CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

SMALL BUSINESS FINANCIAL SOLUTIONS, LLC,	:	
Plaintiff,	:	Case No. 411478-V
v.	:	
PEARL BETA FUNDING, LLC,	:	
Defendant.	:	

MEMORANDUM OPINION
(DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [DE #76])

I. Introduction

This case involves a dispute between two small business finance lenders. Plaintiff Small Business Financial Solutions, LLC ("SBFS") claims, in essence, that defendant Pearl Beta Funding, LLC ("Pearl") interfered with the loan agreement between SBFS and its customer when Pearl (in violation of express terms of the loan agreement between SBFS and the customer) "stacked" financial obligations to Pearl on top of the obligations the customer owed to SBFS. This stacking, according to SBFS, caused unsustainable draws on the customer's bank account, and eventually caused the customer to default under the SBFS loan agreement, resulting in damage to SBFS. For this, SBFS alleges in a two count Amended Complaint, Pearl is responsible.

Pearl denies any wrongdoing, and has moved for summary judgment. SBF opposed the motion, and a hearing was held on August 16, 2017. For reasons that follow, the motion will be denied.

II. Background

The genesis of this dispute is a loan agreement between plaintiff SBFS and its customer, Walden Chiropractic, LLC [1],a Kentucky chiropractic practice ("Walden"). The loan agreement, dated September 26, 2014, provided that SBFS would loan Walden $19,000. Walden, in turn, would repay SBFS $23,180, by way of 120 daily debits of $193.17 from Walden's bank account. The loan agreement granted SBFS a security interest in all of Walden's personal property and proceeds (including account receivables), and prohibited Walden from disposing of SBFS's collateral outside the ordinary course of business. Express conditions of default under the loan agreement included "(xiv) the sale by Borrower [Walden] of its account receivables or future account receivables ... to any person or entity without Lender [SBFS's] written consent; or (xv) Borrower entering into any financing agreement wherein and whereby the payment terms of the agreement require Borrower to make daily or weekly payments." *See* Loan Agreement, ¶27. Shortly after finalizing the Walden loan agreement, SBFS (through its representative, Corporation Services Company) filed a UCC-1 Financing Statement with the Kentucky Secretary of State providing public notice of a security interest in Walden's property. The financing statement admonished others that they would be interfering in SBF's contract rights if they violated SBFS's rights in the collateral.

The financing statement admonition was similar to one that SBFS included in a written warning letter sent to various small business finance lenders (the "Notice Letters") in the Spring of 2014 advising them of prohibitions contained in loan documents between SBFS and its customers, including restrictions prohibiting both the sale or further encumbrance of SBFS collateral, as well as further transactions involving daily or weekly payments. The Notice Letters further advised the other lenders that they would be

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[1] The loan was guaranteed by Dr. Mark Walden. References in this opinion to "Walden" include Dr. Walden unless otherwise indicated.

wrongfully interfering with the contracts between SBFS and its customers if they acted in a way that violated SBFS's contracts with its customers. One of the Notice Letters, dated April 17, 2014, was sent to Pearl Capital Rivis Ventures, LLC, ("Rivis") a predecessor-in-interest to defendant Pearl.[2]

In January 2015, SBFS agreed to refinance Walden's loan pursuant to another Business Loan and Security Agreement. Under the refinanced agreement, SBFS loaned Walden $31,000 in exchange for Walden's agreement to repay SBFS $41,850 by way of 240 daily debits of $174.37 from Walden's bank account. Other terms of the refinanced agreement were identical to those of the first Walden/SBFS agreement, and the previously filed UCC-1 Financing Statement also covered the refinanced loan agreement.

Shortly after, and notwithstanding, the refinanced SBFS loan, Walden sought additional financing – this time from Premier Capital, LLC ("Premier"), another small business finance company and competitor of SBFS. In February 2015, Walden and Premier entered into a Future Receivable Purchase Agreement, under which Premier paid Walden $25,000 in exchange for $36,250 of Walden's future business sales. The receivables would be collected by Premier debiting $279.85 daily for 130 days from Walden's bank account.

