STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

LIP WEST LANSING, LLC,
A Michigan limited liability company,

Plaintiff/Counter-Defendant,

vs. Case No. 22-193988-CB

KRIS KRSTOVSKI, a Michigan resident Hon. Victoria Valentine

Defendant/Counter-Plaintiff,

and,

KRIS KRSTOVSKI, a Michigan resident,
K2-WET LANDING PHASE I, LLC,
A Michigan limited liability company,
K2-LIP JV WEST LANSING, LLC, a
Michigan limited liability company,
WEST LANSING RETAIL PHASE I, LLC,
A Michigan limited liability company, and
WEST LANSING RETAIL DEVELOPMENT
II, LLC, a Michigan limited liability company,

Defendants.

OPINION AND ORDER REGARDING LIP WEST LANSING, LLC'S MOTION FOR SUMMARY DISPOSITION OF KRIS KRSTOVSKI'S COUNTERCLAIM PURSUANT TO MCR 2.116(C)(7) AND (8)

At a session of Court
held in Oakland County, Michigan
on 7/6/2023
PRESENT: HON. VICTORIA A. VALENTINE

The matter before the Court is on Plaintiff/Counter-Defendant LIP West Lansing LLC's ("LIP") Motion for Summary Disposition, seeking to dismiss Defendant/Counter-Plaintiff Kris Krstovski's ("Krstovski") 2-count counterclaim. Krstovski filed a Response to

which LIP filed a Reply. The parties then appeared before the Court for oral argument on May 17, 2023, at which time the Court took the motion under advisement.

The Court has reviewed the pleadings as well as the Motion, Response, and Reply, and heard oral argument on the above-entitled motion. For the reasons set forth below and as set forth in LIP's response, LIP's motion is GRANTED under MCR 2.116(C)(8) and DENIED under MCR 2.116(C)(7).

BACKGROUND

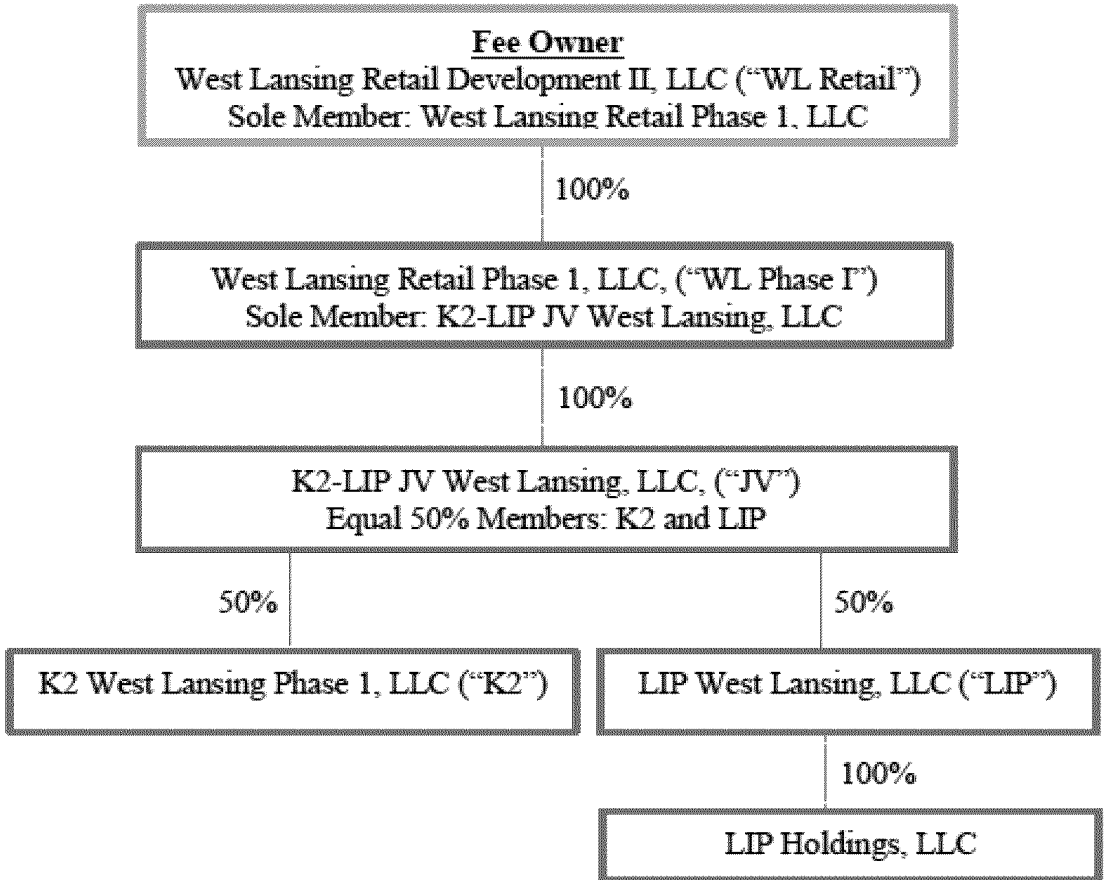
On May 5, 2022, LIP filed its complaint[1] against Krstovski and others alleging:

