

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

GROW MICHIGAN, LLC,

Plaintiff,

v.

**Case No. 20-180564-CB
Hon. James M. Alexander**

LIGHTNING TECHNOLOGIES, INC.,

Defendant.

CONSOLIDATED WITH:

GROW MICHIGAN, LLC,

Plaintiff,

v.

**Case No. 20-180674-CB
Hon. James M. Alexander**

**SOLYCO, LLC,
And DAMIAN KASSAB,**

Defendants.

CONSOLIDATED WITH:

GROW MICHIGAN, LLC,

Plaintiff,

v.

**Case No. 20-180653-PD
Hon. James M. Alexander**

ROBERT DRAKE,

Defendant.

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**OPINION AND ORDER RE: (1) PLAINTIFF'S MOTION TO DISMISS
DEFENDANT/COUNTER-PLAINTIFF SOLYCO, LLC'S COUNTERCOMPLAINT
AND (2) PLAINTIFF'S MOTION TO DISMISS DEFENDANT/COUNTER-PLAINTIFF
DAMIAN KASSAB'S COUNTERCOMPLAINT**

This matter is before the Court on Plaintiff's Motion to Dismiss Defendant/Counter-Plaintiff Solyco, LLC's Counter Complaint and Plaintiff's Motion to Dismiss Defendant/Counter-Plaintiff Damian Kassab's Counter Complaint. The Court dispenses with oral argument in accordance with MCR 2.119(E)(3).

By way of background, Plaintiff Grow Michigan, LLC ("GrowMI") is a "sub-debt lender that focuses on community reinvestment by providing growth capital to Michigan-based small and mid-sized businesses." See Paragraph 7 of the Complaint. Defendant Lightning Technologies, Inc. ("Lightning") is a start-up company that developed a lightweight hybrid pallet with anti-microbial and anti-fungal additives for the shipment of cold food products. On August 30, 2019, GrowMI committed up to five million dollars to Lightning through the execution of a Business Loan Agreement so that Lightning could manufacture and commercialize its pallet product. That same day, Lightning executed a Promissory Note in favor of GrowMI as well as a Security Agreement and Intellectual Property Security Agreement. As a result, GrowMI is the senior secured lender to Lightning. On March 30, 2020, GrowMI initiated litigation against Lightning on allegations that Lightning defaulted on the parties' loan agreement.

On April 6, 2020, GrowMI commenced a subsequent lawsuit against Defendants Solyco, LLC ("Solyco") and Damian Kassab ("Kassab"), the owner of Solyco. Solyco specializes in advising and consulting for small and middle market businesses to help them implement sound management principles and internal control systems. See Paragraph 22 of Solyco's Counterclaim. Lightning retained Solyco to provide consulting services as well as additional capital. As part of their agreement, Kassab joined Lightning as an Executive Vice President and he was placed on Lightning's Board of Directors as Vice Chair. Kassab also received shares of Lightning in connection with Solyco's services.

GrowMI is suing Kassab and Solyco on allegations that they wrongfully transferred collateral from Lightning to Solyco while Lightning was insolvent and in contravention to GrowMI's senior rights to the collateral. In particular, GrowMI alleges that Solyco took an unauthorized payment of \$398,000.00 from Lightning, however, Kassab and Solyco defend that payment as compensation for their consulting services. GrowMI's Complaint against Kassab and Solyco raise the following claims titled: (Count One) Violation of Section 4 of Michigan's Uniform Voidable Transactions Act; (Count Two) Violation of Section 5 of Michigan Uniform Voidable Transactions Act; (Count Three) Conversion; (Count Four) Intentional Interference with Contractual Relationship; and (Count Five) Breach of Fiduciary Duty Against Kassab.

