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

WAYNE A. SEEKELY,
Plaintiff,
v

Case No. 2020-30698-CB
Hon. Michael P. Hatty

JEFFREY CUNMULAJ AND JEFF'S FIREWORKS 1, INC, AND JEFF'S FIREWORKS 3, INC.,
Defendants.

OPINION AND ORDER RE: DEFENDANTS' MOTION FOR RELIEF FROM JUDGMENT / RENEWED MOTION TO SET ASIDE DEFAULT JUDGMENT

At a session of court held in the courthouse
in the City of Howell, County of Livingston, State of Michigan,
on the **31st day of August, 2023.**

PRESENT: HONORABLE MICHAEL P. HATTY
BUSINESS COURT JUDGE

THIS MATTER HAVING COME BEFORE THE COURT on Defendants' motion for relief from judgment / renewed motion to set aside default judgment, and the parties, by and through their respective counsel, having appeared for the hearing on August 31, 2023, and the parties having presented their respective oral arguments on the record, and the Court having reviewed the filings by the parties and the oral arguments, and the Court having reviewed the relevant portions of the file, and the Court being otherwise fully advised in the premises, the Court now issues this Opinion and Order DENYING Defendants' motion for relief from judgment / renewed motion to set aside default judgment for the reasons set forth below.

I. BACKGROUND

Plaintiff filed this case on March 6, 2020, asserting that he had purchased stock in the defendant Fireworks 1 and then the assets of the company were transferred to Fireworks 3 without his knowledge, thus relegating his investment to nothing.

On July 22, 2021, this Court granted plaintiff's motion to compel discovery and ordered as follows:

> Defendants shall respond to plaintiff's requests for production of documents on or before August 12, 2021 and defendant shall be produced for deposition at defense counsel's office on August 25, 2021.

At that time, Plaintiff was represented by Dave Johnson, and Defendants were represented by Dave Bittner.

On September 30, 2021, this Court denied, without prejudice, plaintiff's motion to hold defendants in contempt and enter a default judgment. Instead, this Court ordered defendants to provide discovery responses on or before November 30, 2021 and adjourned dates.

On January 6, 2022, this Court heard plaintiff's second motion to hold defendants in contempt and for entry of default because defendants had again failed to comply with this Court's order to compel. This Court granted the motion to enter defaults against the defendants, but allowed defendants 30 days to cure. That time to respond came and went on February 7, 2022.

The attorneys met with the Court for a pretrial on February 25, 2022. During that pretrial conference, counsel informed the Court that no discovery responses were made and both attorneys requested an adjournment so Mr. Johnson could bring a motion for entry of default judgment and Mr. Bitner could bring a motion to withdraw.

On March 17, 2022, this Court granted Mr. Bitner's motion to withdraw as counsel.

A pretrial conference was then held on April 15, 2022. Mr. Johnson appeared, but no one appeared on behalf of defendants. The pretrial was then adjourned to May 16, 2022.

Before that pretrial occurred, this Court heard plaintiff's motion for default judgment on May 12, 2022. Defendant did not appear for that hearing and this Court granted plaintiff's motion in the amount of $121,000 based on the sworn testimony placed on the record at the hearing. That judgment was served on defendant by this Court on May 16, 2021.

On August 11, 2022, this Court heard Defendants' motion to set aside the default judgment. The motion was brought by Jeff Cunmulaj pro se, and with Mr. Cunmulaj also attempting to bring the motion on behalf of the business entity defendants (which constitutes unauthorized practice of law). The Court found Defendants' proposed defenses to not be meritorious, and denied the motion.

On August 3, 2023, this Court heard Plaintiff's motion for proceedings supplemental to judgment – in which Plaintiff asked for appointment of a receiver, a writ of execution, and a subpoena for a creditor's exam. This Court also heard Defendants' motion to stay collections activity / motion to return seized assets to innocent non-party owners / motion to quash order to seize property / motion for sanctions.