- member oppression
- breach of operating agreement and
- breach of fiduciary duty

On June 22, 2022, Krstovski filed his 2-count Counterclaim[2] and his Answer to LIP's Complaint.[3] Krstovski's 7-paragraph Counterclaim against LIP alleges Tortious Interference with Contractual Relations and Aiding and Abetting Breach of Fiduciary Duty, and specifically "incorporates his answer to LIP's complaint by reference."[4]

Because there are many related underlying legal entities and parties involved, below is a chart illustrating the relationship between LIP, K2, JV, WL Phase I, and WL Retail,[5] to which Krstovski admitted in his Answer to LIP's Complaint that is incorporated into his Counterclaim:[6],

[1] LIP's MSD Exhibit 3: Complaint.
[2] LIP's MSD Exhibit 1: Counterclaim.
[3] LIP's MSD Exhibit 2: Answer.
[4] LIP's MSD Exhibit 1: Counterclaim ¶1.
[5] This is the structure of these companies prior to the Court's September 7, 2022, Receivership Sale Order.
[6] LIP's MSD Exhibit 2: Answer ¶¶ 13-16; see also LIP's Brief, p 3.



LIP brings this motion for summary disposition under MCR 2.116(C)(7), based on collateral estoppel and under MCR 2.116(C)(8), arguing:

- Krstovski lacks standing and is not the real party in interest to assert claims seeking to redress injuries to JV, WL Phase 1, or WL Retail;
- Krstovski's claim for intentional interference with contractual relations fails as a matter of law on its merits; and
- Krstovski's claim for aiding and abetting a breach of fiduciary duty fails on its merits and is barred by collateral estoppel.

STANDARD OF REVIEW

"Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by res judicata or collateral estoppel." *Allen Park Retirees Ass'n v City of Allen*

Park, 329 Mich App 430, 443-44 (2019), *citing Washington v Sinai Hosp of Greater Detroit,* 478 Mich 412, (2007). A party is not required to submit any material in support of a motion under MCR 2.116(C)(7); the motion can be evaluated on the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119 (1999). “The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant.” *Id.* “A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence.” *Maiden*, 461 Mich at 119. “In reviewing the motion, a court must review all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them.” *Yono v Dep’t of Transp (Yono I),* 495 Mich 982, 982-983 (2014); see also MCR 2.116(G)(5).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood,* 461 Mich 109, 119, 597 NW2d 817 (1999). All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dep't of Corrections,* 439 Mich 158,162,483 NW2d 26 (1992). A motion under MCR 2.116(C)(8) 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.* at 163. When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

If a summary disposition motion is based on MCR 2.116(C)(8), the court must give the parties an opportunity to amend their pleadings as provided in MCR 2.118, unless evidence before the court shows that an amendment would be unjustified. MCR

2.116(I)(5). "[A]n amendment is not justified if it would be futile." *Liggett Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 138 (2003).

ANALYSIS

Collateral Estoppel

For collateral estoppel to apply, there are three general requirements: "(1) 'a question of fact essential to the judgment must have been actually litigated and determined by a valid and *final judgment'*; (2) 'the same parties must have had a full [and fair] opportunity to litigate the issue'; and (3) 'there must be mutuality of estoppel.'" *Monat v State Farm Ins Co*, 469 Mich 679, 682-684 (2004), quoting *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3 (1988) (alteration in original). (Emphasis added).

