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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

INGRAM ROOFING, INC.,

Plaintiff,

Case No. 2014-140724-CB

v.

Hon. Martha D. Anderson

HEMOCRAFTERS HOME IMPROVEMENT, INC.,  
CHAD LOREN SCHMIDT, JOHANNES ANTON BOLL, JR.,  
And DEREK ROBERT RAY,

Defendants.

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**OPINION AND ORDER RE: DEFENDANT DEREK ROBERT RAY'S  
MOTION FOR SUMMARY DISPOSITION**

This matter is before the Court on Defendant Derek Ray's Motion for Summary Disposition. The Court dispenses with oral argument in accordance with MCR 2.119(E)(3).

By way of background, Plaintiff filed this lawsuit against Defendants Homecrafters Home Improvement, Inc. ("Homecrafters"), Chad Loren Schmidt, Johannes Anton Boll, Jr., and Derek Robert Ray on May 12, 2014. In the original Complaint, Plaintiff characterized Defendants Ray, Schmidt, and Boll as shareholders and officers or directors of Homecrafters.

Plaintiff initiated litigation against Defendants on the ground that it rendered services as a subcontractor for Homecrafters on various construction projects, however, Defendants failed to pay Plaintiff the sum of \$150,370.42 as the balance due and owing. Plaintiff sought a money judgment in that amount, plus interest, costs, and attorney fees, on the following claims: Accounts Stated, Violation of the Building Contract Fund Act MCL 570.151, *et seq.*, Fraudulent Misrepresentation, Piercing the Corporate Veil, and Respondeat Superior. On June

17, 2015, the Court entered a Default Judgment in the amount of \$162,173.00, plus accrued interest, costs, and attorney fees, against Defendants and in favor of Plaintiff.

When Defendant Derek Ray was served with a Subpoena for a debtor's examination on September 16, 2019, Defendant subsequently filed a Motion to Set Aside Default and Default Judgment on the ground that he was never properly served with the original Complaint. The Court granted Defendant Ray's motion on October 23, 2019 and set aside the Default and Default Judgment against him. Thereafter, the Court entered a Stipulated Order for More Definite Statement on November 14, 2019. The Stipulated Order provided that Plaintiff shall file an amended Complaint as to Defendant Derek Ray only. On November 21, 2019, Plaintiff filed its First Amended Complaint as to Defendant Derek Ray Only. This First Amended Complaint is the subject of Defendant Ray's Motion for Summary Disposition.

In his motion, Defendant Ray is seeking the dismissal of Plaintiff's First Amended Complaint pursuant to MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). When analyzing such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dept of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). A (C)(8) motion may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* And, when deciding such a motion, the Court considers only the pleadings. MCR 2.116(G)(5).

With respect to Plaintiff's Count One, namely the Violation of the Builder's Trust Fund Act MCL 570.151 *et seq.*, Defendant argues that Plaintiff has failed to plead any of the elements necessary to maintain a claim under the Michigan Builder's Trust Fund Act ("MBFTA"). Further, Defendant maintains that he was not obligated to pay Plaintiff because Plaintiff had

contracted with Homecrafters and not with Defendant individually.<sup>1</sup> In fact, Plaintiff alleges in Paragraph 34 of its First Amended Complaint that Homecrafters violated the MBTFA, not Defendant. In the next paragraph, Plaintiff asserts that Defendant, upon information and belief, is the individual who personally misappropriated the Trust Funds. However, Plaintiff does not explain how Defendant misappropriated the Trust Funds in a manner that would violate the MBTFA.

In response, Plaintiff argues that Defendant can be held personally liable under the Michigan Builder's Trust Fund Act as the principal of a corporation that violated the Act. Plaintiff relies on the case of *Livonia Bldg. Materials Co. v Harrison Const. Co.*, 276 Mich App 514; 742 MW2d 140 (2007) for the premise that recovery is permitted from an individual owner of a corporation when it is used to defraud third parties in violation of the MBTFA. In Paragraph 34 of the First Amended Complaint, Plaintiff alleges that "Homecrafters violated the MBTFA by retaining and/or misappropriating the Trust Funds." In Paragraph 35 of the First Amended Complaint, Plaintiff alleges that Defendant Ray is the "individual who personally misappropriated the Trust Funds" and is personally liable for the same.

