STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

SARMAD BRIKHO,

Plaintiff,

vs. Case No. 2014-3977-CB

SHANT SHIRINIAN, SHIRINIAN INVESTMENTS, LLC, VAN 8 COLLISION, INC., GARY CUNNINGHAM, and GARY H. CUNNINGHAM, P.C.

Defendants.
_____/

OPINION AND ORDER

Defendants Shant Shirinian, Shirinian Investments, LLC and Van 8 Collision, Inc. ("Shirinian Defendants") have filed a motion to surcharge receivership fees to Plaintiff Sarmad Brikho ("Plaintiff"). Plaintiffs have filed a response and request that the motion be denied.

In addition, Plaintiff has filed a motion to amend his complaint. The Shirinian Defendants have filed a response and request that the motion be denied. In addition, Defendants Gary Cunningham and Gary H. Cunningham, P.C. (collectively, "Cunningham Defendants") have filed a response and request that the motion be denied.

Further, Plaintiff has filed a motion to add Courtesy Cars, Inc. as a party defendant.

Lastly, the Cunningham Defendants have filed a motion to dismiss Plaintiff's current claims against them. Plaintiff has filed a response and requests that the motion be denied.

Factual and Procedural History

In November 2014, Plaintiffs filed their original complaint in this matter. The original complaint contains the following claims: Count I- Violation of Michigan's Uniform Partnership Act, MCL 449.20 through 449.21; Count II- Conversion; Count III- Equitable Accounting; Count IV- Fraudulent Concealment and Misrepresentation; Count V- Tortious Interference with Business and Contractual Relations; Count VI- Promissory Estoppel; and Count VII- Civil Conspiracy.

On December 4, 2014, the Court entered an Order granting Defendants' motion to dissolve Choice Automotive Group, LLC ("CAG") and to appoint a receiver to liquidate its assets ("Order"). In the Order, the Court appointed Anthony J. Caputo as the receiver. Mr. Caputo has been performing various duties in connection with his role as receiver in this matter.

On December 8, 2014, the Cunningham Defendants filed their instant motion to dismiss Plaintiff's claims against them. Plaintiff has filed a response and requests that the motion be denied. In addition, the Cunningham Defendants have filed a reply brief in support of their motion. The Court has since taken the motion under advisement.

On January 6, 2015, Plaintiff filed his instant motion for leave to file a first amended complaint. Plaintiff attached a proposed amended complaint to his motion. However, Plaintiff has since filed two amended proposed first amended complaints, with the most recent being filed on April 20, 2015. In his most recent proposed amended complaint ("Proposed Complaint"), Plaintiff seeks leave to file the following claims: Count I- Member Oppression against Defendant Shant Shirinian ("Defendant Shirinian"); Count II- Breach of Fiduciary Duty against Shant Shirinian; Count III- Breach of

Fiduciary Duty against the Cunningham Defendants; Count IV- Common Law and Statutory Conversion as to Defendant Gary H. Cunningham ("Defendant" Cunningham"); Count V- Breach of Operating Agreement against Defendant Shirinian; Count VI- Breach of Oral Contract Regarding Second Joint Endeavor against Defendant Shirinian and Defendant Shirinian Investment, LLC ("Defendant Investments"); Count VII- Unjust Enrichment against Defendant Shirinian; Count VIII- Promissory Estoppel against Defendant Shirinian; Count IX- Fraudulent Misrepresentation against Defendant Shirinian and Defendant Investments; Count X- Silent Fraud/Fraudulent Concealment against Defendant Shirinian; Count XI- Civil Conspiracy against all Defendants except CAG; and Count XII- Accounting against Shirinian Defendants, Courtesy and CAG. While Defendants have filed responses to the first of Plaintiff's proposed amended complaints, Defendants have not responded to Plaintiff's motion with respect to the Proposed Complaint.

On March 16, 2015, Defendants filed their instant motion to surcharge Mr. Caputo's receivership fees to Plaintiff. Plaintiffs have filed a response and request that the motion be denied. On April 12, 2015, the Court held a hearing in connection with the motion and took the matter under advisement.

On April 20, 2015, Plaintiff filed his instant motion to amend caption and to add Courtesy Cars, Inc. ("Courtesy") as a party defendant.

