STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

VARILEASE FINANCE, INC.,
And VFI KR SPE I, LLC,

Plaintiffs,

v.

TPI MEXICO, LLC, ET AL.,

Defendants.
______________________________/

Case No. 2019-176351-CB

Hon. Martha D. Anderson

OPINION AND ORDER RE: PLAINTIFFS' MOTION UNDER MCR 2.116(C)(8) FOR SUMMARY DISPOSITION OF DEFENDANTS' COUNTERCLAIMS

This matter is before the Court on Plaintiffs' Motion Under MCR 2.116(C)(8) for Summary Disposition of Defendants' Counterclaims. The Court dispenses with oral argument in accordance with MCR 2.119(E)(3).

By way of background, Plaintiffs entered into the TPI Mexico and TPI Iowa Master Lease Agreements[1] with the respective Defendants for specific, leased equipment. According to Plaintiffs, they purchased and installed over $20 million dollars of equipment for the benefit of Defendants. On September 4, 2019, Plaintiffs initiated this lawsuit against Defendants on allegations that Defendants breached their obligations under the Master Lease Agreements. Specifically, Plaintiffs assert that Defendants have failed to comply with

[1] Pursuant to MCR 2.113(C)(2), "[a]n exhibit attached or referred to under subrule (C)(1)(a) or (b) is a part of the pleading for all purposes." MCR 2.113(C)(1)(b) provides that a copy of a written instrument, upon which a claim or defense is based, must be attached to the pleading unless the instrument is in the possession of the opposing party and the pleading so states. In Paragraph 17 of the Complaint, Plaintiffs allege that the subject Master Lease Agreements are in the possession of Defendants.

certain requirements set forth under Section 19(b) of each Master Lease Agreement.[2] Section 19(b) of the Master Lease Agreements provides in pertinent part:

> Provided no Event of Default has occurred and is continuing, and provided no Event of Default or event which with the giving of notice or lapse of time, or both, would constitute an Event of Default has occurred and is continuing, upon completion of the Base Term of any Schedule, Lessee shall, upon giving one hundred eighty (180) days prior written notice to Lessor by certified mail, elect one of the following options: (i) purchase all, but not less than all, of the Items of Equipment on the applicable Schedule for a price to be agreed upon by both Lessor and any applicable Assignee and Lessee, (ii) extend the Schedule for all, but not less than all, of the Items of Equipment on the applicable Schedule for an additional twelve (12) months at the Base Monthly Rental then in effect or (iii) return all, but not less than all of the Items of Equipment on the applicable Schedule to Lessor at Lessee's expense to a destination within the Continental United States as directed by Lessor...
>
> With respect to option (i) and option (iii), both Lessor and Lessee shall have absolute and sole discretion regarding the terms and conditions of the agreement to the purchase price of the Equipment. In the event that Lessor and Lessee have not agreed to either option (i) or option (iii) by the conclusion of the Base Term, or if Lessee fails to provide notice of its election via certified mail at least one hundred eighty (180) days prior to the termination of the Base Term, then option (ii) shall automatically apply at the end of the Base Term. At the conclusion of option (ii) above, the Lease shall continue for successive six (6) month renewals at the payment specified on the respective Schedule until either Lessee or Lessor provide the other party with at least ninety (90) days written notice of their desire to terminate the agreement."

In response to the Complaint, Defendants filed their Corrected Answer to Complaint, Counterclaims, and Affirmative Defenses on November 5, 2019. Defendants' counterclaims are the subject of Plaintiffs' summary disposition motion herein.

In their motion, Plaintiffs seek dismissal of Defendants' counterclaims 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

[2] The Lease Schedules, referenced in the pleadings, are integrated into the respective Master Lease Agreements.

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).

Defendants' Counts One – Three
(I) Fraudulent Inducement Against Plaintiffs
(II) Fraudulent Misrepresentation Against Plaintiffs
(III) Innocent Misrepresentation Against Plaintiffs

In their motion, Plaintiffs argue that Defendants' fraud and innocent misrepresentation claims fail as a matter of law for the reason that Defendants cannot establish the element of reasonable reliance.

"In order to rescind a contract on the basis of fraudulent inducement, a party must show that: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, 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 the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage." B*ank of Am., NA v Fid. Nat. Title Ins. Co.*, 316 Mich App 480, 499; 892 NW2d 467 (2016).

"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 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).

