

STATE OF MICHIGAN  
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

LEGACY CAPITAL PARTNERS, LLC,

Plaintiff,

vs.

JOHN A. KAILUNAS, II; and REGAL  
INVESTMENT ADVISORS, LLC,

Defendants.

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Case No. 13-09947-CKB

HON. CHRISTOPHER P. YATES

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND VERDICT (AS REVISED)

Nothing about this case is straightforward. Indeed, even the caption presents complications that the Court cannot readily explain.<sup>1</sup> Also, after Plaintiff Legacy Capital Partners, LLC (“Legacy”) filed the pleading at issue in this case presenting claims against Defendants John A. Kailunas, II, and Regal Investment Advisors, LLC (“Regal”) on March 28, 2014, Kailunas failed to file an answer in timely fashion, so the Clerk entered a default against Kailunas on May 14, 2014.<sup>2</sup> Consequently, the Court simply must set the damages that Kailunas must pay to Legacy, but Regal is entitled to contest Legacy’s claims on the merits, and Kailunas has claims of his own that require analysis. The Court held a three-day trial on May 27, June 17, and June 30, 2015. Based upon the record developed at that bench trial, the Court can now render findings of fact, conclusions of law, and a verdict.

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<sup>1</sup> The case began as Hawkpeak, LLC v Legacy Capital Partners, LLC, Matthew Erickson, and John A Kailunas, II, but because of voluntary dismissals, counterclaims, cross-claims, and third-party claims, it has evolved into an action by Legacy Capital Partners, LLC (as a cross-plaintiff and third-party plaintiff) against John A. Kailunas, II (as the cross-defendant) and Regal Investment Advisors, LLC (as the third-party defendant). The Court has simplified the caption to reflect that evolution.

<sup>2</sup> Although Defendant Kailunas filed a motion to set aside that default on May 30, 2014, the Court denied that motion in a written order entered on June 13, 2014.

## I. Findings of Fact

Pursuant to MCR 2.517(A)(1), in an action tried without a jury, “the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment.” The Court must render “[b]rief, definite, and pertinent findings and conclusions on the contested matters” that may take the form of a written opinion. See MCR 2.517(A)(2) & (3). Therefore, the Court shall begin with findings of fact, followed by conclusions of law, and ultimately the verdict.

In 2011, Ralph Allen founded Hawkpeak, LLC (“Hawkpeak”) as a vehicle to assist money managers in raising capital. See Trial Tr (5/27/15) at 11. Then, in 2012, Allen became involved in Plaintiff Legacy, which was “a boutique asset manager.” See id. at 12. In simple terms, Allen took on the responsibility of raising assets for Legacy to manage. Id. A young investment advisor named Matthew Erickson owned a 65-percent majority share in Legacy, while Allen’s company, Hawkpeak, had a 25-percent stake in Legacy. See Plaintiff’s Exhibit 8 (Operating Agreement for Legacy, § 3.1). Defendant Kailunas held the remaining 10-percent share in Legacy, see id., so Erickson, Allen, and Kailunas all stood to profit if Legacy succeeded,<sup>3</sup> see Trial Tr (5/27/15) at 172-173, which depended upon Allen’s ability to obtain assets for Legacy. And beyond that, Allen and Kailunas entered into a “Marketing Services Agreement” in November 2012 that memorialized the relationship between their respective ventures, Hawkpeak and Defendant Regal. See Plaintiff’s Exhibit 7.

By the end of 2012, Plaintiff Legacy garnered only \$5 million in assets under management. See Trial Tr (5/27/15) at 176. Erickson managed those funds under the auspices of Defendant Regal, which held the registrations necessary for Erickson to function as an investment advisor. See id. at

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<sup>3</sup> The Legacy operating agreement bears the signatures Allen as the “managing member” of Hawkpeak, Defendant Kailunas in his individual capacity, and Matthew Erickson as the “managing member” of Legacy and in his individual capacity. See Plaintiff’s Exhibit 8.

21-22. Thus, although Defendant Kailunas owned only a 10-percent interest in Legacy, he held the fate of Legacy in his hands because Kailunas could deny Legacy access to the Regal platform for the investment of Legacy's assets. See id. at 177, 188; Trial Tr (6/17/15) at 143, 145-146.

