

NORTH CAROLINA
FORSYTH COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09-CVS-4007

BB&T BOLI PLAN TRUST,

Plaintiff,

v.

MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY and CLARK
CONSULTING, INC.,

Defendants.

**PLAINTIFF'S RESPONSE TO DEFENDANT CLARK CONSULTING, INC.'S
MOTION TO DISMISS THE FIRST AMENDED COMPLAINT**

Table of Contents

I.	INTRODUCTION	1
II.	FACTUAL BACKGROUND.....	2
III.	ARGUMENT	2
A.	NORTH CAROLINA LAW APPLIES TO PLAINTIFF’S CLAIMS AGAINST CLARK	2
1.	North Carolina Law Applies Under the <i>Lex Loci Delicti</i> Standard	2
2.	North Carolina Law Applies Under the “Most Significant Relationship” Standard	6
B.	CLARK’S MOTION TO DISMISS MUST BE DENIED BECAUSE THE CLAIMS AGAINST CLARK ARE PROPERLY PLED	7
1.	BB&T Trust’s Right to Recovery is Not Limited to Contract.....	7
2.	Clark’s Argument That BB&T Trust Lacks Standing to Enforce the SVA and that Bank of America Had Discretion Over a Reallocation Event is a Red Herring.....	9
3.	BB&T Trust Has Adequately Pled Each of its Claims Against Clark	10
a.	Breach of Fiduciary Duty Claim.....	10
b.	Aiding and Abetting Breach of Fiduciary Duty Claim....	13
c.	Negligence Claim.....	15
d.	Negligent Misrepresentation Claim	16
e.	Fraud Claim	18
f.	UDTPA Claim	20
4.	BB&T Trust Has Adequately Pled Entitlement to Punitive Damages.....	22
IV.	CONCLUSION	23

I. INTRODUCTION

BB&T Trust's complaint cannot be dismissed unless "it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." With one exception, Clark relies exclusively on Delaware law to argue that this certainty exists. However, the choice-of-law factors in this misrepresentation-based lawsuit require application of North Carolina law: the misrepresentations occurred, and the damages were incurred, in North Carolina. Indeed, NCGS §58-3-1 requires that a policy insuring lives in North Carolina – as does the policy at issue here – be governed by North Carolina law. Accordingly, Clark's motion to dismiss based on Delaware law must be denied.

But even under Delaware law, BB&T Trust has satisfied the liberal 12(b)(6) pleading standard. Through almost 40 pages of detailed factual allegations, BB&T Trust's complaint shows that Clark had the duty to monitor the investment it had made on behalf of BB&T Trust and to report any relevant information concerning that investment to BB&T Trust in a timely and accurate manner. Indeed, the defendants knew and intended that BB&T Trust was precluded by federal tax laws from interacting – either directly or indirectly – with the investment manager. Accordingly, they knew that BB&T Trust was entirely dependent upon MassMutual and Clark to monitor the investment, inform BB&T Trust, and take action to protect the investment. The complaint also alleges in detail exactly how Clark breached that duty – how Clark failed to notify BB&T Trust of the occurrence of two "triggering" events, and how Clark failed to ensure that MassMutual took the required actions to liquidate that investment as those "triggering" events required. Given these detailed allegations, there is certainly a "state of facts which could be proved in support of the claim."

II. FACTUAL BACKGROUND

BB&T Trust incorporates by reference the Factual Background section (Section II) of its Response to MassMutual’s Motion to Dismiss, filed concurrently herewith.

III. ARGUMENT

A. NORTH CAROLINA LAW APPLIES TO PLAINTIFF’S CLAIMS AGAINST CLARK

For most torts, North Carolina courts apply the traditional *lex loci delicti* standard for determining the applicable substantive law. For UDTPA claims, the North Carolina courts of appeal are split as to whether to apply the *lex loci delicti* standard or the “most significant relationship” standard. The North Carolina Supreme Court has not resolved this split, but federal courts in the Fourth Circuit apply the “most significant relationship” standard. *See, e.g., Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp 956, 959 (M.D.N.C. 1997) (“the Fourth Circuit has expressed a preference for the ‘most significant relationship’ test” in the UDTPA context). Both standards require that North Carolina substantive law govern the Plaintiff’s claims against Clark.

1. North Carolina Law Applies Under the *Lex Loci Delicti* Standard

Under the *lex loci delicti* standard, the location of the tort determines the applicable substantive law. And North Carolina courts generally interpret the “location of the tort” to mean the location of the last event that is necessary to hold the actor liable for the tort. *See, e.g., Santana, Inc. v. Levi Strauss and Co.*, 674 F.2d 269, 272 (4th Cir. 1982).

Citing *Hensley* and *Boudreau*, Clark argues that the location of Plaintiff’s injury is determinative. Clark argues that since Plaintiff is a Delaware trust, its injury must have occurred in Delaware and, therefore, Delaware law applies. However, this argument is

based on a superficial reading of the *Hensley* and *Boudreau* decisions. Both courts focused on the location of the *act* giving rise to the personal injuries at issue. See *Hensley v. National Freight Transp., Inc.*, 668 S.E.2d 349, 351 (N.C. App. 2008) (“The law of the place where the injury occurs controls tort claims, because an act has legal significance only if the jurisdiction where it occurs recognizes that legal rights and obligations ensue from it.”) (citation omitted); *Boudreau v. Baughman*, 368 S.E.2d 849, 852 (N.C. 1988) (“The complaint alleged that plaintiff, a resident of Massachusetts, had injured his foot on the metal surface of the chair in question while visiting friends in Florida.”)

