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

HEATHER SPITLER, individually and as Successor Trustee of the Todd M. Spitler Trust dated July 25, 2006, and Personal Representative of the Estate of Todd Spitler, an individual, and derivatively in the right of BRIGHTON FORD, INC.,
Plaintiff,

Case No. 19-030330-CB
Hon. L. Suzanne Geddis

v

GERALD SPITLER, SCOTT SPITLER, AND BRIGHTON FORD, INC.,
Defendants.

Hickey, Hauck, Bishoff & Jeffers, PLLC
Mark E. Hauck (P37238)
Andrew M. Gonyea (P79413)
William J. O'Brien (P83025)
Attorneys for Plaintiff
1 Woodward Ave., Ste 200
Detroit, Michigan 48226
313-964-8600

Halm & Prine, P.C.
Thomas A. Halm (P36748)
Co-counsel for Plaintiff
2130 W. Grand River Ave.
P.O. Box 686
Howell, Michigan 48843
517-548-5310

Garratt & Bachand, P.C.
C. William Garratt (P13858)
Donald R. Bachand (P45231)

Attorneys for Defendant Brighton Ford, Inc.
74 West Long Lake Road, Ste 200
Bloomfield Hills, Michigan 48304
248-645-1450

Parker & Parker
Robert E. Parker (P18653)
Attorney for Defendant Gerald Spitler
704 E. Grand River Ave.

Howell, Michigan 48843
517-546-4864

Myers & Myers, PLLC
Kelly A. Myers (P49143)
Attorney for Defendant Scott Spitler
915 N. Michigan Ave., Ste 200
Howell, Michigan 48843
517-540-1700

OPINION & ORDER

At a session of the 44th Circuit Court,
held in the City of Howell, County of Livingston,
State of Michigan, on the 18th day of June, 2020.

Present: Hon. L. Suzanne Geddis
Circuit Court Judge

THIS MATTER HAVING COME BEFORE THE COURT on Plaintiff's motion for appointment of a receiver, parties having appeared by and through their respective counsel, and oral argument having been held on June 15, 2020, and this Court being otherwise fully advised in the premises hereby DENIES Plaintiff's motion for the reasons that follow:

I. Relevant Facts and Procedural History

Gerald Spitler was, for many years, the sole owner of the stock of Brighton Ford, Inc. (hereinafter "Brighton Ford"), but over many years he gifted most of the stock to his sons, Scott and Todd, themselves employees of Brighton Ford.

On September 4, 2018, Todd committed suicide. He had been the general manager of the dealership during a time when the financial condition of the dealership was in decline. At the time of his death, Todd owned 50% of the non-voting stock, and 25% of the voting stock. Scott owned 49% of the non-voting stock, and 24% of the voting stock. And Gerald continued to own 1% of the non-voting stock, and 51% of the voting stock.

A Buy-Sell Agreement (hereinafter "the Agreement") executed in 2006 by Todd, Scott, and Gerald granted the other shareholders an option to buy out a member's stock upon that member's death. The Agreement also laid out how the purchase price of the stock would be determined. If the other shareholders declined to exercise the option to purchase, the Agreement states that the corporation "shall redeem" the decedent's stock. After Todd's death, the parties proceeded according to the Agreement, hiring professionals to evaluate the proper price of the stock Todd's

estate owned. The professional evaluators sought to interview Gerald Spitler as part of that process, but he refused to be interviewed until Plaintiff agreed to use nothing from the valuation in any subsequent action involving the shares.

Brighton Ford had obtained and paid premiums for a $6 million policy on Todd, the proceeds of which appear to have been intended to purchase his shares from his trust. However, the $6 million was paid out to Scott, as the primary beneficiary of the policy, and Scott has not used this money to buy Todd's stock.

When the stock valuation process broke down in December of 2018, Plaintiff filed a six count Complaint for declaratory relief, Specific Performance by Defendants, Breach of Contract, Shareholder Oppression. Shareholder Derivative Action, and Unjust Enrichment. Defendants' first responsive pleading was a motion for summary disposition, which was denied in part and granted in part.

Now, Plaintiff comes before this Court seeking appointment of a receiver over Defendant Brighton Ford (hereinafter "Brighton Ford").

II. Argument

Plaintiff moves for appointment of a receiver, alleging that Brighton Ford is refusing to make distributions to shareholders in order to pressure Heather Spitler to sell the shares owned by Todd Spitler's Trust for a low price. For 2019, some $783,182 in taxable income has been attributed to Todd's shares of Brighton Ford. Plaintiff will have to use her savings to pay the taxes on that if Brighton Ford does not make a distribution to the shareholders. Plaintiff argues that this constitutes textbook minority shareholder oppression and the only remedy is a receiver.

Brighton Ford responds that appointment of a receiver over Brighton Ford would constitute a default of the Ford franchise agreement, and would cause Ford to terminate the

franchise. Further, Brighton Ford maintains that it owes some $20 million to Ford for cars, its monthly expenses are $995,101.00, and its net worth is only $3.2 million. Ergo, if a receiver was appointed and a distribution was made to the shareholders, then Brighton Ford would likely go under. Brighton Ford further contends that appointment of a receiver is an extremely harsh remedy and Plaintiff has failed to provide any proof of waste or mismanagement.

