argument is dispensed pursuant to MCR 2.119(E)(3) because the briefing is more than sufficient to address the issues presented and would not illuminate the parties' argument.[10]

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[3] Complaint, Paragraph 6.

[4] Complaint, Paragraph 7.

[5] Complaint, Paragraph 59

[6] Complaint, Paragraph 60.

[7] Complaint, Paragraph 61.

[8] Complaint, Paragraph 63.

[9] Response at 14.

[10] MCR 2.119(E)(3) provides courts with discretion to dispense with or limit oral argument and to require briefing. MCR 2.116(G)(1) specifically recognizes the application of MCR 2.119(E)(3) to summary disposition motions. MCR 2.116(G)(1) additionally authorizes courts to issue orders establishing times for raising and asserting arguments. See generally MCR 2.116(G)(1)(a). This Court's Scheduling Order clearly and unambiguously set the time for asserting and raising arguments and legal authorities to be in the

At stake is whether dispositive relief in favor of the Defendant is warranted (1) when evidence not part of the pleadings does not bar the claim, (2) although discretion regarding construction and application of the Plan rests solely with the Plan Administrator, the Plan Administrator's interpretation and decisions are nevertheless subject to judicial review under the arbitrary and capricious standard, and (3) the Plan Administrator's decision was not arbitrary and capricious in light of the Plan's provisions? Because the answer is "yes," summary disposition in favor of the Defendant is granted.

II

Applicable standards of review under MCR 2.116

A

MCR 2.116(C)(8)

A motion brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint based on the factual allegations in the complaint. See e.g., *El-Khalil v Oakwood Healthcare, Inc,* 504 Mich 152, 159-160 (2019). Where, as here, a claim is based upon a writing, the writing is part of the pleading *when attached* to the pleading. MCR 2.113(C)(2). As explained by the Court in *El-Khalil*,

> [w]hen considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603 (2013); MCR 2.116(G)(5). A motion under MCR 2.116(C)(8) **may only be granted when a claim is so clearly unenforceable**

briefing – not to be raised and argued for the first time at oral argument. Therefore, both parties have been afforded due process as they each had notice of the arguments and an opportunity to be heard in writing, and this Court has considered the briefing and exhibits as well as the pleading at issue so as to be fully apprised of the parties' positions before ruling. Because due process simply requires parties to have a meaningful opportunity to know and respond to the arguments and evidence which has occurred here, dispensing with oral argument affords due process.

that no factual development could possibly justify recovery. *Adair v Michigan*, 470 Mich 105, 119 (2004).

[*Id.*]

B

MCR 2.116(C)(10)

To the extent the Defendant is relying on evidence beyond the pleadings, e.g., the Separation Agreement and Release, the Motion may be not be considered under MCR 2.116(C)(8). However, Michigan law is well settled that when a party brings a motion for summary disposition under the wrong subrule, a trial court may proceed under the appropriate subrule if neither party is misled. *Blair v Checker Cab Co,* 219 Mich App 667, 670–671 (1996); *Ruggeri Electrical Contracting Co., Inc. v Algonac,* 196 Mich App 12, 18 (1992). The appropriate Rule of Court here is MCR 2.116(C)(10), which tests the factual sufficiency of a claim or defense. See e.g., *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996). "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood,* 461 Mich 109, 119-120 (1999). A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *Skinner v Square D Co*, 445 Mich 153, 162 (1994); *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425 (2008).

C

MCR 2.116(I)(2)

MCR 2.116(I)(2) provides that "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

III

The Agreements

A

SEPARATION AGREEMENT AND RELEASE

The Separation Agreement and Release executed by the Plaintiff on February 14, 2020 provides, in relevant part:

> 1. Payment. Subject to Employee's execution of this Agreement, . . . the Company agrees to:
> ***
> c. **pay Employee the amounts** to which Employee is **entitled under the terms of FordDirect's Long-Term Incentive Plan as Amended and Restated Effective January 1, 2018.**
>
> 2. **Waiver and General Release.**
>
> * * *
>
> Excluded from the Release above is any claim or right which cannot be waived to the extent prohibited by law, **including all claims arising after the date of this Agreement, . . . and the right to sue for breach of this Agreement**….[11]

[11] MSD Ex A.

