

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

WILLIAM EDWIN SMALL, Individually
And on behalf of SCC Holdings, LLC,
Sterling Commercial Credit-Michigan, LLC,
And SCC Services, LLC,

Plaintiff,

Case No. 23-31755-CB

v

Hon. Michael Hatty

BRIAN JENKS,

Defendant.

**OPINION AND ORDER ON DEFENDANT'S
MOTION TO COMPEL ARBITRATION AND FOR SANCTIONS**

At a session of the 44th Circuit Court,
Held in the City of Howell, Livingston County,
State of Michigan, on the 30 day of JUNE, 2023.

PRESENT: HONORABLE MICHAEL P. HATTY
BUSINESS COURT JUDGE

THIS MATTER comes before this Court on Defendant's Motion to Compel Arbitration Pursuant to MCR 2.116(C)(7), MCR 3.602(B)(2), and the Michigan Arbitration Act and for Sanctions (the "Motion"). This Court, having reviewed the parties' written briefs; having heard the parties' oral arguments at a hearing held on April 27, 2023; being otherwise fully advised in the premises; and for the reasons stated herein, GRANTS Defendant's Motion in part and DENIES Defendant's Motion in part.

I. BACKGROUND

Plaintiff Small and Defendant are business partners in three businesses: 1) SCC Holdings LLC, 2) Sterling Commercial Credit – Michigan LLC, and 3) SCC Services LLC. Plaintiff William

Edwin Small (“Small”), Defendant Brian Jenks (“Jenks”), and Small’s ex-wife Karen Small (“Karen”) (collectively, the “Managers”) are members of Sterling-Michigan, Services, and Holdings and are the Managers of Holdings. SCC Holdings LLC is in the business of commercial loans. Plaintiff Small owns 30% of each of the three businesses. He further states that his ex-wife, Karen, owns 30% of each of the three businesses. Defendant also owns 30%. Greg Boller (who is not a party to this action) owns the last 10% of each company. Sterling-Michigan and Services have no assets, no income, no operations, and are dormant. While Sterling-Michigan and Services are dormant, while Holdings remains active for the purpose of repaying its debt obligations to Oxford. *See* Pl’s Compl at ¶¶ 4-6.

The operations of SCC Holdings LLC are governed by its Operating Agreement. *See* Operating Agreement, Exhibit A to Def’s Mot. Pursuant to the Operating Agreement, “[t]here shall be three (3) Manager of the Company.” *Id.* at §5.1.4. The Managers are required to have “the unanimous consent and approval of all such Managers” in order to take “any Actions and Decisions.” *Id.* at § 5.8. Thus, under the terms of the Operating Agreement, neither Small, Jenks, or Karen have the right, or ability, to operate independently from one another with respect to Holdings, but can only act on the issues which they have unanimously agreed to with one another.

The Operating Agreement is also explicit in its requirement that any dispute related to the Managers, or the Operating Agreement is subject to mandatory arbitration. Section 5.9 of the Operating Agreement states:

5.9 Arbitration. In the event that unanimous Manager consent and approval cannot be reached as provided in Section 5.8 above with respect to any Action or Decision, and/or any other Manager action taken on behalf of the Company, **such a Manager dispute shall be submitted to binding arbitration and exclusively resolved in accordance with the provisions of Article IX of this Agreement; provided, however,** that the Managers may decide to modify the applicable arbitration

procedures if done so unanimously, in writing, within thirty (30) days of the occurrence of the subject Manager dispute. (Emphasis added).