Also on August 3, 2023, Defendants filed this instant motion for relief from judgment / renewed motion to set aside default judgment. Defendants argue that the judgment against them is based on erroneous procedure because service was made on them after the second summons expired. Therefore, this Court never acquired personal jurisdiction over Defendants, and the judgment is void. Additionally, last August, when Jeff Cunmulaj filed his Pro Se motion to set aside the default judgment, it contained multiple meritorious defenses – including defective service, the corporate defendants had dissolved, the contract contained a "buyer beware" clause, and the statute of limitations had run on the claims. Said motion should have been granted as service was actually defective and the statute of limitations had expired several years before the Complaint was filed. Furthermore, entry of a default judgment for treble damages ($121,000; when the breach of

contract claim was for $38,400) was unjust and was unsupported by any evidence or facts in the record. Treble damages are discretionary, and the Court abused its discretion granting them.

II. APPLICABLE LAW AND ANALYSIS

1. Defective Service and Lack of Personal Jurisdiction

First, Defendants argue that the judgment against them is void because this Court never acquired personal jurisdiction over Defendants – due to the second summons having expired on November 18, 2020 and service by publication having not been completed until the end of December 2020. Defendants have stated a bit of accurate law, but the motion contains a plethora of factual accuracies and some omissions as to applicable law. The original summons was issued on March 6, 2020. Then COVID-19 became a state of emergency in Michigan, and the Michigan Supreme Court issued numerous administrative orders, including that summons were extended beyond the 91-day mark. Namely AO 2020-03 (issued March 23, 2020) excluded from various civil filing deadlines (including expiration of a summons) all the days after March 10, 2023 and continuing until the state of emergency was lifted. On June 12, 2020, the Michigan Supreme Court issued AO 2020-18, which started the clock running again on civil filing deadlines beginning June 20, 2020. Ergo, the original summons in this case was "live" from March 6, 2020 until Tuesday, September 15, 2020.

On August 17, 2020, Plaintiff filed a motion for second summons, and this Court granted it on August 18, 2020. The second summons expired November 18, 2020. On November 6, 2020, Plaintiff filed a motion seeking alternative service, and this Court ordered alternative service on November 9, 2020. Service was required to be made by first class mail, tacking, and publication. All three Defendants were served by first-class mail on November 16, 2020, and by tacking on November 17, 2020.

On November 23, 2020, Plaintiff's counsel finally submitted the order for service by publication that Plaintiff should have submitted with the motion for alternative service. This Court issued the order for publication for three weeks on November 30, 2020. The second summons had already expired. Plaintiff went forward with the publication anyway, and publication was completed December 24, 2020.

This Court lacked authority to issue an effective "third summons" on November 23, 2020, or to otherwise extend the second summons. In *Hyslop v Wojjusik*, 252 Mich App 500, 506 (2002), the court of appeals reversed the trial court when the trial court issued a third summons. The Court of Appeals reasoned that MCR 2.102(D) only permits a maximum of two summonses to be issued in each case. The *Hyslop* Court also held that the plain language of MCR 2.102(D) did not authorize extension of the life of the second summons, even when the trial court belated realized that it did not give plaintiff enough time in the second summons to complete a necessary task. *Id.* at 507-508.

This is the only way in which Defendants are correct --- the November 23, 2020 Order for service by publication was void. The second summons had already expired and this Court could not extend it.

However, in a much more important way, Defendants are deeply incorrect that all service was defective and this Court never acquired personal jurisdiction. Defendants were actually served by mailing and tacking on November 16 and 17, 2020 (respectively), while the second summons was

still "live." Defendants did receive actual notice of the action. What's more is that Defendants hired legal counsel, and filed a responsive pleading on January 21, 2021, and then stipulated on January 29, 2021 to set aside the non-service dismissal entered by the Clerk. Lack of personal jurisdiction is an affirmative defense that defendants must make in their first responsive pleading, or otherwise the defense is waived. See MCR 2.111(F), MCR 2.116(C)(1), and *Robert A. Hansen Family Trust v FGH industries LLC,* 279 Mich App 468, 476-77 (2008). Defendants' Answer and Affirmative Defenses (see Exhibit H to Defendants' motion) did NOT raise lack of personal jurisdiction as an affirmative defense. Ergo, Defendants waived that defense on January 21, 2021. Defendants may not raise it now.