By late March 2015, Walden sought even more funding. With the help of Keith Taylor[3] Walden was put in contact with, and applied to, Pearl for funding. [4] In the application and underwriting process, Walden disclosed the existing loans with Premier and Rapid/SBFS,[5]

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[2] Pearl acquired Rivis in February 2015.

[3] Taylor was also an independent contractor for SBFS pursuant to a Rapid Advance Sales and Marketing Agreement dated February 26, 2013.

[4] Pearl's predecessor-in interest, Pearl Rivis, apparently also did business with Walden in 2013 and 2014.

[5] SBFS is a wholly owned subsidiary of Rapid Financial Services, LLC.

and Pearl became aware from its review of Walden's bank statements that Walden had daily debits of $174.37 going to "SBFS LLC."[6] Pearl also learned of the UCC-1 Financing Statement.[7]

After requiring Walden to represent and warrant that contracting with Pearl would not cause a default under any other of Walden's other agreements,[8] and Pearl determining that Walden could afford the obligations to it as well as to Premier and SBFS,.[9] Pearl and Walden entered into a Merchant Agreement dated April 7, 2015. Under that agreement, Pearl agreed to pay Walden $7,500 in exchange for "all of Merchant's future accounts, contract rights and other entitlements arising from or related to the payment of monies from Merchant's customers and other third-party payers ... until ... [$10,875] has been delivered by or on behalf of Merchant to [Pearl]." *See* Merchant Agreement, p.1.[10] Included as part of the Pearl contract was a Security Agreement, which granted Pearl a security interest in Walden's property, including without limitation "accounts, chattel paper, documents, equipment, general intangibles ... all proceeds, ... and all funds at any time in the Merchant's Account." *See* Pearl Security Agreement and Guaranty, p. 1.[11]

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6 *See* Pearl's Answers to Interrogatories, No. 10.

7 Although Pearl admits to receiving and reviewing the financing statement, it claims that the copy it received cut off the admonition mentioned above. *See* Pearl Answers to Interrogatories, No. 10.

8 Pearl did not condition funding on verification on that fact, and never obtained a copy of the SBFS contract.

9 *See* Deposition of Pearl's designee, Solomon Lax ("Lax Deposition"), p. 99-100.

10 While the Merchant Agreement envisioned two payments of $7,500, and two corresponding collections of account receivables of $10,875, apparently Pearl neither paid the second $7,500 installment, nor received the second $10,875 of receivables.

11 Like the SBFS Security Agreement, Pearl's Security Agreement with Walden provided Pearl with the right to include language in its financing statement cautioning others against interfering with Pearl's collateral.

Whether Pearl's funding helped Walden stay afloat or caused him to sink is a matter about which the parties disagree. Under Pearl's view of the facts, without its $7,500 deposit into Walden's bank account on April 7th, Walden inevitably would have defaulted on the SBFS loan, as there would have been negative account balances from April 9th through the 27th, from May 15th through the 18th, and from May 22nd through the 29th. Instead, according to Pearl, its $7,500 deposit enabled Walden to end those days with positive account balances, and with continued payments being made to SBFS. According to Pearl, SBFS collected over $4,000 during that period, which it would not otherwise have received. SBFS sees it differently. Under SBFS's view of the facts, Pearl's harmful stacking weighted Walden down, and resulted in Walden's inability to sustain the heavy daily account debits. SBFS notes that by April 15th Walden had withdrawn more than Pearl deposited on April 7th, such that in eight days Walden's bank account balance was roughly the same as it was before Pearl's deposit. Only now, SBFS posits, Walden was in debt to Pearl as well as to SBFS and Premier, and with a much heavier daily strain on Walden's cash flow.

