NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT
08-CV-18850

CHARLES SHAMOON and DEBORAH SHAMOON, Plaintiffs, vs. ALLEN TURKOW and LUCY TURKOW, Defendants.	**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Plaintiffs Charles and Deborah Shamoon through this motion request the Court to grant summary judgment (1) declaring that an agreement they entered with the Defendants entitled them to a percentage of proceeds from the Plaintiffs' Invention (as defined hereinafter), but did not make them owners of an undivided interest in any patents; and (2) dismissing Defendants' counterclaims for fraud, negligent misrepresentation, unfair or deceptive trade practices, and state securities fraud.

The Defendants invested in an Invention owned by Plaintiffs. The terms of the investment agreement clearly stated, and the Turkows clearly understood, that in return for their investment they would receive one-half percent of the proceeds from the Invention. Later, the Defendants took the position that the Agreement gave them an "ownership" interest in the patents associated with the Invention that entitled them to sell or license rights to third parties without accounting to the Plaintiffs or any of the other investors in the Invention. Defendants have clung to this position despite admitting under oath that they did not believe they were purchasing a right to sell or license the Invention at the time of their investment. Therefore this

Court should grant summary judgment declaring that the investment agreement should be interpreted as the parties intended and as its language requires.

Before the Defendants made their investment, they spoke on the telephone with Plaintiff Charles Shamoon. The Defendants both have deep experience in business. They were dealing at arms length with a man they had never spoken with before. Mr. Shamoon advised them in the course of the conversation that he was engaged in negotiations with a manufacturer he hoped would purchase or license the invention. According to Defendants, Mr. Shamoon represented that he was "at the finish line" in the negotiations and that money could change hands in 60, 90, to 120 days. It is undisputed that Mr. Shamoon was engaged in negotiations with GE at the time and that he had reason to believe an agreement would be reached and money would change hands soon. Unfortunately, the negotiations with GE were ultimately unsuccessful. Defendants assert in their counterclaims that Mr. Shamoon made actionable misrepresentations when he predicted that an agreement with GE would be reached, and money would change hands, in the near future. Summary judgment should be granted dismissing Defendants' misrepresentation counterclaims for fraud, negligent misrepresentation, unfair or deceptive trade practices, and state law securities fraud. The unfair trade practices statute does not apply to claims regarding capital investments such as the one at issue in this case. Furthermore, each of these causes of action applies to false or misleading statements of existing fact, and they do not apply to mistaken predictions like those made by Mr. Shamoon. The Turkows made an investment in a promising technology. They understood, or should have understood, that they were taking a risk. They should not be able to use North Carolina tort and securities laws as investment insurance. Defendants' counterclaims should be dismissed.

STATEMENT OF FACTS

1. The Shamoons Develop and Begin to Market the Invention

Plaintiffs Charles and Deborah Shamoon are the owners of an invention described as the Ubiquitous Connectivity & Control System for Remote Locations (the "Invention"). The Invention is the subject of two issued U.S. Patents, U.S. Patent Numbers 6,990,335 issued January 24, 2006 (the "335 Patent") and 7,257,397 issued August 14, 2007 (the "397 Patent") (collectively, the 397 Patent and the 335 Patent will be referred to herein as the "Patents"). The Invention is also the subject of three pending patent applications, Patent Application Numbers 20070167171, 20070155379, and 20070115902 (collectively, the "Patent Applications"). (Charles Shamoon Affidavit (hereinafter "Shamoon Aff.") ¶ 1).[1]

The Invention primarily involves a method through which a user who is away from home can use a cellular phone device to communicate with and control various systems in the home, such as the heating and air conditioning system, and the security system. (Shamoon Aff. ¶ 2).

The Shamoons attended the Living Word Family Church in Raleigh, North Carolina, from about 1996 until they moved to Texas in 2004. Parishioners at the church subscribe to a theology based in part upon the teachings of Kenneth Hagin. The teachings of Mr. Hagin include the idea that believers who have strong faith and employ wise and moral business practices will be rewarded with spiritual abundance and financial prosperity. (Shamoon Aff. ¶ 3). The Shamoons have financed the developing and marketing of the Invention through investments obtained from people who share their faith, most of whom are parishioners of Living Word Church. They have received approximately 37 investments from individuals and couples

[1] The Affidavit of Charles Shamoon is being filed simultaneously herewith.

in the Invention since 2001. Each investor received a document granting him or her a stated percentage of proceeds from the Invention. (Shamoon Aff. ¶ 4).