B

The Plan

As noted, the Separation Agreement specifically provides that, upon execution of the Agreement, the Defendant shall pay the Plaintiff the amount to which she is entitled under the terms of the Plan.[12] The Plan provides, in relevant part (underlined and capital emphasis in original; bold emphasis supplied unless noted otherwise):

ARTICLE I
TITLE AND PURPOSE

1.01 Title. The plan hereby evidenced shall be . . . hereinafter referenced to as the "Plan".

1.02 Purpose. The Plan is intended to provide incentive compensation to leadership and certain other employees of the Company, in order to align efforts to long-term strategic goals and to encourage the continued service of such employees. In all events, it is the intent of the Company [Defendant] that the Plan constitute a "bonus plan" under 29 C.F.R. Section 2510.3-2(c) and therefore not be subject to any provision of the Employee Retirement Income Security Act of 1974, as amended.

ARTICLE II
DEFINITIONS

* * *

2.10 "Individual Account" means the unfunded bookkeeping entries maintained by the Company on its books of account for each Participant.

2.12 "Participant" means an Employee who has been designated to participate in the Plan **for a Plan Year as set forth in Section 3.01 and who is participating in the Plan in accordance with the provisions of Article III.**

[12] The Defendants' briefing references the Plan as the "LTIP." However, for the sake of consistency with the Plaintiff's pleading and the document itself, the Court will reference it as the "Plan".

2.13. "Participation Agreement" means an agreement executed by the Company and an Employee to set forth the terms of, and to authorize and commence, the Employee's participation in the Plan, in the form attached hereto as Exhibit A entitled "FordDirect Long-Term Incentive Plan Participation Agreement." **The terms of the Plan shall in all cases control in the event of any inconsistency** between the terms of the Participation Agreement and the terms of the Plan.

2.14. "Plan Account" means the account maintained by the Company to which amounts are annually credited and debited under Article IV for each Plan Year.

2.15. "Plan Administrator" means the Compensation Committee of the Company's Board of Managers, or its delegate(s) appointed to serve as Plan Administrator.

2.16. "Plan Interest" means an **unfunded and unsecured interest**, **expressed as a specified percentage of the Plan Account**, as determined by the Compensation Committee of the Company's Board of Mangers and set forth in a written or electronic notice furnished to each Participant for the applicable Plan Year, **which has been allocated to a subaccount of a Participant's Individual Account with respect to a Plan Year in accordance with Article V.**

* * *

2.17. "Plan Year" **means January 1 to December 31 of each calendar year**, or the applicable portion of a calendar year in case of a "Final Plan Year" (as defined in Section 8.02).[13]

*** * ***

2.20. "Termination of Employment" means an Employee's separation from service from the Company . . . .

[13] Section 8.02 addresses circumstances where the Company "terminates the Plan". See Section 8.01. Under Section 8.02, titled Distribution of Plan Account upon Termination, "Upon termination of the Plan, the Plan Year shall end as of the date of such termination (the 'Final Plan Year') and an allocation with respect to the Final Plan Year shall be made.

ARTICLE III
ELIGIBILITY AND PARTICIPATION

3.01 Eligibility. For each Plan Year, the Company's chief executive officer shall, for purposes of the allocation process under Articles V and VI, **recommend to the Plan Administrator** (i) which leaders and **other Employees will be eligible to participate in the Plan for that Plan Year and thereby become Participants for that Plan Year** and (ii) **what portion of the Plan Interest** will be allocated to each such Participant **for that Plan Year**. ***The final determination of which leaders and other Employees are eligible to participate*** **in the Plan for a Plan Year and the Plan Interest to be allocated to each such person for such Plan Year** ***shall be determined by the Plan Administrator*** **in its** ***sole discretion.*** For the avoidance of doubt, the sum of the Plan Interest percentages allocated with respect to a Plan Year may be equal to or less than, but never greater that, 100%. **After determination of eligibility for a Plan Year, and Employee must execute a Participation Agreement to participate in the Plan for such Plan Year.**

* * *

3.03 Receipt and Release. Any payment to any Participant . . . in accordance with the provisions of the Plan, shall, to the extent thereof, be in full satisfaction of all claims hereunder against the Company, which may require such Participant, . . . as a condition precedent to such payment, to execute a receipt and release thereof in such form as shall be determined by the Company.

