

**STATE OF MICHIGAN
IN THE BERRIEN COUNTY TRIAL COURT – BUSINESS COURT DOCKET**

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AMY HAYMAN, as Personal Representative of
the Estate of Richard J. Tapper,

Plaintiff,

CASE NO. 2021-0105-CB

v

HON. DONNA B. HOWARD

BUCHANAN METAL FORMING, INC.,

Defendant.

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**OPINION & ORDER REGARDING DEFENDANT’S MOTION FOR SUMMARY DISPOSITION
AND PLAINTIFF’S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT**

At a session of the Berrien County Trial Court, held
On the 22nd day of November 2021, in the City of
St. Joseph, Berrien County, Michigan

I. INTRODUCTION

This matter comes before the Court on the motion for leave to file First Amended Complaint filed on August 11, 2021, by Plaintiff Amy Hayman, as personal representative (“P/R”) of the Estate of Richard J. Tapper (“the Estate”), pursuant to MCR 2.118, and Defendant Buchanan Metal Forming, Inc.’s (“BMF”) motion for summary disposition filed August 26, 2021, pursuant MCR 2.116(C)(6), (C)(7)(and (C)(10), concerning Plaintiff’s claims of breach of contract (Count

I), unjust enrichment (Count II), claim and delivery (Count III), judicial foreclosure (Count IV), contractual attorney fees (Count V).¹

Responsive briefs were filed by the parties. The Court took oral argument on the motions on or about September 21, 2021. At that time, the Court requested supplemental records, namely a complete transcript of Defendant's Exhibit 14, and two register of actions from closed matters in Macomb County Probate Court, and gave Plaintiff an opportunity to submit certain counter-affidavit, if she wished. The Court took the matter under advisement. The parties timely filed the supplemental submissions to the Court September 28, 2021 and October 4, 2021, respectively.

II. BACKGROUND

It is undisputed that Richard J. Tapper ("the Decedent"), Ms. Hayman's father, passed away on or about January 20, 2019. On or about March 29, 2019, Ms. Hayman became the personal representative ("P/R") of the Estate, and Trustee of the Richard J. Tapper Revocable Living Trust ("the 1987 Living Trust"). An Estate probate action was opened in the Macomb County Probate Court under Case No. 2019-230419-DE, assigned to Honorable Sandra A. Harrison. According to the filings of the parties in the instant action, that Estate action (2019-230419) appears to have remained open and pending (*see eg*, Verified Petition, 8/8/19/21, attached to Def Resp Brf, 9/7/21, as **Exhibit 17**).

In a related Macomb County probate action, Case No. 2019-232798-CZ (assigned to Hon. Harrison), on or about December 2, 2019, PNC Bank filed suit against Ms. Hayman as P/R of the Estate, essentially seeking repayment of a loan from the Estate. PNC Bank filed a motion for summary disposition on April 30, 2020 (*see*, Def MSD, **Exhibit 21**). Subsequently, Ms. Hayman, by motion for leave granted, filed a third-party complaint against BMF on or about July 16, 2020 (*see*, Def MSD, **Exhibit 21**). The third-party complaint asserted claims of indemnification and/or subrogation against BMF arising from BMF "allegedly default[ing] on the PNC loan." (3rd Party Compl, ¶¶ 7-16, attached to Pltf Resp Brf, 9/15/21, as **Exhibit D**). On or about August, 7, 2020, those parties were ordered to case evaluation (*see*, Def MSD, **Exhibit 21**). The parties filed additional dispositive motions and briefs in early 2021 (*see*, Def MSD, **Exhibit 21**).

¹ Plaintiff's proposed First Amended Complaint essentially retains the same alleged counts as the original Complaint, but includes additional factual allegations of other loaned funds between the parties (*see* Proposed 1st Am Compl, attached to Pltf Mot Lv Brf, 8/11/21, as **Exhibit 3**; Pltf Resp Brf, 9/15/21, **Exhibit H**).