Id. at § 5.9. Article IX of the Operating Agreement also requires the arbitration of “[a]ny and all disputes, claims or controversies involving the interpretation of this Agreement or any of the provisions, terms, conditions, termination of a Member’s obligations or rights hereunder. . . .” *Id.* at § 9.1. All of the Managers agreed that arbitration is the *exclusive* remedy for all disputes between them under the “Commercial Arbitration Rules (“**Rules**”) of the American Arbitration Association.” *Id.* The Managers, further, agreed that “no party has the right to revert to any federal, state or local court or administrative agency concerning the alleged breaches of this Agreement [except to confirm an arbitration award].” *Id.* The Operating Agreement also prohibits any of the Managers from seeking injunctive relief from courts as it only allows injunctive relief for “specific enforcement of the award. . . .” *Id.*; *see also* § 9.4 Specific Performance; Injunctive Relief (Only allowing injunctive relief in connection with “any arbitration determination.”). Section 5.9 also precludes injunctive relief by the Court on any claim relating to consents and manager approvals as that section states that arbitration is the exclusive remedy.

On February 14, 2023 Small made numerous demands upon Jenks related to the Operating Agreement. In the communications between Jenks’ counsel and Small’s counsel, Small’s counsel acknowledged that if Small “would like to take action, [he] will move forward with arbitration” in response to a proposal which Jenks’ counsel indicated was “more than reasonable. Also, this proposal is made without prejudice to all rights and remedies of Brian and Holdings, all of which are preserved and are not waived.” On February 17, 2023 Small filed this lawsuit against Jenks – alleging numerous claims that he previously acknowledged were required to be brought in arbitration and also filed a Motion for a Preliminary Injunction. On March 2, 2023, the Court granted in part and denied in part Small’s Motion for a Preliminary Injunction and ordered that the

Parties were required to “meet and confer regarding submitting this case to arbitration and the right of any party to file a motion to compel arbitration is preserved” (the “Order”). In the Order, the Court granted Small relief on all of his claims related to specific performance and/or injunctive relief and ordered a limited injunction which allowed Jenks to continue to pay Holdings’ obligations, ordered that Jenks can have view only access to the relevant bank accounts, and that the unanimity requirement of the Operating Agreement would still be enforced. Small subsequently refused to dismiss this lawsuit in favor of arbitration, or to meet and confer about arbitration.

II. ARGUMENTS

Defendant filed this summary disposition motion pursuant to MCR 2.116(C)(7), asking this Court to enforce the Arbitration Clause in the Operating Agreement, and dismiss this case. Specifically, Defendant asserted that Section 5.9 of the Operating Agreement makes arbitration the exclusive remedy for disputes arising from the Agreement and precludes the Managers from seeking relief in State Court. Section IX of the Operating Agreement further lays out the requirements for arbitration and makes arbitration of disputes mandatory. Defendant also asked this Court to sanction Plaintiffs for bringing a frivolous lawsuit when Small knew that the dispute at issue must be arbitrated pursuant to the Operating Agreement, and also to sanction Small under the civil contempt statute (MCL 600.1721) for failure to confer with Defendant about arbitration.

III. APPLICABLE LAW

Jenks’s Motion was filed under MCR 2.116(C)(7). A motion for summary disposition pursuant to MCR 2.116(C)(7) may be brought based on the grounds that entry of judgment, dismissal of the action, or other relief is appropriate because of an agreement to arbitrate or to litigate in a different forum. A party is not required to submit any material in support of a motion

under MCR 2.116(C)(7); the motion can be evaluated on the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119 (1999). “The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant.” *Id.* “A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence.” *Id.* “In reviewing the motion, a court must review all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them.” *Yono v Dep’t of Transp.*, 495 Mich 982, 982-983 (2014); *see also* MCR 2.116(G)(5). “If the movant properly supports his or her motion by presenting facts that, if left un rebutted, would show that there is no genuine issue of material fact that the movant [is entitled to summary disposition], the burden shifts to the nonmoving party to present evidence that establishes a question of fact.” *Kincaid v Cardwell*, 300 Mich App 513, 537 (2013). “If the trial court determines that there is a question of fact as to whether the movant [is entitled to summary disposition], the court must deny the motion.” *Dextrom v Wexford Co.*, 287 Mich App 406, 431 (2010).