In response, Solyco filed an Answer and Counterclaim against GrowMI on May 22, 2020 on allegations that Solyco uncovered financial improprieties committed by Lightning's CEO, Jeffrey Owen, wherein he utilized Lightning's bank account for his personal use. It is Solyco's contention that Jeffrey Owen enlisted GrowMI to launch a campaign against Solyco in an attempt to discredit Solyco by describing it as a "corporate raider" and accusing it of certain misconduct. Solyco's Counterclaim against GrowMI outlines the following grounds: (Count One)¹ Tortious Interference with Contract and Business Expectancy; and, (Count Two) Civil Conspiracy. Relying on similar allegations as Solyco, Kassab filed his Answer and Counterclaim against GrowMI on May 22, 2020 on one count entitled Abuse of Process.

The parties acknowledge the existence of a proxy contest between Jeffrey Owen as CEO of Lightning and Damian Kassab, in addition to other officers of Lightning, in Delaware state court concerning control of Lightning. In addition, a RICO complaint was filed by GrowMI in the United States District Court for the Eastern District of Michigan against Damian Kassab, Solyco, other shareholders of Lightning, etc.

¹ Count One is mislabeled as Count Two.

On July 1, 2020, GrowMI filed its two Motions to Dismiss in which it seeks the dismissal of Solyco and Kassab’s respective Counterclaims pursuant to MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). When analyzing such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dept of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). A (C)(8) motion may be granted only where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.* And, when deciding such a motion, the Court considers only the pleadings. MCR 2.116(G)(5). “A party may not support a motion under subrule (C)(8) with documentary evidence such as affidavits, depositions, or admissions.” *Dalley v Dykema Gossett*, 287 Mich App 296, 305; 788 NW2d 679 (2010). (Citations omitted).

Plaintiff’s Motion to Dismiss Defendant/Counter-Plaintiff Solyco, LLC’s Counter

Complaint

Tortious Interference with Contract and Business Expectancy

With respect to Count One of Solyco’s Counterclaim, namely “Tortious Interference with Contract and Business Expectancy,” GrowMI argues the Solyco has failed to state a claim upon which relief can be granted. GrowMI argues that Solyco’s allegations of wrongdoing are primarily directed at nonparties, Jeffrey Owen and Bhrat Bhise. The only allegations of wrongdoing that are alleged against GrowMI are as follows: (1) GrowMI is not pursuing any of Lightning’s other vendors or Owen, individually; and, (2) GrowMI is demanding that Solyco repay hundreds of thousands of dollars, which Solyco claims is compensation for services rendered.

“The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant. By definition, tortious interference with a contract is an intentional tort. Indeed, it is well-settled that

one who alleges tortious interference with a contractual...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...A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances. If the defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference.” *Knight Enterprises v RPF Oil Co.*, 299 Mich App 275, 280; 829 NW2d 345 (2013). (Citations omitted).

“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. 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. Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.” *BPS Clinical Labs. v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698–99; 552 NW2d 919 (1996). (Citations omitted).

“One who alleges tortuous 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). 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). (Citations omitted).

With respect to the alleged tortious interference with a contract, GrowMI contends that Solyco has failed to produce or reference any such contract in its Counterclaim. Rather, Solyco makes an assertion that it has multiple contracts with Lightning for the payment of consulting services as well as for the repayment of loans. When a claim is based upon a written instrument, a copy of that instrument or its pertinent parts must be attached as an exhibit to the pleading. See MCR 2.113(C)(1). Thus, GrowMI maintains that Solyco's tortious interference with a contract claim fails since it has not proven the existence of an actual contract.

GrowMI next argues that Solyco has failed to allege that GrowMI instigated or induced Lightning to breach the alleged contracts between Lightning and Solyco. Moreover, the allegations in the Counterclaim indicate that Lightning was already in default of its obligations to Solyco before GrowMI pursued the collection of Lightning's debt under the loan agreements. As such, GrowMI maintains that it was not the cause of any interference in relation to Solyco's agreements with Lightning. Additionally, GrowMI asserts that Solyco has not made any factual allegations that GrowMI acted intentionally and maliciously or that it committed a per se wrongful act. Rather, GrowMI is simply attempting to collect on the debt pursuant to its loan agreements.