On April 23, 2015, just over two weeks after Pearl's funding, Walden asked Pearl to reduce the amount of its daily debits. Deliberating on Walden's request, a Pearl customer service representative emailed Pearl colleagues, stating that "[i]t turns out he was over funded, so his current daily payments are too high to manage."[12] As a result, Pearl temporarily reduced Walden's debits, after finding that "he was over funded and cannot manage higher daily payments."[13]

During the summer of 2015, on the advice of Corporate Turnaround, a credit counseling service, Walden stopped paying both SBFS and Pearl. Through a negotiated

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12 *See* Exhibit 16 to Lax Deposition.

13 *See* Exhibit 21 (p.11) to Lax Deposition.

resolution, Pearl was ultimately repaid in full, receiving $4,123 more than it had paid to Walden. SBFS, meanwhile, sued Walden for breaching the loan agreement. And, while SBFS and Walden eventually settled their dispute, SBFS claims it was not made whole, that monies remain outstanding on the loan, and that SBFS is responsible.

In this case, claiming that Pearl's actions caused SBFS's damages, SBFS seeks recovery from Pearl under two theories. *First*, SBFS alleges that Pearl tortiously interfered with the Walden/SBFS loan agreement by inducing Walden (i) to sell portions of (and further encumber) SBFS's collateral, and (ii) to make daily payments. *See* Amended Complaint, ¶¶48-50. As a result, Walden breached its contract with SBFS, which caused SBFS to sustain damage. *Second*, SBFS alleges that Pearl, as a junior secured lender, violated Title 9 of the Uniform Commercial Code ("UCC"), as codified in Maryland at Md. Code Ann., Comm. Law II, Title 9, by interfering with SBFS's rights as a senior secured lender (the "UCC Claim"). By taking a security interest in Walden's assets, SBFS argues, Pearl is liable to it under UCC § 9-625.

Pearl answered SBFS's complaint,[14] denied the allegations, and after discovery moved for summary judgment [DE #76].[15] As related to the tort claim, Pearl argues that it lacked the necessary intent; that it did not interfere with the Walden/SBFS contract; that its conduct was not improper; and, that it did not cause the damages SBFS claims. According to Pearl, rather than cause damage to SBFS, its funding to Walden actually delayed Walden's default and yielded SBFS $4,000 or so more than it would have received otherwise. Similarly, Pearl

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[14] Pearl initially sought dismissal of the Complaint for failing to state a claim [DE #25]. That motion was denied by Judge Greenberg, pursuant to an Order entered September 30, 2016 [DE #44].

[15] SBFS filed an opposition [DE #81], to which Pearl filed both a reply [DE #87] and a reply supplement [DE #90].

asserts, it has no liability under UCC § 9-625 [16] because it had the right to take its own proceeds from Walden's account as a secured creditor.[17] SBFS disagrees, and claims that genuine disputes of material fact preclude summary determination of both the tort issues and the UCC issues. The Court agrees with SBFS.

III. Summary Judgment Principles

The summary judgment rule provides that "[t]he court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact[18] and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). The moving party shoulders the burden of showing that no genuine dispute of material fact exists, *Clark v. O'Malley*, 160 Md. App. 408, 423 (2006), and the Court must view the record in the most favorable light to the non-moving party. *Rogers v. Home Equity USA, Inc.*, 453 Md. 251, 263 (2017). Even if the underlying facts are undisputed, "if those facts are susceptible to more than one permissible

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[16] According to Pearl, it had the right to take the collateral under UCC § 9-607(a)(3)(allowing a secured party to "enforce the obligations of an account debtor"), as more fully explained by Comment 5 (wherein it is clarified that "[a] secured party who holds a security interest in a right to payment may exercise the right to collect and enforce . . . even if the security interest is subordinate to a conflicting security interest in the same right to payment"). SBFS counters that, while Pearl may have had a right to collect, Pearl may not keep the collateral, as under UCC § 9-315(a)(1), SBFS's security interests in the collateral continued even after disposal. Regardless, the real focus of the dispute centers around UCC § 9-332, and the issue of collusion under that section – i.e., whether Pearl and Walden colluded to violate SBFS's rights in the collateral.

