

STATE OF NORTH CAROLINA
COUNTY OF BEAUFORT

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
11 CVS 236

REGINALD M. FOUNTAIN, JR.,)
)
 Plaintiff,)
)
 v.)
)
 FOUNTAIN POWERBOATS, INC.,)
 a North Carolina Corporation,)
)
 Defendant/Counterclaimant,)
)
 v.)
)
 REGINALD M. FOUNTAIN, JR. d/b/a)
 RF POWERBOATS,)
)
 Counterclaim Defendant.)
)

**ORDER ON DEFENDANT'S MOTION
TO STRIKE**

{1} THIS MATTER is before the Court on Defendant's Motion to Strike portions of Plaintiff's Reply to Defendant's Counterclaims ("Motion"). After considering the pleadings and submissions of counsel, Defendant's Motion is GRANTED.

McLawhorn & Associates, P.A. by Charles L. McLawhorn, Jr. for Plaintiff/Counterclaim Defendant Reginald M. Fountain, Jr.

Randolph M. James, P.C. by Randolph M. James for Defendant/Counterclaimant Fountain Powerboats, Inc.

Gale, Judge.

I. FACTUAL AND PROCEDURAL BACKGROUND

{2} The Court understands the following facts to be undisputed, and recites only those facts relevant to the pending Motion.¹

{3} Plaintiff/Counterclaim Defendant Reginald Fountain, Jr. (“Reggie Fountain”) is a citizen and resident of Beaufort County, North Carolina. (Compl. ¶ 1.)

{4} Defendant/Counterclaimant Fountain Powerboats, Inc. (“Fountain Powerboats”) is a North Carolina corporation with its principal offices in Beaufort County, North Carolina. (Compl. ¶ 2.)

{5} Reggie Fountain is the founder of Fountain Powerboats and formerly the company’s president, chairman, and director of engineering. (Compl. ¶ 14.)

{6} Real Fast Powerboats, LLC (“RF Powerboats”) is a North Carolina corporation with its principal place of business in Beaufort County, North Carolina. Reggie Fountain is the sole member and manager of RF Powerboats. (Countercl. ¶ 3.)

{7} Reggie Fountain founded Fountain Powerboats in 1979 following a successful career as a professional speed boat racer. During the relevant time period, Fountain Powerboats was wholly-owned by Fountain Powerboat Industries, Inc. (“Industries”), a company in which Reggie Fountain owned a controlling interest and acted as Chief Executive Officer (“CEO”). (Countercl. ¶ 5.)

{8} On August 24, 2009, Industries and its subsidiaries, including Fountain Powerboats, filed for Chapter 11 bankruptcy in the Eastern District of North Carolina. (Countercl. ¶ 28.) On that same day, Industries filed a Motion for Officer and Director Compensation, requesting that Reggie Fountain receive \$7,038.46 per week in post-petition compensation. (Countercl. ¶ 29.) On October 30, 2009 the Bankruptcy Court entered an order approving compensation to Reggie Fountain in

¹ All citations to “Countercl.” as well as any reference to Fountain Powerboat’s counterclaims generally, refer to the “First Amended Answer, Affirmative Defenses, and Counterclaims” filed August 10, 2011.

the requested amount from August 24, 2009 through September 8, 2009, after which Reggie Fountain would receive \$4,500.00 per week. (Countercl. ¶ 39.)

{9} On October 23, 2009, the Bankruptcy Court allowed Fountain Powerboats to fund its post-petition operations with interim financing from Liberty Associates, L.C. (“Liberty”), and later entered a final order allowing post-petition financing by Liberty. (Countercl. ¶¶ 38, 40.) The reorganization plan confirmed by the Bankruptcy Court on February 11, 2010 resulted in Liberty acquiring Industries and its subsidiaries, including Fountain Powerboats. Reggie Fountain remained CEO of Industries at that time. (Countercl. ¶ 43.)

{10} On or about October 22, 2009, Reggie Fountain, in his individual capacity, entered into a “Consulting Agreement” with Westport Shipyard, Inc. (“Westport”), a Washington corporation, agreeing to provide consulting services to Westport in the development of a 50-foot boat. Reggie Fountain was to receive \$100,000.00 in compensation under the Consulting Agreement. (Compl. ¶¶ 3, 5, 6, 8.)