Here, LIP argues that Krstovski's claim for aiding and abetting a breach of fiduciary duty is barred by collateral estoppel by virtue of Judge Anderson's October 3, 2022, Order in Oakland County case no. 2022-194818-CK,[7] which granted Defendant Daniel Kukes's Motion for Summary Disposition. There, Judge Anderson dismissed with prejudice Krstovski's Amended Complaint[8] against Daniel Kukes, finding that Krstovski lacked standing to sue for *inter alia* breach of fiduciary duty. On October 24, 2022, Krstovski filed a claim of appeal from Judge Anderson's Order.[9] Consequently, Judge Anderson's Order in case 2022-194818-CK is not final because it is on appeal. "A decision is final when all appeals have been exhausted or when the time available for an appeal has passed." *Bryan v JPMorgan Chase Bank*, 304 Mich App 708, 715-716 (2024).

[7] LIP's MSD Exhibit 6: Order in Oakland County Case no. 2022-194818-CK.
[8] LIP's MSD Exhibit 5: Amended Complaint in Oakland County case no. 2022-194818-CK.
[9] COA Case no. 363511.

Consequently, collateral estoppel does not apply, and LIP's motion under MCR 2.116(C)(7) is DENIED.

Standing/Real Party in Interest

"'[A]lthough the principle of statutory standing overlaps significantly with the real-party-in-interest rule, they are distinct concepts.'" *Maki Estate v Coen,* 318 Mich App 532, 539 n 1 (2017), *quoting In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 355 (2013) (alteration in original). "The principle of statutory standing is jurisdictional; if a party lacks statutory standing, then the court generally lacks jurisdiction to entertain the proceeding or reach the merits." *In re Beatrice Rottenberg Living Trust*, 300 Mich App at 355. "In contrast, the real-party-in-interest rule is essentially a prudential limitation on a litigant's ability to raise the legal rights of another." *Id*.

Standing generally references a plaintiff's right to invoke the trial court's power to adjudicate a claimed injury. *Connell v Lima Twp*, 336 Mich App 263, 289 (2021). In *Trademark Prop of Mich, LLC v Fannie Mae*, 308 Mich App 132, 136-137 (2014), the Court of Appeals explained the doctrine as follows:

> The purpose of the standing doctrine is to assess whether a litigant's interest in the issue is sufficient to ensure sincere and vigorous advocacy. That is, the objective of the standing requirement is to ensure that only those who have a substantial interest will be allowed to come in to court to complain. When a party's standing is challenged in a case, the question is whether that person is a proper party to request adjudication of the issue, not whether the issue is justiciable. Standing in no way depends on the merits of the case. When a cause of action exists under law, or when the Legislature has expressly conferred standing, those circumstances are sufficient to establish standing. [citations and quotation marks omitted.]

In *Lansing Sch Ed Ass'n v Lansing Bd of Ed,* 487 Mich 349, 372 (2010), our Supreme Court addressed how to determine whether a litigant has standing:

> We hold that Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan's longstanding historical approach to standing. Under this approach, a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

Legal actions must be prosecuted in the name of the real party in interest. MCL 600.2041; MCR 2.201(B). "A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another." *BCBSM v Eaton Raps Community Hosp*, 221 Mich App 301, 311 (1997). "The real-party-in-interest rule recognizes that litigation should be begun only by a party having an interest that will [ensure] sincere and vigorous advocacy." *Olin v Mercy Health Hackley Campus,* 328 Mich App 337, 345 (2019) (quotation marks and citation omitted). "The rule also protects the defendant by 'requiring that the claim be prosecuted by the party who by the substantive law in question owns the claim asserted' against the defendant.'" *Id*. at 345, *quoting In re Beatrice Rottenberg Living Trust,* 300 Mich App at 356. MCR 2.201(C) governs an individual's or an entity's capacity to sue or be sued. "[T]he defense that a plaintiff is not the real party in interest is not the same as the legal-capacity-to-sue defense." *Olin*, 328 Mich App at 355 (quotation marks and citations omitted). "A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Barclae v Zarb*, 300 Mich App 455, 483 (2013).