"A claim for innocent misrepresentation requires proof that (1) the defendant made a material representation, (2) the representation was false, (3) the defendant made it with the intention of inducing reliance by the plaintiff, (4) the plaintiff acted in reliance on the representation, and (5) the plaintiff thereby suffered an injury that benefited the defendant. Reasonable reliance also must exist to support claims of innocent misrepresentation." *Zaremba, supra.*

One of the main allegations in Defendants' Counterclaim centers on the alleged, oral misrepresentation by James Coleman and Matthew Horn, representatives of Varilease Finance, Inc., that Defendants could purchase the equipment for a nominal or very low amount at the end of the lease term. However, Plaintiffs argue that Defendants cannot demonstrate that they reasonably relied upon the "false" statements allegedly made by Mr. Coleman and Mr. Horn due to the fully integrated Master Lease Agreements. "[W]hen a contract contains a valid merger clause, the only fraud that could vitiate the contract is fraud that would invalidate the merger clause itself, i.e., fraud relating to the merger clause or fraud

that invalidates the entire contract including the merger clause." *UAW-GM Human Res. Ctr. v KSL Recreation Corp.*, 228 Mich App 486, 503; 579 NW2d 411 (1998).

Plaintiffs maintain that the two Master Lease Agreements are fully integrated contracts. In particular, Section 19(c) of each Master Lease Agreement provides in pertinent part:

> The Master Agreement and the Lease constitute the entire and only agreement between Lessee and Lessor with respect to the lease of the Equipment, and the parties have only those rights and have incurred only those obligations as specifically set forth herein. The covenants, conditions, terms and provisions may not be waived or modified orally and shall supersede all previous proposals both oral and written, negotiations, commitments or agreements between the parties.

Section 19(j) of each Master Lease Agreement also provides in pertinent part:

> Lessee hereby acknowledges and agrees that it has had full and fair opportunity to read each of the terms and conditions of this Master Agreement, specifically Sections 2, 16 and 19, and that Lessee fully understands the terms and conditions herein, having had the opportunity to consult with an attorney of its own choosing prior to executing this Master Agreement and any related documents.

It is Plaintiffs' position that Defendants expressly agreed that each Master Lease Agreement constitutes the entire agreement between the parties and that there are no oral collateral agreements. Moreover, Plaintiffs point out that Defendants initialed under Sections 19(c) and 19(j) of the Agreements to signify their understanding of the terms and conditions of the contract, having had an opportunity to seek legal counsel in the matter.

Plaintiffs also defer to the case of *Star Ins. Co. v United Commercial Ins. Agency, Inc.*, 392 F Supp 2d 927, 929 (ED Mich 2005), to support the principle that "[a] merger clause can render reliance unjustified as to agreements, promises or understandings related to performances that are not included in the written agreement...The Michigan courts have said that, as it pertains to representations regarding additional agreements or contractual terms,

a party would not be justified in relying on them where there is a merger clause. The reasoning behind this is clear, one should not be heard to complain that they relied on oral promises regarding additional or contrary contract terms when there is written proof, signed by both parties, to the contrary." *Id. See also Kamalnath, supra.*

In contrast, Defendants maintain that there was justifiable reliance to support these claims, even in consideration of the merger clause. It was Plaintiffs' purported misrepresentation, i.e., that Defendants could purchase the equipment for a reasonable price, upon which Defendants justifiably relied to enter into the Master Lease Agreements. Defendants contend that they are attempting to enforce the written terms of the Master Lease Agreements, particularly the purchase option that Plaintiffs never intended to honor.

Alternatively, Defendants assert that the Master Lease Agreements are entirely voidable for the reason that Defendants' assent to the contracts was induced by a fraudulent or material misrepresentation by Plaintiffs. Again, Defendants argue that they were fraudulently induced to believe that they could purchase the subject equipment at a reasonable purchase price.

To reinforce their argument, Defendants cite to the case of *Van Pembrook v Zero Mfg. Co.*, 146 Mich App 87, 97–98; 380 NW2d 60 (1985). In that case, the Court of Appeals held that "[t]he rule excluding parol evidence to vary or contradict a writing does not extend so far as to preclude the admission of extrinsic evidence to show prior or contemporaneous collateral parol agreements between the parties. The general rule admitting evidence of a collateral agreement is especially applicable where such agreement operates as an inducement for entering into the written agreement." *Id.*