In opposition, Solyco represents that it has contracts for payment of professional fees as well as written promissory notes for the repayment of loans that it gave to Lightning. Solyco attaches interrogatory responses to its Response to support its representation, however, the Court can only consider the pleadings for purposes of a (C)(8) motion. Solyco states further that even if there were no written contracts, its claim is adequately pled based upon Solyco's business expectancies.

With respect to the claim of tortious interference with a business expectancy or relationship, GrowMI contends that Solyco must demonstrate that GrowMI acted both

intentionally and either improperly or without justification to induce a breach or termination of the relationship or expectancy. According to GrowMI, Solyco does not allege that GrowMI acted wrongfully per se or maliciously or unjustifiably under the law. Rather, Solyco's allegations demonstrate that GrowMI's actions were motivated by legitimate business reasons. What is more, Solyco's allegations focus more so on Jeffrey Owen and Bhrat Bhise, neither of whom are parties to this lawsuit or are alleged to have any control of GrowMI. In addition, GrowMI maintains that Solyco's damages were incurred in 2019 and 2020, which was prior to GrowMI's attempts to collect against Lightning. Therefore, Solyco cannot demonstrate that its relationship with Lightning was affected by any conduct of GrowMI.

Conversely, Solyco argues that GrowMI knew of its relationship with Lightning and has filed these lawsuits to publicly discredit Solyco and interfere with its relationship with Lightning. According to Solyco, GrowMI has acted maliciously and without legal justification in its attempt to sever Solyco's relationship with Lightning so that Jeffrey Owen can win a proxy contest for control of Lightning. Solyco also contends that GrowMI is using the existence of its RICO lawsuit in the Eastern District of Michigan in an attempt to damage Solyco's reputation. Solyco maintains that GrowMI is portraying Solyco as a corporate raider while it is covering up Jeffrey Owen's misdeeds with company money.

Solyco argues further that GrowMI could have provided a payoff letter for the satisfaction of Lightning's obligation, however, it chose not to. Additionally, GrowMI's refusal to collect from Jeffrey Owen under the personal guarantee is another example of its attempts to protect Owen and ensure that he remains CEO of Lightning. As a result of GrowMI's conduct, Solyco contends that it has been damaged.

In its Reply, GrowMI reiterates its argument that Solyco has failed to plead a valid business relationship or expectancy between Solyco and Lightning. Additionally, Lightning had already

breached its obligations with Solyco before GrowMI filed any action to pursue its legitimate business interests. GrowMI argues further that Solyco has failed to plead any malice on its part as GrowMI attempts to recoup monies from Lightning pursuant to the loan agreements.

In its Counterclaim, Solyco alleges that “[a]t the express request of Lightning CEO Jeffrey Owen, Solyco loaned Lightning hundreds of thousands of dollars pursuant to a series of promissory notes and other agreements, all of which are currently overdue.” See Paragraph 2 of Solyco’s Counterclaim. Under MCR 2.113(C)(1), however, a written instrument, upon which a claim or defense is based, must be attached to the pleading (with certain exceptions). Clearly, Solyco has not attached any promissory note or loan agreement to its Counterclaim. In fact, Solyco even implies in its Response that if there were no written contracts, it would still have a claim due to its business relationship or expectancy with Lightning. On account of its equivocal pleadings and noncompliance with MCR 2.113(C)(1), Solyco has not satisfied the elements of tortious interference with a contract due to its failure to demonstrate the existence of a contract.

In relation to Solyco’s tortious interference with a business expectancy claim, it is not disputed that GrowMI had knowledge of the relationship between Solyco and Lightning. The issue appears to be whether there was an intentional interference by GrowMI inducing or causing a breach or termination of the relationship between Solyco and Lightning.