2. The Turkows Invest in the Invention

Defendants Alan and Lucy Turkow attend Living Word Family Church. They entered an agreement to invest in the Invention in May 2006 (the "Agreement"). The Agreement, which was signed by the Shamoons and the Turkows, provided in full:

> We, Charles and Deborah Shamoon, hereby grant Allen & Lucy Turkow one-half percent ownership in the Ubiquitous Connectivity & Control System For Remote Locations for the sum of $60,000.
>
> This grant of ownership entitles Allen & Lucy Turkow to one-half percent of all the proceeds from the sale of the Ubiquitous Connectivity & Control System For Remote Locations.

(A copy of the Agreement is attached hereto as **Exhibit A**).

3. The Agreement Only Granted the Turkows a Right to a Percentage of Proceeds from the Invention

There is no dispute that the parties to the Agreement understood when they signed the Agreement in May of 2006 that the term "ownership" as used in the Agreement referred only to the Turkows' "ownership" of the right to receive one-half percent of the proceeds generated by the Invention. (See Charles Shamoon Dep. p. 122, L. Turkow Dep. pp. 64-65, A. Turkow Dep. p. 44).[2] When they signed the Agreement, the Turkows understood that they were making a passive investment in which all returns would be generated through the business efforts of Mr. Shamoon or his employees. (L. Turkow Dep. pp. 66-68, Allen Turkow Dep. p. 44). At the time, the Turkows did not believe that they had purchased the right to make, use, sell, or license the Invention independently of the efforts of Mr. Shamoon. (L. Turkow Dep. pp. 101-02, A. Turkow

[2] Copies of the deposition excerpts cited in this Memorandum are attached hereto as follows: Charles Shamoon as **Exhibit B(1)**; L. Turkow as **Exhibit B(2)**; A. Turkow as **Exhibit B(3)**; Jenny Smith as **Exhibit B(4)**; and Nan Novotka as **Exhibit B(5)**.

Dep. pp. 44-45). Other investors who executed agreements with the same "ownership" language agreed that the reference to "ownership" in the Agreement meant only the right to receive a percentage of the proceeds generated by the Invention. (See Jenny Smith Dep. p. 38, Nan Novotka Dep. pp. 40-41).

Consistent with this understanding, the Turkows made no effort after they entered the Agreement to make, use, or sell the Invention themselves or to license rights in the Invention to others. (L. Turkow Dep. pp. 101-02). Nearly two years after they made their investment, however, the Turkows consulted with an attorney about the Agreement. (L. Turkow Dep. at 96-97). After meeting with their attorney, the Turkows for the first time took the position that the Agreement gave them an "ownership" interest through which they had the right to sell or license the Invention and receive 100% of the proceeds from any such sale or license agreement without accounting to Mr. Shamoon. (L. Turkow Dep. at 100).

4. Charles Shamoon Had Good Reason to Believe in May 2006 that GE Would Enter into an Exclusive Agreement to License the Invention

The Turkows signed the Agreement on May 31, 2006. At that time, Mr. Shamoon was engaged in serious negotiations with General Electric for General Electric to enter into a license arrangement to license the Invention.

In August 2004, Mr. Shamoon met with a gentleman named Sam Southerland. Mr. Southerland had been a Vice President in charge of outside sales for a company called Future Smart, which manufactured and sold low voltage pre-wiring for automation and control products within residential homes. Future Smart had recently been purchased by Honeywell Corporation and Mr. Southerland had just become Vice President in charge of strategic vertical homebuilders for Honeywell. Mr. Shamoon met with him to gather information about sales of technology to

large corporations and to see if Honeywell would be interested in the Invention. (Shamoon Aff. ¶ 6).

Although Mr. Shamoon was experienced in starting and running a small business, he did not have prior experience marketing technology products to large corporations. Mr. Southerland was extremely helpful as a mentor in helping Mr. Shamoon understand the business aspects of developing and marketing the Invention. Mr. Shamoon asked Mr. Southerland how long it would take for money to change hands once a large corporation decides to license or purchase technology from third parties. Mr. Southerland indicated that in his experience the time period would range anywhere from 60 to 180 days and the level of interest determined the timeline. If a company is highly interested, they will push it through so the licensor has funds in 60 days; if the company has a medium interest level, it will take from 90 to 120 days; and the most he had ever seen was 180 days. (Shamoon Aff. ¶ 7).