In the personal injury context, the distinction between where the plaintiff “feels” the injury and where the act causing the injury occurred is often muddled, because the location of both is usually the same. But courts outside the personal injury context have clarified the distinction. In fact, the *United Virginia Bank* case, which Clark cites with approval, is instructive on this issue. In determining where the “last act” giving rise to the counterclaimant’s injury occurred, the *United Virginia Bank* court focused on the location of the act, not the location of the counterclaimant’s wallet:

In substance the defendants argue that the plaintiff committed an unfair trade practice by representing to the defendants that they had a buyer who would pay \$150,000.00 for the plane upon delivery to Norfolk, Virginia. The plane was sold in Richmond, Virginia, for the sum of \$55,000.00, not \$150,000.00. . . . The defendants suffered no actionable injury until the plane was sold below the promised price. Because the last act occurred in Virginia, the substantive law of Virginia applies to defendants' counterclaim.¹

Again this year, the court focused on the location of the *act* giving rise to injury, not on where the plaintiff felt the harm. In *Jones v. Skelley*, 673 S.E.2d 385 (N.C.App.

¹ *United Virginia Bank v. Air-Lift Assoc.*, 339 S.E.2d 90, 94 (N.C.App. 1986).

2009), a South Carolina resident sued her husband's mistress for alienation of affection based on sexual conduct that was alleged to have occurred in North Carolina. Holding that North Carolina law would apply if the allegations were true, the court reasoned that "[t]he issue of where the tortious injury occurs, and accordingly which state's law applies, is based on where the alleged alienating conduct occurred, not the locus of the plaintiff's residence or marriage." *Id.* at 389-90. Likewise, in *Santana, Inc. v. Levi Strauss & Co. Inc.*, 674 F.2d 269 (4th Cir. 1982), the court held that California substantive law governed a fraud claim brought by a Missouri corporation with operations in North Carolina because the last act giving rise to the alleged injury – *i.e.*, the wrongful withholding of payment by Levi Strauss – occurred in California. *See id.* at 273. Similarly, in *Jordan v. Shaw Indus., Inc.*, 131 F.3d 134, 1997 WL 734029 (4th Cir. Nov. 26, 1997) (unpublished disposition), the Fourth Circuit found that it was the location of plaintiff's reliance – not the location of plaintiff's harm – that determined the law applicable to the plaintiff's misrepresentation-based tort claim. *Id.* at *3.

Thus, it is not the location of the plaintiff's wallet that determines which state's law applies, but rather the location of the act that causes the harm alleged. And this is true for the law applicable to the claim as well as to damages (including punitive damages) flowing from the claim. *See Stetser v. Tap Pharmaceutical Products, Inc.*, 598 S.E.2d 570, 581 (N.C. App. 2004).

Here, Clark's actions and omissions that caused Plaintiff's harm all occurred in North Carolina. The misrepresentations made by Clark occurred in North Carolina. *See* First Amended Complaint and Jury Demand ("FAC"), ¶¶ 59, 69, 84-88, 116. The communications between Clark and BB&T Trust during which Clark omitted to disclose

material information occurred in North Carolina. *See* FAC, ¶ 70. And BB&T Trust’s reliance on Clark’s misrepresentations occurred in North Carolina. *See* FAC, ¶¶ 87-88, 119. Thus, the “last act” giving rise to Clark’s liability – reliance – occurred in North Carolina, which mandates that North Carolina substantive law applies. *See Jordan*, 1997 WL 734029 at *3 (finding that the plaintiff’s reliance was the “last act” giving rise to the defendant’s liability on a misrepresentation-based tort claim).

But even if the *lex loci delicti* inquiry focused on the location of the party who is injured as Clark argues, rather than on the location of the act that caused the injury, the result here is the same. When applying the “location of injury” standard to a trust, the location of the beneficiary is determinative, because it is the beneficiary who is ultimately harmed. For example, in *Koch v. Koch Industries, Inc.*, 2 F. Supp. 2d 1416 (D. Kan. 1998), the court found that it was the location of the trust beneficiary – not the trustee – that was relevant in the *lex loci delicti* analysis:

[T]he court is satisfied that the residence of the beneficiary of the trust, not the location of the trustee, is the place where the “loss” is felt for purposes of choice of law analysis. [citations omitted] This result comports with general principals of trust law, for the trustee holds property for the benefit of the beneficiary. *See Restatement (Second) of Trusts* § 2 (1959). Economic harm to the trust is ultimately felt by the beneficiary.

Id. at 1423. *See also Appel v. Kidder, Peabody & Co., Inc.*, 628 F.Supp. 153, 156 (S.D.N.Y. 1986) (location of trust beneficiaries, not trustee or trust corpus, is location of trust’s harm). In the present case, the beneficiary of the BB&T Trust is located in North Carolina. *See* FAC, ¶¶ 87-88. Accordingly, North Carolina law applies even under Clark’s argument.