A court “may order the parties to proceed with arbitration and to take other steps necessary to carry out the arbitration agreement.” *See* MCR 3.602(B)(2). Further, upon “motion of a person showing an agreement to arbitrate and alleging another person’s refusal to arbitrate under the agreement,” the Court may “order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.” *See* Michigan Arbitration Act, MCL 691.1687(1)(b). Upon showing of an agreement to arbitrate, the Court is required to order the parties to arbitrate and may dismiss the circuit court action. MCR 3.602(B).

Under the Michigan Arbitration Act, this Court must first determine “whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.” *See* MCL 691.1686 (2).

Once it has, all other issues, including the enforceability of the arbitration provision, are reserved for the arbitrator. *See* MCL 691.1687(4) (“The Court shall not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.”); MCL 691.1686(3) (“An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable”).

To determine whether a dispute is arbitrable, the Court’s role is to consider “whether there is an arbitration provision in the parties’ contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract.” *Madison Dist Public School v Myers*, 247 Mich App 583, 532 (2001). “Any doubts regarding the arbitrability of an issue should be resolved in favor of arbitration.” *Id.* The burden is on the party seeking to avoid arbitration to show that the dispute is not arbitrable, not on the party seeking to compel arbitration. *Altobelli v Hartmann*, 499 Mich 284 (2016).

A court should not interpret a contract's language beyond determining whether the arbitration provision applies and should not allow the parties to divide their disputes between the court and an arbitrator. *Brucker v McKinlay Transport, Inc*, 454 Mich. 8, 15, 17–18 (1997). The Michigan Supreme Court has cautioned that in deciding the threshold question of a whether the dispute is arbitrable, a reviewing Court must avoid analyzing the merits of the case, which are for the arbitrator to decide. *Altobelli v Hartmann*, 499 Mich 284 (2016). Recognizing the strong preference for arbitration, the Michigan Supreme Court has held that:

An order to arbitrate the *particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute*. Doubts should be resolved in favor of coverage Absent an “*express provision* excluding [a] grievance from arbitration” or the “*most forceful evidence* of a purpose to exclude the claim,” the matter should go to arbitration.

Kaleva-Norman-Dickson School District No 6 v Kaleva-Norman-Dickson Teachers' Association, 393 Mich 583, 592 (1975) (emphasis added) (quoting *United Steelworkers of America v Warrior & Gulf Navigation Co*, 363 US 574, 582-583 (1960)).

IV. ANALYSIS

Defendant has attached Exhibit A to his motion for summary disposition. Exhibit A is the Amended and Restated Operating Agreement for SCC Holdings LLC, left undated, but executed by all Members at some time in 2022.

Article IX of the Amended and Restated Operating Agreement requires the parties to submit to binding arbitration “any and all disputes, claims, or controversies involving the interpretation of this Agreement or any of the provisions, terms, conditions, termination, or enforcement of a Member’s obligations or rights thereunder...” if the dispute cannot be resolved by good faith negotiations at a Meeting to be held within forty-five days of issuance of a written Notice of Dispute to the Manager. *See* Section 9.1. Section 9.2 goes on in relevant part as follows:

...the failure of a party to submit a dispute to arbitration...shall be a complete defense to any suit, action or proceeding initiated in any federal, state or local court...with respect to any dispute which is arbitrable as set forth herein....This agreement to arbitrate shall be specifically enforceable against each of the parties and no party has the right to revert to any federal, state or local court or administrative agency concerning alleged breaches of this Agreement except as other provide[d] in Section 9.2 or 9.4 herein. Arbitration shall be the exclusive remedy for any dispute under this Agreement except to the extent the specific enforcement of the award or specific enforcement of any term or provision of this Agreement in a court having equitable jurisdiction by a decree of specific performance or an injunction or by both is deemed necessary and appropriate by a party...

Section 9.4 states in pertinent part “each and every one of the terms of this Agreement and any arbitration determination shall be enforceable in the Circuit Court for the County of Livingston ...for the purpose of obtaining an order compelling specific performance or injunctive relief...without the necessity of proving it has suffered any actual damage.”