In Paragraph 24 of the Counterclaim, Solyco alleges that “[b]etween 2018 and 2019, Solyco provided thousands of hours of consulting services to Lightning for which it was not regularly paid.” Solyco alleges further that “[t]hroughout the same period, Owen regularly pleaded with Solyco to inject capital into Lightning ostensibly to allow Lightning to grow its operations. Solyco ultimately facilitated more than \$1 million in additional short term loans to Lightning.” See Paragraphs 30-31 of the Counterclaim. Thereafter, Solyco alleges in Paragraph 49 of its Counterclaim that Grow called Lightning’s loan and demanded immediate repayment on

March 17, 2020. Based upon the allegations, the Court agrees with GrowMI's argument that Lightning's breach of its obligations to Solyco occurred prior to March 17, 2020 when GrowMI demanded immediate repayment of Lightning's loan. Thus, Solyco's allegations do not support the claim that GrowMI intentionally interfered by inducing or causing a breach of the relationship between Solyco and Lightning. That breach had already occurred prior to GrowMI's demand for repayment of the Lightning loan obligations.

The Court notes further that many of the allegations in Solyco's Counterclaim are aimed directly at nonparty individuals Jeffrey Owen, Patrick O'Keefe, and Bhrat Bhise.² The following allegations, however, are related to the purported actions of GrowMI:

49. On March 17, 2020, Grow called Lightning's loan and demanded immediate repayment on the ostensible grounds of Lightning's insolvency.

51. To be clear, Solyco has no problem with Grow legitimately attempting to secure repayment of its loan to Lightning. The issue is that Grow's other actions after calling the Lightning note suggest that it is not genuinely seeking repayment, but rather seeks to aid Owen and interfere with Solyco's investments.

54. Grow has attempted to use its position as Lightning's senior lender (a position which is outside the scope of Grow's role as a subordinated lender charged with supporting small and medium businesses under grants from the State of Michigan) to disable Lightning from taking any action, including to pay Solyco the amounts it owed for both its consulting services and on the Lightning debt it holds.

56. As further evidence of Grow's true purpose in calling the Lightning loan and attempting to freeze Lightning's ability to pay other creditors, during the proxy contest Grow spent weeks refusing even to provide a standard payoff letter to Lightning that would allow Lightning to pay off Grow's loan. It only provided that letter recently, after the shareholder vote was concluded.

60. The fact that Grow is taking these actions with the specific purpose of impairing Solyco's investment in Lightning could not be clearer from the face of its Complaint. Grow demands that Solyco repay hundreds of thousands of dollars that Solyco earned for services it provided to Lightning and it wants to prevent Solyco from recouping the additional hundreds of thousands of dollars that it has loaned to Lightning. The damage Grow seeks to inflict on Solyco is explicit.

² See Paragraphs 45-48 and 52 of Solyco's Counterclaim.

70. Grow's actions against Solyco, in concert with Owen and Bhise, are designed to impair Solyco's investments in Lightning and force Solyco to walk away from Lightning at a loss so that Owen and those close to him can continue using the Company for their illicit and improper purposes.

78. Among other things, Grow has:

- a. Demanded that Solyco repay amounts that it legitimately earned
- b. Interfered with Lightning's ability to repay other amounts owed to Solyco that are past due
- c. Prevented Lightning, Solyco, or a third party from paying off the Grow loan

80. To be clear, Solyco's claims are not based on an effort by Grow to collect on a legitimate debt. Solyco's claims are based on Grow's separate acts which demonstrate that Grow is not genuinely seeking repayment of a debt, but is maliciously and without legal justification attempting to interfere with Solyco's relationship with Lightning. These acts include:

- a. Executing an "observer rights" agreement in secret with Owen
- b. Refusing on multiple occasions to provide a payoff letter to facilitate payment of the loan Grow claimed was in default
- c. Refusing on multiple occasions to permit a third party to buy out the Grow-Lightning loan
- d. Failing to enforce the personal guarantee Owen executed in favor of Grow.