ARTICLE IV
PLAN ACCOUNT

4.01 Creation of Plan Account. **For each Plan Year** beginning on or after the Effective Date, the Company shall create a Plan Account to which amounts are credited or debited for such Plan Year as provided in the Plan.

4.02 Plan Year Credit. ***For each Plan Year***, the Compensation Committee may, ***in its sole judgement***, select and establish benchmarks, . . . which will be used to determine credits available under the Plan and how the credits are to be allocated among eligible Participants ***for the designated Plan Year.***

4.03 Notice. ***For each Plan Year,*** the Compensation Committee shall provide a notice to Participants ***eligible to share in the applicable Plan Year*** *credit* and how such credit, if any, will be allocated among the eligible Participants.

ARTICLE V
PARTICIPANT'S INDIVIDUAL ACCOUNTS, ANNUAL DISTRIBUTIONS

* * *

5.02 Individual Accounts. For Plan Years commencing in 2018 and thereafter, ***the Company shall maintain an Individual Account for each Participant. For each Plan Year the Individual Account shall be credited with the Participant's share of the amount determined in Section 4.02 and shall be debited by the amount distributed pursuant to Section 5.03.*** *Any amount credited to the Individual Account, after taking into account credits or debits described in this subsection, shall become* ***the opening balance credited to the Individual Account for the next Plan Year.***

5.03 **Annual Distributions**. **Subject to Sections 5.05 and 5.06**, ***for each Plan Year,*** there shall be distributed to each Participant an amount equal to one third (1/3) of the opening balance credited to Participant's Individual Account for such Plan Year ***plus*** the Participant's share of the current Plan Year amount determined under Section 4.02. ***The amount of the current Plan Year distribution shall be paid to the Participant no later than March 15 following such Plan Year.***

a) *Notwithstanding any other provision in this Plan to the contrary*, the allocations made to Individual Accounts under Section 5.02 and distributions provided for in this Section 5.03 *are subject to the forfeiture . . . provisions of Section[] 5.05 . . . .*

***

5.05 **Termination of Employment and Forfeiture of Distributions.**

a) General. Notwithstanding any other provision of the Plan except as provided in subsection (b) or (c) of this Section 5.05, a Participant who experiences a Termination of Employment prior to a Change in Control *will forfeit his/her right to receive an allocation* from the Plan Account for ***any Plan Year that has not actually been allocated as of the date of his/her Termination of Employment,*** and any undistributed balance in his/her Individual Account as of the date of his/her Termination of Employment

shall also be forfeited. All forfeitures shall revert to the Company rather than being reallocated among the then remaining Participants.

b) Dismissal Without Cause or Resignation for Good Reason. Notwithstanding Section 5.05a) [sic], ***a Participant who is Terminated from Employment without Cause or resigned with Good Reason, will receive an allocation from the Plan Account for the Plan Year in which the termination without Cause . . . occurs PROVIDED***[14], *HOWEVER*,[15] that his/her allocation for such Plan Year shall ***be prorated based on the number of months of the Participant's continuous employment with the Company in the Plan Year in which the termination occur***s (a month is included in such calculation to the extent the Participant remains continuously employed through the 15th of such month) ***and the balance shall be forfeited.*** Subject to the foregoing, in connection with a termination by the Company without Cause or resignation for Good Reason, the Participant shall receive a distribution equal to one-third (33 1/3%) of such allocation to his/her Individual Account ***(and, for the avoidance of doubt, there shall be no additional distribution pursuant to Section 5.03).*** Such distribution will be paid in accordance with the provisions of Section 5.05 at the same time annual distributions are generally made to other Participants and, subject to satisfaction of amounts due under Section 5.05(b)(i) above, any undistributed balance in his/her Individual Account following such payment shall be forfeited.