2. North Carolina Law Applies Under the “Most Significant Relationship” Standard

Under the “most significant relationship” standard, the fact that all of the substantive interaction between Clark and BB&T Trust, all of Clark’s misrepresentations and omissions, Clark’s breaches of duty, and BB&T Trust’s reliance occurred in North Carolina dictates that North Carolina law governs the claims against Clark.

This issue was squarely addressed by the US District Court for the Middle District of North Carolina in *Simms Investment Company v. E.F. Hutton & Company Inc.*, 688 F. Supp. 193 (M.D.N.C. 1988), *reconsideration granted* 699 F. Supp. 543 (reinstating claim under Colorado Blue Sky law because it did not present conflict of law issue). In applying the “most significant relationship” standard to tort claims based on false representations, the *Simms* court found that the substantive law of North Carolina applied to the plaintiff’s tort claims because the alleged misrepresentations and the plaintiff’s reliance thereon occurred in North Carolina. *Id.* at 199. Indeed, the court noted that this conclusion comported directly with Section 148 of the *Restatement (Second) of Conflict of Laws*:

When the plaintiff has suffered pecuniary harm on account of his reliance on the defendant's false representations and when the plaintiff's action in reliance took place in the state where the false representations were made and received, the local law of this state determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship²

Just as in *Simms*, the misrepresentations, omissions, breaches of duty, and reliance at issue here all occurred in North Carolina.³ All of the substantive interaction between BB&T Trust and Clark occurred in North Carolina. Accordingly, the substantive law of

² *Simms*, 688 F. Supp. at 199.

³ See FAC ¶¶ 59, 69, 84-88, 116, 119.

North Carolina governs the claims against Clark under the “most significant relationship” standard. And since North Carolina law governs the claims, it also governs the damages (including punitive damages) that can be recovered on those claims. *See Stetser*, 598 S.E.2d at 581.

B. CLARK’S MOTION TO DISMISS MUST BE DENIED BECAUSE THE CLAIMS AGAINST CLARK ARE PROPERLY PLED

The essential question on Clark’s motion to dismiss under Rule 12(b)(6) “is whether the complaint, when liberally construed, states a claim upon which relief can be granted on *any* theory.” *Oberlin Capital, L.P. v. Slavin*, 554 S.E.2d 840, 844 (N.C. App. 2001) (citation omitted) (emphasis in original). Clark’s motion to dismiss must be denied unless “it appears beyond doubt that the plaintiff could not prove any set of facts to support [its] claim[s] which would entitle [it] to relief.” *Hunter v. Guardian Life Ins. Co. of Am.*, 593 S.E.2d 595, 598, *disc. rev. denied*, 599 S.E.2d 49 (N.C. 2004). All material factual allegations in the complaint must be taken as true. *See Oberlin*, 554 S.E.2d at 844. Indeed, “[t]he system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss.” *Lea v. Grier*, 577 S.E.2d 411, 414-15 (N.C. App. 2003). When ruling on a 12(b)(6) motion to dismiss, the trial court should liberally construe the complaint and should not dismiss the action unless “it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.” *Davis v. Messer*, 457 S.E.2d 902, 906-07 (N.C. App. 1995) (citations omitted).

1. BB&T Trust’s Right to Recovery is Not Limited to Contract

Clark does not argue that BB&T Trust’s right to recovery is “limited to contract” under North Carolina law, nor does Clark cite any North Carolina authority for such a

limitation. Accordingly, since North Carolina law governs BB&T Trust's claims against Clark, the Court must deny Clark's request that BB&T Trust's claims be "limited to contract."

Even if Delaware law were the governing law, however, there is no such limitation on BB&T Trust's right to recovery against Clark. Clark cites three unreported Delaware cases for the proposition that BB&T Trust's claims against Clark sound solely in contract and are, therefore, barred since there is no contract between Clark and BB&T Trust. *See* Motion to Dismiss, p. 10. Clark's argument is facially illogical, and an examination of the cases cited by Clark confirms the argument to be without merit.

In each of the three cases on which Clark relies, the court found that the plaintiff's tort claims against the defendant and the defendant's principals were all based on the improper performance of the defendant's obligations under a contract between the plaintiff and the defendant. *See Pinkert v. Olivieri*, 2001 WL 641737, *5 (D. Del. 2001); *Brasby v. Morris*, 2007 WL 949485, *6-7 (Del. Super. 2007); *Christiana Marine Service Corp. v. Texaco Fuel and Marine Marketing, Inc.*, 2002 WL 1335360, *1-2, 5 (Del. Super. 2002). Since BB&T Trust has not alleged a contract with Clark, there is no overlap of tort and contract law. As noted by the *Brasby* court, the underlying rationale for the economic loss rule is to "prohibit [] certain claims in tort where overlapping claims based in contract adequately address the injury alleged." *Brasby*, 2007 WL 949485 at *6. Where the overlap between contract and tort claims is missing because there is no contract between the plaintiff and the defendant, the economic loss doctrine does not apply:

Plaintiff has asserted that Leroy Morris committed fraud individually. In this instance, there is no overlap of contract and tort law. The economic loss doctrine

focuses on limiting parties to the appropriate basis of recovery, not on restricting the possible sources of recovery.

Brasby, 2007 WL 949485 at *8.