In reply, Defendant argues that officers may be held individually liable under the MBTFA when they personally cause their corporation to act unlawfully. However, Plaintiff

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<sup>1</sup> Defendant relies on the case of *KMH Equip. Co. v Chas. J. Rogers, Inc.*, 104 Mich App 563, 567-68; 305 NW2d 266 (1981), to argue that Plaintiff cannot make a claim against him individually under the MBTFA. The *KMH* Court reasoned that under the Building Contract Fund Act, a "general contractors' statutory fiduciary duty is to pay those subcontractors, laborers and materialmen who were engaged by them...Defendant general contractors' obligation under the Building Contract Fund Act is not to pay persons engaged by someone else." This reasoning simply means that a contractor is not obligated to pay persons with whom the contractor did not have a direct contractual relationship. Homecrafters had a contractual relationship with Plaintiff and under the relevant case law, Plaintiff is seeking relief from Defendant, as an officer of Homecrafters, on the allegation that Defendant personally misappropriated the Trust Funds.

still has to allege the requisite elements as to Defendant individually to satisfy Count One of the First Amended Complaint. It is Defendant's position that Plaintiff has failed to do so.

"The MBTFA is a penal statute, but our Supreme Court recognizes a civil cause of action for its violation. The MBTFA applies to funds paid to contractors and subcontractors for products and services provided to them under their construction contracts." *Livonia Bldg. Materials Co., supra* at 519. (Citations omitted).

"The prima facie elements of a civil cause of action brought under the act include (1) the defendant is a contractor or subcontractor engaged in the building construction industry, (2) a person paid the contractor or subcontractor for labor or materials provided on a construction project, (3) the defendant retained or used those funds, or any part of those funds, (4) for any purpose other than to first pay laborers, subcontractors, and materialmen, (5) who were engaged by the defendant to perform labor or furnish material for the specific project. MCL 570.151 *et seq.*" *DiPonio Const. Co. v Rosati Masonry Co.*, 246 Mich App 43, 49; 631 NW2d 59 (2001).

In its First Amended Complaint, Plaintiff alleges that "Homecrafters was a contractor engaged in the building construction industry."<sup>2</sup> Plaintiff also avers that "Homecrafters engaged Ingram Roofing to perform its Services on the Projects" between August 1, 2011 and December 1, 2012.<sup>3</sup> Plaintiff alleges further that "Homecrafters, upon information and belief has been paid in part or in full for the Services to the Projects improved by Ingram Roofing with entrusted construction funds for the benefit of Ingram Roofing."<sup>4</sup> Third, Plaintiff states that "Homecrafters violated the MBTFA by retaining and/or misappropriating the Trust

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<sup>2</sup> See Paragraph 27 of the First Amended Complaint.

<sup>3</sup> See Paragraph 28 of the First Amended Complaint.

<sup>4</sup> See Paragraph 29 of the First Amended Complaint.

Funds.” Plaintiff points out that the “MFTBA requires Homecrafters to pay all subcontractors and the suppliers engaged for each Project, before using any of the funds for its own use and/or benefit.”<sup>5</sup> Plaintiff asserts in Paragraph 34 that Defendant is “the individual who personally misappropriated the Trust Funds” and “is personally liable for Homecrafters’ violation of MBTFA.” Under a (C)(8) analysis, Plaintiff has presented sufficient allegations to adequately plead that Homecrafters violated the MBTFA. What is more, Plaintiff has a Default Judgment against Homecrafters relative to the original Complaint in which Plaintiff claimed a Violation of the Building Contract Fund Act MCL 570.151, *et seq.*