In late December of 2012, Defendant Kailunas grew frustrated with Erickson. See Trial Tr (5/27/15) at 23-24, 152-155. Then, in early 2013, tension developed between Kailunas and Allen when Allen concluded that Kailunas was trying to freeze him out of Legacy's business. See id. at 25-28. Consequently, on February 14, 2013, Allen resigned from Defendant Kailunas's company, Defendant Regal. See id. at 28. As the bonds among the three members of Legacy frayed, Kailunas started taking actions that impaired Legacy's operations. For example, on March 1, 2013, Kailunas dictated that Legacy had to operate under a servicing agreement, see id. at 79, 156, 188, which barred Erickson and Legacy from contacting additional Regal representatives in efforts to expand Legacy's portfolio and prohibited Erickson from conducting webinars and sending out updates. See id. at 156-157, 188. This hindered the growth of Legacy and frustrated Erickson, see id. at 158, 191, who also had to deal with Kailunas exerting pressure on him to remove Allen from Legacy. See id. at 158.

By the fall of 2013, Plaintiff Legacy was beset by problems arising from the conflicts among its three members. Thus, Defendant Kailunas gave back his interest in Legacy on October 1, 2013, see Trial Tr (5/27/15) at 160; Trial Tr (6/17/15) at 62, Legacy stopped doing business, see Trial Tr (5/27/15) at 111-112, and assets managed by Legacy were transferred from the Regal platform to the platform of a separate entity called Legacy Planning Associates ("LPA").<sup>4</sup> See id. at 139-140, 204. After that, Legacy retained less than \$4 million in assets under management on Regal's platform, see

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<sup>4</sup> Despite the similarity in names, Plaintiff Legacy and LPA are completely separate entities. Matthew Erickson controlled Legacy, see Trial Tr (5/27/15) at 145, whereas LPA was controlled by Michael Wood. See id. at 116, 145-146.

id. at 203, 205; Trial Tr (6/17/15) at 64, which were folded into Regal, see Trial Tr (6/17/15) at 150-151, leaving Legacy holding no assets under management. In Legacy’s claims against Kailunas and Regal, Legacy demands recompense for its squandered assets, broken business relationships, and unrealized business expectancies. And in spite of the default entered against Kailunas, he has claims against Hawkpeak that the Court must address. Therefore, the Court shall devote one section of its analysis to Legacy’s claims against Kailunas and Regal, another section to Kailunas’s claims against Hawkpeak, and a final section to the damages that the Court shall award.

## II. Conclusions of Law

Because Plaintiff Legacy has asserted four remaining claims against Defendants Kailunas and Regal, the Court shall devote substantial attention to those claims in rendering its conclusions of law. After that, the Court shall shift its focus to the two remaining claims advanced by Kailunas against Hawkpeak. Finally, the Court shall set the amount of damages Kailunas must pay to Legacy.

### A. Plaintiff Legacy’s Claims Against Defendants Kailunas and Regal.

In a pleading entitled “Legacy Capital Partners, LLC and Matthew Erickson’s Counter-Claim, Cross-Claim and Third Party Complaint,” Plaintiff Legacy sets forth four claims that the Court must resolve. Count Three accuses Defendant Kailunas of breaching the fiduciary duties that he owed to Legacy. Count Six alleges that Kailunas engaged in willful and oppressive conduct directed toward Legacy. Count Ten presents a claim against Kailunas and Defendant Regal for tortious interference with a business relationship or expectancy. Count Eleven asserts that Kailunas breached the Legacy operating agreement. The Court’s task in assessing Defendant Kailunas’s liability is simple. Under Michigan law, “a default settles the question of liability as to well-pleaded allegations and precludes

the defaulting party from litigating that issue.” Kalamazoo Oil Co v Boerman, 242 Mich App 75, 79 (2000), quoting Wood v DAIIE, 413 Mich 573, 578 (1982). Consequently, the Court concludes that the default entered against Kailunas on May 14, 2014, establishes his liability on each of the four remaining counts in Legacy’s pleading.