Thus, each of the three cases on which Clark relies makes clear that the economic loss doctrine comes into play only due to an overlap in contract and tort claims against the particular defendant, and there is no overlap here. Accordingly, BB&T Trust's claims are not "limited to contract."⁴

2. Clark's Argument That BB&T Trust Lacks Standing to Enforce the SVA and that Bank of America Had Discretion Over a Reallocation Event is a Red Herring

Contrary to Clark's contention, BB&T Trust is not suing to enforce the SVA. BB&T Trust is suing MassMutual under its contract with MassMutual. Part of that contract is MassMutual's contractual promise to BB&T Trust that it will comply with its obligations under the SVA and cause Bank of America to do the same. *See* FAC ¶¶ 44-46, 123, 125.

Further, whether Bank of America had a level of discretion over a Reallocation Event is not relevant to BB&T Trust's claims against Clark (or MassMutual). Clark was obligated to monitor and report on the performance of the Falcon investment. *See* FAC ¶¶ 32, 34, 66, 71, 92. Based on the information that Clark was required to provide, BB&T Trust could exercise its rights, options, and alternatives with respect to the Falcon

⁴ Further, even if the economic loss doctrine were applicable, BB&T Trust's negligence, negligent misrepresentation, fraud, breach of fiduciary duty, and aiding and abetting claims are exempt. *See Christiana Marine*, 2002 WL 1335360 at *5; *Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194, 1201 n.5 (Del. 1992); *Commonwealth Constr. Co. v. Endecon, Inc.*, 2009 WL 609426 (Del. Super. Ct. Mar. 9, 2009) (noting the "legion" exceptions to the economic loss doctrine, particularly with respect to intentional torts, and following the "emerging trend" in declining to apply the doctrine under Delaware law). Here, Defendants breach of fiduciary duty was intentional, bringing it within the reasoning of *Commonwealth* and making the economic loss doctrine inapplicable. *See also Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc.*, 247 F.3d 79, 104-05 (3d Cir. 2001) (refusing to apply the economic loss doctrine to a breach of fiduciary duty claim under Pennsylvania law and citing with approval the 10th Circuit's similar holding under Colorado law); *see also* Response to MassMutual's Motion to Dismiss, Section III.B.2.

investment. Clark failed to fulfill its obligations to BB&T Trust, and, as a result, BB&T Trust was deprived of the opportunity to timely exercise its rights, options and alternatives – one of which was to ensure that the Falcon investment was liquidated either as contemplated by the PPM or through a negotiated liquidation. *See* FAC ¶¶ 31-34, 68-72, 76.

3. BB&T Trust Has Adequately Pled Each of its Claims Against Clark

a. Breach of Fiduciary Duty Claim

Clark does not assert any basis under North Carolina law for dismissing the breach of fiduciary duty claim. Therefore, the motion to dismiss this claim must be denied.

The breach of fiduciary duty claim would also survive if the Court were to apply Delaware law.

Clark relies on the *Wal-Mart Stores, Inc. v. AIG Life Insurance Co.* case to argue that Clark did not owe a fiduciary duty to BB&T Trust. *See* Motion to Dismiss, pp. 13-16. Clark’s reliance is misplaced, however, because of key differences in the facts of that case compared to the facts here.

The *Wal-Mart* court acknowledged that the relationship between an insurance broker and its customer can constitute a fiduciary relationship. *See Wal-Mart Stores, Inc. v. AIG Life Insurance Co.*, 901 A.2d 106, 114 (Del. 2006) (“The court is mindful of the fact that normal business dealings (such as that of an insurance broker and its client) can sometimes take on certain aspects of a fiduciary relationship”). But the *Wal-Mart* court found that the relationship between Wal-Mart and its insurance brokers in that case did not rise to the level of a fiduciary relationship because there were no factual allegations

from which the court could infer that (1) there was an alignment of interests between the brokers and the insured, (2) the brokers exerted control or domination over the insured, or (3) the brokers engaged in self-dealing. *Id.* at 114. And that finding made sense because Wal-Mart alleged simply that it had relied on the expertise of the brokers to identify a suitable tax-shelter COLI plan.

Here, the relationship between BB&T Trust and Clark extended far beyond simply identifying and buying a suitable BOLI plan. Indeed, the essence of the BOLI investment at issue here is substantially different from the Wal-Mart COLI plan. The benefit of Wal-Mart's plan was the ability to (a) buy the insurance, (b) borrow back the premium, and (c) take a tax deduction for the "interest" paid on the loan. *See Wal-Mart*, 901 A.2d at 111. But the BOLI plan here does not work this way. Rather, it is an investment vehicle – BB&T Trust paid \$112 million in premiums to MassMutual, those premiums were invested for BB&T Trust's benefit, and gains on the investment inured to BB&T Trust's benefit on a tax-deferred basis. *See* FAC ¶¶ 21, 43. The key feature of the BOLI investment vehicle that gives rise to a fiduciary duty here – a feature that was not part of the Wal-Mart COLI tax-shelter – is that BB&T Trust was precluded from interacting directly or indirectly with the Falcon investment advisor and, therefore, Clark and MassMutual were obligated to do so on BB&T Trust's behalf. It was only through Clark's and MassMutual's monitoring of Falcon's performance and timely and accurate reporting to BB&T Trust that BB&T Trust would be informed of the status of its BOLI investment. *See* FAC ¶¶ 25-26. Thus, BB&T Trust placed a special trust and confidence in Clark to properly monitor the Falcon investment and to report back to BB&T Trust in a timely, accurate, and truthful manner. *See* FAC ¶ 92. And throughout this ongoing