However, Plaintiff is seeking relief under this claim against Defendant Ray as a shareholder and/or officer or director of Homecrafters. “Officers of a corporation may be held individually liable when they personally cause their corporation to act unlawfully. A corporate employee or official is personally liable for all tortious or criminal acts in which he participates, regardless of whether he was acting on his own behalf or on behalf of the corporation. If a defendant personally misappropriates funds after they are received by the corporation, he or she can be held personally responsible under the MBTFA.” *Livonia Bldg. Materials Co, supra.*

“[T]here is no requirement that contract payments be made directly to the officer of a corporate contractor in order to hold the officer individually responsible under the MBTFA. Indeed, as long as defendant personally misappropriated the funds after they had been received by the corporation, she could be held responsible under the MBTFA.” *People v Brown*, 239 Mich App 735, 743–44; 610 NW2d 234 (2000). “[T]he plain language of the MBTFA indicates that intent to defraud is evidenced simply by the appropriation by a contractor ... of

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<sup>5</sup> See Paragraph 31 of the First Amended Complaint.

any moneys paid to him for building operations before the payment by him of all moneys due or so to become due [to] laborers, subcontractors, materialmen or others entitled to payment. Moreover, a reasonable inference of appropriation arises from the payment of construction funds to a contractor and the subsequent failure of the contractor to pay laborers, subcontractors, materialmen, or others entitled to payment." *BC Tile & Marble Co. v Multi Bldg. Co.*, 288 Mich App 576, 588; 794 NW2d 76 (2010), quoting *Livonia Bldg. Materials Co, supra* at 520 and MCL 570.153. Applying this reasoning to the case at hand, the *BC Tile* Court determined that "the simple fact that a corporate officer wrote checks to make payments to entities other than the contractor to whom money was owed under the MBTFA was enough to establish a presumption of appropriation, and further to find the officer personally liable." *BC Tile & Marble Co., supra* at 591; See also *Livonia Bldg. Materials Co, supra* at 522.

Notably, Plaintiff alleges in Paragraph 35 of the First Amended Complaint that upon information and belief, Defendant Ray personally misappropriated the Trust Funds and is personally liable for Homecrafter's violation of the MBTFA.<sup>6</sup> Yet, Plaintiff never specifically alleges in Count One of the First Amended Complaint that Defendant himself violated the MBTFA and/or that Defendant is personally liable under the MBTFA.

For purposes of a (C)(8) motion, the Court must accept all well-pled factual allegations as true and construe those allegations in a light most favorable to the nonmovant. With regard to Count One, the Court finds that Plaintiff has not adequately plead its Violation of the Builder's Trust Fund Act against Defendant Ray to survive summary disposition.

Regarding Plaintiff's Fraudulent Misrepresentation claim or Count Two of the First Amended Complaint, Plaintiff alleges that Defendant falsely represented that: (1) he had a

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<sup>6</sup> See Paragraph 35 of the First Amended Complaint.

valid Michigan Builder's license; and (2) that Homecrafter's payment for services had been forwarded to Plaintiff. According to Defendant, Plaintiff acknowledges that the payment was due from Homecrafters and not from him individually. Defendant also asserts that Plaintiff's First Amended Complaint fails to plead its fraud claim with particularity as the allegations do not explain the when, where, or how of the alleged misrepresentations. Additionally, Defendant argues that the allegations in Plaintiff's First Amended Complaint do not demonstrate that the representations were material, that Defendant intended for Plaintiff to act upon the representations, and that Plaintiff's reliance on the representations were reasonable.

In opposition, Plaintiff contends that Defendant falsely represented that he held a valid Michigan builders license. Plaintiff states further that the First Amended Complaint specifically identifies the time frame, ie. between August 1, 2011 through December 1, 2012, that Defendant made misrepresentations to Plaintiff regarding payment. Plaintiff also argues that it properly pled that Defendant knew that his representations regarding payment and his builder's license were false at the time the statements were made.<sup>7</sup> Plaintiff maintains that it relied upon the misrepresentations in fully performing its obligations as a subcontractor.<sup>8</sup>

"To prove a claim of fraudulent misrepresentation, or common-law fraud, a plaintiff must establish that: (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the plaintiff acted

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<sup>7</sup> See Paragraphs 42 and 43 of the First Amended Complaint.