The Shamoons moved from Raleigh, North Carolina to Texas in October 2004 so that Mr. Shamoon could further develop business ties with Mr. Southerland and Honeywell. Although they ultimately were unable to reach a license arrangement with Honeywell as hoped, Mr. Southerland provided valuable information to assist in the further development and marketing of the Invention. (Shamoon Aff. ¶ 8).

By early 2006, the 335 Patent had been issued and additional patents were in the works, Plaintiffs had developed a prototype that demonstrated how the Invention works, and they had engaged Market InView, a market research company, which completed a study demonstrating the business viability of the Invention. Mike Bender, who served as Plaintiffs' Vice President of Business Development, and Mr. Shamoon were actively working to identify business partners to purchase or license the Invention and generate proceeds for the investors. (Shamoon Aff. ¶ 9).

In early 2006, Mike Bender was introduced, via email, to Steve Connor, an executive level manager at GE Security, the division of General Electric that sold home security products. Mike Bender and Mr. Shamoon had several conference calls with Steve Connor. Steve Connor indicated that the Invention fit perfectly with GE Security's portfolio. He also indicated that the Invention would save GE years on research and development efforts. (Shamoon Aff. ¶ 10).

Mr. Shamoon and Mike Bender arranged to meet with GE Security employees Steve Connor, Warren Hill, and Bonnie Crawford on April 11, 2006, to give a live demonstration and presentation about the Invention. Mike Bender and Mr. Shamoon flew to GE's facility in Tualatin, Oregon for the meeting, which lasted for about three hours. They signed a mutual nondisclosure agreement before either side shared any information. Mr. Shamoon gave a short introduction, then Mike Bender gave a PowerPoint presentation and demonstration of the product. (Shamoon Aff. ¶ 11 and Shamoon Aff. Ex. 2).

During the meeting, GE was able to see firsthand a live demo of the Invention. GE's employees asked many, many questions. Mr. Shamoon believed that the Invention was a significant advancement over GE's related efforts because the Invention was cheaper than what GE was doing and relied upon cell phones, which people would be able to easily access while traveling. Based upon information provided by Steve Connor both at the meeting and in telephone calls that took place beforehand, Mr. Shamoon understood that GE was extremely interested in the Invention. Mr. Shamoon understood that the steps that would need to take place before GE would license the Invention were that the GE legal team would have to review the Patent to ensure there were no legal issues, the technical group would have to make sure there were no technical issues with GE's adoption of the technology, and GE would have to receive final approval to enter an exclusive license arrangement from GE Security supervisor Jim

Paulson. Steve Connor indicated that Mr. Paulson usually accepted Steve's recommendations and that GE in the past had moved quickly and purchased new products and shelved them for a season to stay ahead of the market. (Shamoon Aff. ¶ 12).

Within about a month after the meeting, Steve Connor organized a morning conference call that included Mr. Shamoon, Mike Bender, and Bryan Peterson, an engineer with GE. Mr. Peterson indicated that he had recently taken a road trip with Steve Connor and that the Invention was the primary topic of the conversation. He said that GE was very interested in the Invention. Mr. Peterson asked a number of questions, and Mr. Shamoon and Mike Bender responded to those questions. (Shamoon Aff. ¶ 13).

On May 11, 2006, Mr. Shamoon received an email from Steve Connor stating that GE was "ratcheting up our development efforts on this product" and "[p]erhaps a trip to MN can be arranged soon." (Shamoon Aff. ¶ 14, Ex. 3). In light of what they had been told at the meeting in Oregon and the fact that they had answered the GE engineer's technical questions, Mr. Shamoon understood from Steve Connor's email that GE was ready to move toward a license agreement. (Shamoon Aff. ¶ 14).

The May 11, 2006 email suggested that Mr. Shamoon and Mike Bender hold a conference call with GE on Friday or Monday of that week. Steve Connor was busy and so the conference call was delayed. Thereafter, in mid to latter May 2006, Mr. Shamoon and Mike Bender spoke with Bonnie Crawford, one of the other GE Security employees who had participated in the meeting in Oregon. Bonnie Crawford reiterated that GE definitely was interested in the Invention. She stated GE had presented the product to Mr. Paulson within twenty four (24) hours of the presentation. She said everything else had been done and the only thing they still needed was to get Mr. Paulson's final "OK" to go forward with a license

arrangement. She stated that Mr. Shamoon should call Bonnie Crawford within two weeks. (Shamoon Aff. ¶ 15).

