

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

JASON SOULLIERE,

Plaintiff,

Case No. 2014-294-CZ

vs.

LOUIE MCALPINE AND CINDY  
MCALPINE,

Defendants,

and

LOUIE MCALPINE AND CINDY  
MCALPINE,

Third Party Plaintiffs,

vs.

SLEEPER #3 TRACT 2, LLP, SECURE  
OPERATIONS GROUP, MATTHEW  
MURRAY, and DOUBLE M LAND  
& MINERALS, LLC,

Third Party Defendants.

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OPINION AND ORDER

Third Party Defendants Sleeper #3 Tract 2, LLP and Secure Operations Group have filed a joint motion for summary disposition pursuant to MCR 2.116(C)(1), (8) and (10). In addition, Third Party Defendants Matthew Murray and Double M Land & Minerals, LLC have filed a separate joint motion for summary disposition pursuant to MCR 2.116(C)(8). Defendants/Third Party Plaintiffs Louie McAlpine and Cindy McAlpine (“Defendants”) have filed a response to each motion and request that the motions be denied.

### *Factual and Procedural History*

This lawsuit stems from Plaintiff's purchase of a 20% fractional undivided oil and gas working interest with a 15% net revenue interest in "Sleeper #3, Tract 2" (the "Interests"). The investment was formally memorialized in a February 5, 2012 participation agreement (the "Agreement"). Plaintiff purchased the Interests from Secure Operations Group, LLC ("SOG"), an Oklahoma limited liability company.

On January 27, 2014, Plaintiff filed his complaint in this matter alleging that the Interests constitute securities under the Uniform Security Act, MCL 451.2101 et seq. (the "Act"), that Defendants' actions in issuing, offering for sale, promoting, and selling the Interests violated the Act, and that Defendants are liable for the violations as managers, members, officers, directors, agents and/or control persons of SOG. On March 14, 2014, the Defendants filed a motion for summary disposition in lieu of filing an answer. On May 8, 2014, the Court denied Defendants' motion.

Defendants have since filed their third party complaint ("Third Party Complaint"). On July 28, 2014 Third Party Defendants Sleeper #3 Tract 2, LLP ("Sleeper") and SOG (collectively, "Oklahoma Movants") filed their instant motion for summary disposition. Defendants have filed a response and request that motion be denied.

On September 28, 2014, Third Party Defendants Matthew Murray and Double M Land & Minerals, LLC (collectively, "Murray Movants") filed their instant motion for summary disposition. Defendants have filed a response and request that the motion be denied.

On November 24, 2014, the Court held a hearing in connection with the motions and took the matters under advisement.

### *Standard of Review*

In reviewing a motion for summary disposition brought under MCR 2.116(C)(1), the court considers consider the pleadings and documentary evidence submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5). *WH Froh, Inc v Domanski*, 252 Mich App 220, 225-226; 651 NW2d 470 (2002). The plaintiff bears the burden of establishing jurisdiction over a defendant, but need only make a prima facie showing of jurisdiction to defeat a motion for summary disposition. *Id.*

Summary disposition may be granted pursuant to MCR 2.116(C) (8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtko v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C) (10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

#### *Arguments and Analysis*

##### (1) Oklahoma Movants' Motion for Summary Disposition

In support of its motion, the Oklahoma Defendants contend that they are entitled to summary disposition as the Court does not have personal jurisdiction over them.

Whether a court possesses limited personal jurisdiction involves a two-step inquiry. *Yoost v Caspari*, 295 Mich.App 209, 222; 813 NW2d 783 (2012). The Court first determines if

personal jurisdiction is authorized under Michigan's long-arm statute and, if it is authorized, the court then considers whether the exercise of jurisdiction comports with due process. *Id.* Under Michigan's long-arm statute, the courts of this state will have limited personal jurisdiction over a partnership that—in relevant part—transacts “any business within the state” or does or causes “any act to be done, consequences to occur, in the state resulting in an action for tort.” MCL 600.735 (1) and (2). The Legislature’s use of the word “any” in the statute encompasses each and every transaction of business, however slight. *Yoost*, 295 Mich.App at 229, citing *Sifers v. Horen*, 385 Mich. 195, 199 n 2, 188 NW2d 623 (1971).