On April 27, the Court held a hearing in connection with Plaintiff's motion for leave to file a first amended complaint, and Plaintiff's motion to amend caption and add party, and took the matters under advisement.

Additionally, the parties have since stipulated to the removal of CAG is a Plaintiff and to include CAG as a nominal defendant only.

The Court will address the motions in turn, beginning with Plaintiff's motion for leave to file a first amended complaint.

(1) Plaintiff's Motion for Leave to File a First Amended Complaint.

Standard of Review

MCR 2.118(A)(2) provides that leave to amend a pleading shall be freely given when justice so requires. A motion to amend ordinarily should be granted, unless one of the following particularized reasons exists: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed (4) undue prejudice to the opposing party by virtue of allowance of the amendment, and (5) futility of amendment. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000). Delay alone does not justify denying a motion to amend, but a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result. *Franchino v Franchino,* 263 Mich App 172, 191; 687 NW2d 620 (2004).

Arguments and Analysis

In their responses, Defendants contend that Plaintiff's motion should be denied as the amendment would be futile. While a trial court should freely grant leave to amend when justice so requires, leave should be denied where amending the complaint would be futile. *Jenks v Brown,* 219 Mich App 415, 420; 557 NW2d 114 (1996). An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its

face. *McNees v Cedar Springs Stamping Co*, 184 Mich App 101, 103; 457 NW2d 68 (1990).

A. Count I- Shareholder Oppression against Defendant Shirinian

Plaintiff's oppression claim is brought pursuant to MCL 450.4515(1), which provides:

> (1) A member of a limited liability company may bring an action in the circuit court of the county in which the limited liability company's principal place of business or registered office is located to establish that acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member.
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> (2) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other member interests disproportionately as to the affected member. The term does not include conduct or actions that are permitted by the articles of organization, an operating agreement, another agreement to which the member is a party, or a consistently applied written company policy or procedure.

As a preliminary matter, MCL 450.4515 ordinarily allows a member to bring actions when a manager or member engages in acts which are illegal, fraudulent or willfully unfair and oppressive toward (1) the LLC, OR, (2) the member. With respect to any actions that allegedly were illegal, fraudulent or willfully unfair and oppressive toward CAG, the Court is convinced that Plaintiff no longer has the authority to bring such claims.

On December 4, 2014, the Court appointed Mr. Caputo as the receiver for the purpose of dissolving CAG and liquidating its assets. In order to properly dissolve CAG, the Court is convinced that Mr. Caputo will need to review CAG's documentation and determine whether the CAG has any claims that should be pursued against Plaintiff, Defendant Shirinian, or any other entity/person. Although a member is authorized to bring an oppression claim based on another member or manager's actions against an LLC, the history of animosity and level of discontent between Plaintiff and Defendant Shirinian all but assure that Mr. Caputo, rather than either member, is in the best position to objectively determine whether bringing claims under MCL 450.4515 is in CAG's best interests. Consequently, Plaintiff's request for leave to amend to add oppression claims based on alleged actions which were illegal, fraudulent or willfully unfair and oppressive toward CAG will be denied.

As discussed above, MCL 450.4515 also permits a member to bring an action based on acts of a member and/or manager that were illegal, fraudulent or willfully unfair and oppressive toward a member. In *BSA Mull, LLC v Garfield Inv Co*, unpublished per curium in the Court of Appeals, decided September 30, 2014 (Docket Nos: 310989, 311911, 315359 and 315544), the Michigan Court of Appeals addressed the scope of a member's ability to bring a claim under section 515:

> The definition of "willfully unfair and oppressive conduct" as "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member" in the LLCA mirrors the definition of the same phrase as set forth in the Michigan Business Corporation Act at MCL 450**.**1489(3) with the word "shareholder" taking the place of "member." In *Franchino v Franchino*, 263 Mich App 172; 687 NW2d 620 (2004), the Court stated that "willfully unfair and oppressive conduct" refers to conduct that substantially interferes only with rights that automatically accrue to a shareholder by virtue of being a shareholder. By association, only conduct that

> substantially interferes with rights that automatically accrue to a member by virtue of being a member will be considered for purposes of determining whether such conduct was willfully unfair and oppressive. Shareholder interests typically include actions like "voting at shareholder's meetings, electing directors, adopting bylaws, amending charters, examining the corporate books, and receiving corporate dividends." *Franchino*, 263 Mich.App at 184. Again, by association, these same interests could be deemed typical of a member in an LLC.