Based upon this call with Bonnie Crawford and the prior course of dealing with GE, Mr. Shamoon believed that the technical and legal hurdles had been cleared and the only remaining step from GE was to obtain approval from Mr. Paulson to license the Invention. Because of what Mr. Shamoon had learned previously in discussions with Mr. Southerland, Mr. Shamoon was confident that they were close to completing a deal with GE and that once GE made its decision, funds would change hands quickly because of GE's clear interest in the product. (Shamoon Aff. ¶ 16).

5. Before the Turkows Invested, Charles Shamoon Accurately Advised Them He was in Negotiations with an Original Equipment Manager, and He Honestly Expressed Optimism that an Agreement Would Be Reached Soon

Defendants Alan and Lucy Turkow both have deep backgrounds in technology and business. Lucy Turkow is educated as a registered nurse and in business management. (L. Turkow Dep. pp. 5-6). After working as an operating room nurse, she rose to become the Vice President of Nursing at Froedert Memorial Hospital in Milwaukee, Wisconsin. In that position she was in charge of the finances and staff for the hospital's nursing department. (*Id*. p. 10). Thereafter she worked for several large companies that sold medical technology products to hospitals in their marketing and sales departments. (*Id*. p. 6). In 2004 she and a business partner started their own business, entitled MedSpa, that combined medical spa services with hair transplant services. (*Id*. pp. 19-22). Ms. Turkow currently engages in futures trading on the S&P 500 index. (*Id*. p. 24).

Alan Turkow is an electrical engineer. (Alan Turkow Dep. p. 6). He served for twenty two years in the Air Force providing ground to air communication support. (*Id*. p. 7). Thereafter he was employed in sales for several different companies that manufactured electrical

components, ultimately serving as a regional sales manager for two of the companies. (*Id*. pp. 7-10). He also now engages in S&P futures trading. (*Id*. p. 8). Sometime before May of 2006 when they invested in the Invention, the Turkows invested in the stock market with the help of a stockbroker from Merrill Lynch. (L. Turkow Dep. pp. 25-26). The Turkows did not, however, seek any outside advice regarding their investment in the Invention. (*Id*. p. 80).

The Turkows attend Living Word Church in Raleigh, the same church that the Shamoons attended when they lived in Raleigh. Lucy Turkow was acquainted with Nan Novotka, who was one of the original investors in the Invention. Ms. Novotka told Ms. Turkow about her investment in the Invention. (L. Turkow Dep. p. 32-33). At one point, Ms. Turkow "mentioned well, if there's ever an opportunity to get in on this, let me know, and it was almost in jest." (*Id*. at 33). In May 2006, Novotka indicated there may be an opportunity to invest in the Invention. (*Id*. at 35). She provided Ms. Turkow a packet of information that included a printout of a patent from the United States Patent and Trademark Office website, a nondisclosure form, and a "white paper" with information concerning the potential marketability of the invention. (*Id*. at 36). Ms. Novotka indicated that Mr. Shamoon was engaged in a sales negotiation process regarding the Invention. (*Id*. p. 39).

After reviewing the information, the Turkows arranged a conference call with Nan Novotka and Mr. Shamoon on May 29, 2006 to discuss the potential investment. (L. Turkow Dep. p. 48). The Turkows had never met or spoken with Charles Shamoon before this call. (A. Turkow Dep. p. 43). The conference call took place shortly after Bonnie Crawford from GE told Mr. Shamoon that everything else had been done and the only remaining step GE would need to take to go forward with a license arrangement was approval from Mr. Paulson, and that Mr. Shamoon should call her in two weeks. According to Ms. Turkow, Mr. Shamoon stated during

the call that "they were in sales negotiations," that "he could not divulge [the name of their negotiating partner] because he had signed a nondisclosure." Mr. Shamoon also stated that "he was working with an OEM [original equipment manufacturer] that pursued them and they were at the finishing line." (L. Turkow p. 54). He also predicted that the Turkows "could look to receive a return on the investment" in "60 days or less." (*Id.* p. 58). Later, in response to a question from Nan Novotka, Mr. Shamoon allegedly indicated that they could expect to have money in hand in "60, 90, worst case scenario, 120 days." *Id.* The Turkows do not claim that Mr. Shamoon told the Turkows that an agreement with the OEM was already signed. (*See* A. Turkow Dep. p. 30). As a businessman, Mr. Turkow understands that both parties are free to walk away from business negotiations at any time before a final agreement has been signed. (*Id.*)