In addition or contemporaneously with the above actions, in Macomb County probate action, Case No. 2019-232914-CZ (also before Hon. Harrison), on or about December 12, 2019, BMF, along with Ms. Hayman's brother and BMF shareholder and officer, Christopher Tapper, and Anthony Ballor, as successor Trustee of the Tapper Irrevocable Stock Trust–2004 (“the 2004 Stock Trust”), initiated a separate action in the probate court against Ms. Hayman, as P/R of the Estate, and also as Trustee of the 1987 Living Trust. BMF purportedly asserted a twelve-count complaint claiming conversion, breaches of fiduciary duty, fraud, tortious interference, breach of contract, wilful misconduct against shareholders, and/or for specific performance (*see*, 2019-232914 Compl, attached to Pltf Resp Brf, 9/15/21, as **Exhibit A**). In that action, Ms. Hayman filed a counter-complaint on or about January 27, 2020, naming all three plaintiffs as counter-defendants, but only asserting specific claims against Mr. C. Tapper (*see* 2019-232914 Cntr-Compl, pp 32-40, Counts I & II; Request for Relief, attached to Pltf Resp Brf, 9/15/21, as **Exhibit B**). On or about July 16, 2020, Ms. Hayman filed a first amended counter-complaint, essentially adding an additional claim for statutory shareholder oppression (Count III) against Mr. C. Tapper, and asserting a claim of breach of a buy-out agreement (Count IV) against all three counter-defendants (*see* 2019-232914 1st Am Cntr-Compl, ¶¶65-75, pp 14-17, attached to Pltf Resp Brf, 9/15/21, as **Exhibit C**). Beginning in November 2020, and over the course of several months, the parties in the 2019-232914 action made numerous summary disposition filings, which eventually culminated with a hearing (before Hon. Harrison) on or about March 9, 2020.

Shortly thereafter, with all three actions still pending in the probate court, including the aforementioned summary disposition motions being under advisement, Plaintiff, through counsel, issued a notice of default letter concerning a 1990 Promissory Note allegedly owed by BMF, which is subject of the instant action (Letter, 3/19/21, attached to Compl, as **Exhibit B**). As indicated therein, Plaintiff asserted in part that:

Since Richard J. Tapper's passing in January 2019, BMF has failed to make the required semi-annual payments of accrued interest as provided for by the Note. Indeed, *the Estate has not received any payments from BMF.*

(Letter, 3/19/21, **Exhibit B**)(emphasis added).

The Court (by Hon. Harrison) issued its written Opinion and Order on the parties' competing summary disposition motions in the 2019-232914 case (OpOrder, 3/25/21, attached to Pltf Resp Brf, 9/15/21, as **Exhibit E**). As indicated therein, the Court (by Hon. Harrison) dismissed BMF's claims of conversion (Count I), breach of fiduciary duty (Count II), fraud (Counts IV, X,

IX & X), tortious interference (Count VI), part of the shareholder oppression claims (Count VIII), based upon a failure to state a claim and/or no genuine issues of material fact remaining. The Court (by Hon. Harrison) also dismissed Ms. Hayman's counterclaims of conversion (Count I) and shareholder oppression (Count III). (OpOrder, 3/25/21, pp 11-29, **Exhibit E**).

Ultimately, the parties were also ordered to case evaluation in the 2019-232914 case, resulting in an acceptance of the case evaluation award by both parties.² A clarification hearing in the 2019-232914 case, with the case evaluation panel present was held on March 31, 2021 (by Hon. Harrison). At that hearing, Ms. Hayman's counsel acknowledged the resolution of the claims between Ms. Hayman and BMF resulting from the case evaluation. Counsel and the case evaluator explained in part:

[By Mr. McCarthy]

[W]e agree that the case evaluation I think that occurred on February 25th of this year, even though it was in the confines I think of the 914 action, that this case evaluation also evaluated the cross claim that was pending in the 798 action. So just mechanically it was just getting a proper order entered, whether one was necessary. But I don't think there's any, any, any dispute over, over that. . . .

[By Ms. Maison]

I actually was the person who wrote up the award. . . . The case evaluation award was intended to resolve all claims as between the parties. There, it was intended to basically be a full and final settlement of the claims as between them, . . . it was intended to be global and so they're, whether it spoke to a separate subrogation claim it was intended to have finality and be global as between these two parties. I think that my panel would agree with that.

(Hrg Tr, 3/31/21, pp 7-8, MSD **Exhibit 20**).

