STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

STRATEGY AND EXECUTION, INC.,

Plaintiff,

v

Case No. 15-146756-CK
Hon. Wendy Potts

LXR BIOTECH, LLC,

Defendant.
_____/

OPINION AND ORDER RE: PLAINTIFF'S MOTION FOR PARTIAL SUMMARY DISPOSITION FO DEFENDANT'S FIRST AMENDED COUNTERCLAIM (COUNT II)

At a session of Court
Held in Pontiac, Michigan
OCT 05 2016

This matter is before the Court on Plaintiff's motion for partial summary disposition of Count II of Defendant's first amended counterclaim. By way of background, Plaintiff is a corporation organized to provide sales, marketing, and management services to companies. Defendant is a manufacturer and distributor of energy supplements in the retail market. In July 2014, the parties signed a letter in which they memorialized the terms of their agreement whereby Plaintiff would provide sales and marketing services to Defendant in return for financial payment. Plaintiff is alleging in its Complaint that Defendant has failed to pay for the services rendered.

It is undisputed that Defendant was in the process of attempting to obtain funding by discussing with Robert Kovach the possibility of a potential infusion of capital in exchange for equity and/or debt financing for Defendant. At the request of Defendant's president, Andrew

Krause, an officer of Plaintiff by the name of Thomas Morse met with Mr. Kovach regarding the potential investment opportunity. A change in the management structure of LXR Biotech was discussed between Mr. Kovach and Mr. Morse and ultimately, Mr. Kovach presented Mr. Krause with a plan for significant investment, conditioned on a management change. Mr. Krause declined Mr. Kovach's proposal and as a consequence, Mr. Kovach declined to invest in Defendant. Defendant subsequently filed as Count II in its Counter-Complaint a claim against Plaintiff for Tortious Interference with Advantageous Business Relationship or Expectancy. The Court previously granted Plaintiff's motion for summary disposition on Count II, but allowed Defendant the opportunity to amend its claim for Tortious Interference.

Plaintiff has now filed this motion, requesting the Court dismiss Count II of Defendant's First Amended Counter-Complaint with prejudice and pursuant to MCR 2.116(C)(10). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, 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. 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." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

"The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff." *BPS Clinical Labs v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698-99; 552 NW2d 919 (1996). In this case, Defendant, as the Counter-Plaintiff, is alleging that the Plaintiff, as

Counter-Defendant, engaged in tortious interference with an advantageous business relationship or expectancy.

It is well settled that "one who alleges tortious interference with a contractual or business 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." *Feldman v Green,* 138 Mich App 360, 378; 360 NW2d 881 (1984). "A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances." *Prysak v R L Polk Co,* 193 Mich App 1, 12-13; 483 NW2d 629 (1992). "To establish that a lawful act was done with malice and without justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference." *BPS Clinical Labs, supra.*

In its motion, Plaintiff first asserts that collateral estoppel precludes Defendant's claim because the Court previously granted Plaintiff's motion for summary disposition as to Count II. However, this argument fails because the Court gave Defendant an opportunity to amend its claim for tortious interference.

Plaintiff next argues that Defendant has failed to come forward with evidence that suggests that Plaintiff intentionally interfered in a per se wrongful manner, or in a lawful way with malice and without justification, relative to any relationship or expectancy Defendant had with Mr. Kovach. Conversely, Defendant asserts that Mr. Morse intentionally interfered with the business relationship between Defendant and Mr. Kovach by attempting to arrange an ouster of current LXR management by denigrating management to Mr. Kovach in order to prevent the infusion of capital upon the terms that Defendant and Mr. Kovach were pursuing. As a result of Plaintiff's alleged conduct, Defendant claims that it has suffered substantial damages in the

amount of three million dollars. It is Plaintiff's belief, however, that Defendant has continued an ongoing business relationship with a company known as BEMO USA WLL (Qatar), in which Mr. Kovach allegedly has an ownership interest. As such, Plaintiff argues that any business relationship or expectancy Defendant had with Mr. Kovach has not been interrupted or interfered with.

Upon review of Plaintiff's motion and Defendant's response as well as the parties' supporting documentation, the Court takes note of the Affidavit of Richard Kovach, in which Mr. Kovach explained that his discussions with Mr. Krause concerning further investment were elevating and he "wanted to know more details of the company's operations." Both parties agree that Mr. Morse had met with Mr. Kovach at Defendant's suggestion. In its responsive brief, Defendant indicates that the purpose of that meeting was for Mr. Morse to update Mr. Kovach on sales strategy, results and opportunities being pursued. Defendant stated further in its responsive brief that Mr. Morse was to provide company information as well for the contemplated capital infusion.

In his Affidavit, Mr. Kovach indicated that "Tom Morse and I discussed structuring a transaction as a capital infusion to the company, as a condition to a closing. I informed Tom Morse that a change of top management would need to take place." Mr. Kovach stated further that "[a] plan was presented to Andy Krause regarding a significant investment requiring a management change and he declined. At which point I felt the investment opportunity was too risky and I declined." The Court observes that the substance of Mr. Kovach's Affidavit is consistent with the statements made by Mr. Morse in his Affidavit.

"The party opposing the motion may not rest upon mere allegations or denials in the pleadings. It must set forth specific facts using documentary evidence to show the existence of a

genuine issue for trial." *Libralter Plastics, Inc. v Chubb Grp. of Ins. Companies*, 199 Mich App 482, 485; 502 NW2d 742 (1993).

Defendant LXR presents evidence in the form of a declaration of Wade Dann that challenges the credibility of the allegations made in Morse's affidavit. Plaintiff asserts that its actions were motivated by a justifiable business interest in that Defendant owed Plaintiff money under the parties' ongoing contractual relationship. In opposition, Defendant contends that it was Mr. Morse's plan to place LXR Biotech in bankruptcy and through that process, Plaintiff would be able to assume control and Mr. Morse would become president of LXR Biotech. The Court in *White v Taylor Distributing Company, Inc*, 275 Mich App 615; 739 NW2d 132 (2007) reasoned that, "courts may not resolve factual disputes or determine credibility in ruling on a summary disposition motion" *Id* at 625.

Michigan Courts have long held that "defendants motivated by legitimate personal and business reasons are shielded from liability against this cause of action [tortious interference with a contractual or business relationship]." *Formall, Inc v Community Nat'l Bank*, 166 Mich App 772, 780; 421 NW2d 289 (1988); citing *Christner v Anderson, Nietzke & Co, PC*, 156 Mich App 330, 348-349; 401 NW2d 641 (1986). While the Court notes that it is an extremely close call, the Court is not presently persuaded by Plaintiff's assertion that it had (and currently has) a legitimate business reason for its course of conduct. However, this claim could be the subject of a motion for directed verdict during trial.

In consideration of the parties' arguments and supporting documentation in the light most favorable to the opposing party, the Court finds that Defendant has demonstrated evidence to establish a genuine issue regarding the material facts related to Count II of its First Amended

Counter-Complaint. Thus, Plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) is denied.

IT IS SO ORDERED.

Dated: OCT 05 2016

Hon. Wendy Potts