Here, there is no dispute that the Parties have an agreement to arbitrate as Small admits that he entered into “SCCH’s Amended and Restated Operating Agreement” with Jenks. Pl’s Compl at ¶ 8. The Operating Agreement forms the entire basis of Small’s lawsuit, as all of his claims arise under his claim that Jenks has violated the Operating Agreement. *Id.* at ¶¶ 57-68. The Operating Agreement contains a valid Arbitration Provision, which governs all of the claims in Small’s Complaint. Exhibit A to Def’s Mot at §§ 5.9, 9.1, 9.4. Therefore, because the Arbitration Provision in the Agreements is binding, as it requires arbitration for “[a]ny and all disputes, claims or controversies. . . .” as Small’s “exclusive remedy,” Small’s Complaint must be dismissed, and he must pursue his claims against Jenks in arbitration. *Id.* at §§ 5.9, 9.1; *see Altobelli*, 499 Mich at 303 (finding that a broad arbitration provision in an operating agreement covering “any dispute” included plaintiff’s tort claims against individual principals of a law firm).

IV

Small’s argument that this Court can continue to exercise its jurisdiction over this case because he has, allegedly, claimed specific performance in his claims for equitable relief is inapposite. According to Small, this Court has jurisdiction over all of his claims because they are for “specific performance.” However, “[s]pecific performance is an equitable remedy that permits a court to enforce a contract when the plaintiff does not otherwise have an adequate remedy at law.” *Vascular Management Servs of Novi, LLC v EMG Partners, LLC*, 2023 WL 2436801, at*4 (Mich Ct App March 9, 2023). Thus, specific performance is different than equitable relief. *Id.* at *10. Specific performance does not allow the court to order the dissolution of a company, the buyout of a membership interest, or amend an agreement – the exact relief Small has requested in his Complaint. *See* Pl’s Compl at § 96 (Asking for the “dissolution, buy-out of Small’s membership interest, and/or an amendment of the Agreement placing Small in control” of SCCH, SCCM, and

SCCS). Small's claims for Oppression (Count I) and Production of and Control Over Corporate Records (Count II) have nothing to do with injunctive relief or specific performance, but are equitable claims seeking equitable relief, and even his claim for Specific Performance (Count III) asks for relief beyond specific performance of the Operating Agreement such as "control over corporate records." *Id.* at §§ 58-66. All of these claims are for control of the business or other relief that are subject to arbitration.

While the Court acknowledges that Section IX in the Operating Agreement carves out a small exception to arbitration, this Court finds that Plaintiffs cannot plead creatively so as to turn the small exception into such a large exception it swallows the rule. The exception is created by Section 9.2 and it states in pertinent part: "Arbitration shall be the exclusive remedy for any dispute under this Agreement except to the extent ... specific enforcement of any term or provision of this Agreement in a court having equitable jurisdiction by a decree of specific performance or an injunction or by both is deemed necessary and appropriate by a party..." Plaintiffs carefully plead their Counts in the Complaint to masquerade as if demanding specific performance of the Operating Agreement. However, this Court is entitled to read beyond the labels and headings of a party's pleadings. "It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *See Adams v Adams*, 276 Mich App 704 (2007) (citing *David v Sternberg*, 272 Mich App 377, 381(2006); *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33 (2005)).

Based on review of the substance of the pleadings, the Court finds that Plaintiffs' Complaint is exactly the type of dispute about management the LLC that the arbitration clause of the Operating Agreement was designed to address. This matter is a dispute involving the interpretation of the Operating Agreement and the enforcement of the Member's rights and

obligations thereunder. Therefore, this Court concludes that this present action cannot lie in this Court because the parties have agreed to submit these disputes to binding arbitration. Plaintiffs are trying to creatively plead around the arbitration requirement, and this Court will not allow gamesmanship to contravene the plain and unambiguous language the parties agreed to when they entered the Operating Agreement.

Accordingly, for all those reasons stated above, this Court does not have jurisdiction over Small's claims and his Complaint shall be dismissed in favor of arbitration pursuant to the Arbitration Provision.