In his proposed amended complaint, Plaintiff alleges that Defendant Shirinian has engaged in a continuing course of conduct or a significant action or series of actions that have substantially interfered with his membership interest in CAG. (*See* Proposed Complaint, at ¶85.) Specifically, Plaintiff alleges that Defendant Shirinian has willfully oppressed his interest as a member of CAG by engaging in the activities set forth in paragraphs 39-40, 43, 45-56, 64-73 and 78-80 of the proposed complaint. (*See* Proposed Complaint, at ¶ 82.)

Many of Plaintiff's allegations with respect to his oppression claim are based on Defendant Shirinian's breaches of CAG's operating agreement. However, all but one of the alleged breaches address harm caused to CAG in general, rather than to Plaintiff's interest as a member in particular. (*See* ¶45(a), (b), (d)-(h) of the Proposed Complaint.) Consequently, the Court is satisfied that such allegations may not form the basis for Plaintiff's oppression claim. Moreover, a failure to comply with an operating agreement "is tantamount to a breach of contract" and "[i]t does not equate to a breach of contract…….. *BSA*, unpub op at 5. For these reasons, the Court is convinced that the allegations contained in¶45(a), (b), (d)-(h) of the Proposed Complaint cannot form the basis for Plaintiff's proposed oppression claim.

Plaintiff also alleges that Defendant Shirinian locked CAG's books and records in a place where Plaintiff could not access them (*See* Proposed Complaint, at ¶43, 45(c),

46). The only authority, other than the operating agreement, which grants a member a right to access an LLC's books and records is MCL 450.4503. However, MCL 450.4503 conditions a member's right to inspect certain documents on first making a written request. In his proposed complaint, Plaintiff does not allege that he made a written request and that the demand was denied. Consequently, Plaintiff has failed to allege that he has been deprived of his rights under section 503. Moreover, to the extent that Plaintiff alleges that his right to access CAG's records under the operating agreement has been oppressed, he has failed to allege that he ever attempted, prior to this litigation, to inspect any books or records without success. For these reasons, Plaintiff's allegations related to his right to inspect CAG's books and records may not, as alleged, form the basis for an oppression claim.

The majority of Plaintiff's remaining alleged bases for his oppression claim relate either to Defendant Shirian's failure to satisfy his duties under a contract (¶31, 39, 78-80) or that Defendant Shirinian used his control of CAG for his personal benefit (¶47-48, 50), the benefit of other entities he had an interest in (¶40, 49, 51, 53-56), or his family and friends (¶52). However, even if proven, entering into contracts that were not in CAG's best interest affects CAG as a whole rather than Defendant Shirinian's interest in particular. Consequently, the Court is convinced that paragraph 40 may not form the basis for Plaintiff's oppression claim.

Additionally, ¶57-67, 69-73 addresses various actions taken by Defendant Cunningham rather than Defendant Shirinian. It is undisputed that Defendant Cunningham is not, and has never been, a member or manager of CAG. Consequently, actions taken by Defendant Cunningham cannot form the basis for an oppression claim.

Based on the reasoning set forth above, the Court is convinced that Plaintiff's request for leave to add a claim for shareholder oppression must be denied.

B. Breach of Fiduciary Duty

In his proposed complaint, Plaintiff alleges that Defendant Shirinian, as a co-member of CAG, owed him a fiduciary duty, that Defendant Shirinian breached his fiduciary duty, and that he has suffered damages as a result of Defendant Shirinian breaching his fiduciary duty.

The initial issue is whether a member of an LLC owes his co-member a fiduciary duty. Under Michigan common law governing corporations, a majority or controlling shareholder is a fiduciary and holds a duty to the corporation and its minority shareholders to act in good faith. *Salvador v Connor*, 87 Mich App 664, 675; 276 NW2d 458 (1979). Specifically, Michigan Courts have recognized two types of situations in which a minority shareholder may maintain a breach of fiduciary duty claim against a majority shareholder: (1) When he has sustained a loss separate and distinct from that of other stockholders generally [*Christner v Anderson, Nietzke & Co, PC*, 433 Mich 1, 9; 444 NW2d 779 (1989)], and (2) When he can show a violation of a duty owed directly to him that is independent of the corporation. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 464; 666 NW2d 271 (2003).