relationship between BB&T Trust and Clark, Clark undertook this responsibility and acted (or purported to act) in a manner consistent with this responsibility. Thus, (1) there was an alignment of interests between Clark and BB&T Trust because both were seeking to maximize returns on the Falcon investment,⁵ (2) Clark exerted a level of control or domination over BB&T Trust in that it controlled the flow of information to BB&T Trust, and (3) Clark engaged in self-dealing, in that it either intentionally or recklessly protected the commissions it received from the Falcon investment (both from BB&T Trust and from the other two, much larger, investors in Falcon) at the expense of timely and accurate reporting to BB&T Trust. *See* FAC ¶¶ 81-84, 92-93. Thus, whereas the *Wal-Mart* court would have found a fiduciary duty to exist if *any* of these factors were properly pled, *all three* of these factors exist here.

Delaware courts have found this sort of relationship to be fiduciary in nature. For example, in *Sciarra v. Minnesota Mutual Life Ins. Co.*, 1979 WL 193317 (Del. Super. April 6, 1979), the customer obtained three mortgage loans and applied for credit life insurance for those loans through Home Federal Savings and Loan. Over the ensuing three-month period, Home Federal kept the customer informed of the status of the applications and directed the customer to submit additional documentation and revised insurance applications. Although the customer complied with the directions of Home Federal, he died before the credit life policies were issued. *Id.* at *1. Because of the ongoing relationship between the customer and Home Federal and the customer's reliance on Home Federal to timely and accurately inform and advise the customer, the court found that Home Federal owed a fiduciary duty to the customer. *Id.* at *2-3.

⁵ Clark received recurring commissions from BB&T Trust's Falcon investment. FAC ¶ 81.

BB&T Trust has pled sufficient facts from which the Court can conclude that Clark undertook a fiduciary duty to act on BB&T Trust's behalf to monitor and report on the performance of the Falcon investment, especially considering that Clark knew and intended that BB&T Trust would be entirely dependent upon Clark and MassMutual to do so in a timely, accurate, and honest manner. *See* Response to MassMutual's Motion to Dismiss, Section II.A.2. (discussing how the very design of MassMutual's and Clark's BOLI plan precluded BB&T Trust from controlling its investment or the investment advisor). Accordingly, Clark's motion to dismiss the breach of fiduciary duty claim must be denied.

b. Aiding and Abetting Breach of Fiduciary Duty Claim

Clark does not assert any basis under North Carolina law for dismissing the claim for aiding and abetting breach of fiduciary duty. Therefore, the motion to dismiss this claim must be denied.

Further, even if this claim was governed by Delaware law, the complaint contains sufficient facts from which the Court can conclude that Clark aided and abetted MassMutual's breach of fiduciary duty. First, BB&T Trust has pled sufficient facts showing that MassMutual owed and breached a fiduciary duty. *See* Response to MassMutual's Motion to Dismiss, Section III.B.3. Second, BB&T Trust has alleged that both MassMutual and Clark knew of the poor performance of the Falcon Fund and (a) falsely represented to BB&T Trust that no Reallocation Event had occurred as of August 31, 2007, and (b) failed to timely inform BB&T Trust that a Reallocation Event had occurred in November 2007. *See* FAC ¶¶ 100-101. Clark knew that MassMutual had a fiduciary duty to timely and accurately report these events to BB&T Trust and that

MassMutual had failed to do so.⁶ See FAC ¶¶ 92, 106. Accordingly, Clark also knew that its own failure to timely and accurately inform BB&T Trust of the Reallocation Events enabled MassMutual's breach of duty to continue undetected. As such, Clark knowingly participated in MassMutual's breach of fiduciary duty.

These factual allegations are sufficient to sustain the aiding and abetting claim under Delaware law. The *HMG/Courtland Props* case cited by Clark is instructive on this point. There, the court held that the defendant was not liable for aiding and abetting breach of fiduciary duty because she was not shown to have acted with knowledge that in so acting she was assisting her brother in hiding their ownership interest in the entity at issue. See *HMG/Courtland Props, Inc. v. Gray*, 749 A.2d 94, 121 (Del. Ch. 1999). Thus, the aiding and abetting claim there would have been sustained if the facts had shown simply that the defendant knew that her conduct helped her brother conceal information that he was obligated to disclose. *Id.* The other cases cited by Clark comport with this standard. See, e.g., *Maliede v. Townson*, 780 A.2d 1075, 1098 (Del. 2001) (“Knowing participation in a board's fiduciary breach requires that the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach.”); *In re Santa Fe Pacific Corp. Shareholder Litig.*, 669 A.2d 59, 72 (Del. 1995) (finding the aiding and abetting allegations deficient because the *only* allegations were conclusory allegations that the defendant “knowingly and substantially participated and assisted” in the breach of duty).

⁶ Clark also knew that MassMutual had the ability to buy and sell assets within BB&T Trust's Separate Account within the guidelines established in the PPM. See Response to MassMutual's Motion to Dismiss, Section II.A.3; see also *Forsythe v. ESC Fund Mgmt. Co., Inc.*, 2007 WL 2982247, *10 (Del.Ch. Oct. 9, 2007) (fiduciary relationship arose from investment agreement where investment manager could buy and sell investments for owners' account within established guidelines).