However, the Court of Appeals in the more recent case of *UAW-GM Human Res. Ctr. v KSL Recreation Corp.*, 228 Mich App 486, 499–503; 579 NW2d 411 (1998), disagreed with the *Van Pembrook* Court's holding. The Court of Appeals in *UAW-GM* held that "[w]ith respect to *Van Pembrook,* we conclude that it suggests that parol evidence may be used to vary the terms of a written agreement despite the existence of an integration clause, and we accordingly decline to follow *Van Pembrook*...[A] contract with a merger clause nullifies all antecedent claims. In our view, this includes any collateral agreements that were allegedly an inducement for entering into the contract. In the context of a contract that included a merger clause, parol evidence regarding false representations in a collateral agreement that induced the plaintiff to enter into the contract would vary the terms of the contract...[W]hile parol evidence is generally admissible to prove fraud, fraud that relates solely to an oral agreement that was nullified by a valid merger clause would have no effect on the validity of the contract." *UAW-GM, supra.*

Considering only the pleadings in this matter, the Court agrees with Plaintiffs that Defendants cannot demonstrate that they reasonably relied on an alleged oral side agreement when they knowingly executed the fully integrated Master Lease Agreements. In fact, Defendants agreed that "[t]he Master Agreement and the Lease constitute the entire and only agreement between Lessee and Lessor with respect to the lease of the Equipment, and the parties have only those rights and have incurred only those obligations as specifically set forth herein. The covenants, conditions, terms and provisions may not be waived or modified orally and shall supersede all previous proposals both oral and written, negotiations, commitments or agreements between the parties." See Section 19(c) of the

Master Lease Agreements. Since Defendants cannot satisfy this element of reasonable reliance, their fraud and innocent misrepresentation claims fail as a matter of law.

Moreover, the Court observes that the alleged side agreement is a future promise that Plaintiffs will offer Defendants a nominal or low sale price for the equipment at the end of the lease term. "Since fraud must relate to facts then existing or which have previously existed, the general rule is that fraud cannot be predicated upon statements promissory in their nature and relating to future actions, nor upon the mere failure to perform a promise, or an agreement to do something at a future time, or to make good subsequent conditions which have been assured. Nor, it is held, is such nonperformance alone even evidence of fraud. Reasons given for this rule are that a mere promise to perform an act in the future is not, in a legal sense, a representation, and a failure to perform it does not change its character. Moreover, a representation that something will be done in the future, or a promise to do it, from its nature cannot be true or false at the time it was made. The failure to make it good is merely a breach of contract, which must be enforced by an action on the contract, if at all. A statement that, at the time it is made, cannot be said from its nature to be true or false cannot be the basis for a claim in fraud." *Travis v ADT Sec. Servs., Inc.*, 884 F Supp 2d 629, 639–40 (ED Mich 2012).

Therefore, Defendants' fraud and innocent misrepresentation claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery" and they fail as a matter of law. *Wade, supra.*

Defendants' Count Four – Breach of Contract Against Plaintiffs

"A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby

resulting in damages to the party claiming breach." *Miller-Davis Co. v Ahrens Const., Inc.*, 495 Mich 161, 178 (2014).

Regarding the breach of contract claim, Plaintiffs argue that Defendants have not identified any contractual term or provision that they have allegedly breached. Plaintiffs maintain that each of the Master Lease Agreements, specifically Section 19(b), expressly provides Defendants with three options at the end of the lease term. That is, Defendants could purchase all of the equipment, Defendants could extend the schedule for the equipment, or Defendants could return all of the equipment. Additionally, Section 19(b) grants the parties "absolute and sole discretion regarding the terms and conditions of the agreement to the purchase price of the Equipment." Should the parties be unable to agree to this option, then option (ii), namely the extension of the schedule, would automatically apply.

Plaintiffs believe that Defendants are actually presenting an argument regarding the covenant of good faith and fair dealing, which is not permitted when the express terms of a contract are plain and unambiguous. "Michigan law does not recognize an implied contractual duty of good faith. Where the express terms of a contract govern the disputed issue, a court should not imply a duty of good faith." *Aetna Cas. & Sur. Co. v Dow Chem. Co.*, 883 F Supp 1101, 1111 (ED Mich 1995). (Citations omitted).

Yet, Defendants argue that Plaintiffs breached the Master Lease Agreements on account of their refusal and failure to negotiate, in good faith, a fair purchase price for the equipment, which was within their discretion. Defendants rely on the unpublished case of *Lowe's Home Centers, Inc. v. LL & 127, LLC*, 147 F App'x 516, 523–24 (6th Cir 2005), in which the United States Court of Appeals reasoned that "[e]very contract contains an implied covenant of good faith in the performance and enforcement of the contract...Michigan law

does not recognize an action independent of breach of contract for a breach of the implied covenant of good faith. However, where the manner of performance under a contract is left to the discretion of a party, that party may breach the contract by exercising its discretion in bad faith."

