STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

UNITED STATES INDEMNITY AND
CASUALTY COMPANY, LTD.,
a foreign corporation,

Plaintiff,

v

Case No. 15-147288-CK
Hon. Wendy Potts

TALMER BANK AND TRUST,
a Michigan chartered banking institution,
f/k/a First Michigan Bank, a State-Chartered Bank,

Defendant.
_____/

OPINION AND ORDER RE: DEFENDANT'S MOTION FOR SUMMARY DISPOSITION UNDER MCR. 2.116(C)(4), (C)(8), AND (C)(10)

At a session of Court
Held in Pontiac, Michigan
On
MAR 15 2016

This matter is before the Court on Defendant Talmer Bank and Trust's Motion for Summary Disposition pursuant to MCR 2.116(C)(4), (C)(8), and (C)(10). By way of background information, Plaintiff United States Indemnity and Casualty Company, Ltd. filed its complaint on May 29, 2015 pursuant to a cause of action arising from a December 2010 letter of credit agreement. The letter of credit issued by Talmer was for the benefit of Talmer's customer, United States Indemnity and Casualty Company, Ltd., with a designated beneficiary of ULICO Casualty Company. ULICO is a Delaware Domestic Property and Causality Insurance Company that went into a receivership on or about March 11, 2013. Plaintiff pledged $400,000 as collateral for the letter of credit, and the $400,000 remains on deposit with Talmer. The letter of credit was extended to December 10, 2013. At that time, the Delaware court seized control over

the assets, liabilities, and business affairs of ULICO. ULICO has not surrendered the letter of credit allegedly because the Receiver will not release or surrender the letter of credit until all potential claims are resolved on the bond or surety.

Defendant first moves for summary disposition under MCR 2.116(C)(4) alleging that the Court does not have subject matter jurisdiction over the claims asserted in Plaintiff's Complaint. "A summary disposition motion pursuant to MCR 2.116(C)(4) tests the trial court's subject matter jurisdiction." *Braun v Ann Arbor Charter Twp.*, 262 Mich App 154, 157; 683 NW2d 755 (2004). Defendant alleges that the injunction orders issued by the Delaware Court are enforceable and must be recognized by the Michigan Courts. Defendant further alleges that there is no dispute that the Delaware court has jurisdiction over the subject matter of this case. Defendant also argues that the injunction orders are valid and subject to recognition in Michigan under the Full Faith and Credit Clause. Plaintiff responds to Defendant's arguments regarding subject matter jurisdiction by alleging that (1) this case does not involve ULICO, (2) the injunction orders do not apply to Talmer, and (3) the full, faith and credit on an out of state injunction does not apply to persons who were not parties to the out of state case. The Orders attached to Defendant's Brief in Support of its Motion from the Court of Chancery of the State of Delaware pertain to *State of Delaware ex rel. The Honorable Karen Weldin Stewart, CIR-ML, Insurance Commissioner of the State of Delaware v ULLICO Casualty Company, a Delaware Domestic Property and Casualty Insurance Company*, Case No. 8392-VGC and *In the matter of the Rehabilitation of ULLICO Casualty Company*, Case No. 8392-VCN.

The case before this Court involves United States Indemnity and Casualty Company, Ltd., a foreign corporation and Talmer Bank and Trust f/k/a First Michigan Bank, an active State-Chartered Bank. The parties to the present case were not parties to the case in Delaware.

Defendant asserts that the Full Faith and Credit Clause compels this Court's recognition of the injunctive orders from the Delaware court.

"The Full Faith and Credit Clause of the United States Constitution, U.S. Const. art. IV, § 1, provides: 'Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.' Pursuant to its authority to prescribe the manner of proving acts, records, and judicial proceedings under the Full Faith and Credit Clause, Congress has enacted 28 U.S.C. § 1738, which provides in relevant part: The records and judicial proceedings of any court of any . . . State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form. Such . . . records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." *Hare v Starr Commonwealth Corp*, 291 Mich App 206, 214-215; 813 NW2d 752 (2011).