On or about April 12, 2021, an order granting plaintiff PNC Bank summary disposition was entered in the 2019-232798 case. Soon thereafter, a stipulated order dismissing with prejudice the claims between Ms. Hayman, as P/R of the Estate, and BMF was entered on or about April 28, 2021. (*See*, MSD **Exhibit 21**). Similarly, in the second probate action, Case No. 2019-232914, the Court (by Hon Harrison) also entered a stipulated order dismissing with prejudice all the claims between the parties, on or about April 28, 2021. (*See*, MSD **Exhibit 22**).

² The Court notes that for purposes of this Opinion, the Court did not review or consider Defendant's MSD Brief Exhibit 11, which is deemed inadmissible under MCR 2.403(J)(4).

III. ANALYSIS

A. Jurisdiction

In Plaintiff's initial pleading for the instant action, as well as in her proposed first amended complaint, Plaintiff asserts jurisdictional propriety in this Court, citing the Michigan Constitution of 1963, Art VI, §13, MCL §§600.601(1)(a), 600.711, 600.715, and 600.8031. (Compl, 5/11/21, ¶¶4-7, p 2; Proposed 1st Am Compl, attached to Pltf Mot Lv, 8/12/21, as **Exhibit 3**). However, in this case the pleadings and other filings of the parties before this Court, namely the reference and inclusion of various probate actions between these parties in Macomb County, naturally prompt review of subject matter jurisdiction in the general circuit court, and more specifically in this Business Court. "Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending." *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 MichApp 523, 528; 695 NW2d 508 (2004) (quotation marks and citation omitted). This issue also presents questions of statutory interpretation, which are questions of law for this Court. *White v Harrison-White*, 280 MichApp 383, 387; 760 NW2d 691 (2008). "The primary goal of statutory interpretation is to ascertain and give effect to the Legislature's intent as expressed by the language of the statute." *Mericka v Dep't of Community Health*, 283 MichApp 29, 38; 770 NW2d 24 (2009).

Subject-matter jurisdiction cannot be forfeited or waived and can be raised at any time by any party or the court. *Arbaugh v Y&H Corp*, 546 US 500, 514; 126 SCt 1235; 163 LE2d 1097 (2006); *Harris v Vernier*, 242 MichApp 306, 316; 617 NW2d 764 (2000); *Davis v Dep't of Corrections*, 251 MichApp 372, 374; 651 NW2d 486 (2002); *see also* MCR 2.116(D)(3); 2.111(F)(2). Therefore, although not specifically raised as part of either of the instant motions in this action (*eg.* under MCR 2.116(C)(4)), this Court has an obligation to question *sua sponte* its jurisdiction over the subject matter of this action, as filed, before deciding the other issues raised by the parties' motions. *See, Arbaugh, supra* at 514; *Yee v Shiawassee Co Bd of Comm'rs*, 251 MichApp 379, 399; 651 NW2d 756 (2002)(lack of subject matter jurisdiction is so serious a defect in proceedings that a court is duty-bound to dismiss even if defendant had not so requested).

Generally, subject matter jurisdiction is determined by the allegations in the pleadings. *Trost v Buckstop Lure Co, Inc*, 249 MichApp 580, 587-588; 644 NW2d 54 (2002). However, it is well settled in Michigan law, that courts are not bound by the labels that parties may place in their claims. *Manning v Amerman*, 229 MichApp 608, 613; 582 NW2d 529 (1998). Instead, "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 claims.” *Adams v Adams*, 276 MichApp 704, 710-711; 742 NW2d 399 (2007). Said differently, “the court may look behind the technical label that a plaintiff attaches to a cause of action to the substance of the claim asserted.” *Local 1064, RWDSU AFL–CIO v. Ernst & Young*, 449 Mich 322, 327 n 10; 535 NW2d 187 (1995)(analyzing statute of limitations defense); *see also, Estate of Corrado by Meyers v Rieck*, 333 MichApp 402, 408; 960 NW2d 218 (2020)(reviewing claims under ordinary negligence vs malpractice). It follows then that in making its review of subject matter jurisdiction for summary dispositional purposes, a court considers “[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties. . . .” *Henry v Laborers’ Local 1191*, 495 Mich 260, 273; 848 NW2d 130, 137 (2014), quoting MCR 2.116(G)(5).