***

ARTICLE VII
PLAN ADMINISTRATOR

7.01 Powers and Duties. The Plan Administrator shall be responsible for the management, operation and administration of the Plan. In addition to the powers, rights and duties set forth elsewhere herein, the Plan Administrator shall:

* * *

c) enforce the Plan in accordance with its terms and any rules and regulations adopted hereunder;

* * *

[14] Capitalized and bold emphasis supplied, italicized emphasis in original.
[15] *Id.*

e) construe and interpret the Plan to resolve all questions arising regarding the existence or nonexistence of, entitlement to, and/or the nature and amount of the rights and interests of all persons under the Plan; and any such determinations shall be final[.]

* * *

ARTICLE IX
MISCELLANEOUS PROVISIONS

* * *

9.09 Plan Interpretation. The **Plan Administrator shall be vested with discretionary authority to determine eligibility for distributions and to construe the terms of the Plan. Pursuant to this provision, the Plan Administrator shall be authorized and empowered to exercise its discretion to construe and interpret the Plan to resolve all questions arising regarding the existence of, entitlement to, and the value and amount [sic] distributions, rights and interests of all persons in and under the Plan. Any and all such determinations by the Plan Administrator shall be final, binding and conclusive as regards such questions.**[16]

Attached to the Plan (and Complaint) is "Exhibit A – Participation Agreement" (consistent with Sections 2.13 and 3.01 of the Plan).[17] This Agreement, which the Plaintiff nowhere disputes she signed (as required by Sections 2.13 and 3.01 to participate), provides, in relevant part:

> I have received a copy of the FordDirect Long-Term Incentive Plan, as amended and restated effective January 1, 2018 (the Plan). I understand that the terms of the Plan govern my rights under the Plan, including any right I have to receive distributions under the Plan. I understand that the terms of the Plan will control in the event of any inconsistencies between this Participation Agreement and the Plan.
>
> * * *

16 The Plaintiff's initials appear next to this provision.

[17] MSD Ex 4 appears to signature page to the Participation Agreement.

Plan Account Credit and Reductions
I understand that each Plan Year, [Defendant] (the "Company") will determine whether a credit shall be made to the Plan Account, based on the terms of the Plan. If a credit is made to the Plant Account for a Plan Year, the amount of the credit shall be determined by the Company based upon the terms of the Plan, there may be years in which a credit is not made to the Account.

No Vested Right to Plan Account
I understand that I have no vested right to amounts in the Plan Account, until distributions from the Plan are actually paid to me following the end of a Plan Year in which I was eligible to receive such distributions from the Plan.

IV
Additional background and arguments

The Plaintiff was employed by the Defendant from January 15, 2018 until she was terminated without cause on February 1, 2020. The parties agree that the Plan Administrator deemed the Plaintiff eligible to participate in the 2018 and 2019 Plan Years, and that the Plaintiff executed a Participation Agreement to participate in the Plan for such Plan Years as required by Section 3.01 of the Plain.[18] For the 2018 Plan Year, the Plaintiff's "Plan Interest" was 6% of the total bonus pool; for the 2019 Plan Year, the Plaintiff's allocation percentage was 8%.[19]

The Defendant maintains that the Plaintiff is not entitled to anything more under the Plan than what the Plan Administrator has determined she was entitled to – i.e., $51,866.77 for her participation in the 2019 Plan Year (even though the text supports paying her nothing). According to the Defendant, the amount paid represents a one-third portion of her 2019 Plan Year Credit and the Plan Administrator's determination is final and binding pursuant to the discretion afforded to the Plan Administrator in Sections 9.09 and 7.01 to interpret and construe the terms of the Plan and to resolve all questions

[18] (See Uncontroverted Complaint, 12, 19-20 and Supporting Brief, p 5 referencing various Complaint allegations.
[19] Complaint, Paragraph 12. See also Paragraph 13 describing the percentages as the Plaintiff's "share of the end of the year bonus pool" as well as Supporting Brief at pp 5.