The Full Faith and Credit does not apply in the present case. The parties to this case were not parties to the Delaware action. Talmer cites to *Hare v Starr Commonwealth* in support of its argument that Plaintiff consented to the jurisdiction of the Delaware courts, availed itself to the jurisdiction of the Delaware courts or had sufficient minimum contacts with Delaware so as to reasonably expect to be hailed into a Delaware court. Talmer argues that the Delaware orders are subject to recognition in Michigan under the Full Faith and Credit clause, which prevents the

litigation of issues in Michigan on issues that have already been decided in Delaware. The Delaware action involves completely separate parties. The Court finds that Talmer's obligations to Plaintiff are separate and distinct from Talmer's contractual obligations with ULICO. "The purpose of the Full Faith and Credit Clause 'is to prevent the litigation of issues in one state that have already been decided in another.'" *Hare v Starr Commonwealth Corp*, 291 Mich App 206, 216; 813 NW2d 752 (2011). The parties in the present case were not parties to the Delaware action; therefore, the Full Faith and Credit Clause does not bar Plaintiff's claims. Accordingly, Defendant's motion for summary disposition under MCR 2.116(C)(4) is denied.

Defendants next allege that summary disposition is appropriate under MCR 2.116(C)(8) for failure to state a claim, or under MCR 2.116(C)(10) asserting that no genuine issue of material fact exists. A motion under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). A motion under (C)(10) tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Under (C)(10), "In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

"MCR 2.116(C)(8) permits a trial court to grant summary disposition when an opposing party has failed to state a claim on which relief can be granted. Thus, a motion under this rule tests the legal sufficiency of a claim. *Computer Network*, 265 Mich App at 312, 696 NW2d 49. The motion may not be supported or opposed with affidavits, admissions, or other documentary

evidence, and must be decided on the basis of the pleadings alone. *Id.*; MCR 2.116(G)(2). The trial court reviewing the motion must accept as true all factual allegations supporting the claims, and any reasonable inference or conclusions that might be drawn from those facts. *Detroit Int'l Bridge Co. v Commodities Export Co.,* 279 Mich App 662, 670, 760 NW2d 565 (2008). A motion for summary disposition under MCR 2.116(C)(8) may be granted only when a claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Attorney General v Merck Sharp & Dohme Corp.,* 292 Mich App 1,8, 807 NW2d 343 (2011)." *Gorman v American Honda Motor Co., Inc.*, 302 Mich App 113, 131-132; 839 NW2d 223 (2013). Defendant's argument that summary disposition pursuant to MCR 2.116(C)(8) is appropriate in the present case is bereft of analysis. Michigan law is clear that, "A party may not merely announce a position and leave it to [the] Court to discover and rationalize the basis for the claim." *National Waterworks, Inc v International Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007). Upon review of the pleadings alone, and accepting as true all factual allegations supporting the claims, the Court finds that Plaintiff has not failed to state a claim on which relief can be granted. Accordingly, Defendant's claim for summary disposition pursuant to MCR 2.116(C)(8) is denied.

Defendant next moves for summary disposition based on MCR 2.116(C)(10) arguing that the factual and evidentiary record presents no issue of disputed material fact as a matter of law. Under (C)(10), "[i]n presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314

(1996), citing *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

Talmer alleges that it is continuing to honor the agreement and the irrevocable letter of credit until such a time that beneficiary ULICO surrenders the letter of credit. Talmer argues the letter of credit has not been surrendered and that only when it is surrendered can the letter of credit be released to Plaintiff. Talmer further argues that there are still ceded and outstanding claims or draws on the letter of credit. In response, Plaintiff argues that Talmer's position is contrary to the facts and to Plaintiff's position that the letter of credit expired. In its Response, Plaintiff attaches a letter from James T. Dunn, Executive Managing Director and Chief Legal Officer of Talmer Bank and Trust, to a ULICO representative stating that he understood that ULICO did not have any claims to be made. Each party presents disputed facts regarding the existence of outstanding claims on the letter of credit. A genuine issue of material fact exists when reasonable minds could differ on a material issue. *Allison v. AEW Capital Mgt., LLP,* 481 Mich. 419, 425, 751 N.W.2d 8 (2008).

The Court finds that factual development is necessary to resolve the claims pending in this action. Summary disposition is not appropriate where factual development is required to resolve discrepancies in the parties' arguments and evidence. Thus, Defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) is denied.

IT IS SO ORDERED.

Dated: MAR 15 2016

Hon. Wendy Potts