Applying these standards and principles, this Court recognizes that circuit courts in Michigan are courts of general jurisdiction, which maintain original jurisdiction “to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state.” MCL §600.605. As such, “circuit courts are presumed to have subject-matter jurisdiction unless jurisdiction is expressly prohibited or given to another court by constitution or statute.” *In re Wayne Co Treasurer*, 265 MichApp 285, 291; 698 NW2d 870 (2005). Additionally, a business court, such as this Court, is a division within the circuit court created by statute to specifically handle business and/or commercial disputes. *See*, MCL §600.8301, *et seq.* Business and commercial disputes include, by definition unless otherwise explicitly excluded, those disputes between a business enterprise and its present or former owners, managers, shareholders, members, officers, agents, or employees. MCL §600.8301(1)(c)(ii). However, the expressed statutory exclusions for business disputes include “[p]roceedings under the Estates and Protected Individuals Code [“the EPIC”], 1998 PA 386, MCL 700.1101 to 700.8206.” MCL §600.8301(3)(e).

On the other hand, unlike the circuit courts’ general jurisdiction, the probate court is a court of limited jurisdiction, statutorily established in the EPIC, *see* MCL §700.1101 *et seq.* The EPIC provides in pertinent part that:

The court has *exclusive* legal and equitable jurisdiction of all of the following:

- (a) A matter that relates to *the settlement of a deceased individual's estate*, whether testate or intestate who was at the time of death domiciled in the court or was at the time of death domiciled out of state leaving an estate within the county to be administered, including, but not limited to, all of the following proceedings:
 - (i) The internal affairs of the estate.
 - (ii) Estate administration, settlement, and distribution.
 - (iii) Declaration of rights that involve an estate, devisee, heir, or fiduciary.

* * *

MCL 700.1302 (emphasis added). “Settlement” is defined as “in reference to a decedent’s estate, the full process of administration, distribution, and closing.” MCL 700.1107(d).

Turning to Plaintiff’s asserted claims (and proposed amended claims), it is apparent that although Plaintiff asserts the Estate’s claims against Defendant are merely business disputes, *i.e.* “BMF is a business enterprise and Plaintiff’s estate is a former owner,” the true gravamen of Plaintiff’s claims indicate otherwise. Plaintiff asserts that the Complaint is filed solely as the P/R of the Estate, and that “[o]n or about July 19, 1990, decedent, Richard J. Tapper, agreed to loan Defendant \$230,000.00 subject to the terms and conditions set forth in the Promissory Note,” and that the Estate is seeking “repayment of principal, as well as interest payments.” (Compl, 5/11/21, ¶¶ 1, 9-19). The Estate, through Plaintiff, further seeks recovery of certain collateral, namely Defendant’s property, by way of claims for claim and delivery and/or foreclosure (*see*, Compl, 5/11/21, Counts III & IV). The proposed First Amended Complaint, adds oddly enough, allegations concerning events where “Defendant loaned Plaintiff monies from 1991 through 1998 totaling at least \$421,154.00, with interest” and that “[o]n July 29, 2021, Defendant demanded repayment of the Additional Loans. . .” (Proposed 1st Am Compl, ¶¶ 20-23, Pltf Mot Lv Brf, 8/11/21, **Exhibit 3**; Pltf Resp Brf, 9/15/21, **Exhibit H**). Certainly, without more the Court’s review of subject matter jurisdiction would end there.

However, although this Court has not been provided a full record of the Macomb probate actions, from what is before this Court, the probate court has jurisdiction of Plaintiff’s asserted claims. First, it is clear that the Estate’s claims or valuations of the referenced loan-related assets were already addressed or at least implicated in the Macomb County Probate Court actions (*see eg*, RSM Valuation, O’Keefe Valuation, Estate Inventory, attached to MSD Brf, 8/26/21, as **Exhibits 9, 10, 12** respectively; Loudermilk Affidavit, filed 9/20/21 as **MSD Exhibit 19**; O’Keefe Affidavit, filed 10/4/21). It is also noted that the Estate’s probate action, Case No. 2019-230419-