In their response, Defendants contend that this Court has limited personal jurisdiction over the Oklahoma Movants under MCL 600.735. MCL 600.735 provides:

Sec. 735. The existence of any of the following relationships between a partnership association or unincorporated voluntary association or an agent thereof and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise limited personal jurisdiction over such partnership association or unincorporated voluntary association and to enable such courts to render personal judgments against such partnership association or unincorporated voluntary association arising out of the act or acts which create any of the following relationships:

- (1) The transaction of any business within the state.
- (2) The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort.
- (3) The ownership, use or possession of any real or tangible personal property situated within the state.
- (4) Contracting to insure any person, property, or risk located within this state at the time of contracting.
- (5) Entering into a contract for services to be rendered or for materials to be furnished in the state by the defendant.

Defendants contend that jurisdiction is proper because the Oklahoma Movants transacted business in this case by having their agents solicit sales in Michigan and by hiring a Michigan resident as a broker.

In their reply, the Oklahoma Movants contend that the claims at issue relate solely to actions taken in Oklahoma, and therefore may not form the basis for jurisdiction under section 735.

In the Third Party Complaint claim against the Oklahoma Movants, Defendants allege that: (1) On December 14, 2013 they entered into a settlement agreement and release of all claims (“Settlement Agreement”) with Sleeper; (2) That under the terms of the Settlement Agreement Defendants agreed to convey all of their right, title and interest in and to any property in Sleeper #3, Tract 2, that was held by Defendants, to settle any and all disputes that might arise from Defendants’ participation in Sleeper’s interests and/or properties; (3) That in exchange for the conveyance Sleeper agreed to indemnify Defendants from any loss from any claims, demands or actions that might be made or brought against Defendants as a consequence of the operations of Sleep 3, Tract 2; (4) That SOG is liable under the Settlement Agreement as the general partner of Sleeper; and (5) That Plaintiffs’ claims against Defendants fall within the scope of the indemnity provisions of the Settlement Agreement. (*See* Third Party Complaint, at ¶10-16.)

Based on the allegations set forth above, Defendants’ indemnification claim is based completely on the Oklahoma Movants’ duties under the Settlement Agreement. However, it appears uncontested that the Settlement Agreement was executed in Oklahoma and that it is to be interpreted under Oklahoma law. Limited jurisdiction extends only to claims arising from the defendant's activities that were either within Michigan or had an in-state effect. *Third Nat'l Bank*

*in Nashville v WEDGE Group Inc.*, 882 F2d 1087, 1089 (6th Cir 1989). In this case, Defendants' claims against the Oklahoma Movants arise out of activities within the State of Oklahoma, i.e. executing the Settlement Agreement. Consequently, the Court is convinced that limited personal jurisdiction may not extend to Defendants' third party claim against the Oklahoma Defendants. Accordingly, the Oklahoma Defendants' motion for summary disposition must be granted.

(2) Murray Movants' Motion for Summary Disposition

As a preliminary matter, the Murray Movants' motion was filed pursuant to MCR 2.116(C)(8) only. "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and allows consideration of only the pleadings. The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *MacDonald v PKT, Inc.*, 464 Mich 322, 332, 628 NW 2d 33 (2001). Accordingly, while the Murray Movants have attached documentary evidence in support of their reply, the Court's decision will not take that evidence into account as doing so would go beyond the scope of review under the (C)(8) standard.

The Third Party Complaint contains two claims against the Murray Movants. The first claim (Count II) is a claim for statutory contribution under the Michigan Uniform Securities Act ("MUSA"). Specifically, Defendants claim is based on MCL 451.2509(8), which provides:

A person liable under this section has a right to contribution as in cases of contract against any other person liable under this section for the same conduct.

In their motion, the Murray Movants first contend that the right to contribution provided by MUSA is trumped by the Tort Reform Act. While the Tort Reform Act has its own contribution provision, MCL 600.2925(a), Defendants are not seeking contribution under that statute. Therefore, the authority cited by the Murray Movants in support of their assertion that

Defendants cannot recover under section 2925(a) is irrelevant. Further, the Murray Movants have not cited to any authority holding that section MCL 600.2925(a) invalidated or overruled the right to contribution under MUSA.

