STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

JOHN DRAPER,
Plaintiff,

v. **Case No. 14-143981-CK**
Hon. James M. Alexander

VOSHON LENARD, ET AL,
Defendants.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants Jaffe, Raitt, Huer & Weiss, P.C.'s and Christopher J. Moceri's motion for summary disposition. The Court dispenses with oral argument pursuant to MCR 2.119(E)(3).

Plaintiff claims that he and Defendant Lenard formed Defendant VKL Investments in 2012 for the purpose of developing franchised Wingstop restaurants in the Detroit metro area. Prior to this time, Jaffe and Moceri were Lenard's attorneys.

Plaintiff brought this suit on claims that Defendants conspired to terminate Plaintiff's management agreement and ownership interest in VKL Investments. As part of this alleged plan, Defendants reorganized VKL Investments and set up Defendant VKL Manager, in which, Plaintiff held a 50% interest.

With respect to the moving Defendants, Plaintiff alleges that Jaffe and Moceri owed certain duties to Plaintiff as counsel for VKL Investments and breached said duties when they chose to represent Lenard and VKL in the attempt to squeeze Plaintiff out. On these general allegations, Plaintiff alleges claims of: (Count III) Declaratory Judgment, (Count VI) Aiding and

Abetting Breach of Fiduciary Duty, (Count VII) Breach of Fiduciary Duty, (Count VIII) Accounting, and (Count IX) Abuse of Process.

It is worth noting that, in the consolidated companion case (14-143854-CK), Plaintiff previously filed a motion to disqualify Jaffe from representing VKL Investments. At a hearing on May 20, 2015, this Court has ruled that Plaintiff did not reasonably repose his faith, confidence, and trust in Jaffe's or Moceri's advice – such that these Defendants owed Plaintiff any fiduciary duty.[1] As discussed later, this ruling has implications on Plaintiff's claims against Jaffe and Moceri.

In any event, the present motion seeks dismissal of all of Plaintiff's claims against Jaffe and Moceri under MCR 2.116(C)(8) or (C)(10). A (C)(8) motion tests the legal sufficiency of the complaint, and a motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

The Court also notes, pursuant to the Court's October 29, 2015 Order, Plaintiff was required to file a response to Defendants' motion by January 6, 2016.[2] Plaintiff, however, failed to file a response or present any other evidence contradicting Defendants' claims. The Michigan Court of Appeals has held that:

> A party opposing a motion brought under C(10) may not rest upon the mere allegations or denials in that party's pleadings, but must by affidavit, deposition, admission, or other documentary evidence set forth specific facts showing that there is a genuine issue for trial. . . . [W]here the opposing party fails to come forward with evidence, beyond allegations or denials in the pleadings, to establish the existence of a material factual dispute, the motion is properly granted. McCormic v Auto Club Ins Ass'n, 202 Mich App 233, 237; 507 NW2d 741 (1993) (internal citations omitted).

[1] On June 4, 2015, the Court entered its order denying Plaintiff's motion to disqualify for the reasons stated on the record on May 20, 2015.

[2] In the companion case, 14-143854-CK, on November 19 and 20, 2015, the Court entered orders allowing Plaintiff's counsel to withdraw from this matter. The orders also provided Plaintiff until December 18, 2015 to obtain new counsel, but the file contains no appearance for any new counsel.

Because Plaintiff failed to respond to Defendants' motion, the Court concludes that Plaintiff failed to present any evidence contradicting Defendants' claims, and as a result, fails to establish a question of fact regarding Defendants' entitlement to judgment as a matter of law. As a result, the Court GRANTS Defendants' Motion for Summary Disposition and DISMISSES Plaintiff's Complaint in its entirety as to Defendants Jaffe and Moceri.

Although the Court has granted Defendants' motion based on Plaintiff's failure to respond, the Court will briefly address the merit of Plaintiff's claims.

1. Counts VI and VII for Aiding and Abetting Breach of Fiduciary Duty and Breach of Fiduciary Duty.

Defendants first move for summary disposition of Plaintiff's Counts VI and VII for Aiding and Abetting and Breach of Fiduciary Duty. As stated, per the May 2, 2015 ruling and June 4, 2015 Order, the Court has already held that Jaffe owed no duty to Plaintiff because he did not reasonably place faith, confidence, and trust in Jaffe's legal services. Rather, at all relevant times, Plaintiff used his own attorney.[3]

Simply, Jaffe (and Moceri) owed no duty to Plaintiff that would support a breach of fiduciary duty claim, and the same is properly dismissed.