The Court is cognizant of Solyco's allegations that GrowMI has interfered maliciously with Solyco's relationship with Lightning on account of its execution of an "observer rights" agreement, refusal to provide a payoff letter to facilitate payment, refusal to permit a third party to buy out the loan, and failure to enforce Owen's personal guarantee. See Paragraph 80 of the Counterclaim. While Solyco objects to GrowMI's actions, these actions do not corroborate an improper motive or demonstrate that GrowMI acted with malice and without justification. In fact, the observer rights agreement was executed between GrowMI and Lightning on March 17, 2020 prior to the initiation of this lawsuit. See Exhibit I of the Complaint. Section 5.1(c)(iv) of the Security Agreement between GrowMI and Lightning also provides GrowMI, as lender, the right "to commence and prosecute any suit, action or proceeding at law or in equity in any court of competent jurisdiction to collect the Collateral or any part thereof and to enforce any other right in respect of any Collateral." The Security Agreement entitles GrowMI to pursue the Collateral

through litigation as well as provides GrowMI with the discretion to “settle, compromise, or adjust any suit, action or proceeding as described above.” See Section 5.1(c)(vi) of the Agreement. Pursuant to the Agreement, GrowMI utilized its discretion to demand payment from Lightning for legitimate business reasons. Based on the foregoing, Solyco has not demonstrated that GrowMI engaged in tortious interference with its business relationship or expectancy for the purpose of invading Solyco’s business relationship with Lightning.

In consideration of Solyco’s allegations concerning its Tortious Interference with Contract and Business Expectancy claim, the Court finds that Solyco has not alleged sufficient facts to survive summary disposition of Count One of its Counterclaim.

Civil Conspiracy

With respect to Count Two of Solyco’s Counterclaim, namely “Civil Conspiracy,” GrowMI argues that Solyco has failed to establish the underlying tort of tortious interference with a contract or business expectancy and so this claim must fail as well.

“A civil conspiracy is 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.” *Admiral Ins. Co. v Columbia Cas. Ins. Co.*, 194 Mich App 300, 313; 486 NW2d 351 (1992). Michigan law is well settled that “a claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort.” *Advocacy Org for Patients & Providers v Auto Club Ins Ass’n*, 257 Mich App 365, 384; 670 NW2d 569 (2003); quoting *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986).

The Court agrees with GrowMI’s argument that since Solyco cannot identify a valid underlying tort, namely its tortious interference with contract and business expectancy claim, its civil conspiracy claim must fail as a matter of law. Accordingly, and for the reasons stated herein,

GrowMI's Motion to Dismiss Defendant/Counter-Plaintiff Solyco, LLC's Counter Complaint Pursuant to MCR 2.116(C)(8) is GRANTED.

Pursuant to MCR 2.116(I)(5), "[i]f the grounds asserted are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." In accordance with MCR 2.116(I)(5), the Court shall provide Solyco the opportunity to amend its Counterclaim within two weeks of this Opinion and Order.

Plaintiff's Motion to Dismiss Defendant/Counter-Plaintiff Damian Kassab's Counter Complaint

In his Counterclaim, Damian Kassab ("Kassab") recites similar allegations as Solyco against GrowMI in relation to its purported campaign to assist Jeffrey Owen in his efforts to retain control of Lightning. It is Kassab's position that GrowMI is obstructing Lightning from paying off the loan. As such, GrowMI can utilize its creditor status to ensure Owen's control of the company. If Lightning satisfied the GrowMI loan, Kassab argues that GrowMI would no longer have a cause of action against him. Consequently, Kassab has raised one count of Abuse of Process against GrowMI in his Counterclaim.

"To recover upon 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 which is improper in the regular prosecution of the proceeding." *Friedman v Dozorc*, 412 Mich 1, 30–31; 312 NW2d 585 (1981). "[U]lterior purpose alleged must be more than harassment, defamation, exposure to excessive litigation costs, or even coercion to discontinue business." *Early Detection Ctr., P.C., v New York Life Ins. Co.*, 157 Mich App 618, 629–30; 403 NW2d 830 (1986). Regarding the improper use of process, "there must be some allegations besides the mere issuance of a summons and complaint because the action for abuse of process lies for the improper use of process after it has been issued, not for maliciously causing it to issue. Further, the pleadings must allege a use of process for a purpose

outside of the intended purpose and must allege with specificity an act which itself corroborates the ulterior motive.” *Friedman, supra*.

In its motion, GrowMI characterizes Kassab as a Lightning insider who authorized certain transfers of cash collateral from Lightning to Solyco without approval, while Lightning was insolvent, and in contravention to GrowMI’s status as the senior secured lender. GrowMI argues further that Kassab’s claim of Abuse of Process fails because the initiation of a lawsuit is not itself actionable as an abuse of process, nor has Kassab alleged any actionable ulterior motive in filing this lawsuit.