The Murray Movants also contend that subsection (11) of MCL 451.2509 prevents Defendants from seeking contribution in this case. The only cases in which subsection 11 or its predecessor, MCL 451.810(f), have been invoked is in instances where the plaintiff urging the violation participated in the wrongdoing. See *William's Delight Corp v Harris*, 87 Mich App 202; 273 NW2d 911(1978); *Walton v Semmler*, 6 Mich App 596; 149 NW2d 885 (1967); *Schrier v B & B Oil Co*, 311 Mich 118; 18 NW2d 392 (1945). Moreover, while MCL 451.2509 has replaced MCL 451.810, section 2509 has included the contribution provision of section 810, the language of which the Court finds helpful. Specifically, section 810(a)(2)(b) provides:

(b) Every person who directly or indirectly controls a seller liable under subsection (a), every partner, officer, or director of the seller, every person occupying a similar status or performing similar functions, every employee of the seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller, unless the person sustains the burden of proof that he or she did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

Under the former section it is clear that every person/entity that contributed to the wrongful conduct forming the basis for the plaintiff's claims is liable for the wrongdoing and that each person/entity may be subject to contribution. Consequently, the Court is convinced that the language in section 2509(11) does not invalidate the right to contribution provided in subsection (8). Accordingly, the Court is satisfied that the Murray Defendants contention is without merit.

In their motion, the Murray Defendants also seek summary disposition of Count III of the Third Party Complaint. Count III purports to state a claim for common law indemnification against the Murray Defendants. Common law indemnity is only available to parties that can “plead and prove freedom from personal fault. This has been frequently interpreted to mean that the party seeking indemnity must be free from active or causal negligence.” *Langley v Harris Corp*, 413 Mich 592, 597; 321 NW2d 662 (1982). This rule is quite strict: a common-law indemnification action “cannot lie where the [party seeking indemnification] was even .01 percent actively at fault.” *St. Luke's Hospital v Giertz*, 458 Mich 448, 456; 581 NW2d 665 (1998); see also *Paul v Bogle*, 193 Mich App 479, 491; 484 NW2d 728 (1992) (noting that “common-law indemnity ... require[s] that the person seeking indemnification be free from any active negligence”). Again, this is because indemnity is only available to “a party who faces vicarious liability for the negligent act of another.” *Sawka v Prokopowycz*, 104 Mich App 829, 833; 306 NW2d 354 (1981). In its determination of whether the party seeking indemnification is free of fault, “a court must review the underlying complaint against that party as well as the complaint which seeks indemnity.” *Fishbach–Natkin, Inc v Shimizu America Corp*, 854 F Supp 1294, 1301 (1994), citing *Oberle v Hawthorne Metal Prod*, 192 Mich App 265, 270; 480 NW2d 330 (1991); and *Skinner v. D–M–E Corp*, 124 Mich.App 580, 586; 335 NW2d 90 (1983) .

In this case, Plaintiff’s claims against Defendants seek damages based on Defendants’ wrongdoing, not the wrongdoing of Defendants and/or the Murray Defendants. In order to prevail on his claims, Plaintiff will have to establish that Defendants engaged in some wrongdoing, which in turn would bar Defendants from seeking indemnity from the Murray Defendants. Consequently, the Court is convinced that Defendants’ common law indemnity



claim against the Murray Defendants fails a matter of law. As a result, the Murray Defendants' motion for summary disposition of Defendants' common law indemnity claims must be granted.

*Conclusion*

Based on the foregoing, the Court is convinced that it lacks personal jurisdiction over Third Party Defendants Sleeper #3 Tract 2, LLP and Secure Operations Group in connection with Count I of the Third Party Complaint. Consequently, Third Party Defendants Sleeper #3 Tract 2, LLP and Secure Operations Group's motion for summary disposition of Count I of the Third Party Complaint is GRANTED pursuant to MCR 2.116(C)(1).

In addition, for the reasons discussed above, Third Party Defendants Matthew Murray and Double M Land & Minerals, LLC's motion for summary disposition pursuant to MCR 2.116(C)(8) is GRANTED, IN PART, and DENIED, IN PART. Third Party Defendants Matthew Murray and Double M Land & Minerals, LLC's motion for summary disposition of Count III of the Third Party Complaint is GRANTED. The remainder of the motion is DENIED. The Court states this Opinion and Order neither resolves all pending matters nor closes the case. MCR 2.602(A)(3).

IT IS SO ORDERED.

/s/ John C. Foster  
JOHN C. FOSTER, Circuit Judge

Dated: December 18, 2014

JCF/sr

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