To speak directly to Defendants' argument, this Court acquired personal jurisdiction over Defendants pursuant to MCL 600.701(3) --- by Defendants consenting to personal jurisdiction by participating in the lawsuit. MCL 600.745 is a statute regarding forum selection clauses, which is a separate and distinct legal issue from personal jurisdiction, and a forum selection clause does not govern whether a Michigan Court has personal jurisdiction over of the parties. *See e.g., Turcheck v Amerifund Financial, Inc,* 272 Mich App 341 (2006); *see also Hansen Family Trust, supra*, at 476-77. Defendants' argument based on MCL 600.745 is simply inapposite. Accordingly, the judgment entered on May 12, 2022 is NOT void for lack of personal jurisdiction.

2. *<u>Prior Motion to Set Aside Default Judgment Contained Meritorious Defenses</u>*

Next, Defendants argue that Jeff Cunmulaj's prior motion, heard in August 2022, raised numerous meritorious defenses, including:

1. Lack of service of the Summons and Complaint
2. Corporate defendants had previously been dissolved
3. Stock Purchase Agreement included "buyer beware" assumption of investment risk clauses
4. Statute of limitations had run on Plaintiff's claims
5. Wrong venue

There are two things that Defendant must show this Court in order for the Court to set aside the default:

1) good cause or reasonable excuse for failure to Answer timely AND
2) facts demonstrating a defense to the claims.

Good cause under MCR 2.603(D) includes: (1) a substantial defect or irregularity in the proceeding on which the default was based; (2) a reasonable excuse for failure to comply with requirements that created the default; or (3) some other reason showing that manifest injustice would result if the default were allowed to stand. *See Shawl v Spence Bros, Inc*, 280 Mich App 213, 221 (2008); *see also Village of Edmore v Crystal Automation Sys*, 322 Mich App 244 (2017). The burden of proof that good cause exists to set aside the default falls on the moving party. *See Saffian v Simmons*, 477 Mich 8, 15 (2007).

For all the reasons set forth above, there was no substantial irregularity in the proceedings. Service, though technically defective for failure to timely complete publication, was sufficient to give Defendants actual notice of the proceedings, and Defendants consented to personal jurisdiction in this Court. Defendants are unable to give any excuse for the failure to turn over discovery

responses between when the Court ordered them compelled in July 2021 and when the Court entered a default judgment for failure to comply with discovery ten months later (May 2022).

Typically, a lesser showing of good cause is needed when the stated meritorious defense is strong. *See Barclay v Crown Bldg & Dev, Inc*, 241 Mich App 639 (2000). Often, a showing of a meritorious defense, together with factual issues to be determined at trial, is sufficient to establish good cause. See *Komejan v Suburban Softball, Inc*, 179 Mich App 41, 51 (1989). To obtain relief from a default or default judgment, a party must file a statement of facts showing a meritorious defense, verified in the manner prescribed by MCR 1.109(D)(3), in addition to showing good cause. *See* MCR 2.603(D)(1). A verified statement of meritorious defense is a statement, made on personal knowledge, which states with particularity those facts admissible as evidence, establishing the grounds offered in the motion to set aside the default or default judgment. Under *Huntington National Bank v Ristich*, 292 Mich App 376, 392 (2011), the affidavit of meritorious defense must contain facts on which the defense is based. In addition, *Novi Construction v Triangle Excavating Co.,* 102 Mich App 586, 590 (1980) held that an affidavit of meritorious defense that merely states a conclusion or bare denial is insufficient to establish a meritorious defense.

Defendants' chief claim of meritorious defense is that the statute of limitations expired before the Complaint was filed because the statute of limitations was three years or two years from the time of discovery, whichever is sooner, and the acts Plaintiff complained of should have been discovered in 2017 at the latest, and the suit was not filed until 2020. Defendants cite MCL 450.1489, which states in relevant part:

> (1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder.
>
> …
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>> (f) …An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.