GrowMI highlights the *Friedman* Court’s denial of the plaintiff’s abuse of process claim for failing to satisfy the second element above, reasoning that “a summons and complaint are properly employed when used to institute a civil action.” *Friedman, supra* at 31. In comparison, Kassab is arguing that GrowMI has committed abuse of process by filing the instant lawsuit as well as the related lawsuits. According to GrowMI, this argument does not satisfy the second element regarding the improper use of process.

GrowMI maintains further that Kassab has failed to establish any ulterior motive by GrowMI in filing the lawsuits. While Kassab alleges that GrowMI filed this lawsuit for the ulterior purpose of assisting Owen in retaining control of Lightning, Kassab does not point to any improper use of any judicial process within this lawsuit as a corroborating act. Moreover, GrowMI asserts that Section 5.1(c)(iv) of the Security Agreement with Lightning grants it the authority “to commence and prosecute any suit, action or proceeding at law or in equity in any court of competent jurisdiction to collect the Collateral or any part thereof and to enforce any other right in respect of any Collateral.” As such, GrowMI was authorized to file this lawsuit as well as the related lawsuits as its right under the Security Agreement.

In opposition, Kassab contends that GrowMI's lawsuits were not filed with the purpose of collecting under the loan agreements, but rather to unlawfully assist Jeffrey Owen in retaining control of Lightning. Kassab specifically identifies GrowMI's purported abuse of process as: (1) cloaking Bharat Bhise, a director of Lightning in the Owen camp, with authority to represent to Kassab and others that the GrowMI litigation would disappear if the attempts to remove Owen were ceased; and, (2) refusing to provide a payout figure for the loan allowing it to be satisfied.

Kassab defers to the following allegations in his Counterclaim:

1. Kassab asserts counterclaims against GrowMI arising out of GrowMI's abuse of process in filing repetitive lawsuits against Lightning Technologies, Inc. ("Lightning" or the "Company"), Solyco, LLC ("Solyco"), Kassab and Robert Drake, with the ulterior motive of aiding and abetting Jeffrey Owen and others in fraudulently retaining control of Lightning and concealing Owen's ongoing mismanagement of the Company and his repeated breaches of fiduciary duties to the Company and its shareholders.

2. The purpose of the foregoing misconduct was to prevent the replacement of Owen as Chairman of the Board of directors and CEO of Lightning in order to conceal Owen's repeated self-dealing and violations of his fiduciary duties to Lightning. It should be noted that Owen was never actually an employee of Lightning, but rather an employee of a 1099 Contractor known as Palm International, LLC ("Palm") that provided services to Lightning. Both Owen and his personal assistant, Rosie Borowski, upon information and belief, are employees of Palm.

22. Indeed, until recently, GrowMI refused even to provide a payoff letter to Lightning that would let Lightning know the amount required to satisfy the debt to GrowMI. GrowMI has also engaged in a series of actions demonstrating that it is not guided by a desire to collect a debt owed by Lightning but rather to unjustifiably harm Kassab and elevate Owen.

23. On information and belief, GrowMI's strategy during the proxy contest, in concert with Bhise and Owen, was to paralyze the Lightning board from acting while attempting to create a scapegoat to take the blame for Owen's misconduct.

24. In fact, Bhise, one of the co-conspirators, and in collusion with Owen, O'Keefe, and GrowMI, has represented in writing that GrowMI will drop its effort to foreclose on the Lightning loan if the shareholders desist from their justified efforts to remove Owen from his leadership of the Company.

77. For his part, Bhise is involved and working in concert with GrowMI and Owen to secure Owen's position. In furtherance of GrowMI's plan and the resulting

abuse of process, Bhise announced in an email that Grow's suit and improper efforts to secure repayment would go away so long as Owen remained CEO of Lightning. Bhise's email announcement confirms that the GrowMI litigation in Oakland County is a sham.