It is well-established that "[a] corporation is its own 'person' under Michigan law, an entity distinct and separate from its owners, even when a single shareholder holds ownership of the entire corporation." *Salem Springs, LLC v Salem Twp*, 312 Mich App 210, 222 (2015)*, quoting, Hills & Dales v Pantig,* 295 Mich App 14, 20 (2011).

Generally, "a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort, must be brought in the name of the corporation and not that of a stockholder, officer, or employee." *Michigan National Bank v. Mudgett*, 178 Mich App 677, 679 (1989); see also *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 474 (2003). There were two exceptions to this general rule in distinguishing between a direct and derivate shareholder suit where:

> (1) the individual "has sustained a loss separate and distinct from that of other stockholders generally," *Christner v. Anderson, Nietzke & Co., P.C.*, 433 Mich. 1, 9, 444 N.W.2d 779 (1989) (quotation marks omitted), or where (2) the individual shows a "violation of a duty owed directly to the individual that is independent of the corporation," *Belle Isle Grill*, 256 Mich.App. at 474, 666 N.W.2d 271; see also *Mudgett*, 178 Mich.App. at 679-680, 444 N.W.2d 534.

Recently, the Michigan Supreme Court in *Murphy v Inman,* 509 Mich 132, 165 (2022), clarified these two exceptions, holding that:

> [I]n order to distinguish between direct and derivative actions brought by shareholders of a corporation in Michigan, courts must ask (1) who suffered the alleged harm, and (2) who would receive the benefit of any remedy recovered. The second question logically follows from the first. If the answer to both questions is the corporation, the action is derivative. If the shareholder suffers the harm independent of the corporation and receives the remedy rather than the corporation, the action is direct.[10]

[10] "Although a limited liability company is not a corporation under Michigan law, *Alliance Obstetrics & Gynecology, PLC v Treasury Dep't,* 285 Mich App 284, 288, 776 NW2d 160 (2009), it is nonetheless true that the rules regarding corporate form apply equally to limited liability companies." *Salem Springs, LLC v Salem Twp*, 312 Mich App at 223.

Here, Krstovski's counterclaim alleges the following harm:

> 5. As a proximate result of LIP's interference, Krstovski has suffered damages substantially in excess of $25,000, including, but not limited to, lost profits that will be delayed or eliminated because of any delay in completion of the Project, (b) carrying costs which Krstovski would not have incurred but for the interference, and (c) expenses that Krstovski would not have been required to pay but for the interference.

He also alleges that LIP has "purported to prohibit Krstovski from taking actions necessary to the successful development of the Project, for the ulterior purpose of promoting the self-interest of Daniel Kukes."[11]

Yet, Krstovski admits in his Answer[12] to LIP's Complaint,[13] which is incorporated into his counterclaim,[14] that the "*Project*," is not owned by him; rather it is owned by WL Retail:

> 12. WL Retail is the owner of a commercial property in Delta Township, Michigan (the "Property") that is currently being developed as a mixed-use retail shopping center and, when completed, will consist of approximately 400,000 square feet of retail space (the "Project").

Krstovski also admits that the sole member of WL Retail, the *Project's* owner, is WL Phase I,[15] whose sole member is JV,[16] which in turn is owned equally by K2 and

[11] LIP's MSD Exhibit 1: Counterclaim ¶ 2.
[12] LIP's MSD Exhibit 2: Answer ¶ 12.
[13] LIP's MSD Exhibit 3: Complaint ¶ 12.
[14] LIP's MSD Exhibit 1: Counterclaim ¶ 1.
[15] LIP's MSD Exhibit 3: Complaint ¶ 13; LIP's MSD Exhibit 2: Answer ¶ 13; and LIP's MSD Exhibit 1: Counterclaim ¶ 1.
[16] LIP's MSD Exhibit 3: Complaint ¶ 14; LIP's MSD Exhibit 2: Answer ¶ 14; and LIP's MSD Exhibit 1: Counterclaim ¶ 1.