<sup>8</sup> See Paragraph 44 of the First Amended Complaint.

in reliance upon the representation; and (6) the plaintiff thereby suffered injury.” *Roberts v Saffell*, 280 Mich App 397, 403; 760 NW2d 715 (2008).

“[T]o sustain a fraud claim, the party claiming fraud must *reasonably* rely on the material misrepresentation.” *Zaremba Equip., Inc. v Harco Nat’l Ins. Co.*, 280 Mich App 16, 39; 761 NW2d 151 (2008). “Moreover, an action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact. Future promises cannot constitute actionable fraud.” *Kamalnath v Mercy Mem’l Hosp. Corp.*, 194 Mich App 543, 554–55; 487 NW2d 499 (1992).

Pursuant to MCR 2.112(B)(1), “[i]n allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity.” The circumstances constituting fraud must be pled in detail such as who, what, when, where, and how. *Botsford Gen. Hosp. v United Am. Healthcare Corp.*, an unpublished opinion per curiam of the Court of Appeals, issued December 2, 2003 (Docket No. 241108).

In its First Amended Complaint, Plaintiff alleges that Defendant “falsely represented to Jeremy, on behalf of Ingram Roofing, that Ray held a valid Michigan residential builders license (Ray’s Fraudulent Builder’s License)” in order to induce Plaintiff to complete the projects.<sup>9</sup> Plaintiff also avers that “Ray represented to Ingram Roofing Ray’s Fraudulent Builder’s License.”<sup>10</sup> Plaintiff then alleges in Count Two that “Homecrafters and Ray, individually, knowing that the Funding was not completed, never intended on paying Ingram Roofing for the Services.”<sup>11</sup> Plaintiff states further that “Ray’s Payment Representation and Ray’s Fraudulent Builder’s License (collectively ‘Misrepresentations’) were false at the time the

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<sup>9</sup> See Paragraph 15 of the First Amended Complaint.

<sup>10</sup> See Paragraph 38 of the First Amended Complaint.

<sup>11</sup> See Paragraph 41 of the First Amended Complaint.



statements were made” and that “Ray knew the Misrepresentations were false at the time the statements were made or made the statements recklessly.”<sup>12</sup> Next, Plaintiff alleges that “[i]n reliance upon the Misrepresentations, Ingram Roofing fully performed its Services at the Projects.”<sup>13</sup> Lastly, Plaintiff asserts that it suffered economic damages as a result of Defendant’s Misrepresentations.

While Plaintiff appears to have satisfied certain elements of the fraud claim, Plaintiff has failed to demonstrate with particularity the factual circumstances surrounding Defendant’s purported misrepresentation regarding a valid builder’s license. In Paragraph 15, it appears that the representation was made so that Plaintiff would complete the Projects, however, it is unclear at what point during the course of the business relationship this was made. Secondly, Plaintiff’s alleged misrepresentation regarding payment appears to be a future promise that cannot constitute actionable fraud.

Moreover, Plaintiff has not pled that it reasonably relied on Defendant’s purported misrepresentations or that these misrepresentations were material to sustain Plaintiff’s fraud claim. As such, Plaintiff’s allegations are not sufficient to adequately plead its Fraudulent Misrepresentation claim.

With regard to Plaintiff’s claim for Respondeat Superior, namely Count Three of the First Amended Complaint, Defendant argues that this doctrine is not an independent cause of action. See generally, *360 Const. Co. v Atsalis Bros. Painting Co.*, 915 F Supp 2d 883, 894 (ED Mich 2012).