92. After this suit was initiated by GrowMI, Owen penned a letter to shareholders specifically using this suit as a basis to urge shareholders to continue supporting him. Indeed, he specifically offered to supply shareholders with "a list of the various court documents." The letter went on to claim that GrowMI "has expressly stated that they will foreclose on the Company if Jeffrey is no longer the CEO and Chairman."

According to Kassab, these allegations all illustrate ulterior motives by GrowMI. What is more, Kassab characterizes these allegations as illegitimate aims of this litigation wherein GrowMI acted outside of the scope of the regular prosecution of the proceeding to protect Jeffrey Owen as Chairman and CEO of Lightning. Kassab argues further that factual developments in the RICO case, which was filed nine days after Kassab filed his Answer and Counterclaim, indicate that Lightning's loan is current and so GrowMI should have dismissed its state court actions. In support of these assertions, Kassab submits exhibits that cannot be considered by the Court for purposes of a (C)(8) motion.

In support of his position, Kassab relies on the case of *Three Lakes Association v Whiting*, 75 Mich App 564, 255 NW2d 686 (1977), "in which a claim survived a motion for judgment on the pleadings where plaintiff alleged that defendants initiated an action for damages against him with the purpose of causing so much trouble and expense in defending that action that plaintiff would be forced to give up his opposition to the defendant's building project. The court of appeals concluded that it could reasonably be inferred from the plaintiff's well-pleaded complaint that defendants had used process as a 'threat or a club' to achieve their collateral and improper purpose." *Sage Int'l, Ltd. v Cadillac Gage Co.*, 556 F Supp 381, 388-89 (E. Mich 1982). In the *Three Lakes* case, Defendants were also alleged to have abused the discovery process by

burdening the plaintiff with requests, increasing costs, and delaying compliance with the plaintiff's discovery requests.

In reply, GrowMI contends that it initiated litigation against Lightning to recover the amounts to which it is entitled under the loan agreements. GrowMI asserts that it initiated litigation against Kassab and Solyco to recover the monies Lightning paid to Solyco while Lightning was insolvent. Notwithstanding, Kassab attempts to argue that GrowMI is liable for abuse of process since Kassab does not agree with the steps GrowMI has taken to preserve the collateral securing its loan. As argued previously, GrowMI states that it has the right to commence legal proceedings to collect the collateral under the Security Agreement. Furthermore, GrowMI maintains that it had the right to file its RICO claim and other related litigation following Lightning's default on the loan.

Contrary to Kassab's assertions in his response, GrowMI denies that Patrick O'Keefe and Jeffrey Owen are close personal friends. GrowMI also states that sending a notice of default to Owen as opposed to the entire board of directors was proper under the operative loan documents. It is GrowMI's position that it is pursuing legitimate business interests in prosecuting Kassab and the other defendants and as such, there is no abuse of process.

As noted previously, "[t]o recover upon 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 which is improper in the regular prosecution of the proceeding." *Friedman, supra* at 30–31. "A meritorious claim of abuse of process contemplates a situation where the defendant has availed himself of a proper legal procedure for a purpose collateral to the intended use of that procedure...Furthermore, the improper ulterior purpose must be demonstrated by a corroborating act; the mere harboring of bad motives on the part of the actor without any manifestation of those motives will not suffice to establish an abuse of process." *Vallance v Brewbaker*, 161 Mich App 642, 646; 411 NW2d 808

(1987). “It is not enough that the actor have an ulterior motive in using the process of the court. It must further appear that he did something in the use of the process outside of the purpose for which it was intended...If he uses the process of the court for its proper purpose, though there is malice in his heart, there is no abuse of the process.” *Young v Motor City Apartments Ltd. Dividend Hous. Ass'n No. 1 & No. 2*, 133 Mich App 671, 682; 350 NW2d 790 (1984). (Citations omitted).

The Court is cognizant of Kassab’s allegations that GrowMI, as the senior lender, has an ulterior purpose aside from collecting the debt or preserving the collateral as a result of Lightning’s default on the subject loans. That is, GrowMI is purportedly utilizing this litigation as a means to protect Jeffrey Owen and maintain his control over Lightning. In his Counterclaim, Kassab makes specific allegations against GrowMI in support of his claim that GrowMI has an ulterior purpose in this lawsuit.