In their Counterclaim, Defendants allege that "Plaintiffs' refusal to sell Defendants the equipment at a reasonable purchase price and negotiate in good faith constitutes a breach of the contracts at issue." See Paragraph 128 of the Counterclaim. Defendants subsequently provide case law to support their position that "[e]very contract in which performance is left to a party's discretion is subject to an implied covenant of good faith." See Paragraph 129 of the Counterclaim. Defendants further assert that "[b]y not defining how or under what terms an equipment price was to be negotiated, the TPI Mexico and TPI Iowa Master Lease Agreements left this to the parties' discretion. Therefore, Plaintiffs are obligated under Michigan law to act in good faith. Plaintiffs failed to do so, thereby materially breaching the agreements." See Paragraph 130 of the Counterclaim.

In opposition, Plaintiffs assert that Defendants have not identified any lease promise that would fall within the "bad faith" exception. Rather, Section 19(b) provides Plaintiffs with absolute and sole discretion regarding the terms and condition of the purchase price. Plaintiffs also argue that the *Lowe's* case is distinguishable from the case at hand because those parties did not define a process for entering into their latter agreements.

"Breach of contract actions based upon the breach of an implied covenant of good faith and fair dealing are limited to contracts where a contractual term leaves the manner of performance to one party's discretion. An implied covenant of good faith and fair dealing in the performance of contracts is recognized by Michigan law only where one party to the

contract makes its performance a matter of its own discretion. Where a party to a contract makes the manner of its performance a matter of its own discretion, the law does not hesitate to imply the proviso that such discretion be exercised honestly and in good faith." *McLiechey v Bristol W. Ins. Co.*, 408 F Supp 2d 516, 522 (WD Mich 2006). (Citations omitted).

Here, Section 19(b) of the Master Lease Agreements provides that both Plaintiffs and Defendants "shall have absolute and sole discretion regarding the terms and conditions of the agreement to the purchase price of the Equipment." If the parties do not agree on the purchase price, then the lease shall be extended. As such, the provision effectively grants Plaintiffs the absolute and sole discretion to determine the purchase price of the equipment at the end of the lease term. In consideration of Defendants' breach of contract allegations in the Counterclaim and the relevant case law, Defendants have adequately pled their breach of contract claim under Michigan law, namely a breach of contract that is based upon an implied covenant of good faith and fair dealing, to survive summary disposition.

With respect to Defendants' breach of contract claim based on repudiation, Plaintiffs argue that they are simply attempting to enforce the Master Lease Agreements in order to recover the amounts due and owing under the contracts. As a consequence, there is no material breach on the part of Plaintiffs.

"Under the doctrine of repudiation or anticipatory breach, if, before the time of performance, a party to a contract unequivocally declares the intent not to perform, the innocent party has the option to either sue immediately for the breach of contract or wait until the time of performance." *Stoddard v Manufacturers Nat. Bank of Grand Rapids*, 234 Mich App 140, 163; 593 NW2d 630 (1999). With respect to the doctrine of repudiation and in consideration of the pleadings, Defendants have not sufficiently alleged that Plaintiffs have

repudiated the Master Lease Agreements. Therefore, this particular claim under the doctrine of repudiation fails as a matter of law.

Defendants' Count Five – Tortious Interference with Contractual Relations Against Plaintiffs

"The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant. By definition, tortious interference with a contract is an intentional tort. Indeed, it is well-settled that one who alleges tortious interference with a contractual...relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another...A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances. If the defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference." *Knight Enterprises v RPF Oil Co.*, 299 Mich App 275, 280; 829 NW2d 345 (2013). (Citations omitted).

In their motion, Plaintiffs assert that this claim fails as a matter of law for the reason that there is no allegation that a contract between Defendants and a non-party has been breached. Further, the claim is based upon a possibility that may never occur. And finally, Defendants have failed to allege an intentional doing of a per se wrongful act on the part of Plaintiffs or that Plaintiffs engaged in a lawful act with malice or that was unjustified in law for the purpose of invading the contractual rights or business relationship of another. Plaintiffs point out that the Master Lease Agreements expressly provide that Plaintiffs own the subject equipment and Plaintiffs have the right to sell the equipment upon default by Defendants.

Conversely, Defendants assert that Plaintiffs' fraudulent and bad faith conduct qualifies as wrongful per se and malicious under Michigan law. Defendants maintain that they have alleged Plaintiffs' misrepresentations, bad faith, and malicious actions throughout their counterclaims.