Since the complaint contains factual allegations based on which BB&T Trust could prove that Clark knew that its actions enabled MassMutual to conceal information from BB&T Trust in violation of its fiduciary duty, the aiding and abetting claim must be sustained.

c. Negligence Claim

Clark does not assert any basis under North Carolina law for dismissing the negligence claim. Therefore, the motion to dismiss this claim must be denied.

Further, even if this claim was governed by Delaware law, the complaint contains sufficient facts based on which BB&T Trust could prove that Clark owed and breached a duty of care to BB&T Trust. In its role as BB&T Trust's insurance broker/advisor, Clark undertook the obligation to monitor the performance of the Falcon Fund and to timely and accurately report that performance to BB&T Trust. *See* FAC ¶¶ 32, 34, 66, 92. Indeed, Clark communicated with BB&T Trust in this role hundreds of times. *See* FAC ¶ 85. As such, Clark had a duty of care to BB&T Trust to monitor and report as a member of Clark's profession would do in similar circumstances. *See, e.g., Apartment Communities Corp. v. American E. & S. Insurance Brokers*, 1999 WL 1011975, *6 (D. Del. Oct. 13, 1999) ("One who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities"). Clark's failure to timely and correctly report the Falcon Fund's performance to BB&T Trust was a breach of that duty. *See* FAC ¶¶ 70, 72, 111.

d. Negligent Misrepresentation Claim

Clark does not assert any basis under North Carolina law for dismissing the negligent misrepresentation claim. Therefore, the motion to dismiss this claim must be denied.

This claim is also sufficient under Delaware law. Clark argues that the claim is deficient under Delaware law in two respects: (1) insufficient facts showing that Clark failed to exercise reasonable care in falsely representing that no Reallocation Event triggers had been hit as of August 31, 2007, and (2) insufficient facts showing that BB&T Trust justifiably relied on Clark's misrepresentation. *See* Motion to Dismiss, p. 19. This argument is without merit.

First, the complaint is replete with allegations that a Reallocation Event trigger had, in fact, been hit in August 2007. *See, e.g.*, FAC ¶¶ 52-53, 67. Further, the complaint points out exactly how that trigger was hit in August 2007. *See* FAC ¶ 52 (one-year rolling annualized standard deviation of monthly gross NAV exceeded 10% as of August 31, 2007). And the complaint alleges that Clark falsely represented that no Reallocation Event trigger had been hit and failed to exercise reasonable care in making that false representation. *See, e.g.*, FAC ¶¶ 116-118. Certainly, taking all factual allegations in the light most favorable to BB&T Trust, a “state of facts [exists] which could be proved in support of the claim”⁷ that Clark failed to exercise reasonable care in representing that no triggers had been hit.

Second, BB&T Trust alleges exactly how it relied on Clark's false representation. Since Clark's false representation was that no trigger had been hit, BB&T Trust relied by not taking immediate action to ensure that its Falcon investment was liquidated, either as

⁷ *See Davis*, 457 S.E.2d at 906-07.

contemplated by the PPM or through a negotiated liquidation. *See, e.g.*, FAC ¶ 119. And since BB&T Trust had the right at any time to surrender the BOLI policy, this provided BB&T Trust with substantial leverage to negotiate a rapid liquidation of the Falcon investment in which any notice or waiting periods were waived. *See* Response to MassMutual’s Motion to Dismiss, Section II.C. A surrender of the BOLI policy would obligate Bank of America to pay out under the SVA. *See id.* Accordingly, BB&T Trust had significant leverage to negotiate a resolution short of policy surrender – *i.e.*, a liquidation of the Falcon investment.⁸

Further, Clark’s argument that BB&T Trust’s reliance was not justifiable because Clark’s misrepresentation was just a “single vague statement” and because BB&T Trust “knew that BOA had sole discretion to determine whether the occurrence of a triggering event would constitute a Reallocation Event” is misplaced here. *See* Motion to Dismiss, pp.19-20. Whether reliance is justifiable is a fact question for the jury that should not be decided through a 12(b)(6) motion. *See Wilmington Trust Co. v. Aetna Casualty and Surety Co.*, 690 A.2d 914, 916 (Del. 1996) (“whether [plaintiff’s] reliance on a misrepresentation was reasonable is a question for the jury.”) In addressing Clark’s motion to dismiss, the Court is required to take as true the allegation that BB&T Trust’s reliance was justifiable. *See Oberlin*, 554 S.E.2d at 844. And the conclusion that BB&T Trust’s reliance was justifiable makes sense here. Clark represented that no Reallocation Event trigger had been hit. Since no trigger had been hit, that meant that there was no

⁸ Indeed, as Clark well knows, in late 2007, BB&T Trust had taken steps to liquidate its Falcon investment as quickly as it could in the absence of knowledge that a Reallocation Event had occurred, and, through Clark and MassMutual, had engaged in negotiations to modify the stable value protection applicable to BB&T Trust’s BOLI investment. Thus, Clark’s insistence on additional allegations of contemporaneous facts appears to be an attempt to get a second bite at the motion-to-dismiss apple by forcing an amendment to the complaint.