In *Dawson v Delisle*, unpublished per curium opinion of the Court of Appeals, decided July 21, 2009 (Docket No. 283195), the Michigan Court of Appeals applied the common law to the context of an LLC. Specifically, the Court acknowledged that the two situations that would allow a minority shareholder to pursue a breach of fiduciary duty claim in the context of corporations would also allow a member to bring a breach of

fiduciary duty claim against a majority member. *Dawson*, supra, at 4, citing *Belle Isle*, *supra*, and *Michigan Nat'l Bank v Mudgett*, 178 Mich App 677, 679, 444 NW2d 534 (1989). While the Court in *Dawson* ultimately found that the plaintiff had failed to allege facts fitting into either situation, the fact remains that under certain circumstances a minority member may maintain a breach of fiduciary duty claim against a majority member.

While it remains to be seen whether Plaintiff will be able to establish that Defendant Shirinian breached his fiduciary duty to him, the Court is convinced that Plaintiff has sufficiently plead a claim for breach of fiduciary duty. As a result, his motion for leave to add Count II of the proposed complaint will be granted.

C. Breach of Fiduciary Duty against Defendant Cunningham and Defendant Cunningham, P.C.

As a preliminary matter, Plaintiff has failed to allege that he has satisfied the requirements for bring a derivative action on behalf of CAG. Consequently, the extent Plaintiff seeks to bring a breach of fiduciary duty claim against the Cunningham Defendants on CAG's behalf, the Court is convinced that such as claim, as alleged, is legally deficient and therefore futile.

The remainder of count III is based on Plaintiff's allegation that the Cunningham Defendants owe him a fiduciary duty individually. Specifically, Plaintiff alleges that his claim is based on the actions set forth in paragraphs 57-80 of the Proposed Complaint. (*See* ¶ 94 of Proposed Complaint.) While Plaintiff alleges that the Cunningham Defendants represented him in a real estate transaction (Id. at ¶60), the remainder of the allegations do not relate to that transaction. Rather, the remaining allegations relate to a real estate transaction involving the Shirinian Defendants and CAG (¶64-68), automobile

purchases on behalf of CAG (¶65-77), and an accounting of CAG (¶78-80.) The Court is convinced that none of the allegations within the Proposed Complaint relate to transactions in which Plaintiff retained the Cunningham Defendants to represent him individually. Consequently, the Court is convinced that Plaintiff has failed to state a breach of fiduciary duty against the Cunningham Defendants. Accordingly, Plaintiff's request for leave to add Count III must be denied.

D. Count IV- Common Law and Statutory Conversion against the Cunningham Defendants.

In Count IV of the Proposed Complaint, Plaintiff alleges that Defendant Cunningham utilized CAG's license without authorization for his own benefit. (*See* Proposed Complaint, at ¶97-99.) While such allegations may form the basis for CAG to file a claim against the Cunningham Defendants, Plaintiff has failed to plead that one or more of his personal assets have been converted. Consequently, the Court is convinced that Plaintiff has failed to state a claim for conversion individually. Moreover, Plaintiff has not properly attempted to bring a claim on CAG's behalf. For these reasons, Count IV of the Proposed Complaint is futile as stated.

E. Count V- Breach of Operating Agreement against Defendant Shirinian

In Count V of the Proposed Complaint, Plaintiff alleges that the operating agreement is a valid and enforceable contract, that Defendant Shirinian has breached the operating agreement, and that Defendant Shirinian's breaches have damaged Plaintiff. (*See* Proposed Complaint, at ¶101-104.) While it has yet to be determined whether the operating agreement is a valid and binding agreement, or whether Defendant Shirinian breached the operating agreement to Plaintiff's detriment, the Court is satisfied that Count V states a claim for breach of contract against Defendant Shirinian.

F. Count VI- Breach of Oral Agreement Regarding Second Joint Endeavor against the Shirinian Defendants.

Count VI relates to an alleged oral contract between Plaintiff and the Shirinian Defendants. After reviewing the proposed count, the Court is convinced that it properly states a potential basis for relief against the Shirinian Defendants.