DE, in Macomb County Probate Court (before Hon. Harrison) is apparently still open, and in the current Complaint (as well as the proposed First Amended Complaint), Plaintiff, as P/R of the Estate, is seeking recovery to and on behalf of the Estate certain monies loaned in the 1990s between the Decedent and Defendant, including interest, as well as or alternatively, property of Defendant. Moreover, undeniably Ms. Hayman had asserted exclusive subject matter jurisdiction in the probate court under the EPIC when, on behalf of the Estate, she sought payment from BMF for the PNC Bank loan in the Macomb County Probate 2019-232798 action. Specifically, in Ms. Hayman's Third Party Complaint, she confirmed that "Jurisdiction is appropriate before this Court pursuant to MCL 700.1302 (2019-232798 3rd Party Compl, ¶ 4, Pltf Resp Brf, 9/15/21, **Exhibit D**). Likewise, with respect to the Estate's claims or defenses over BMF company stock or shares, trusts, and/or the handling of corporate funds by the Decedent, as set forth in the BMF Complaint in the Macomb County Probate 2019-232914 action, there was no challenge or question that the probate court had exclusive jurisdiction under the EPIC of those claims by and against the Estate. Again, Ms. Hayman admitted the Macomb County Probate Court had "subject matter jurisdiction over the relief sought in this Complaint pursuant to MCL 700.1302 and/or MCL 700.1303." (*See* 2019-232914 Answer to Compl, ¶ 7, p 3, Pltf Resp Brf, 9/15/21, **Exhibit B**).

Under these circumstances, this Court finds no other reasonable way to read Plaintiff's instant claims alleged but as similarly relating to loaned funds and interest purportedly belonging to the Estate, which if collected, will directly affect the assets available for distribution in settlement of the Estate. Arguably, it has already directly impacted the valuation of certain company shares, as an asset, litigated in the Macomb County Probate Court. Consequently, this Court finds Plaintiff's Complaint (and proposed First Amended Complaint) to plainly be pursuing, in relevant part, a "settlement of the deceased individual's estate," by way of a determination of the loan-related affairs of the Estate, and/or the Estate's rights or interest to monies related to those alleged loans to or by the Decedent, as well as seeking to regain or foreclose on the Estate's purported collateral or mortgage rights to certain of Defendant's property. As such, Plaintiff's claims fall squarely within the exclusive jurisdiction of the probate court, pursuant to the EPIC, MCL 700.1302(a)(i), (ii) and (iii). "When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void." *Todd v Dep't of Corrections*, 232 MichApp 623, 628; 591 NW2d 375 (1998)(citation omitted); *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992). Therefore, Plaintiff's claims, as pled in this action, must be dismissed.

Alternatively, even assuming *arguendo* that the probate court does not have exclusive jurisdiction over the Estate's claims filed in this action by Plaintiff pursuant to MCL 700.1302, the probate court certainly has concurrent jurisdiction over them under MCL 700.1303. Section 1303 of the EPIC provides in part that:

The court has concurrent legal and equitable jurisdiction to do all of the following in regard to an estate of a decedent, protected individual, ward, or trust:

(a) Determine a property right or interest.

* * *

(i) Hear and decide a contract proceeding or action by or against an estate, trust, or ward.

700.1303(1)(emphasis added). With respect to any concurrent jurisdiction of §1303, the Legislature explained that “[t]he underlying purpose and policy of this section is to simplify the disposition of an action or proceeding involving a decedent’s, a protected individual’s, a ward’s, or a trust estate by consolidating the probate and other related actions or proceedings in the probate court.” MCL 700.1303(3). With that purpose, the Legislature provided an additional mechanism for the facilitation of litigation surrounding a decedent’s estate. Under MCL 700.1303(2), it further provides:

If the probate court has concurrent jurisdiction of an action or proceeding that is pending in another court, on the motion of a party to the action or proceeding and after a finding and order on the jurisdictional issue, the other court may order removal of the action or proceeding to the probate court. If the action or proceeding is removed to the probate court, the other court shall forward to the probate court the original of all papers in the action or proceeding. After that transfer, the other court shall not hear the action or proceeding.