Significantly, Defendant explains that Plaintiff is misinterpreting the doctrine of respondeat superior wherein an employer is generally liable for the torts its employees that

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<sup>12</sup> See Paragraphs 42 and 43 of the First Amended Complaint.

<sup>13</sup> See Paragraph 45 of the First Amended Complaint.

are committed within the scope of their employment. Here, Defendant contends that he should not be liable for the alleged torts of Homecrafters or another employee, Mr. Schmidt, as asserted by Plaintiff in Paragraph 53. In that paragraph, Plaintiff states that Defendant, as the owner of Homecrafters, “is responsible and liable for the acts of Homecrafters and its officers and other owners during the course of its operations.”

Conversely, Plaintiff stands by its argument that Defendant should be held liable, as a principal of Homecrafters, for the torts that the corporation or agent committed during its operations. Plaintiff references the bad check that was issued to Plaintiff in October 2012 by Mr. Schmidt, identified as an agent of Homecrafters in Plaintiff’s Response. Plaintiff also alleges that Defendant was specifically aware that the check had insufficient funds based upon his failure to provide the proper funding of Homecrafters.

“The doctrine of respondeat superior is well established in this state: An employer is generally liable for the torts its employees commit within the scope of their employment. Although an act may be contrary to an employer’s instructions, liability will nonetheless attach if the employee accomplished the act in furtherance, or the interest, of the employer’s business.” *Hamed v Wayne Cty.*, 490 Mich 1, 10–11; 803 NW2d 237 (2011).

The Court agrees with Defendant that the doctrine of respondeat superior does not apply in this matter for the reason that this doctrine imputes liability upon an employer, such as Homecrafters, for tortious actions of its employees. The doctrine does not assign liability to the individual Defendant for the actions of the employer, Homecrafters, or his fellow shareholder, officer, or director, Mr. Schmidt.

Plaintiff relies on the case of *Kerry v Turnage*, 154 Mich App 275, 281; 397 NW2d 543 (1986), to argue that “the principal is held responsible for the torts of its agent which are committed in the scope of the agency.” The Court of Appeals in *Kerry* recognizes this theory

as vicarious liability, which is not a cause of action. More importantly, *Kerry* was implicitly overruled by *Auto Owners Ins. Co. v Seils*, 310 Mich App 132, 163–64; 871 NW2d 530 (2015). Therefore, the Court finds that Plaintiff’s Count Three fails as a matter of law and no factual development could possibly justify recovery.

Finally, Defendant maintains that Plaintiff’s fourth count<sup>14</sup> of Piercing the Corporate Veil is not an independent cause of action, but rather an equitable remedy. Defendant also argues that Plaintiff has not provided any factual support for this claim, nor can Plaintiff satisfy the elements of piercing the corporate veil. For example, Plaintiff does not allege that it sustained an unjust loss or injury in the First Amended Complaint. According to Defendant, Plaintiff makes conclusory statements such as “Ray used Homecrafters as a mere instrumentality” and “Ray used Homecrafters to commit a fraud or wrong.” Defendant also asserts that Count Four cannot survive summary disposition for the reason that it is contingent upon Plaintiff’s “failed” claim for fraudulent misrepresentation.

Conversely, Plaintiff points out that Michigan law allows parties to pursue this theory as a separate cause of action when there is an underlying judgment. What is more, Plaintiff contends that Michigan law allows for recovery from individual owners of corporations when the corporations are used to defraud third parties in violation of the MBTFA. Since Plaintiff holds a Default Judgment against Homecrafters, Plaintiff maintains that it may pursue a piercing the corporate veil remedy against Defendant Ray.

In reply, Defendant argues that piercing the corporate veil can only be implemented if a fact-finder concludes that the individual misused the corporation so that it was unable to

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<sup>14</sup> Plaintiff has a typographical error in the First Amended Complaint in its designation of the Piercing the Corporate Veil claim as Count III rather than Count IV. The Court shall refer to this claim as Count Four.

pay on the outstanding judgment. Defendant again asserts that Plaintiff cannot bring an action for piercing the corporate veil without alleging the requisite elements.