regarding entitlement to distributions, the value and amount of distributions, and the rights and interests of all persons in and under the Plan as well as the nature and amount of rights and interests in expressly and repeatedly agree to delegate. The Defendant emphasizes that Section 7.01(e) specifically states that the Plan Administrator's determinations are "final" and Section 9.09 similarly provides that "Any and all such determinations by the Plan Administrator shall be final, binding and conclusive as regards such questions." The Defendant also relies on Section 3.01 in arguing that the Plaintiff is not entitled to any payment for the 2020 Plan year. The Defendant maintains that because the Plaintiff has no right to second guess the Administrator's decision-making, and Michigan law precludes courts from rewriting the Release or the Plan, the Plaintiff cannot state a claim for breach of contract. Apparently recognizing that the Plan Administrator's determination is nevertheless subject to review under an arbitrary and capricious standard, the Defendant further, or alternatively, argues that the Plan Administrator acted reasonably, not arbitrarily and capriciously based on (1) the Plaintiff's "unequivocal affirmation" in her Participation Agreement of her "understand[ing] that I have no vested right to amounts in the Plan Account, until distributions from the Plan are actually paid to me following the end of a Plan Year in which I was eligible to receive such distributions from the Plan";[20] (2) the General provision contained in Section 5.05a) of the Plan, and (3) application of Sections 2.12, 4.02-4.03, and 3.01, all of which undermine the Plaintiff's claim regarding the 2020 Plan Year.

The Plaintiff counters that she is entitled to more than the one-third "share" or $51,866.67, paid. According to the Plaintiff, although she was "properly paid"[21] her $51,866.67 *share* under Section 5.03 of the Plan,[22] Section 5.05(b)

[20] See Supporting Brief at p 10. As noted, the Participation Agreement is part of Complaint Ex A (reattached by the Defendant as MSD Ex 4.)

[21] Complaint, Paragraph 23

[22] Complaint, Paragraph 26

(1) she is entitled to one third of her 2019 "Opening Balance",[23] and

(2) there is a dispute regarding her rights for the 2020 Plan Year,[24] more particularly described as a right to payment for an "allocation" for the 2020 Plan Year consistent with discussion of this term in Sections 3.01, 4.02, and 4.03, and pursuant to 5.05(b).[25] According to the Plaintiff, this amount will not be known until some time in early 2021.[26]

To support her arguments, the Plaintiff argues "there is a fundamental difference of opinion about the interpretation of the Plan regarding the 2019 Plan Year and the 2020 Plan Year,"[27] "the Court may have a difficult time interpreting and reconciling the relevant sections of the Plan,"[28] and that in all events the Defendant's interpretation should be rejected as "absurd" and/or "arbitrary and capricious"[29] because it runs afoul to the rules of contract construction; actually reveals "possible ambiguities in the Plan" creating a factual matter to be resolved at trial, is inconsistent with its own actions;[30] and/or manifests a conflict of interest regarding its own interest in saving money by misreading the Plan provisions which should weigh in the Plaintiff's favor.[31] She emphasizes that the Court has the power, consistent with the arbitrary and capricious standard, to reject the Plan Administrator's "arbitrary" reliance on the March 15 payment deadline in Section 5.03(a) as well as the Plan Administrator's misplaced reliance on Section 5.05(a) which is expressly subject to Section 5.05(b). Elsewhere, the Plaintiff argues that because she was terminated in the 2020 Plan Year, she is actually entitled to "'an allocation from the Plan Account' for the 2020 Plan Year" pursuant to the language

[23] Complaint, Paragraphs 26 and 69.
[24] Complaint, Paragraph 71.
[25] Complaint 32-43.
[26] Complaint, Paragraph 39.
[27] Response at 2, Complaint at Paragraph
[28] Response at 2.
[29] Response at 12. See generally Response at Section 3, pp 9-13.
[30] Response at 10-11.
[31] Response at 12.

addressing the term "allocation" in Sections 3.01, 4.02 and 4.03.[32] Relying heavily on Section 5.05(b), the Plaintiff maintains this allocation is to be calculated by prorating the number of months of her continuous employment in the Plan Year in which she was terminated – i.e., one full month in 2020, or 1/12 of Plan Year 2020 which will not be known until the end of 2020.[33] According to the Plaintiff, any other reading renders nugatory language in Section 5.05b) providing (bold emphasis supplied): "**Notwithstanding Section 5.05a), a Participant who is Terminated from Employment without Cause . . . will receive an allocation from the Plan Account for the Plan Year in which the termination without Cause . . . occurs**, *provided, however,* that his/her allocation for such Plan Year shall be prorated based on the number of months of the Participant's continuous employment with the Company in the Plan Year in which the termination occurs . . .." The Plaintiff also maintains that Section 5.05(b) distinguishes employees terminated without cause from those terminated *for Cause* which is what Section 5.05(a) addresses.