Therefore, to the extent Defendant’s summary disposition motion clearly seeks to preclude Plaintiff’s claims from proceeding before this Court, albeit under alternative bases not herein decided, Defendant would, in the alternative, be entitled to removal of the action to the Macomb County Probate Court under MCL 700.1303(2).

Moreover, where two statutes are in conflict, such as the jurisdiction of this Business Court under MCL 600.8035(3), and jurisdiction under the EPIC, pursuant to MCL 700.1302 and 700.1303, “the more specific statute must control over the more general statute.” *See, Donkers v Kovach*, 277 MichApp 366, 371; 745 NW2d 154 (2007). Here, in effectuating the intent of the Legislature through the statutory language, this Court concludes that the more specific grant of jurisdiction under the EPIC, MCL 700.1302 and 700.1303 controls over this Court’s jurisdiction;

noting that the Legislature specifically granted jurisdiction in broad fashion to the probate court over claims of a decedent's estate, to simplify the disposition of such actions or proceedings, *see*, MCL 700.1303(3). Indeed, MCL 600.8031(3)(e) expressly excludes any proceedings under the EPIC from "business or commercial disputes."

Judicial Economy, Convenience & Venue

Relatedly, while this Court gives deference to a party's choice of jurisdiction where concurrent jurisdiction exists in more than one court, *see*, *Wayne Co Chief Executive v Governor*, 230 MichApp 258, 270; 583 NW2d 512 (1998), because there were already proceedings ongoing in the Macomb County Probate Court with respect to other loans and the valuation of the Estate assets involving Defendant BMF based upon such loans and other affairs handled by the Decedent, this Court finds that even if this Court has concurrent jurisdiction, judicial economy and the convenience of parties, witnesses and counsel would be best served by having the instant claims, including the balance of the parties' current motions, be heard in the Macomb County Probate Court. Courts will evaluate convenience "primarily in terms of the interests of the parties and any relevant witnesses. However the primary goal is to minimize the costs of litigation not only by reducing the burdens on the parties, but also by considering the strains on the system as a whole." *Gross v General Motors Corp*, 448 Mich 147,155; 528 NW2d 147 (1995) , *citing Piper Aircraft Co v Reyno*, 454 US 235, 256-257; 102 SCt 252, 266-267; 70 LE2d 419 (1981); *Gulf Oil Corp v Gilbert*, 330 US 501, 507-509; 67 SCt 839, 842-843; 91 LEd 1055 (1947). *See also*, *Nat'l Waterworks, Inc v Int'l Fidelity & Surety Ltd*, 275 MichApp 256, 259-260; 739 NW2d 121 (2007), quoting MCR 8.111 ("[I]f one of two or more actions arising out of the same transaction or occurrence has been assigned to a judge, the other action or actions must be assigned to that judge. . . .").

Consistent with those principles, the Court finds Plaintiff's claims should more appropriately be handled in the Macomb County Probate Court based upon the EPIC's venue provisions, which state in pertinent part:

- (2) Venue for a subsequent proceeding that is within the court's exclusive jurisdiction is in the place where the initial proceeding occurred, unless the initial proceeding has been transferred as provided in subsection (3), in section 856 of the revised judicature act of 1961, MCL 600.856, or by supreme court rule.

- (3) If the first proceeding described in subsection (1) was informal, on application of an interested person and after notice to the proponent in the first proceeding, the court, upon finding that venue is elsewhere, may transfer the proceeding and the file to the other court.
- (4) On motion by a party or on the court's own initiative, a proceeding's venue may be changed to another county by court order for the convenience of the parties and witnesses, for the attorneys' convenience, or if an impartial trial cannot be had in the county where the action is pending.

* * *

MCL 700.3201(2) – (4). Here, there is no question that Plaintiff, as P/R for the Estate, initiated proceedings (and apparently continues to have an action pending) in the Macomb County Probate Court, namely Case No. 2019-230419-DE (before Hon. Harrison). Plaintiff presumably selected venue in Macomb County and there was no challenge to same. It is also clear that Plaintiff's initial proceeding was followed by two additional Macomb County Probate actions, 2019-232798-CZ and 2019-232914-CZ (before Hon. Harrison), in which Plaintiff, on behalf of the Estate, and Defendant were parties. Again, consistent with MCL 700.3201, the two subsequent actions asserted venue, without challenge, in Macomb County Probate Court under the EPIC. (*See*, 2019-232914 Answer to Compl, ¶ 9, p 3, Pltf Resp Brf, 9/15/21, **Exhibit B**; 2019-232798 3rd Party Compl, ¶ 3, Pltf Resp Brf, 9/15/21, **Exhibit D**).