In contrast, Defendant Regal retains the right to contest Plaintiff Legacy’s claim against the company on the merits. In Count Ten, Legacy contends that Regal committed tortious interference with Legacy’s business relationships with its existing clients and Hawkpeak, as well as its business expectancies with its prospective clients. To be sure, Kailunas’s actions in placing Legacy under the servicing agreement impaired Legacy’s business operations by restricting its ability to attract new investors, and the Court can readily conclude that Kailunas acted in his capacity as a Regal principal when he imposed the servicing agreement upon Legacy. But the claim for tortious interference with business relationships and expectancies not only requires proof of “an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy,” Health Call of Detroit v Atrium Home & Health Care Services, Inc., 268 Mich App 83, 90 (2005), but also must involve “something illegal, unethical, or fraudulent.” Dalley v Dykema Gossett, PLLC, 287 Mich App 296, 324 (2010). Legacy has not presented evidence that Regal did anything “illegal, unethical, or fraudulent,” so Legacy’s claim against Regal fails. Moreover, if Legacy’s “actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.” Id. During trial, Regal presented substantial evidence that it imposed the servicing agreement upon Legacy based upon legitimate concerns about Legacy’s capitalization and Erickson’s ability to make Legacy successful. See Trial Tr (6/17/15) at 37-43. Consequently, the Court concludes, as a matter of law, that Legacy has not established its one and only claim against Regal.

B. Defendant Kailunas's Claims Against Hawkpeak.

On November 22, 2013, Defendant Kailunas filed an "Answer and Counterclaim" presenting three claims against Hawkpeak. Count One accuses Hawkpeak and Matthew Erickson of engaging in a civil conspiracy to prevent Defendant Kailunas from receiving compensation from Legacy and to interfere with Kailunas's "contractual and business relationships." Count Two asserted that Hawkpeak misappropriated Kailunas's trade secrets, but Kailunas formally abandoned that claim in the midst of trial, see Trial Tr (5/27/15) at 49, so the Court need not address that counterclaim. See Order Dismissing Counterclaim Count II (May 27, 2015). Count Three alleges that Hawkpeak took part in "Tortious [sic] Interference With Advantage Business Relationship" by contacting Kailunas's "[c]lients, broker-dealers and financial advisors[,]" which "caused disruption and/or termination of certain business relationships or expectancies."

To prevail on a claim for civil conspiracy Defendant Kailunas must establish that Hawkpeak participated in "a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." Urbain v Beierling, 301 Mich App 114, 131 (2013). Kailunas has failed to prove anything that even approaches criminal or unlawful purposes or means on Hawkpeak's part, so Kailunas cannot prevail on his claim for civil conspiracy. Beyond that, "a claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort." Advocacy Organization for Patients & Providers v Auto Club Ins Ass'n, 257 Mich App 365, 384 (2003). Although Kailunas insists that Hawkpeak engaged in an underlying tort by tortiously interfering with his business relationships and expectancies, the evidence does not support such a claim. Indeed, the record developed at the trial makes clear that Kailunas has utterly failed to establish that claim.

As the Court has already explained in rejecting Plaintiff Legacy's claim against Defendant Regal, a claim for tortious interference with business relationships and expectancies requires proof of "an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy," Health Call, 268 Mich App at 90, and must involve "something illegal, unethical, or fraudulent." Dalley, 287 Mich App at 324. Kailunas contends that Hawkpeak caused Michael Wood to remove assets from the Regal platform, but Wood himself testified unequivocally that he made an independent decision to move those assets. See Trial Tr (5/27/15) at 118-123. In fact, when pressed by the Court for an explanation for his movement of the assets, Wood stated that he was motivated entirely by "[m]y own history; my own experience, and my own desire to just kind of chart my own ship and not be under anybody else's governance or restrictions." Id. at 122. That constitutes the antithesis of tortious interference with business relationships and expectancies. Also, even if the Court could ascribe Wood's actions to Hawkpeak's interference, the absence of "illegal, unethical, or fraudulent" acts on Hawkpeak's part would doom Kailunas's claim.<sup>5</sup> Thus, the Court finds, by a preponderance of the evidence, that Kailunas has failed to support each of his claims.