G. Counts VII and VIII- Unjust Enrichment and Promissory Estoppel against Defendant Shirinian.

Counts VII and VIII are brought as an alternative claim in the event that alleged contract forming the basis for count VI is found to be invalid or otherwise unenforceable. Pursuant to MCR 2.111(A)(2), a plaintiff may bring alternative claims to breach of contract and implied contract. Consequently, the Court is convinced that Plaintiff's inclusion of Counts VII and VIII is permitted under Michigan Law.

H. Count IX- Fraudulent Misrepresentation against the Shirinian Defendants.

To properly plead a claim for fraudulent misrepresentation, a plaintiff must allege that (1) the defendant made a material representation; (2) the representation was false; (3) the defendant knew, or should have known, that the representation was false when he made it; (4) the defendant made the representation with the intent that the plaintiff rely on it; (5) and the plaintiff acted on the representation, incurring damages as a result. *Foreman v Foreman*, 266 Mich App 132, 141, 701 N.W.2d 167 (2005).

In Count IX of the Proposed Complaint, Plaintiff lists several statements which he alleges that Defendant Shirinian, and Shirinian Investments, through Defendant Shirinian, made which they knew were false at the time they were made. Plaintiff also alleges that the statements were made with the intention of having him rely on them, that he did in fact rely on them, and that such reliance was to his detriment. The Court is satisfied that

such allegations are sufficient to state a claim for fraudulent misrepresentation against the Shirinian Defendants.

I. Count X- Silent Fraud/Fraudulent Concealment against Defendant Shirinian

To prove silent fraud, also known as fraudulent concealment, a plaintiff must establish (1) that the defendant suppressed the truth with the intent to defraud the plaintiff and (2) that the defendant had a legal or equitable duty of disclosure. *Lucas v Awaad*, 299 MichApp 345, 363–364; 830 NW2d 141 (2013). Further, "[a] plaintiff cannot merely prove that the defendant failed to disclose something; instead, 'a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive.' " *Id.* at 364, quoting *Roberts v Saffell*, 280 Mich App 397, 404; 760 NW2d 715 (2008), aff'd 483 Mich 1089 (2009) (internal citation omitted).

In his proposed complaint, Plaintiff alleges that Defendant Shirinian had a duty to disclose the actions forming the basis for Plaintiff's shareholder oppression claim, and that he took steps to conceal his actions by failing to disclose his conduct, failing to provide an accounting, keeping books and records under lock and key. (*See* Proposed Complaint, at ¶134-135.) Plaintiff also alleges that Defendant Shirinian's concealment caused Plaintiff to have false impressions regarding their business relations. (Id. at ¶136.)

The Court is convinced that, if proven, Plaintiff has stated a viable claim for silent fraud/fraudulent concealment.

J. Count XI- Civil Conspiracy against all Defendants except CAG.

A civil conspiracy claim is only as good as the underlying tort claim; if a plaintiff fails to establish any actionable underlying tort, the conspiracy claim must also fail. *Advocacy Org for Patients & Providers v Auto Club Ins Assn*, 257 Mich App 365, 670

NW2d 569, 580 (2003). For the reasons discussed above, Plaintiff has failed to state a claim against the Cunningham Defendants. Moreover, Plaintiff has not alleged that Defendant Van 8 Collision, Inc. or proposed defendant Courtesy Cars, Inc. have committed a tort against him. Consequently, the only Defendants against whom Plaintiff has stated a viable tort claim are Defendants Shant Shirinian and Shirinian Investments, LLC. However, Defendant Shirinian Investments, LLC is controlled by Defendant Shant Shirinian. A business cannot conspire with its own agent or employees. *Hull v Cuyahoga Valley Joint Vocational Sch Dist Brd of Ed*, 926 F2d 505, 509-10 (6th Cir 1991). Accordingly, under *Hull* Defendant Shirinian can not conspire with an entity that he controls. For these reasons, Plaintiff's conspiracy claim is futile.