LIP.[17] And while Krstovski is a *co-manager* of JV, JV's equal members are K2[18] and LIP.[19]

Further, Article 5.13 of JV's Operating Agreement[20] provides that all property is owned by the *Company*;[21] not by Krstovski individually:

> **5.13. Title to Company Property**
>
> All property owned by the Company shall be owned by the Company as an entity and, insofar as permitted by applicable law, no Member or Manager shall have any ownership interest in any Company Property in its individual name or right and, each membership or other ownership interest in the Company shall be personal property for all purposes.

And Articles 4.1 and 4.3 of JV's Operating Agreement respectively allocates JV's profits and losses to its *members* and distributes "Net Cash Flow of the Company to the *Members*" -- i.e., LIP and K2—not to Krstovski individually.

The Court agrees with LIP that based on the above, including the above referenced Articles of JV's Operating Agreement, Krstovski has no *individual* interest in JV's assets or property, or in any profits, losses, or distributions from the Company relating to the "Project." Rather, as LIP argues, the alleged losses are suffered through a series of entities *legally distinct* from Krstovski.

> In short, any injury to K2, JV, WL Phase I, or WL Retail relating to the Project is an injury to one or more of those entities - not Krstovski individually. Krstovski, individually, is three-entities removed from WL Retail - the entity that *could claim* to have directly "suffered the

[17] LIP's MSD Exhibit 3: Complaint ¶ 15; LIP's MSD Exhibit 2: Answer ¶ 15; and LIP's MSD Exhibit 1: Counterclaim ¶ 1.
[18] Krstovski is the managing member of K2 which is owned 50% by Krstovski and 50% by non-party Jerome Masakowski. LIP's MSD Exhibit 3: Complaint ¶ 17.
[19] Daniel Kukes is the managing member of LIP, which is 100% member-owner of LIP. LIP's MSD Exhibit 3: Complaint ¶ 16.
[20] LIP's MSD Exhibit 4, Exhibit A attached thereto: Operating Agreement.
[21] The Operating Agreement defines "Company" to mean "K2-LIP JV WEST LANSING, LLC, the limited liability company organized and operated pursuant to this Agreement." See LIP's MSD Exhibit 4, Exhibit A attached thereto: Operating Agreement ¶ 1.10.

> alleged harm, and ... who would receive the benefit of any remedy recovered," based on lost profits due to the delay of the "Project."[22]

Accordingly, the Court finds that Krstovski, individually is not the one (1) who suffered the alleged harm, and (2) who would receive the benefit of any remedy recovered. *Murphy v Inman,* 509 Mich at 165. Therefore, because Krstovski does not own the claim, LIP's Motion for Summary Disposition under MCR 2.116(C)(8) is GRANTED as Krstovski lacks standing and is not the real party in Interest as to the claim of tortious interference of a contract.

Tortious Interference of a Contract

In Michigan, "[t]he 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." *Health Call of Detroit v Atrium Home & Health Care Servs,* 268 Mich App 83, 90 (2005). A party may allege an unjustified instigation of a breach in only one of two ways: either (1) "the intentional doing of a *per se* wrongful act" or (2) "the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights ...of another." *Knight Enters v RPF Oil Co,* 299 Mich App 275, 280 (2013) (citation omitted). A wrongful *per se* act is an act that is inherently wrongful or an act that "[could] never be justified under <u>any</u> circumstances." *Id.* "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." *Id.*

Further, a claim for tortious interference under Michigan law requires plaintiff to plead and to establish "that the defendant was a 'third party' to the contract or business

[22] LIP's Brief, p 12.

relationship." *Reed v Mich Metro Girl Scout Council,* 201 Mich App 10, 13 (1993). "It is now settled law that *corporate agents* are not liable for tortious interference with the corporation's contracts *unless they acted solely for their own benefit with no benefit to the corporation." Reed,* 201 Mich App at 13 (emphasis added).