V

The Separation and Release Agreement does not bar any review of the Plaintiff's breach of contract claim

As noted, Section 1(c) of the Separation Agreement and Release expressly states that "Subject to [the Plaintiff's] execution of this Agreement, . . . the Company agrees to: *** (c) pay Employee [Plaintiff] the amounts to which the Employee [Plaintiff is entitled under the terms of [the Plan]." Under Section 2 of the Agreement, "Excluded from the Release" are "all claims arising after the date of this Agreement, . . . and the right to sue for breach of this Agreement." Because the Plaintiff's breach of contract claim alleges the Defendant has not paid her the amounts to which she is entitled to under the terms of the

[32] Complaint, Paragraphs 32-34.

[33] See e.g., Complaint at 35-45.

Plan as required by the Separation and Release Agreement, her claim is expressly excluded from the Release agreement contained in her Separation and Release Agreement. More particularly, because she was paid on March 6, 2020[34] after executing the Agreement on February 14, 2020,[35] the Plaintiff's claim arose "after the date of this Agreement," and her claim that she was not paid the amounts to which she is entitled under the Plan amount to a claim that the Defendant has breached the Separation and Release Agreement.

VI
The Plan Administrator's interpretation and decision are subject to judicial review under the arbitrary and capricious standard

Contrary to the Defendant's arguments, contracts reserving the manner of performance to a plan administrator remain subject to judicial review under the arbitrary and capricious standard. *Firestone Rubber & Tire Co,* 489 US 101, 115 (1989) (emphasis supplied, internal quotations omitted) ("In an action challenging the denial of benefits under 29 USC § 1132(a)(1)(B), a plan administrator's decision is reviewed "under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. If the benefit plan does grant such discretionary authority, the plan administrator's decision to deny benefits is reviewed under the 'arbitrary and capricious' standard of review"); *Shelby County Health Care Corp v Southern Council of Indus Workers Health and Welfare Trust Fund,* 203 F3d 926, 934 (CA 6, 2000); *Perry v Simplicity Eng'g,* 900 F2d 963, 965 (CA 6, 1990) *(i*n reviewing a plan administrator's actions under ERISA, a trial court should apply the deferential arbitrary and capricious standard of review if the plan grants the administrator discretionary authority to determine eligibility for benefits or to construe the terms of the plan")*Thomas v John Deere Cor,* 205 Mich App 91, 95 (1994) ("Because defendant had reserved for itself the authority to determine whether there was good and

[34] Complaint, Paragraph 23.
[35] MSD Ex A.

just cause, and because defendant had, in the manner provided by the alleged employment contract, determined that there was good and just cause for terminating plaintiff's employment, terminating plaintiff's employment was not a breach of that contract"); *Colaluca v Climaco, Climaco, Seminatore, Lefkowitz & Garofoli,* unpublished disposition 107 F3d 11 (CA 6, 1997) at *2-3;[36] *JPMorgan Chase & Co,* 517 F Supp 2d 954, 958-959 and 962-963 (ED Mich, 2007) (albeit applying Delaware law); *Taylor v Spectrum Health Primary Care Partners,* unpublished opinion per curiam of the Court of Appeals, issued December 10, 2015 (Docket No. 323155), 2015 WL 8539499 at *5, citing *Thomas v John Deere Cor,* 205 Mich App 91, 95 (1994).[37]

VII
The arbitrary and capricious standard

As elaborated in the Sixth Circuit Court of Appeals decision in *Shelby County Health Care Corp,* 203 F3d at 933-934, the arbitrary and capricious standard is "highly deferential":

> [u]nder this standard of review, "we must decide whether the plan administrator's decision was 'rational in light of the plan's provisions.'" *Id.* (quoting *Daniel v Eaton Corp,* 839 F2d 263, 267 (6th Cir), *cert denied,* 488 US 826 (1988)). A decision is not arbitrary and capricious if it is based on a reasonable interpretation of the plan. *See Johnson v Eaton Corp.,* 970 F2d 1569, 1574 (6th Cir 1992).