K. Count XII- Accounting

In their response, the Shirinian Defendants contend that Plaintiff's proposed accounting claim should be dismissed because "[a]n accounting is only necessary where discovery is insufficient to determine the amounts at issue." *Cyril J Burke, Inc v Eddy & Co Inc.*, 322 Mich 300, 51 NW2d 238 (1952). While an accounting may very well be rendered unnecessary based on the discovery that has been, or will be, conducted in connection with this matter, the Court is convinced that Plaintiff's request for an accounting as to CAG or Shirinian Investments, LLC is not futile on its face.

However, the Court is convinced that Plaintiff's claim for an accounting of Van 8 Collision, Inc. and Courtesy Cars, Inc. is futile. Plaintiff has not stated a viable claim against either party, and has failed to provide the Court with any authority that would entitled him to conduct an accounting against either party in the absence of an underlying

claim against the entity(ies). Consequently, the Court is convinced that Plaintiff's accounting claim against those two entities is futile.

(2) Plaintiff's Previous Claims against the Cunningham Defendants

The Court also recognizes that the Cunningham Defendants previously filed a motion to dismiss Plaintiff's original complaint with respect to the claim made against them. Upon reviewing the original complaint, the Court is convinced that the claims against the Cunningham Defendants must be dismissed for the same reasons as Plaintiff's proposed claims against them fail as a matter of law. Consequently, the Cunningham Defendants' original motion to dismiss must be granted.

(3) Shirinian Defendants' Motion to Surcharge Receivership Fee to Plaintiff.

In their motion, the Shirinian Defendants request that the Court enter an order charging the fees and expenses of Mr. Caputo to be the sole responsibility of Plaintiff and directing him to pay the same as when they are incurred. In support of their request, the Shirinian Defendants contend that Plaintiff has consistently refused to cooperate with the receiver and has prevented the orderly liquidation of CAG. Specifically, the Shirinian Defendants assert that Plaintiff has:

(i) Failed to turn over to the receiver the Flagstar Bank records for CAG's account;

(ii) Replaced the original CAG business records with photocopies;

(iii) Failed to return the secretary of state receipts belonging to CAG;

(iv) Failed to return CAG's 2011 and 2012 Comerica Bank statements for account ending in 5208;

(v) Failed to return one of CAG's deposit books; and

(vi) Failed to return any of the 2011 deal files concerning Summit Place Kia.

(vii) Failed to turn over certain CAG records that the receiver has requested.

In support of their assertions, the Shirinian Defendants rely on the affidavit of Sally Mersino. (*See* Exhibit C to Shirinian Defendants' Motion to Surcharge.) In her affidavit, Ms. Mersino testified that she Plaintiff has not returned many of CAG's records that he took in late 2014, and that those he did return were not in the organized form they were in when they were originally taken. (Id.) In addition, the Shirinian Defendants rely on the affidavit of J. Stott Matthews, a computer forensics expert. (*See* Exhibit D to Shirinian Defendants' Motion to Surcharge.) Mr. Matthews testified that he has not been able to identify and recover certain types of documents on CAG's servers, that an external hard drive was connected to the servers on December 15, 2014, and that he suggested that Defendants' obtain the hard drive to attempt to find more documents. (Id.)

In his response, while Plaintiff concedes that the records he delivered to Mr. Caputo were unorganized, he explains that the disorganization was due to the fact that the December 8, 2014 Order requiring him to produce the records mandated that he produce the records by 5 p.m. that day. (*See* Exhibit D to Plaintiff's response: December 8, 2014 Order.) Further, Plaintiff's counsel has represented that he has complied with all requests since he was retained in early March 2015.

Upon reviewing the record, the Court is convinced that Defendants' motion should be denied, in part, and granted, in part. The motion practice involved since this case was filed in October 2014 has been extensive, and the parties have been in contact with the Court frequently. Although the Court notes that this matter has begun to take shape since the current counsel for both sides has been retained, the fact remains that Mr.

Caputo has been involved in this matter since well before the current counsel was retained.

With regards to the documents produced in connection with the December 8, 2014 Order, the Order was necessitated by Plaintiff's failure to comply with the Court's prior order and CAG's operating agreement. Indeed, Plaintiff was to return all CAG documents to CAG's headquarters pursuant to a November 3, 2014 stipulated order. Had Plaintiff complied with the requirements of the operating agreement and the stipulated order entered in November 2014, he would not have been had to return the documents in a disheveled state. As a consequence of Plaintiff's failure to return the documents in a timely manner, the documents were ultimately return in a state that required Mr. Caputo to expend a substantial period of time organizing them. Moreover, Defendants have presented evidence that some of the documents were not returned, which has caused Mr. Caputo to expend additional time trying to find the documents he needs.