III. Applicable Law

A circuit court has broad discretion to appoint a receiver in an appropriate case. *See e.g. Reed v Reed*, 265 Mich App 131, 161 (2005). Circuit court judges "in the exercise of their equitable powers, may appoint receivers in all cases pending where appointment is allowed by law." MCL 600.2926; *see also* MCR 2.622(A). The Court may "appoint a receiver when specifically allowed by statute and also when no specific statute applies but the facts and circumstances render the appointment of a receiver an appropriate exercise of the circuit court's equitable jurisdiction." *See Reed, supra*, at 161; *see also Weathervane Windows, Inc v White Lake Constr Co*, 192 Mich App 316, 322 (1991). The purpose of appointing a receiver is "to preserve property and to dispose of it under the order of the court." *Arbor Farms LLC v GeoStar Corp*, 305 Mich App 374, 390 (2014); see also *Shouneyia v Shouneyia*, 291 Mich App 318 (2011). Typically a receiver should be appointed only in extreme cases. *See Petitpren v Taylor Sch Dist*, 104 Mich App 283, 297 (1981).

IV. Analysis

At the heart of Plaintiff's motion is the contention that Brighton Ford is squeezing Plaintiff out by refusing to make a distribution to the shareholders. Plaintiff frames this as oppressive conduct and invokes the shareholder oppression claim made in the Complaint. While it appears from the history of this case and the arguments made at the hearing that Brighton Ford

and Gerald Spitler are indeed engaging in gamesmanship designed to pressure Plaintiff into settlement, it is a gamesmanship the Board is permitted to engage in. MCL 450.1345 leaves it to the discretion of the Board whether a distribution should be made to the shareholders based on the assets and debts of the company and the Board's sound business judgment. While Plaintiff is correct that *Madugula v Taub*, 496 Mich 685, 718 (2014) does list "receive distributions" as a right of a shareholder, the opinion in that case also qualifies that statement by explaining that the relationship between a corporation and its shareholders is contractual in nature, and governed by the articles of incorporation and the bylaws. *See id.*

Here, the Board is controlled by Gerald Spitler, who owns 51% of the voting stock. Todd Spitler's Trust has no absolute right to receive an annual distribution from Brighton Ford. Under the plain terms of MCL 450.1345, whether to make a distribution to the shareholders is discretionary. Because it is a discretionary action of the board, it is subject to the business judgment rule. Based on the filings, the decision to not make distributions to shareholders cannot be said to be so unreasonable so as to bring the decision outside the protection of the business judgment rule. Therefore, the failure to make a distribution to the shareholders cannot be the basis for a successful showing of mismanagement or waste.

Plaintiff has not shown any other waste of assets by Brighton Ford, nor has she shown Brighton Ford has disobeyed Court orders. Plaintiff further has not demonstrated that the assets of Brighton Ford are in imminent danger of loss or being disposed of. Here, Plaintiff has only shown that Brighton Ford has failed to pay a distribution to shareholders, and it makes her tax liability burdensome. While this Court has no illusions about the tactical advantage gained by refusal to make shareholder distributions, Brighton Ford is entitled to decide to not make such a distrubtion. Since Plaintiff has only shown that Brighton Ford has done what it is entitled to do,

and receivership is such a harsh remedy, this Court finds that under *Petitpren v Taylor Sch Dist*, 104 Mich App 283 (1981) a receivership is not an appropriate remedy here.

Finally, Brighton Ford includes a request for an award of attorney fees both in the written Response and in the oral argument, on the grounds that Plaintiff's motion was frivolous. Having reviewed the filings and being aware of the history of this case, this Court finds that Plaintiff's motion, while it ultimately did not win the day, was not frivolous within the meaning of MCL 600.2591, and was not submitted to the Court contrary to MCR 1.109(E). MCL 600.2926 applies to a case such as this by its plain terms, and Brighton Ford's argument that a receiver may be appointed only in creditor/debtor cases is without merit. *See e.g. Weathervane Windows, Inc v White Lake Constr Co*, 192 Mich App 316, 322 (1991). This Court has broad authority to appoint a receiver, and, considering the issues raised by the filings, and also the dynamic of this case, Plaintiff made a colorable argument that appointment of a receiver was justified here. Just because this Court ultimately rejected Plaintiff's argument does not mean that Plaintiff's argument must have been frivolous. *See e.g. Kitchen v Kitchen*, 465 Mich 654, 663 (2002). For those reasons, this Court finds that Plaintiff's motion was not frivolous. Accordingly, no sanction should be imposed on Plaintiff.

V. Conclusion

For the reasons stated above, this Court finds that in light of all the circumstances, appointment of a receiver is not appropriate in this situation. Therefore, Plaintiff's motion is DENIED.

IT IS SO ORDERED.

S. Geddis (P35307)

Hon. L. Suzanne Geddis (P35307)
Circuit Court Judge