Accordingly, this standard of review "is the least demanding of judicial review." *Davis v Kentucky Fin Cos Retirement Plant,* 887 F2d 689, 693 (CA 6, 1989). If a court can determine "a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary and capricious." *Id.* As such, the Court only

[36] One the compendium of decisions collected under MSD Ex 5.

[37] Attached among the compendium of decisions collected under MSD Ex 5.

determines if the Defendant acted reasonably, not whether there were other permissible course of conduct. See, e.g., *Shull v State Mach Co Inc Employees Profit Sharing Plan,* 836 F3d 306, 308 (CA 7, 1987). See also *Davis,* 887 F2d at 693. Another federal court has elaborated:

> "Arbitrary and capricious" is usually ascribed to action which is unreasonable or irrational, or to that which is unconsidered or which is wilful and not the result of a winnowing or sifting process. It means action taken without consideration of and in disregard of the facts and circumstances of the case. Action is also said to be arbitrary and capricious if it is whimsical or fickle, or not done according to reason; that is, it depends upon the will alone.
> *Maher v NECA – Local Union No 313, IBEW Pension Trust Fund,* Civ A No 5026, 1977 WL 9559, * 4 (Del Ch Dec 21, 1977)(unpublished) (citing *Willdel Realty, Inc v. New Castle County,* 270 A2d 174, 178 (Del Ch 1970)).
>
> [*JPMorgan Chase & Co v Pierce,* 517 F Supp 2d at 963.]

VIII
The Plan Administrator's decision was not arbitrary and capricious

Applying these principles to the instant case, the Defendant's decision was not arbitrary and capricious. Both parties have placed before the Court differing interpretations of the Plan. Under a de novo review, this Court would be required to issue a conclusion that one was wrong and one was right. But that is not the standard here. The only question is whether the Defendant's interpretation is arbitrary and capricious. The Plaintiff's briefing is less than convincing that it she entitled to dispositive relief. The Plaintiff's arguments certainly fail to show that the Defendant acted with whimsy, fickleness, or without reason. To the contrary, the Defendant has a rational basis for its decision grounded in the Plan and facts before it. For the reasons articulated in the Defendant's briefing, such an interpretation is not arbitrary or capricious.

Without limiting the foregoing, the Defendant argued the well reasoned position that the Plaintiff had no vested right to the amount in the Plan Account until she received

a distribution, and as an unvested right, she cannot seek to compel payment. Further, citing the text of the Plan and the facts before it, the Defendant explains that under the Plan, the general rule of Section 5.05(a) resulted in the Plaintiff's forfeiture of any allocations in the Plan Account. The Defendant also explains why the Plaintiff is not a 2020 Plan Participant. There are several other pages of analysis in the Defendant's Briefing about why it is not liable for the payments. There is no showing that this analysis is flippant, fickle, or without reason. To the contrary, this reasoning is grounded in the pertinent text of the governing documents.

The Plaintiff, of course, argues that the Defendant's interpretation is dead wrong based on other provisions of the Plan. But that argument misses the point. Even if this Court were inclined to find that the Plaintiff has the better of the argument, that is immaterial. The Plan grants the Plan Administrator discretion, and the exercise of that discretion was not used in a fickle, whimsical, or unreasoning fashion. The only way for the Plaintiff to prevail in this lawsuit is to ignore the governing standard of review. To grant the Plaintiff relief under these circumstances would render the arbitrary and capricious nugatory and replace it with de novo review.

ORDER

Based on the foregoing Opinion, the Defendant's Motion for Summary Disposition under MCR 2.116(C)(8) (or [C][10]) is GRANTED, the Plaintiff's counter request for relief under MCR 2.116(I)(2) is DENIED. THIS RESOLVES THE LAST PENDING CLAIM AND CLOSES THE CASE.

/s/Michael Warren

_____/
HON. MICHAEL WARREN
CIRCUIT COURT JUDGE