{11} On October 22, 2009, Reggie Fountain, purportedly acting in his capacity as CEO and President of Fountain Powerboats, executed a document labeled “Agreement” with Westport evidencing Fountain Powerboats’ agreement to provide Westport with an “operating plug” prototype and granting “permission to use designs and features of the Fountain 48 Express Cruiser in building and selling similar boats for commercial and military use.” (Compl. Ex. B.)²

{12} Reggie Fountain left the employ of Fountain Powerboats on December 10, 2010.³

{13} On March 1, 2011, Reggie Fountain filed a Complaint in Beaufort County Superior Court. In his Complaint, Reggie Fountain alleges that: 1)

² The Court recognizes that Reggie Fountain’s authority to enter into both the Consulting Agreement and the Agreement with Westport, as well as the validity of each agreement, is a central issue in the underlying claims and counterclaims in this suit. The Court merely acknowledges that Reggie Fountain in fact executed these documents, and does so for the limited purpose of providing context for this Motion.

³ Reggie Fountain claims he resigned on this date. Fountain Powerboats contends he was terminated with cause. (Compl. ¶ 15; Countercl. ¶ 15.)

Fountain Powerboats is in possession of, and refuses to remit to Reggie Fountain, \$75,000.00 of the money allegedly due to him under the Consulting Agreement with Westport; and 2) Fountain Powerboats is in possession of approximately \$250,000.00 worth of Reggie Fountain's personal memorabilia and refuses to return any of those items to him. (Compl. ¶¶ 8, 19.)

{14} This case was designated a mandatory complex business case by the Chief Justice of the Supreme Court of North Carolina on April 5, 2011, and assigned to this Court on the same day. Reggie Fountain filed a motion objecting to designation, which was fully briefed and subsequently denied by Order of the Chief Special Superior Court Judge for Complex Business Cases on June 14, 2011.

{15} Fountain Powerboats filed its "Answer, Affirmative Defenses, and Counterclaims" on May 16, 2011, and pursuant to Rule 15 of the North Carolina Rules of Civil Procedure ("Rule(s)"), filed its "First Amended Answer, Affirmative Defenses, and Counterclaims" on August 10, 2011, before a responsive pleading had been filed by Reggie Fountain. In its Amended Answer, Fountain Powerboats denies many of Reggie Fountain's allegations, raises several affirmative defenses, and further asserts the following counterclaims against Reggie Fountain: 1) conversion; 2) misappropriation of trade secrets; 3) breach of fiduciary duty; 4) usurpation of corporate opportunities; 5) unjust enrichment; 6) constructive fraud; 7) tortious interference with contract; and 8) unfair and deceptive trade practices. (Countercl. ¶¶ 107–189.)

{16} On August 21, 2010, Reggie Fountain filed his 89 page "Reply to Counterclaim" ("Reply"), along with more than 200 pages of attached exhibits. The Reply essentially raises only one defense – unclean hands on the part of Fountain Powerboats and its management, specifically non-parties William Gates ("Gates") and Joseph Wortley ("Wortley").

{17} On September 9, 2011, Fountain Powerboats filed and briefed the Motion currently before the Court. Fountain Powerboats alleges that Reggie Fountain's Reply contains pages of "redundant, irrelevant, immaterial, impertinent, or scandalous" material which should be stricken pursuant to Rule 12(f).

{18} The matter has been fully briefed and is now ripe for disposition.

II. STANDARD OF REVIEW

{19} Rule 12(f) states that upon motion of one of the parties, a “judge may order stricken from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter.” Whether to grant a movant’s request to strike such material is within the Court’s discretion. *See Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 25, 588 S.E.2d 20, 25 (2003). That being said, “matter should not be stricken [from a pleading] unless it has no possible bearing upon the litigation.” *Shellhorn v. Brad Ragan, Inc.*, 38 N.C. App. 310, 316, 248 S.E.2d 103, 108 (1978). If there is any question as to whether an issue may arise, the motion to strike should be denied. *Id.*

III. ANALYSIS

{20} Rule 8(b) applies both to answers to complaints and replies to counterclaims. It states that “[a] party shall state in *short and plain terms* his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies.” N.C. R. Civ. P. 8(b) (emphasis added). Unlike Rule 8(a), which applies to complaints, Rule 8(b) does not include language discussing a party’s ability to provide the court with “notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved.” N.C. R. Civ. P. 8(a). In short, Rule 8(b) does not permit a responding party in its reply to counterclaim to provide the same richness of detail the rules allow in the counterclaim itself. Put another way, “[w]hat is excluded from a reply is a new cause of action or other matter beyond the scope of the new matter raised in the answer.” *Hunt v. Hunt*, 117 N.C. App. 280, 283, 450 S.E.2d 558, 560 (1994) (citing *Spain v. Brown*, 236 N.C. 355, 357, 72 S.E.2d 918, 919 (1952)).