Defendants fail to consider that Plaintiff did not bring an action for shareholder oppression or any other action for fraud/breach of fiduciary duties under MCL 450.1489. Plaintiff's Complaint had two counts (see Exhibit B to the motion): 1. Breach of Contract; 2. Conversion (statutory).

The statute of limitations for a breach of contract action seeking damages is six years from when the action accrued. MCL 600.5807(9). Based on the Complaint, the action could not have accrued prior to 2016. Therefore, filing the Complaint in 2020, four years later, was within the statute of limitations. The statute of limitations for a statutory conversion claim is three years. MCL 600.5805(2); *see also Local Emergency Financial Assistance Loan Bd. V Blackwell*, 299 Mich App 727, 740 (2013). Here, the Complaint charged that Defendants had wrongfully withheld

financial accountings from Plaintiff and failed to provide him with K-1s in 2016, 2017, and 2018. Since the alleged wrongs continued to occur into 2018, filing the Complaint in 2020 was within the statute of limitations. Accordingly, the defense that the Complaint was barred by the statute of limitations has no merit.

As to venue --- even assuming arguendo that Livingston County is not the correct venue for this action, incorrect venue is not proper grounds to set aside a judgment. In *Sutter v Ocwen Loan Servicing LLC*, unpublished per curiam opinion of the Court of Appeals, Issued May 24, 2016 (Docket No. 320704), *10, the Court of Appeals rejected this exact same argument, holding:

> In its motion for relief from judgment, defendant raised for the first time the issue whether venue was proper. The trial court determined that defendant waived this issue by failing to raise it earlier. MCR 2.221(A) provides that a motion for a change of venue must be filed either before or at the time that the defendant files an answer. Defendant did not file a motion for a change of venue or an answer to plaintiffs' complaint. Therefore, the trial court did not err in ruling that defendant waived the issue. In addition, the court properly concluded that the venue issue was an insufficient basis to set aside the default judgment. MCL 600.1645 provides, "No order, judgment, or decree shall be void or voidable solely on the ground that there was improper venue." Therefore, even assuming that venue was improper, the default judgment was not void or voidable merely because the case was filed in the wrong venue. *See id.*

While *Sutter* is an unpublished case, it is directly on point for this "wrong venue" argument Defendants now raise, thus making the *Sutter* Court's reasoning persuasive. Also, MCL 600.1645 is right on point. Defendants in this case made no motion to transfer venue while the case was pending, and therefore they waived that issue. Furthermore, assuming Livingston County is the wrong venue for this case, that is neither good cause nor a meritorious defense that would justify setting aside the default judgment.

As to Defendants' argument that the business entities had already dissolved, first, this Court notes that Jeff's Fireworks 1, Inc and Jeff's Fireworks 3, Inc dissolved on July 15, 2020, which was several months after this suit was initiated, and only about four months before the Defendants were served. Furthermore, during the winding up of its affairs, a dissolved business can still sue and be sued. The Michigan Court of Appeals in *Flint Cold Storage v Department of Treasury,* 285 Mich App 483, 495-99 (2009) explained that a business entity can still sue and be sued after it has dissolved, until it has finished winding up its affairs. There is no statutory time period to complete winding up, so the Court must imply a reasonable time period based on the circumstances. In *Flint Cold Storage*, *supra,* the Court of Appeals held that 32-years was an unreasonable time for the business entity to claim it was still winding up its affairs, and thus it was not entitled to sue the Treasury for unclaimed funds held by the department.

In the case at bar, this suit was initiated before the business entities dissolved, and the business entities participated in the suit through their counsel, David Bittner. Based on all the circumstances, the business entities were not finished winding up their affairs when the judgment was entered, as they had an outstanding lawsuit against them that had begun before the dissolution. Accordingly,

the fact that the business entities dissolved while the suit was pending is neither good cause nor a meritorious defense to justify setting aside the judgment.

Defendants have not developed their argument about the Stock Purchase Agreement, so it is properly considered to be abandoned.