[17] Pearl also argues that under UCC § 9-315 ("security interest attaches to any identifiable proceeds of collateral"), SBFS's security interest never attached to the proceeds in Walden's bank account because the account contained funds from a variety of commingled sources, and were not traceable by SBFS to a particular source of funds. Pearl's argument fails, however, given that the Walden/SBFS agreement granted SBFS a security interest in all of Walden's assets, including accounts receivable and bank accounts (not just certain funds in those accounts).

[18] A fact is "material" if its resolution affects the outcome of the case, *Montgomery County v. Soleimanzadeh*, 436 Md. 377, 397 (2013).

inference, the choice between those inferences should not be made as a matter of law, but should be submitted to the trier of fact." *Fenwick Motor Co. v. Fenwick*, 258 Md. 134, 138 (1970) (citations omitted). When these principles are applied to this case, summary judgment must be denied.

IV. Discussion

A. The Tortious Interference with Contract Claim

The tort of intentional interference with contract requires proof of five elements: "(1) existence of a contract between plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional interference with that contract; (4) breach of that contract by the third party; and (5) resulting damages to the plaintiff." *Fowler v. Printers II, Inc.*, 89 Md. App. 448, 466 (1991). Here, Pearl claims that based on the undisputed facts it is entitled to judgment as a matter of law because SBFS is unable to satisfy either the third or the fifth elements (intentional interference and resulting damages).[19] A discussion of each element follows.

1. Intentional interference

The "intentional interference" element requires intentionality, interference, and impropriety. *K & K Management v. Lee*, 316 Md. 137, 155 (1989) (citing Restatement (Second)

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[19] Regarding the first and fourth elements, there is no dispute that SBFS and Walden had a valid contract, and that Walden breached that contract by (i) encumbering SBFS's collateral with the Pearl security interest, (ii) entering into another contract requiring daily payments to Pearl, and (iii) failing to fully repay SBFS. Regarding the second element (knowledge), while facts are in dispute, there is evidence that Pearl had actual and/or constructive knowledge of the Walden/SBFS contract and prohibitions therein in that (i) the UCC-1 Financing Statement was a matter of public record; (ii) Pearl consciously considered Walden's ability to afford his obligations to SBFS, Premier, and Pearl before entering into its agreement with Walden; (iii) Pearl reviewed Walden's bank statements reflecting daily debits to "SBFS LLC" of $174.37 and learned from its underwriting process that Walden's "other lender" was receiving $174 daily payments; and, (iv) Rivis, Pearl's predecessor-in-interest, received SBFS's warning letter cautioning against interfering with SBFS's loan agreements. Moreover, there is evidence that the prohibitions in the Walden/SBFS contract are standard in the industry and that Pearl's own contracts have similar provisions and prohibitions.

of Torts § 766 ("Restatement")).[20] One acts intentionally, according to the Restatement, if he "desires to cause consequences of his act" or "believes [] the consequences are substantially certain to result." Restatement, §8A.

Pearl first argues that it neither desired for Walden to breach a contract, nor believed it was substantially certain to occur. Indeed, Pearl notes, it required Walden to represent and warrant that the agreement with Pearl would not cause a default under any other of Walden's contracts, and Pearl assumed the truth of Walden's statement. To accept Pearl's position as a matter of law, however, would require the Court to ignore the publicly filed UCC-1 Financing Statement, the Notice Letter, and the information known to Pearl through its underwriting process. The issue is not one that can be resolved summarily as a matter of law.

Pearl next claims that it did not "induce" [21] Walden to breach the contract with SBFS, because its contact with Walden was not initiated by Pearl, but by Walden (through Mr. Taylor), and because Walden was already predisposed to breach. When viewed through the lens of the applicable law, Pearl's view of inducement is too narrow. *See e.g. Fowler v. Printers, II, supra,* 89 Md. App. at 470, quoting Prosser, *Law of Torts* §129, at 991 (5th ed. 1971) ("actual inducement is not necessarily required at all ... interference with contract may be quite sufficient for liability provided always that the interference was unjustified"). *See also Sharrow v. State Farm Mutual Automobile Insurance Co.*, 306 Md. 754, 766, 767 (1986) (in the context of a case involving alleged interference with an attorney-client agreement, "any purposeful conduct, however subtle" was said to be sufficient); Restatement, §766, Comment K (explaining that inducement constituting intentional interference with a contract is "*any conduct* conveying to the third person the actor's desire to influence him not

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[20] As discussed *infra*, in a case of interference with an express contract not terminable at will, impropriety may be found from the interference itself.