With respect to Kassab’s allegations concerning GrowMI’s refusal to provide a payoff letter, the Court agrees with GrowMI that Section 5.1(c)(iv) of the Security Agreement grants GrowMI the discretion “to commence and prosecute any suit, action or proceeding at law or in equity in any court of competent jurisdiction to collect the Collateral or any part thereof and to enforce any other right in respect of any Collateral.” Additionally, Section 5.1(c) provides GrowMI with the discretion to deal with the collateral as though it were the absolute owner, which would include decisions related to the collection of Lightning’s collateral.

Kassab does raise serious allegations that a representation was made by Bhrat Bhise, a Lightning board member, and Jeffrey Owen to the shareholders that GrowMI would not foreclose on the Lightning loan if they ceased their efforts to remove Owen as CEO of Lightning. Kassab also alleges that Bhrat Bhise announced via email that GrowMI’s lawsuit would go away if Owen remained CEO of Lightning. In addition, Kassab alleges that Owen penned a letter to Lightning’s

shareholders, claiming that GrowMI “has expressly stated that they will foreclose on the Company if Jeffrey is no longer the CEO and Chairman.” See Paragraphs 24, 77, and 92 of Kassab’s Counterclaim.

Clearly, Kassab likens this case to the *Three Lakes Association* case in which the defendants abused the court process to burden the plaintiff and create such expense that the plaintiff would be forced to give up his opposition to the defendants’ building project. Yet, Kassab’s allegations are directed at nonparty individuals who are not alleged to have legal authority or control over GrowMI. Additionally, these alleged acts were not a part of this judicial process, but rather occurred outside of the arena of this court case.

Here, Kassab has not demonstrated that GrowMI engaged in certain acts to corroborate an ulterior purpose for the protection of Jeffrey Owen and his leadership role in Lightning. “A claim asserting nothing more than an improper motive in properly obtaining process does not successfully plead an abuse of process...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*, 287 Mich App 296, 322–23; 788 NW2d 679 (2010).

Regarding the second element of an abuse of process claim, the Court defers to the *Friedman* Court’s reasoning that an action for abuse of process “lies for the improper use of process after it has been issued.” *Friedman, supra*. It is not enough that GrowMI filed a Complaint in this matter. Kassab must demonstrate that GrowMI used the judicial process after the commencement of litigation for an improper purpose. If GrowMI “uses the process of the court for its proper purpose, though there is malice in [its] heart, there is no abuse of the process.” *Young, supra*. Upon review of the allegations in the Counterclaim, the Court observes that Kassab has not been able to demonstrate that GrowMI abused the court process during the pendency of this action. While Kassab may or may not be correct in his theories regarding GrowMI’s

intentions, the allegations are not sufficient to demonstrate that GrowMI's actions constitute an improper use of process.

In consideration of Kassab's allegations concerning its Abuse of Process claim, the Court finds that Kassab has not alleged sufficient facts to demonstrate both ulterior purpose and the improper use of process to survive summary disposition of Count One of his Counterclaim. Accordingly, and for the reasons stated herein, GrowMI's Motion to Dismiss Defendant/Counter-Plaintiff Damian Kassab's Counter Complaint Pursuant to MCR 2.116(C)(8) is GRANTED.

Pursuant to MCR 2.116(I)(5), "[i]f the grounds asserted are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." In accordance with MCR 2.116(I)(5), the Court shall provide Damian Kassab the opportunity to amend his Counterclaim within two weeks of this Opinion and Order.

It is further ordered that all future filings in relation to these consolidated matters shall be effectuated in the earlier case, Case Number 2020-180564-CB.

It is further ordered that the case code for Case Number 2020-180653-PD shall be changed from "PD" to "CB."

IT IS SO ORDERED.

September 29, 2020
Date

James M. Alexander
Honorable James M. Alexander
Circuit Court Judge