{21} Fountain Powerboat’s Motion objects to a wide cross-section of the Reply comprising a substantial percentage of its content. The Court agrees with Fountain Powerboats that the vast majority of the contested sections should be stricken from

the record. However, “[t]o set all of them out verbatim and discuss the contextual setting of each would burden this opinion with a tediousness serving no useful purpose.” *Daniel v. Gardner*, 240 N.C. 249, 252, 81 S.E.2d 660, 663 (1954). It is sufficient to say the objectionable material falls within one or more of the following general categories:

1. Allegations of impropriety and financial mismanagement on the part of Wortley and Gates.
2. Self-promotional statements.
3. References to past and pending litigation involving non-parties to this suit.
4. Self-serving and irrelevant metaphors and analogies.
5. Statements that appear to serve no purpose but to frustrate Fountain Powerboats current operations and promote RF Powerboats.
6. Unnecessary name calling.
7. Statements that are otherwise immaterial, impertinent, and redundant.

{22} In addition, the Reply is accompanied by over 250 pages of exhibits. In the Court’s estimation, almost none of these exhibits are germane to any legitimate defenses that can be asserted by Reggie Fountain. It appears that the majority of these materials have been attached to the Reply so as to become part of a centralized public record Reggie Fountain can use to further his personal ends, easily accessible via the Business Court’s website.

{23} The review of this matter has already taken a considerable amount of the Court’s resources, and there is little need to restate each objectionable portion of the Reply in this order.

{24} Reggie Fountain appears to raise but one affirmative defense in his lengthy Reply – unclean hands on the part of Fountain Powerboats via Gates and Wortley. The defense of unclean hands has two prerequisites. First, the party attempting to use the defense must demonstrate that they were, in fact, harmed by the alleged iniquitous conduct. *See Ray v. Norris*, 78 N.C. App. 379, 385, 337 S.E.2d

137, 142 (1985) (stating “[t]he doctrine of clean hands is only available to a party who was injured by the alleged wrongful conduct”). In addition, the unclean hands defense requires wrongful conduct on the part of the claimant against the defendant. *See Id.* at 384–85, 337 S.E.2d at 141 (stating “[r]elief is not to be denied because of general iniquitous conduct on the part of the complainant or because of the latter’s wrongdoing in the course of a transaction between him and a third person”); *see also High v. Parks*, 42 N.C. App. 707, 711, 257 S.E.2d 661, 663 (1979) (indicating “[a] person is not barred from his day in court in a particular case because he acted wrongfully in another unrelated matter or because he is generally immoral”).

{25} A large percentage of the Reply details a host of alleged misdeeds on the part of Gates and Wortley that, if true, do not reflect well on those individuals. However, neither of those individuals are Parties to this litigation. Furthermore, most of the alleged misconduct on the part Gates and Wortley pertain to others.⁴ Fountain Powerboats does not seek to strike allegations that involve alleged harm to Reggie Fountain.⁵

IV. CONCLUSION

{26} In sum, the Court agrees with Fountain Powerboats that the Reply contains a host of irrelevant, immaterial, and redundant material within the purview Rule 12(f). Furthermore, the Court cannot ascertain any legitimate defense on the part of Reggie Fountain that would be compromised by the adoption of Fountain Powerboat’s Proposed Amended Reply. Therefore, the Court, in its discretion, GRANTS Defendant Fountain Powerboats’ Motion and Orders that the Proposed Amended Reply submitted with the Motion should be deemed to be the

⁴ For example, the Reply’s allegation that Wortley and Gates misused Fountain Powerboats’ corporate property. (Reply ¶ 83.) Reggie Fountain had no ownership interest in Fountain Powerboats at the time of this alleged misconduct, and thus cannot demonstrate any harm to him resulted from this alleged misappropriation.

⁵ For instance, Fountain Powerboats does not seek to strike allegations suggesting that Reggie Fountain’s salary was unilaterally cut in his final weeks with the company. (Reply ¶ 42.)

Reply of record and the initial Reply shall be stricken and removed from the Court's website. The Court may be asked to revisit its Order at a later time should the stricken matters become pertinent to a claim properly raised in the pleadings.

IT IS SO ORDERED, this 18th day of November, 2011.

/s/ James L. Gale
James L. Gale
Special Superior Court Judge
for Complex Business Cases