Finally, Defendant seeks sanctions against Plaintiffs for filing the Complaint in this case, on the grounds that Plaintiffs' Complaint in the Circuit Court was frivolous because the matters raised in the Complaint are plainly subject to Arbitration pursuant to the Operating Agreement. Defendant invokes both MCL 600.2590 and MCL 600.1701, seemingly asking this Court to sanction Plaintiffs for the frivolous filing and to hold Plaintiffs in contempt for failure to arbitrate the disputes raised by the Complaint.

As to the matter of the request for the Court to utilize its contempt powers against Plaintiffs, this Court finds that Defendant's request for such in the motion is so procedurally unsound as to preclude the Court from exercising its contempt powers over Plaintiffs without violating due process requirements. MCR 3.606 governs the process and procedure of initiation of contempt proceedings. "Contempt of court is a willful act, omission, or statement that tends to impair the authority or impede the functioning of a court." *In re Contempt of Robertson*, 209 Mich App 433, 436 (1995). *See also In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 708 (2000). "The contempt power is awesome and must be used with the utmost restraint." *Id.*, quoting *In re Hague*, 412 Mich 532, 555 (1982). The contempt power must be used "judiciously and only when the

contempt is clearly and unequivocally shown.” *In re Contempt of Dudzinski*, 257 Mich App at 109. The authority of the courts to punish for contempt is inherent in the judicial power vested in courts by Const 1963, art 6, § 1. *In re Contempt of Auto Club Ins Ass’n, supra* at 708. In addition to the inherent judicial power, MCL 600.1701 specifically empowers the Circuit Court to use contempt powers to enforce its orders and to ensure the orderly conduct of court proceedings. When the allegedly contemptuous behavior takes place outside the immediate view of the court, i.e., when the contempt is indirect, the court may only punish the alleged contemnor after proof of the facts charged has been made by affidavit or other method and opportunity has been given to defend the charges. *In re Contempt of Steingold*, 244 Mich App 153, 157-158 (2000). *See also* MCL 600.1711(2) (“When any contempt is committed other than in the immediate view and presence of the court, the court may punish it by fine or imprisonment, or both, after proof of the facts charged has been made by affidavit or other method and opportunity has been given to defend”); *see also* MCR 3.606(A). Other methods to initiate contempt proceedings include the Court taking judicial notice, direct contempt committed in the presence of the Court, or contempt initiated by the Friend of the Court in domestic cases. None of those methods apply in this case. None of these other methods to initiate contempt proceedings apply in this case.

In this particular case, this Court entered an Order on March 2, 2023 which included a requirement that the parties meet and confer regarding submitting this matter to arbitration. Defendant charges that Plaintiffs failed to so meet and confer. However, Defendant’s request for contempt sanctions is not supported by an affidavit made on personal knowledge. “Before a show cause order may issue, there must be a sufficient foundation of competent evidence, and legitimate inferences therefrom.” *In re Contempt of Steingold*, 244 Mich App at 158. The court’s personal jurisdiction over the alleged contemnor is dependent on adequate proof of the facts charged.

Ferranti v Electrical Resources Co, 330 Mich App 439, 446 (2019), citing *In re Contempt of Steingold*, 244 Mich App at 159 (“If an inadequate affidavit is the predicate which underlies the contempt proceeding or if no affidavit at all accompanies the petition, the court lacks jurisdiction over the person of the alleged contemnor.”). In *Ferranti*, the Court held that “the trial court erred by ordering a show-cause hearing on the basis of the submitted affidavit” where the affidavit was “insufficient to establish contemptuous acts.” *Ferranti*, 330 Mich App at 446. Therefore, Defendant’s failure to provide a sufficient factual basis on which to initiate contempt proceedings – that is the failure to support the request for contempt with an adequate affidavit – dooms Defendant’s request for contempt against Plaintiffs.