Reallocation Event that might be waived by Bank of America. Moreover, Clark's analogy to the *Outdoor Technologies* case does not withstand scrutiny. The bank representative in *Outdoor Technologies* stated that the plaintiff did not have "proper authorization" – which begs the question of "what else do I need?" *Outdoor Technologies, Inc. v. Allfirst Financial, Inc.*, 2001 WL 541472, *6 (Del. Super. Apr. 12, 2001). The court's conclusion in that case that further inquiry was required is intuitive. In contrast, however, Clark stated here that no Reallocation Event trigger had been hit yet – no follow-up question is needed.

e. Fraud Claim

Clark does not assert any basis under North Carolina law for dismissing the fraud claim other than that it is not stated with the requisite particularity. *See* Motion to Dismiss, pp. 20-22. As shown below, the complaint alleges each element of the fraud claim with particularity. *See also* FAC ¶¶ 129-135. Therefore, since North Carolina law applies, the motion to dismiss this claim must be denied.

The fraud claim is also sufficient even if Delaware law applies as Clark contends. First, Clark contends it had no duty to notify BB&T Trust that a Reallocation Event trigger had been hit. *See* Motion to Dismiss, p. 21. Accordingly, it argues that the fraud claim based on Clark's failure to timely notify BB&T Trust of the November 2007 Reallocation Event trigger must fail. *Id.* However, as discussed above in Section III.B.3.a. and III.B.3.c., Clark did undertake a duty to monitor and report on the Falcon investment's performance. Further, Clark communicated regularly with BB&T Trust throughout the August – December 2007 time period⁹ and, accordingly, had the duty to timely and correctly report the November 2007 Reallocation Event trigger so as to

⁹ *See* FAC ¶ 70.

prevent its regular communications with BB&T Trust from being misleading. *See Stephenson v. Capano Dev., Inc.* 462 A.2d 1069, 1074 (Del. 1983).

Second, Clark argues that it could not have made knowing or reckless misrepresentations or omissions concerning whether a Reallocation Event trigger had been hit because Bank of America had discretion to waive a Reallocation Event. *See* Motion to Dismiss, p. 21. But this argument fails even superficial scrutiny. The first step in determining whether a Reallocation Event occurred was determining whether a “trigger” had been hit. The question of whether Bank of America can waive a Reallocation Event is moot if no trigger has been hit. And it was this initial fact – whether a trigger had been hit – that Clark knowingly and/or recklessly misrepresented. *See* FAC ¶¶ 69-70, 129.

Third, Clark contends that the complaint does not adequately allege facts showing that Clark intended to induce BB&T Trust not to liquidate its Falcon investment. *See* Motion to Dismiss, p. 21. However, the complaint is replete with allegations concerning Clark’s motive – *i.e.* preserving the commissions it received from BB&T Trust’s Falcon investment as well as the much more substantial commissions from the other two investors in Falcon. *See* FAC ¶¶ 80-84, 132. Further, as discussed above, BB&T Trust had the leverage to obtain a liquidation of its Falcon investment in the event a Reallocation Event trigger was hit – either as contemplated in the PPM or through negotiation. *See* Section III.B.3.d. above; *see also* Response to MassMutual’s Motion to Dismiss, Section II.C. In the same way, Clark’s argument that BB&T Trust has not sufficiently pled justifiable reliance is also without merit. BB&T Trust has pled with particularity exactly how it relied on Clark’s misrepresentation – *i.e.*, refraining from

taking action to ensure a timely liquidation of the Falcon investment. *See, e.g.*, FAC ¶¶ 54, 76, 133. *See also* Section III.B.3.d. above (Clark's statement that no trigger had been hit yet is hardly a "single vague statement" on which one, *as a matter of law*, cannot justifiably rely, as Clark contends).

Finally, the complaint clearly sets out BB&T Trust's causation and damages allegations. Absent Clark's misrepresentations and omissions, BB&T Trust would have liquidated its Falcon investment as soon as possible after August 2007 and, thereby, would have avoided further losses on the investment. *See, e.g.*, FAC ¶¶ 54, 133-134. The causal link could not be more clear.

f. UDTPA Claim

As discussed above in Sections III.A.1. and III.A.2., North Carolina law governs the UDTPA claim. Clark asserts two grounds for its request to dismiss the UDTPA claim under North Carolina law. First, Clark asserts without reference to any authority whatsoever that BB&T Trust is not a member of the "consuming public" and, as a Delaware resident, is not entitled to sue under the UDTPA. *See* Motion to Dismiss, p. 23. Since Clark has asserted absolutely no authority for either point, Clark's first ground for dismissing this claim must be rejected. Indeed, Clark's assertions are contrary to North Carolina authority. *See, e.g., Concrete Servs Corp. v. Investors Group, Inc.*, 340 S.E.2d 755 (N.C. App. 1986) (stating that "[t]he statutes do not protect only individual consumers, but serve to protect business persons as well" and concluding that "[t]he fact that plaintiff is a corporation is...immaterial.") . *Hardees Food Systems, Inc. v. Beardmore*, 1997 WL 33825259, *2-3 (E.D.N.C. June 6, 1997) (allowing UDTPA claim by foreign counterclaimant).