With respect to the aiding and abetting claim, Plaintiff claims that Jaffe and Moceri "consulted with and advised Lenard," "drafted and sent the letter purported to terminate [Plaintiff]," and "drafted the redemption agreements." But these allegations merely amount to an attorney advising his client and acting at his client's direction. Plaintiff fails to allege any conduct that remotely supports such an aiding and abetting claim.

[3] The Court incorporates its May 20, 2015 ruling into this Opinion.

For the foregoing reason, considering only the pleadings and accepting all well-pled factual allegations as true, the Court finds that Plaintiff's Counts VI and VII for Aiding and Abetting and Breach of Fiduciary Duty are so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. As a result, Defendants' motion for summary disposition of said claims is GRANTED under (C)(8), and Plaintiff's Counts VI and VII are DISMISSED as to Jaffe and Moceri.

2. Counts III and VIII for Declaratory Judgment and Accounting.

Defendants next move for summary disposition of Plaintiff's Counts III and VIII for Declaratory Judgment and Accounting, respectively. Defendants claim that they are entitled to dismissal of these claims because they are properly between Plaintiff and the VKL Defendants, not Jaffe and Moceri. The Court agrees.

Plaintiff's Declaratory Judgment claim seeks a ruling that VKL Manager's termination of Plaintiff was *ultra vires* and invalid and whether Lenard's subsequent redemption of Plaintiff's shares of the VKL entites was *ultra vires* and invalid. Although Plaintiff's Complaint alleges this Count is leveled against all Defendants, the complained-of acts do not have anything to do with the moving Defendants. As a result, dismissal of said claim against Jaffe and Moceri is appropriate.

Similarly, Plaintiff's accounting claim, which seeks an accounting of the VKL entities records, has nothing to do with Jaffe or Moceri. Rather, MCL 450.4503 provides that such requests are necessarily directed at the corporation or those in control. Jaffe and Moceri are neither.

For the foregoing reason, considering only the pleadings and accepting all well-pled factual allegations as true, the Court finds that Plaintiff's Counts III and VIII for Declaratory Judgment and Accounting are so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. As a result, Defendants' motion for summary disposition of said claims is GRANTED under (C)(8), and Plaintiff's Counts III and VIII are DISMISSED as to Jaffe and Moceri.

3. Counts IX for Abuse of Process.

Finally, Defendants seek dismissal of Plaintiff's Count IX for Abuse of Process. The Court of Appeals has held:

> To recover pursuant to a theory of abuse of process, a plaintiff must plead and prove (1) an ulterior purpose, and (2) an act in the use of process that is improper in the regular prosecution of the proceeding. In *Vallance v Brewbaker*, 161 Mich App 642, 646; 411 NW2d 808 (1987), this Court described a meritorious claim of abuse of process as a situation where the defendant has used a proper legal procedure for a purpose collateral to the intended use of that procedure. The Court further stated that there must be some corroborating act that demonstrates the ulterior purpose. A bad motive alone will not establish an abuse of process. *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992) (internal citations omitted), citing *Friedman v Dozorc*, 412 Mich 1, 30-31; 312 NW2d 585 (1981).

Moreover, "the ulterior purpose alleged must be more than harassment, defamation, exposure to excessive litigation costs, or even coercion to discontinue business.'" *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 323; 788 NW2d 679 (2010); quoting *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 629-630; 403 NW2d 830 (1986).

In his Complaint, Plaintiff claims that Jaffe and Moceri are liable for abuse of process with respect to a TRO request in the companion case. Specifically, in paragraph 159 of the Complaint, Plaintiff alleges:

> [Jaffe] and Lenard . . . had an improper motive and ulterior purpose: they sought to surprise [Plaintiff] by obtaining the order, creating ill will in the public, obtaining an advantage in pressing the litigation, and forcing [Plaintiff] to litigate and negotiate from a position of weakness.

The allegations, even if accepted as true, do not amount to conduct arising to "more than harassment, defamation, exposure to excessive litigation costs, or even coercion to discontinue business." Instead, at most, they amount to a "bad motive." And as held in *Bonner*, "bad motive alone will not establish an abuse of process." *Bonner*, 194 Mich App at 472.

For the foregoing reason, considering only the pleadings and accepting all well-pled factual allegations as true, the Court finds that Plaintiff's claim for abuse of process is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. As a result, Defendant's motion for summary disposition of said claim is GRANTED under (C)(8), and Plaintiff's Count IX is DISMISSED as to Jaffe and Moceri.

4. Summary/Conclusion.

To summarize, Jaffe and Moceri's motion for summary disposition is GRANTED in its entirety, and Plaintiff's First Amended Complaint (Case No. 14-143981-CK) is DISMISSED as to said Defendants in its entirety.

IT IS SO ORDERED.

January 15, 2016____ __/s/ James M. Alexander_____
Date Hon. James M. Alexander, Circuit Court Judge