3. Lack of Evidentiary Support for Award of Treble Damages

Finally, Defendants argue that an award of treble damages under MCL 600.2919a was not justified, and this Court had no factual or evidentiary basis to award the same.

MCR 2.603(B)(3)(b)allows the Court to hold additional hearings if the Court needs further evidence before entering a default judgment, stating:

> If, in order for the court to enter a default judgment or to carry it into effect, it is necessary to
>
> (i) take an account,
> (ii) determine the amount of damages,
> (iii) establish the truth of an allegation by evidence, or
> (iv) investigate any other matter,
>
> the court may conduct hearings or order references it deems necessary and proper, and shall accord a right of trial by jury to the parties to the extent required by the constitution.

The use of the permissive "may" in the court rule connotes that the trial court has the discretion to conduct additional hearings if it finds it needs additional evidence. Whether to grant or deny treble damages, even when statutory conversion is shown, is within the discretion of the trial court. *See Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 497 Mich 337, 449 (2015); *see also Hoffenblum v Hoffenblum*, 308 Mich App 102, 117 (2014).

On May 12, 2022, this Court heard Plaintiff's third motion for default judgment. This Court had before it the Complaint, alleging that Plaintiff invested $38,400 in the Defendants and was conned out of his monies. This Court also had Plaintiff's verified motion for entry of default judgment, stating that Plaintiff's treble damages were $121,000. Defendants did not appear or respond to the motion. This Court took evidence on the record at the hearing, and on the basis of that evidence, determined that treble damages were warranted by the circumstances, and that the amount was $121,000. This Court was not required to conduct any additional hearings, and this Court was within its powers to exercise its discretion and award treble damages. Defendants fail to explicate what circumstances did not justify an award of treble damages, and they fail to support their argument that treble damages were not justified with any legal authority. Defendants cite only *Aroma Wines, supra* (which supports that an award of treble damages is within the discretion of the trial court) and *Department of Agriculture v Appletree Mktg LLC,* 485 Mich 1, 13-14 (2010) for the elements of statutory conversion, but no case showing when treble damages are not justified.

Defendants have styled their motion as a motion for relief from judgment, and they rely on MCR 2.612(C)(1), (2), and (3). Relief from judgment is governed by MCR 2.612(C)(1), which sets forth the grounds for setting aside or undoing a prior judgment as follows:

> (a) Mistake, inadvertence, surprise, or excusable neglect;
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> (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial;
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> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;[1]
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> (d) The Judgment is void.
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> (e) The Judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.
>
> (f) Any other reason justifying relief from the operation of the judgment.

MCR 2.612(C)(2) and (3) state:

> (2) The motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c), within one year after the judgment, order, or proceeding was entered or taken. Except as provided in MCR 2.614(A)(1), a motion under this subrule does not affect the finality of a judgment or suspend its operation.
> (3) This subrule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding; to grant relief to a defendant not actually personally notified as provided in subrule (B); or to set aside a judgment for fraud on the court.

An allegation of fraud must be raised in a motion within one year after judgment was entered. *Nederlander v Nederlander*, 205 Mich App 123, 126–127 (1994). Here, the default judgment was entered on May 12, 2022. Far more than one year has elapsed before Defendants brought this motion. So, any motion for relief from judgment based on MCR 2.612(C)(1)(a)-(c) is untimely. In addition and more to the point, Defendants arguments in the brief do not invoke the grounds for relief stated in MCR 2.612(C)(1)(a)-(c). While Defendants fail to specify which subsection they rely on for their motion for relief from judgment, leaving this Court to guess, the substance of their arguments appear to arise from MCR 2.612(C)(1)(d) and (f).

For all the reasons set forth in detail above, the May 12, 2022 judgment is not void. Therefore, MCR 2.612(C)(1)(d) is not grounds to set this judgment aside.