With respect to the computer equipment at issue, Plaintiff's counsel has represented to the Court that he is in the process of producing the "server" referenced in Defendants' motion. While sanctions of some sort may be appropriate in the event that the server/computer is not produced, or in the event that it is produced and it is determined that files have been deleted in an effort to hide/destroy evidence, the Court will refrain from imposing any penalty at this time with respect to that issue.

In regards to the bank records that Mr. Caputo subpoenaed from Flagstar Bank, Plaintiff's counsel has represented that Plaintiff did not have the records in his possession and had attempted to "recreate" the records by contacting a Flagstar branch. However, the receiver testified that the records Plaintiff produced were incomplete and irrelevant,

and that he was required to subpoena the relevant documents. While Plaintiff did not have the documents in his possession, Plaintiff has not presented the Court with any reason why he could not have had the documents produced via subpoena or otherwise. The fact of the matter is that Mr. Caputo ultimately was required to spend his time make extra efforts to have the documents produced.

With regards to the remaining ways in which Defendants contend Plaintiff has failed to cooperate with the receiver, Defendants have failed to produce any evidence support their assertions. Consequently, the Court is not convinced that sanctions are appropriate regarding those items.

Due to Plaintiff's unwillingness to cooperate with respect to the bank records and CAG's business records at issue in December 8, 2014 Order, the Court is convinced that Plaintiff should be required to pay a higher percentage of the receiver fees incurred in connection with the receiver's efforts to obtain those documents. In particular, the Court is convinced that the receiver's fees from December 8, 2014 to March 20, 2015 should be apportioned as follows: Plaintiff is responsible for 60% of Mr. Caputo's fees. The remaining 40% shall be paid by Defendant Shirinian. Any fees incurred after March 20, 2015 shall be apportioned as provided previously.

Conclusion

Based upon the reasons set forth above, Plaintiff Sarmad Brikho's motion for leave to amend his complaint is GRANTED, IN PART, and DENIED, IN PART. Specifically, Plaintiff's request for leave to file Count I- Member Oppression against Defendant Shant Shirinian, Count III- Breach of Fiduciary Duty against the Cunningham Defendants, Count IV- Common Law and Statutory Conversion as to Defendant Gary H.

Cunningham, and Count XI- Civil Conspiracy against all Defendants except CAG, and the portion of Count XI- Accounting relating to Defendants Van 8 Collision, Inc. and proposed defendant Courtesy Cars, Inc. is DENIED. Moreover, Plaintiff's motion to add Courtesy Cars, Inc. as a party defendant is DENIED.

Plaintiff's request for leave to filed Count II- Breach of Fiduciary Duty against Shant Shirinian, Count V- Breach of Operating Agreement against Defendant Shirinian, Count VI- Breach of Oral Contract Regarding Second Joint Endeavor against Defendant Shirinian and Defendant Shirinian Investment, LLC, Count VII- Unjust Enrichment against Defendant Shirinian, Count VIII- Promissory Estoppel against Defendant Shirinian, Count IX- Fraudulent Misrepresentation against Defendant Shirinian and Defendant Investments, Count X- Silent Fraud/Fraudulent Concealment against Defendant Shirinian, and Count XII- Accounting against the Shirinian Defendants is GRANTED.

In addition, the Shirinian Defendants' motion to surcharge receiver fees is GRANTED, IN PART, and DENIED, IN PART. The receiver's fees from December 8, 2014 to March 20, 2015 are hereby apportioned as follows: Plaintiff is responsible for 60% of Mr. Caputo's fees. The remaining 40% shall be paid by Defendant Shirinian.

Finally, Plaintiff's outstanding claims against Defendant Gary Cunningham and Cunningham, P.C. are DISMISSED.

In compliance with MCR 2.602(A)(3), the Court states this *Opinion and Order* does not resolve the last claim and does not close the case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: May 11, 2015

JCF/sr

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