Therefore, to the extent the Court has found above that the probate court has exclusive jurisdiction, proper venue for Plaintiff's current action (*i.e.* subsequent proceedings), is in Macomb County Probate Court pursuant to §3201(2). In addition or alternatively, to the extent the Estate's 2019-230419 initial probate action was initiated as an informal estate action, venue is dictated under §3201(3) to be in Macomb County. Further, the Court deems it proper to exercise its discretion pursuant to §3201(4), looking at the impact on the system as a whole, including the convenience of the parties, witnesses and attorneys, in finding that Macomb County is the more appropriate venue for adjudication of Plaintiff's claims. Neither Plaintiff, nor Mr. C Tapper, President of Defendant BMF, reside in Berrien County. In fact, Plaintiff's place of residence is believed to be in Macomb County or adjacent, Wayne County. Mr. O'Keefe, a witness for Plaintiff is apparently in nearby Oakland County (*see*, O'Keefe Affidavit, 10/4/21). All the attorneys to this action are similarly on the east-side of the State. Really, the only connection to Berrien County, appears to be the collateral, the BMF property, Plaintiff seeks to take title of in recovery of the

alleged unpaid loan amounts owed to the Estate (*see eg.* Compl, 5/11/21, Counts III & IV; Pltf Mot Lv, 8/12/21, **Exhibit 3**).

In light of the above, this Court finds no apparent circumstances in which the probate court's jurisdiction would be circumscribed by the general jurisdiction of the circuit court, including the statutory jurisdiction of this Business Court under MCL 600.8301, *et seq.* It also finds under the circumstances that venue in Macomb County is proper and statutorily indicated over Berrien County, pursuant to MCL 700.3201.

B. Motion for Leave to Amend

Lastly, the Court turns briefly to Plaintiff's motion for leave to file her First Amended Complaint (*see*, Pltf Mot Lv, 8/12/21, **Exhibit 3**). MCR 2.118 provides for a party to amend a pleading upon leave of court or consent of the parties. "Leave shall be freely given when justice so requires." MCR 2.118(A)(2). With that, it is long been held that "[l]eave to amend should be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party, or where amendment would be futile." *Miller v Chapman Contracting*, 477 Mich 102, 105-06; 730 NW2d 462 (2007)(citations omitted). "An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face." *Hakari v Ski Brule, Inc*, 230 MichApp 352, 356; 584 NW2d 345 (1998)(citations omitted).

For the reasons discussed above, the Court finds Plaintiff's proposed amended complaint lacks subject matter jurisdiction in this Court under MCL 700.1302, or alternatively, should be addressed by the Macomb County Probate Court, holding concurrent jurisdiction under MCL 700.1303, and for judicial economy, convenience, and venue under MCL 700.3201. Consequently, the Court finds futility in granting Plaintiff leave for filing her proposed amended complaint. Therefore, Plaintiff's motion for leave to file said amended complaint pursuant to MCR 2.118(A)(2) must be denied.

IV. CONCLUSION

In light of the foregoing reasons, and the Court being otherwise advised in the premises, the Court concludes as follows:


IT IS HEREBY ORDERED that pursuant to MCR 2.116(C)(4) and/or (I)(1), on the basis of lack of subject matter jurisdiction, summary disposition to Defendant, and against Plaintiff is **GRANTED**, and Plaintiffs' Complaint is **DISMISSED**.

IT IS FURTHER HEREBY ORDERED, that Plaintiff's motion for leave to file an amended complaint is deemed futile, and therefore **DENIED**.

IT IS SO ORDERED.

This is a final order, resolving the last pending claim and closing the case. MCR 2.602(A)(3)

11/22/2021
Date


Hon. Donna B. Howard (P57635)
Berrien County Trial Court, Business Div.