Before a party may obtain relief from a judgment under the broad language of MCR 2.612(C)(1)(f) ("[a]ny other reason justifying relief from the operation of the judgment"), the party must satisfy three conditions:

> (1) the reason for setting aside the judgment must not fall under any other subrules of MCR 2.612(C)(2),

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[1] If fraud has been perpetrated on the court by the concealment of facts that affect a party's property rights, the court has the inherent power to void its Judgment. *Berg v Berg*, 336 Mich 284 (1953).[1] That power applies whether the judgment was entered by consent or after a trial. *Isabell v Isabell*, 333 Mich 519 (1952).

(2) the substantial rights of the opposing party must not be detrimentally affected, and

(3) extraordinary circumstances must exist that mandate setting aside the judgment to achieve justice.

Rose v Rose, 289 Mich App 45 (2010).

Generally, relief is granted under this subsection of the court rule only when the judgment was obtained by the improper conduct of the party in whose favor it was rendered. *See Altman v Nelson*, 197 Mich App 467 (1992). Here, Defendants' motion fails because Defendants have failed to show any improper conduct by Plaintiff in obtaining the judgment. Instead, the history of this file reveals that this Court gave Defendants numerous opportunities to cure their failures to provide discovery – compelling the production of discovery in July 2021, then denying the Plaintiff's motion for default judgment in September 2021, and giving Defendants an extension on their discovery deadline in January 2022, February 2022, and April 2022. This Court heard Plaintiff's motion for contempt and default judgment for discovery violations three times before granting it, giving Defendants ample chances over ten months to cure their discovery violations.

Circuit courts have the power to sanction litigants who disobey court rules or the Court's prior orders, including by dismissal of an action or default (if the non-compliant party is the defendant). *See e.g. Maldonado v Ford Motor Co*, 476 Mich 372, 376 (2006). MCR 2.313(B)(2) provides specifically for violations of Court orders related to discovery, and allows the Court to levy "such sanctions as are just," including dismissal, for a party's failure to attend a deposition, serve answers to interrogatories, or to respond to requests for inspection. Sanctions for discovery violations are entrusted to the sound discretion of the trial court, entrusting the trial court to consider all the circumstances surrounding the case and the discovery violations before imposing the drastic sanction of dismissing a claim or barring a party presenting evidence on a claim. *See e.g. Duray Development LLC v Perrin*, 288 Mich App 143 (2010). Relevant factors can include, but are not limited to:

(1) whether the violation was willful or accidental;

(2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses);

(3) the prejudice to the defendant;

(4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice;

(5) whether there exists a history of plaintiff's engaging in deliberate delay;

(6) the degree of compliance by the plaintiff with other provisions of the court's order;

(7) an attempt by the plaintiff to timely cure the defect[;] and

(8) whether a lesser sanction would better serve the interests of justice.

See id., at 165; see also Dean v Tucker, 182 Mich App 27 (1990).

Looking at the case law surrounding dismissal of claims for discovery violations, what has occurred in this case are exactly the circumstances in which default for discovery violations was justified. *See Reno v Gale*, 165 Mich App 86, 91–92 (1987); *see also Bellok v Koths*, 163 Mich App 780, 783 (1987) (In *Bellok*, plaintiffs' case was properly dismissed where they failed to produce meaningful and timely responses to interrogatories, and "plaintiffs' lengthy, protracted delays and denials of discovery consumed the duration of this litigation"). Considering all the

circumstances in this case at bar, this Court finds that Plaintiff's motion for entry of default judgment in these circumstances was proper. Defendants have failed to show any extraordinary circumstances that necessitate setting aside the May 12, 2022 judgment.

III. CONCLUSION

NOW THEREFORE IT IS ORDERED that for all those reasons set forth in detail above, Defendants' motion for relief from judgment / renewed motion to set aside default judgment is DENIED.

IT IS FURTHER ORDERED that Plaintiff's request for sanctions / an award of attorneys' fees for responding to this motion is DENIED for Plaintiff's failure to support such a request, both legally and factually under *Adair v State of Michigan*, 301 Mich App 547 (2013) and *Pirgu v United Service Auto Ass'n,* 499 Mich 269 (2016).

IT IS SO ORDERED.

/s/ Hon. Michael P. Hatty_________________
Hon. Michael P. Hatty (P30990)
Business Court Judge