In consideration of the elements of the tortious interference claim, the Court notes that Defendants have not alleged that Plaintiffs' actions have in fact caused Defendants to breach their contracts with their customers. Defendants' allegations are worded in the future tense concerning "if Plaintiffs are permitted to sell and or repossess the equipment," "Defendants will be unable to meet their obligations to customers," or "if Defendants do not fulfill their supply and delivery requirements." See Paragraphs 143, 145, and 147 of the Counterclaim.

In addition, Defendants have not demonstrated that Plaintiffs' actions were intended to invade Defendants' business relationships with their customers. Stated otherwise, Defendants have not demonstrated that Plaintiffs' actions are wrongful per se or malicious when Sections 16 and 19 of the Master Lease Agreements expressly outline Plaintiffs' rights as the lessor, including but not limited to, the sale or repossession of the equipment. "[W]here a defendant has a contractual right, the exercise of that right cannot, as a matter of law, constitute a per se wrongful act." *Saab Auto. AB v Gen. Motors Co.*, 770 F3d 436, 442–43 (6th Cir 2014). Therefore, Defendants have not provided sufficient allegations to support Count Five of the Counterclaim.

Defendants' Count Six – Declaratory Relief Against Plaintiffs

Lastly, Defendants seek declaratory judgment in Count Six of their Counterclaim. In particular, Defendants are requesting the Court to determine that the purchase option of the

Master Lease Agreements, namely Section 19(b)(i), are contracts for sale with an open price term that are subject to MCL 440.2305. Defendants argue that the Agreements treat Plaintiffs as an agent for Defendants for remarketing and reselling the equipment, which is inconsistent with a true lease where a lessor would retain all of the profits from any re-sale of the returned property.

In contrast, Plaintiffs point out that in Section 19(m), the parties agreed that the contracts are finance leases as defined by Section 2A-103(g) of the UCC. Section 5 of the Agreements also identify the lease agreements as net leases. Additionally, Sections 8(a) and 8(b) expressly reference Defendants' lease-hold interest in the equipment and identify the lease as a finance lease and true lease. While Plaintiffs recognize that the option to purchase equipment is a possibility, that future possibility does not mean that the Master Lease Agreements are contracts to sell goods. Plaintiffs argue that these Master Lease Agreements cannot fulfill the requirements of the UCC's definition of "contracts for sale."

"Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract. The general rule of contracts is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in courts." *Kendzierski v Macomb Cty.*, 503 Mich 296, 312; 931 NW2d 604 (2019). (Citations omitted).

Defendants note further that Plaintiffs did not move to dismiss Defendants' alternative request for declaratory relief concerning the claim that the Master Lease Agreements are void against public policy because they create perpetual leases. In their reply brief, Plaintiffs assert that Defendants' perpetual lease argument fails for the reason that the Master Lease Agreements provide for the purchase of equipment, the return of equipment,

or after the applicable extension term, termination by providing ninety (90) days' written notice. The Court agrees with Plaintiffs that the Master Lease Agreements include a termination provision and as such, Defendants cannot convince this Court that the Agreements are void against public policy. In light of the clear and unambiguous language in the Master Lease Agreements, Defendants are not entitled to declaratory judgment.

For the reasons stated herein, Defendants' Counts One, Two, Three, Five and Six of the Counterclaim are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. MCR 2.116(C)(8); *Wade, supra*. Accordingly, Plaintiffs' Motion for Summary Disposition is GRANTED pursuant to MCR 2.116(C)(8) with regard to Counts One, Two, Three, Five, and Six of Defendant's Counterclaim. It is further ordered that Defendants' Counts One, Two, Three, Five, and Six are DISMISSED with prejudice.

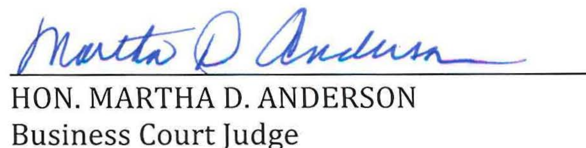
It is further ordered that Plaintiffs' Motion for Summary Disposition is DENIED with respect to Count Four of Defendant's Counterclaim, only as to Defendants' breach of contract claim based upon the breach of an implied covenant of good faith and fair dealing.

It is further ordered that Plaintiffs' request for costs and attorneys' fees is DENIED.

It is further ordered that Defendant TP Composites Services, S de R. L. de C. V. is dismissed without prejudice as a party to this action on account of Plaintiffs' failure to serve said Defendant prior to the expiration of the Summons or December 9, 2019. MCR 2.102(E).

IT IS SO ORDERED.

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



HON. MARTHA D. ANDERSON
Business Court Judge

Dated: 3/10/2020.