Here, Krstovski's counterclaim[23] against LIP alleges that:

> COUNT I - INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS
>
> 3. Krstovski incorporates the allegations of paragraphs 1 and 2 of his counterclaim.
>
> 4. Using illegal, unethical or fraudulent means as described in Krstovski's answer to complaint, LIP has interfered in the Operating Agreement of the JV between Kukes and Krstovski.
>
> 5. As a proximate result of LIP's interference, Krstovski has suffered damages substantially in excess of $25,000, including, but not limited to, lost profits that will be delayed or eliminated because of any delay in completion of the Project, (b) carrying costs which Krstovski would not have incurred but for the interference, and (c) expenses that Krstovski would not have been required to pay but for the interference.

And paragraph 31 of Krstovski's Answer provides in part, "[w]hile Kukes has disagreed with Krstovski's proposed course of action, his disagreement does not result from any legitimate difference of opinion as to the manner in which the management of JV, WL Phase 1, and WL Retail should be conducted, but instead because of Kukes' desire to promote his self-interest at the expense of these entities."[24]

Krstovski, therefore, argues "LIP should not be able to evade the actions of its corporate agent, Kukes, who has intentionally interfered with JV's Operating Agreement

[23] LIP's MSD Exhibit 1: Counterclaim ¶¶ 3-5.
[24] LIP's MSD Exhibit 2: Answer ¶ 31.

for Kukes's own benefit with no benefit to JV. Kukes is clearly a corporate agent of LIP, which has a 50% membership interest in JV."[25]

Krstovski's tortious interference claim, however, is not against the corporate agent, which is allegedly Daniel Kukes.[26] Rather, it is against LIP, which is undisputedly a party to JV's Operating Agreement as one of JV's two members. Based on the above, and independent of lack of standing/real party in interest issue, the Court finds that LIP is not a "third party" to JV's Operating Agreement. As a result, the Court grants LIP's motion for summary disposition under MCR 2.116(C)(8) as to the claim for intentional interference with JV's Operating Agreement.

Aiding and Abetting a Breach of Fiduciary Duty

Under the Limited Liability Company Act (LLCA) a "manager" is a person "designated to manage the limited liability company pursuant to a provision in the articles of organization stating that the business is to be managed by or under the authority of managers." MCL 450.4402(2)(o). Under MCL 450.4404(1), a "manager shall discharge his or her duties as a manager in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner he or she reasonably believes to be *in the best interests of the limited liability company*." (Emphasis added).

With regard to fiduciary relationships, it has been held:

> Limited liability companies involve fiduciary relationships. See Am Jur 2d, Limited Liability Companies, § 11; cf. *Salm v. Feldstein,* 20 A.D.3d 469, 469-470, 799 N.Y.S.2d 104 (2005) (managing member of limited liability company owed fiduciary duty to **co-member** to disclose all

[25] Krstovski's Brief in Response, p 12.
[26] Apparently, Krstovski had filed a claim against Kukes for tortious interference in Oakland County case no. 2022-194818-CK, which was dismissed with prejudice, and which is on appeal.

> material facts before purchasing the co-member's interest in the company). "When a fiduciary relationship exists, the fiduciary has a duty to act for the benefit of the principal regarding matters within the scope of the relationship." *Prentis Family Foundation, Inc v. Barbara Ann Karmanos Cancer Institute,* 266 Mich.App. 39, 43, 698 N.W.2d 900 (2005). The LLCA's requirement that a manager discharge duties "in the best interests of the limited liability company," MCL 450.4404(1), **indicates that a manager's fiduciary duties are owed to the company, not the individual members.** Cf. *Remora Investments, LLC v. Orr,* 277 Va. 316, 673 S.E.2d 845 (2009) (Virginia statutory law containing similar "best interests of the limited liability company" provision did not provide a basis for member to bring a claim for breach of fiduciary duty directly against another manager or member).

Dawson v DeLisle. 2009 WL 2168887 (emphasis added).[27]

Michigan "recognizes a cause of action for aiding and abetting a breach of fiduciary duty." *Nicholl v Torgow*, 330 Mich App 660, 675 (2019). A third party who participates with another in violating that person's fiduciary duty is liable to the beneficiary. *Id.* (citing *LA Young Spring & Wire Corp v Falls*, 307 Mich 69, 106, 11 NW2d 329 (1943)). Nevertheless, this claim hinges on the existence of the underlying tort.