[21] While not the only way to interfere with a contract, inducement to breach is one way. *See* Restatement (Second of Torts), § 766 Comment K.

to deal with the other.") (emphasis added). Accordingly, that Pearl did not initiate the contact with Walden, or that Walden was predisposed to breach is not, on the record before the court, dispositive of whether Pearl induced Walden's breach.

Lastly, Pearl claims that, even if the Court finds that it intended to induce Walden to breach his contract with SBFS, its actions were not improper. In a case such as this, however, involving an express contract not terminable at will, the Court of Appeals has stated that impropriety may be satisfied through a showing of interference. *See Macklin v. Robert Logan Assoc., 334 Md. 287. 304 (1994) (*"Thus, where there is an existing contract, not terminable at will, between a plaintiff and a third party, acts by a defendant to induce the third party to breach that contract are, themselves, improper and wrongful"). This is so, said the Court, because "[w]here a contract between two parties exists, the circumstances in which a third party has a right to interfere with the performance of that contract are [ ] narrowly restricted." *Id.* at 298. If the fact finder thus determines that Pearl interfered with the existing Walden/SBFS contract, that determination may also suffice for purposes of showing that the interference was improper, wrongful and unjustified. The issue is not one that can be determined summarily as a matter of law.

2. Resulting damages

In *Lyon v. Campbell,* 120 Md. App. 412, 431(1998), the Court of Special Appeals stated that "[t]o establish causation in a tortious interference action, the plaintiff must prove that the defendant's wrongful conduct or unlawful conduct proximately caused the injury alleged." The tortious conduct, however, need not be the sole cause to be the proximate cause. Rather, "[t]o create a jury issue, a plaintiff need only introduce evidence to show that, more likely than not, the defendant's wrongful conduct caused the injury alleged." *Id.*[22] "The plaintiff is

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[22] Proximate causation consists of two elements: (1) causation in fact (actual causation) and (2) legally cognizable causation (foreseeable causation). *Pittway Corp. v. Collins,* 409 Md. 218, 243 (2009). The "substantial factor" test comes into play "[w]hen two or more

not required to exclude every possible cause of injury," i*d.*, and, proximate cause may be proved by circumstantial evidence if such evidence "supports a rational inference of causation." *Id.* at 437. Finally. unless the facts are undisputed, or are susceptible of only one inference, the issue of proximate cause "is ordinarily a question for the jury." *Industrial Serv. Co. v. State to Use of Bryant*, 176 Md. 625, 638-39 (1939) (citation omitted). *See also Caroline v. Reicher*, 269 Md. 125, 133 (1973).

Pearl argues that the evidence shows as a matter of law that it did not cause SBFS's damages. Relying on the testimony of its expert,[23] Pearl claims that without Pearl's $7,500 deposit on April 7th, Walden would have had negative account balances throughout the months of April and May, and would have defaulted on SBFS's loan even sooner. Instead, according to Pearl, its $7,500 cash injection sustained Walden's business, allowing SBFS to collect $4,000 or so more than it would have collected otherwise. In response, SBFS argues that there are sufficient facts from which the finder of fact may reasonably infer that it was Pearl's interference (through its contract with Walden) which caused the daily draws from Walden's bank account to become unsustainable, and which led eventually to Walden's default under the SBF contract. As SBFS highlights, among other things, while Pearl determined initially that Walden was capable of paying all three creditors (SBFS, Premier and Pearl), within eight days of Pearl's April 7th deposit, Walden was essentially back to where he started, but with significantly greater long-term daily bank account strain. Shortly after Pearl made its $7,500 deposit, its own agent recognized that Walden was overfunded,

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independent [ ] acts bring about an injury...Causation in fact may be found if it is 'more likely than not' that the defendant's conduct was a substantial factor in producing the plaintiff's injuries." *Id.*, *citing Hartford Ins. Co. v. Manor Inn*, 335 Md. 135, 156-57 (1994).