### C. Damages.

In light of the Court's determinations concerning liability, only Plaintiff Legacy is entitled to recover damages, and those damages can only come from Defendant Kailunas. Accordingly, the Court must establish the amount of damages that Kailunas must pay Plaintiff Legacy for the actions

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<sup>5</sup> The Court also must note in passing that any claim for tortious interference with business relationships and expectancies against Plaintiff Hawkpeak would belong to Regal, but not Kailunas. To the extent that injury resulted from Wood's transfer of assets from the Regal platform, that harm was suffered by Regal, as opposed to Kailunas. To be sure, Kailunas was the majority and managing member of Regal at that time, see Trial Tr (6/17/15) at 7, but Kailunas cannot personally assert the claims of his company just because of that status.

that resulted in the demise of Legacy. Although Legacy has furnished three separate methods for the calculation of damages, see Trial Tr (5/27/15) at 40, the most accurate measure of damages can be derived from Hawkpeak's buyout price for its interest in Durand Capital Partners, LLC ("Durand"), which was nearly an identical twin of Legacy. Compare Plaintiff's Exhibit 8 (Operating Agreement for Legacy) with Plaintiff's Exhibit 9 (Operating Agreement for Durand); see also Trial Tr (6/17/15) at 32. Specifically, on March 29, 2013, Durand bought back Hawkpeak's 25-percent interest for the sum of \$300,000 to be paid in installments for ten years. See Trial Tr (5/27/15) at 31-32, 41; see also Plaintiff's Exhibit 13 (Confidential Settlement and Mutual Release Agreement, §§ 3, 4). Reducing that stream of payments to its present value yields the amount of \$285,148.98 in present dollars, see Trial Tr (5/27/15) at 41, which reflects the value of Hawkpeak's 25-percent interest in Durand as of March 29, 2013. Multiplying that figure by four to reach 100 percent of the present value of Durand yields a total value of \$1,140,595.90. That figure best captures the loss to Legacy resulting from the actions of Kailunas that brought about the demise of Legacy.

Defendant Kailunas challenges the validity of that damage calculation by contending that the comparison of Plaintiff Legacy's value to the buyout price for 25 percent of Durand is inapposite for several reasons, but the Court concludes that Durand provides a nearly perfect model for setting the value of Legacy. First, immediately before Durand's buyout of Hawkpeak, Durand and Legacy had nearly the same amount of assets under management. See Trial Tr (5/27/15) at 32. Second, both of the companies maintained their assets on Defendant Regal's platform, see id. at 59, and Regal placed each of the companies under a restrictive servicing agreement on the same date in early March 2013. See Trial Tr (5/27/15) at 79; Trial Tr (6/17/15) at 42-43. Third, Legacy's money manager, Matthew Erickson, outperformed Durand's money manager, James Tassoni, during the time period when their

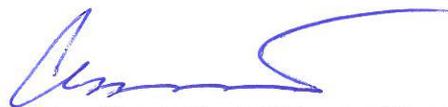
companies operated on the Regal platform. See Trial Tr (5/27/15) at 87, 123-124. Thus, the Court concludes, as a matter of law, that Legacy suffered damages of \$1,140,595.90 because of the actions of Kailunas. Accordingly, the Court shall render a verdict in favor of Legacy and against Kailunas in that amount on each of the four claims asserted by Legacy.

### III. Verdict

For all of the reasons stated in the Court's findings of fact and conclusions of law, the Court hereby renders a verdict in favor of Plaintiff Legacy and against Defendant Kailunas in the amount of \$1,140,595.90 on Counts Three, Six, Ten, and Eleven of Legacy's "Counter-Claim, Cross-Claim and Third Party Complaint." In contrast, the Court hereby enters a verdict of no cause of action with respect to Legacy's claim against Defendant Regal in Count Ten of Legacy's "Counter-Claim, Cross-Claim and Third Party Complaint." Also, the Court hereby renders a verdict of no cause of action with regard to Kailunas's two remaining claims against Hawkpeak set forth as Counts One and Three in the "Answer and Counterclaim" filed on November 22, 2013. The Court invites Legacy to submit a proposed final judgment reflecting these verdicts for consideration under the so-called 7-day rule. See MCR 2.602(B)(3).

IT IS SO ORDERED.

Dated: December 15, 2015



HON. CHRISTOPHER P. YATES (P41017)  
Kent County Circuit Court Judge