“Michigan law respects the corporate form, and our courts will usually recognize and enforce separate corporate entities. But ‘usually’ means not *always*, and when the requisite evidence establishes that the corporate form has been abused, the corporate form will be pierced so that creditors can seek payment of a corporate debt from a responsible corporate shareholder. Consequently, piercing the veil of a corporate entity is an equitable remedy sparingly invoked to cure certain injustices that would otherwise go unredressed in situations ‘where the corporate entity has been used to avoid legal obligations....’ It is therefore a remedy, and not a separate cause of action, something which the federal courts applying Michigan law have previously recognized.” *Gallagher v Persha*, 315 Mich App 647, 653–54; 891 NW2d 505 (2016). (Citations omitted).

Yet, the *Gallagher* Court recognized an instance when an underlying cause of action is not necessary to support the remedy of piercing the corporate veil. “While we continue to recognize that piercing the corporate veil is merely a remedy to be applied in certain limited circumstances, the concern that there be a separate cause of action to support this type of equitable relief does not arise when, as in this case, there already exists a judgment based on one or more causes of action.” *Gallagher, supra* at 661. “As a result, when a judgment already exists against a corporate entity, an additional cause of action is not needed to impose liability against a shareholder or officer if a court finds the necessary facts to pierce the corporate veil.” *Gallagher, supra* at 665.

“[T]here are three requisites to piercing the corporate veil and finding an identity between business entities. First, the corporate entity must be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or

wrong. Third, there must have been an unjust loss or injury to the plaintiff.” *Nogueras v Maisel & Assocs. of Michigan*, 142 Mich App 71, 86; 369 NW2d 492 (1985).

“A corporate veil is pierced and liability imposed upon an individual shareholder or officer not because the shareholder or officer was necessarily liable under the cause of action resulting in the judgment against the corporation. Instead, liability is imposed because the fact-finder has concluded that the individual so misused the corporation that it was unable to pay on the outstanding judgment and an injustice would occur if the corporate form was not ignored.” *Gallagher, supra* at 664. (Citations omitted).

Defendant argues, and the Court agrees, that Plaintiff’s allegations in Count Four are not factually sufficient to demonstrate that Homecrafters was a sham corporation utilized by Defendant to commit a fraud or a wrong, that Defendant so misused the corporation that it was unable to pay the outstanding judgment, or that an unjust loss or injury occurred to Plaintiff as a result of Defendant’s actions. As a result, the Court finds that Plaintiff’s allegations in the First Amended Complaint are not sufficient to adequately plead its claim in Count Four.

Accepting all well-pled factual allegations as true and construing the allegations in a light most favorable to Plaintiff, Defendant’s Motion for Summary Disposition is GRANTED under MCR 2.116(C)(8).

The Court is cognizant of Plaintiff’s request for an opportunity to amend its pleadings should the Court find that Plaintiff’s First Amended Complaint is deficient in any way. Pursuant to MCR 2.116(I)(5), “[i]f the grounds asserted [for summary disposition] are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118.” As such, the Court shall allow Plaintiff to amend its First Amended Complaint with respect to Counts One, Two, and Four only and as outlined in

this Opinion and Order. The Court denies Plaintiff's request to amend Count Three of the First Amended Complaint for the reason that an amendment would not be justified. Therefore, Plaintiff's Count Three is DISMISSED with prejudice.

Plaintiff shall have 14 days to amend the First Amended Complaint as to Defendant Derek Ray Only. Failure to do so shall result in the dismissal of Counts One, Two, and Four of the First Amended Complaint, or effectively, the First Amended Complaint in its entirety.

It is further ordered that the parties' respective requests for attorney fees and costs are DENIED.

**IT IS SO ORDERED.**

**This Opinion and Order does NOT resolve the last pending matter and does NOT close the case.**

Dated: 3/25/2020.

/s/ Martha Anderson  
HON. MARTHA D. ANDERSON  
Business Court Judge