As for Defendant’s request for sanctions against Plaintiffs for filing a frivolous lawsuit, this Court finds that the totality of the circumstances does not warrant an award of sanctions. MCR 1.109(E)(5) requires a party or attorney signing and filing a document with the Court to only so file if the document is, *inter alia*, “well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law.” MCL 600.2591(3)(a) echoes the court rule when it defines frivolousness as a claim that meets at least one of the following conditions:

- 1) it was filed with the primary purpose of harassing, embarrassing, or injuring the opposing party;
- 2) it had no reasonable basis to believe that the facts underlying that party’s legal position were in fact true; or
- 3) the legal position was devoid of arguable legal merit.

Attorney General and MDEQ v Harkins, 257 Mich App 564, 575-76 (2003), *overruled on other grounds by Garg v Macomb Co Community Health Servs*, 472 Mich 263, 283-85 (2005) succinctly summarizes the law regarding frivolousness and a mandatory sanction if the document was signed in violation of MCR 1.109, stating in pertinent part:

Every document of a party represented by an attorney must be signed by at least one attorney of record, which constitutes a certification that: (1) the signor has read the document; (2) to the best of the signor's knowledge, information and belief after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading is signed in violation of MCR 2.114(D) [now replaced by MCR 1.109], the party or attorney, or both, must be sanctioned. In addition, a party pleading a frivolous claim is subject to costs under MCR 2.625(A)(2). The frivolous claims provisions impose an affirmative duty on each attorney to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed. The reasonableness of the inquiry is determined by an objective standard. The focus is on the efforts taken to investigate a claim before filing suit, and a determination of reasonable inquiry depends on the facts and circumstances of the case. The attorney's subjective good faith is irrelevant. That the alleged facts are later discovered to be untrue does not invalidate a prior reasonable inquiry. *[internal citations omitted]*

See also Robert A. Hansen Family Trust v FGH Industries LLC, 279 Mich App 468, 485-86 (2008); *see also Home-owners Ins Co v Andriacchi*, 320 Mich App 52, 76 (2017). In *BJs and Sons Const. Co. Inc. v VanSickle*, 266 Mich App 400, 404-08 (2005), the Court of Appeals described the purpose behind MCL 600.2591, MCR 2.625, and MCR 1.109 as a deterrent to prevent “parties and attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose.” *Id* at 405.

In this particular case, this Court does find, for all the reasons stated above, that the disputes raised in Plaintiffs’ Complaint all fall squarely within the scope of the Arbitration Clause in the Operating Agreement. However, the Court acknowledges that the Arbitration Clause contains a narrow exception to arbitration of disputes, which allows certain, limited disputes to be brought before the Circuit Court. While the Court declines to allow what appears to be Plaintiffs’ gamesmanship avoid the plain language of the agreement of the parties reached when they entered into the Operating Agreement, the Court finds that there is not sufficient proofs brought before the

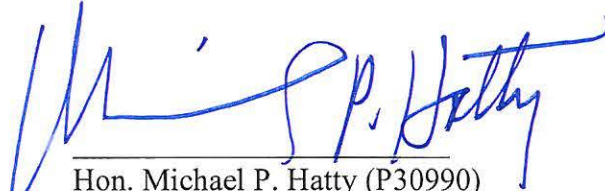
Court to show definitively that Plaintiffs filed the Complaint in bad faith or for the primary purpose of harassing Defendant, or that Plaintiffs brought the Complaint in Circuit Court while knowing there was no reasonable basis for Plaintiffs' legal position. Plaintiffs may have believed they had a colorable argument to avoid the arbitration clause in the Operating Agreement, and the mere fact that their arguments ultimately failed does not render those arguments per se frivolous. *See e.g., Kitchen v Kitchen*, 465 Mich 654, 662 (2002).

V. CONCLUSION

For all the reasons set forth in detail above, this Court finds that it lacks jurisdiction over Defendant pursuant to MCR 2.116(C)(7), MCR 3.602(B)(2), and the Michigan Arbitration Act, and **GRANTS** Defendant's motion for summary disposition and **DISMISSES** Plaintiff's complaint without prejudice. However, this Court **DENIES** Defendant's Motion as it relates to sanctions and/or contempt proceedings.

IT IS SO ORDERED.

This is a final order and closes the case.



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