Here, Krstovski's aiding and abetting claim asserts that "LIP has aided and abetted in Kukes' breach of fiduciary duty that he owed to Krstovski."[28] Consequently, Krstovski must establish the existence of the underlying fiduciary duty Kukes owed to Krstovski individually to sustain this claim.

Under the JV'S Operating Agreement, Krstovski and Kukes are its co-managers,[29] and only LIP West Lansing LLC ("LIP") and K2 West Lansing Phase I, LLC ("K2") are its

[27] Although Unpublished decisions of this Court are not binding, MCR 7.215(C)(1), they can be "instructive or persuasive," *Paris Meadows, LLC v City of Kentwood*, 287 Mich App136 n 3,(2010).
[28] LIP's MSD Exhibit 1: Counterclaim ¶7.
[29] Kukes became co-manager of JV following Kevin Baker's death in July. See LIP's MSD Exhibit 3: Complaint ¶ 19; LIP's MSD Exhibit 4: Operating Agreement Section 5.1(C).

members.[30] And pursuant to Article 5.4 of JV''s Operating Agreement,[31] the managers owe a fiduciary duty to the *Company and its Members,* not to the managers:

> G. The Managers shall be under a fiduciary duty to conduct the affairs of the Company in the best interests of the Company and of the Members, including the safekeeping and use of all Company funds and assets and the use thereof for the exclusive benefit of the Company.

In fact, Krstovski admits in his Answer to LIP's Complaint, which is incorporated into his Counterclaim, that "LIP and K2 are the only members of JV, each owning a 50% membership interests [sic] in JV."[32] And certainly Krstovksi is not the "Company," which is defined in the Operating Agreement to mean "K2-Lip JV West Lansing LLC."[33]

Because this is a (C)(8) motion, the Court is limited to the pleading. Because a claim for Aiding and Abetting Breach of Fiduciary Duty hinges on the existence of an underlying fiduciary duty, the Court finds, independent of the lack of standing/real party in interest issue, that Krstovski has neither alleged nor identified the existence of the requisite underlying fiduciary duty Kukes, as co-manager of JV, owed to Krstovski individually, who is also co-manager of JV. As a result, the Court grants LIP's motion for summary disposition under MCR 2.116(C)(8) as to the aiding and abetting the breach of fiduciary duty count.

Lasty, Krstovski seeks leave to Amend its Counterclaim. As previously noted, if a summary disposition motion is based on MCR 2.116(C)(8), the court must give the parties an opportunity to amend their pleadings as provided in MCR 2.118, unless evidence before the court shows that an amendment would be unjustified. MCR 2.116(I)(5). "[A]n

[30] LIP's MSD Exhibit 4, Exhibit A attached thereto: Operating Agreement.
[31] LIP's MSD Exhibit 4, Exhibit A attached thereto: Operating Agreement.
[32] LIP's MSD Exhibit 2: Answer ¶15 and Exhibit 3: Complaint ¶15.
[33] LIP's MSD Exhibit 4: Operating Agreement.

amendment is not justified if it would be futile." *Liggett Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 138 (2003).

Krstovski may Amend his Counterclaim solely to identify the underlying fiduciary duty owed to him, which is needed to establish his Aiding and Abetting a Breach of Fiduciary Duty claim.

CONCLUSION

IT IS HEREBY ORDERED, for the reasons set forth above:

- LIP's motion under MCR 2.116(C)(7) is DENIED as the doctrine of collateral estoppel does not apply;
- LIP's motion under MCR 2.116(C)(8) is GRANTED as Krstovski lacks standing and is not the real party in interest to assert claims seeking to redress injuries to JV, WL Phase 1, or WL Retail;
- LIP's motion under MCR 2.116(C)(8) is GRANTED as to Krstovski's claim for intentional interference with contractual relations; and
- LIP's motion under MCR 2.116(C)(8) is GRANTED as to Krstovski's claim for aiding and abetting a breach of fiduciary.
- Krstovski may amend his Counterclaim within 14 days of the date of this Order as indicated above.

This is not a final order and does not close out the case.

IT IS SO ORDERED.

SEAL OF THE 6TH CIRCUIT COURT
/s/Victoria A. Valentine
OAKLAND COUNTY MICHIGAN