[23] Pearl's expert, Mr. Sherman, opines that Walden would have defaulted even without Pearl, but his opinion assumes that Walden would have acted precisely the same without Pearl's deposit as with it. This conclusion, SBFS claims, is too speculative to be accepted, and therefore should be excluded as incompetent evidence, *citing Porter Hayden Co. v. Wyche*, 128 Md. 382, 391 (1999). It is unnecessary to rule on this issue at this time.

and within a few months, Pearl had debited $2,393 more from Walden's account than it had deposited.

The bottom line is that while Pearl's position has support in the record, a "rational inference of causation" *Lyon, supra,* 120 Md. App. at 431, may also be drawn from the evidence supporting SBFS's position. As a result, summary judgment is inappropriate.

B. The UCC Claim

Under UCC § 9-332, "[a] transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party." UCC § 9-332(b). According to both parties, Pearl is a transferee of its and SBFS's shared collateral. Whether Pearl has a right to take the collateral, therefore, depends upon whether Pearl and Walden colluded to interfere with SBFS's rights as a senior secured lienholder.

UCC § 9-332 does not define collusion; however, a comment to that section notes that the term's use in § 9-332 is the same as in § 8-115. *Id.,* at Comment 4. Another Comment, this one to UCC §8-115, explains that the "collusion test is intended to adopt a standard akin to the tort rules that determine whether a person is liable as an aider or abettor for the tortious conduct of a third party." See UCC §8-115. The referenced tort rules are to the Restatement, which provides:

> "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third party."

Restatement, § 876. Under UCC § 9-332, therefore, any of these three scenarios constitutes "collusion" between a junior secured lender and a third party against a senior secured lender's rights in collateral.

In this case, the question of whether Pearl colluded with Walden to harm SBFS's right to the collateral cannot be determined as a matter of law. Under the second of the above-stated Restatement scenarios, where one knows that another's conduct constitutes a breach of duty and gives the other substantial assistance to do so, the parties may be deemed to have colluded. Here, there is sufficient evidence from which to find that Pearl knew its contract with Walden would breach the latter's contract with SBFS, and that Pearl substantially assisted Walden in breaching the SBFS contract by the same action that forms the predicate for the tort claim. So too there is evidence from which a fact finder could find otherwise. Summary judgment on the UCC Claim will be denied.

C. The Declaratory Judgment Counterclaim

Because summary judgment will be denied on the issues related to the claims of SBFS, summary judgment is also inappropriate on Pearl's Counterclaim request for a judgment declaring Pearl free from liability.

IV. Conclusion

In conclusion, the Court will deny Defendant's Motion for Summary Judgment as related to both the claims brought by SBFS under the Amended Complaint, and on the Counterclaim brought by Pearl.

An Order to that effect accompanies this Memorandum Opinion.

Harry C. Storm, Judge
Circuit Court for Montgomery County, Maryland

CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

SMALL BUSINESS FINANCIAL SOLUTIONS, LLC,	:	
Plaintiff,	:	Case No. 411478-V
v.	:	
PEARL BETA FUNDING, LLC,	:	
Defendant.	:	

ORDER
(DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [DE #76])

Upon consideration of Defendant's Motion for Summary Judgment [DE #76], Plaintiff's Opposition [DE #81], and Defendant's Reply [DE #87] and a Reply Supplement [DE #90], a hearing held thereon, and for reasons set forth in the Memorandum Opinion accompanying this Order, it is this 29th day of September 2017 by the Circuit Court for Montgomery County, Maryland

ORDERED, that the motion is DENIED.

Harry C. Storm, Judge
Circuit Court for Montgomery County, Maryland