Second, Clark claims that the UDTPA claim is just a restated contract claim and, therefore, must be dismissed. *See* Motion to Dismiss, pp. 23-24. This ground for dismissal is also without merit. As an initial matter, since BB&T Trust's UDTPA claim is based on the same misrepresentations set out in its fraud and negligent misrepresentation claims, both of which are sufficiently pled as set out in Sections III.B.3.d. and III.B.3.e. above, BB&T Trust has also sufficiently pled misrepresentation as the basis for its UDTPA claim. *See, e.g., Hardy v. Toler*, 218 S.E.2d 342, 346 (N.C. 1975) (fraud is a sufficient basis for a UDTPA claim); *Forbes v. Par Ten Group, Inc.*, 294 S.E.2d 643, 651 (N.C. 1990) *disc. rev. denied* 328 N.C. 89, 402 S.E.2d 824 (1991) (negligent misrepresentation is a sufficient basis for a UDTPA claim). Further, "[a]n intentional misrepresentation made for the purpose of deceiving another which has the natural tendency to injure another' can act as a sufficient aggravating circumstance" for a valid UDTPA claim. *See, e.g., N.C. Mut. Life Ins. Co. v. McKinley Fin. Servs., Inc.*, 2005 WL 3527050, *10 (M.D.N.C. Dec. 22, 2005) (*quoting Baldine v. Furniture Comfort Corp.*, 956 F. Supp. 580, 587 (M.D.N.C.1996)). Here, Clark intentionally misrepresented to BB&T Trust that no Reallocation Event trigger had been hit in August 2007, and intentionally failed to timely report the November 2007 Reallocation Event trigger. *See* FAC ¶¶ 69, 84, 138. Intentional misrepresentations like these have been found to be a sufficient basis for a valid UDTPA claim. *See, e.g., N.C. Mut. Life Ins. Co.*, 2005 WL 3527050 at *12 (finding that the intentional destruction of documents in preparation for an audit was a sufficient basis for a UDTPA claim).

4. BB&T Trust Has Adequately Pled Entitlement to Punitive Damages

Clark claims that BB&T Trust's claim to recover punitive damages fails because it has not alleged with the requisite particularity that Clark acted with fraud or malice, or that Clark acted recklessly or willfully. *See* Motion to Dismiss, pp. 24-25. To the contrary, however, BB&T Trust has alleged with specificity that Clark intentionally misrepresented (including by omission) that no Reallocation Event triggers had been hit in August and November 2007, that Clark did so to induce BB&T Trust not to act to liquidate the Falcon investment, and that Clark's motive was to protect the commissions it received on the Falcon investment (BB&T Trust's investment as well as the much more substantial investments of two other Falcon investors) at the expense of BB&T Trust. *See* FAC ¶¶ 80-84, 103, 108, 113, 121, 135. This is exactly the type and specificity of allegation that routinely has been found to support a claim for punitive damages. *See, e.g., Ward v. Beaton*, 539 S.E.2d 30, 34 (N.C. App. 2000) ("In accordance with Rule 9(k), plaintiff's complaint averred both malice and willful conduct as the relevant aggravating factors under *G.S. ID-15*. Absent any additional requirement in the statute that the complaint state with particularity the circumstances underlying these factors, we find the pleadings in compliance with Rule 9(k)."); *see also, Zubaidi v. Pickett*, 595 S.E.2d 190, 193 (N.C. App. 2004) (finding allegations that defendants' actions were "deceitful, malicious, and willful" and that set forth the alleged fraudulent statements to be sufficient under Rule 9(k)."); *Food Lion, LLC v. Schuster Marketing Corp.*, 382 F. Supp. 2d 793, 800-801 (E.D.N.C. 2005) (refusing to dismiss a claim for punitive damages where fraudulent misrepresentations accompanying a breach of contract were alleged); *Terry v. Terry*, 88, 273 S.E.2d 674, 680 (N.C. 1981) (holding that the trial court

erred in dismissing plaintiff's claim for punitive damages since plaintiff's fraud claims constituted a sufficient basis to withstand a motion to dismiss on his punitive damage claim). Accordingly, Clark's motion to dismiss the claim for punitive damages must be denied.

IV. CONCLUSION

For the foregoing reasons, Clark's motion to dismiss should be denied. If the Court should find that one or more claims have not been sufficiently pled, the Court should allow BB&T Trust the opportunity to replead those claims to correct any pleading defect.¹⁰

Respectfully submitted, this 1st day of October, 2009.

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¹⁰ See *Mascaro v. Mountaineer Land Group, LLC*, 2006 NCBC 18, 68 (N.C. Super. Ct. 2006) (exercising discretion in granting plaintiff's alternative motion for leave to amend and granting motion to dismiss without prejudice); *Matrix Capital Mgmt. Fund, L.P. v. BearingPoint, Inc.*, 576 F.3d 172, 196 (4th Cir. 2009) (finding reversible error in the trial court's dismissal with prejudice where a second amended complaint could have cured the deficiencies).

CERTIFICATE OF COMPLIANCE WITH RULE 15.8

I, Mark Vasco, certify that the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANT CLARK CONSULTING, INC.'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT** complies with Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court.

/s/ Mark Vasco
Mark Vasco

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANT CLARK CONSULTING, INC.'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT** was served on all parties to this action this 1st day of October, 2009, via the Business Court's electronic filing system and electronic mail, as follows:

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