6. The Negotiations With GE Were Not Successful

Ultimately, the negotiations with GE that appeared so promising in May 2006 were not successful. Mr. Shamoon called Bonnie Crawford in June 2006, just after the Turkows made their investment. She indicated that GE remained interested, but that they would be unable to conclude a license agreement in 2006 because they had exhausted their budget applicable to such purchases for 2006. (Shamoon Aff. ¶ 18). She advised Mr. Shamoon to contact GE in January 2007 when GE would have money available in the budget. In December and January, Mr. Shamoon saw advertisements which appeared to show that GE was offering technology for sale that was very similar to the technology Mr. Shamoon had demonstrated. (*Id.* ¶ 19). Mr. Shamoon called Bonnie Crawford in January 2007 as she had requested, and learned that she was no longer employed by GE. He contacted Jim Paulson of GE. Mr. Paulson's assistant ultimately indicated that GE was not interested in licensing the Invention. Mr. Shamoon believes GE made a decision to use his technology without licensing it. (*Id.* ¶ 20).

ARGUMENT

I. The Agreement Gave the Turkows the Right to a Percentage of the Proceeds from the Invention, But They Did Not Receive All Rights of Patent Co-Ownership

Plaintiffs are entitled to a declaratory judgment that the sole "ownership" right the Agreement granted to the Turkows was the right to receive one-half percent of the proceeds from the Invention. The North Carolina Declaratory Judgment Act is a recognized means for parties to resolve issues of contract interpretation. *See Bellefonte Underwriters Ins. Co. v. Alfa Aviation, Inc.*, 61 N.C. App. 544, 300 S.E.2d 877 (1983). Summary judgment may be granted in favor of either the plaintiff or defendant in an appropriate declaratory judgment case. *Blades v. Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972). Summary judgment is appropriate on the "ownership" issue because uncontroverted evidence clearly demonstrates that the only "ownership" right the Defendants received was ownership of the right to a percentage of proceeds from the Invention.

"The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E.2d 622, 624 (1973). Here, the language of the Agreement plainly confirms that the "ownership" contemplated by the Agreement is only a right to a percentage of proceeds. The Agreement specifically states that "[t]his grant of ownership entitles Allen & Lucy Turkow to one-half percent of all the proceeds from the sale of the Ubiquitous Connectivity & Control System For Remote Locations." By expressly defining ones "ownership" right only – the right to a percentage of proceeds – without listing any other right or incident of ownership, the Agreement defined the limits of "ownership" that the Turkows received. Construing the Agreement to impliedly grant other ownership rights when it specifically listed one ownership right would contravene the maxim *expressio unius est*

exclusio alterius (the expression of one thing is the exclusion of another). Such a construction would also render the entire second sentence of the two sentence Agreement superfluous.

The Turkows contend that by using the term "ownership," the Agreement gave the Turkows **all** rights normally afforded to joint patent owners under 35 U.S.C. § 262, which provides:

> In the absence of any agreement to the contrary, each of the joint owners of a patent may make, use, offer to sell, or sell the patented invention within the United States, or import the patented invention into the United States, without the consent of and without accounting to the other owners.

Defendants' argument, however, ignores the crucial phrase at the beginning of the statute – "In the absence of any agreement to the contrary." The Agreement constitutes "any agreement to the contrary." Rather than broadly granting the Turkows an undivided and unlimited ownership interest in patents, the Agreement carefully and expressly limited the Turkows "ownership" rights to entitlement to one-half percent of all proceeds from the Invention.

If there was any doubt about the meaning of the Agreement, the issue would be resolved by the parties' own contemporaneous interpretation. Courts construing a contract must give consideration to "evidence of the parties' own interpretation of the contract prior to the controversy." *Bicket v. McLean Secs., Inc.*, 138 N.C. App. 353, 361, 532 S.E.2d 183 (2000). The Turkows and Charles Shamoon all testified in depositions that when they signed the Agreement they understood the term "ownership" to mean only entitlement to a percentage of the proceeds from the Invention. (Charles Shamoon Dep. p. 122, L. Turkow Dep. pp. 64-65, A. Turkow Dep. p. 44).[3]

[3] The fact that the Turkows took a different position regarding the meaning of the contract nearly two years after they signed the Agreement – after consulting with a lawyer – does not create an issue of fact because the relevant issue is what the parties understood "prior to the controversy." *Bicket, supra.*

The Turkows' new position that they purchased an ownership interest that allowed them to make, use, sell, or license the Invention without accounting to Plaintiffs for the proceeds is belied by their own actions after the Agreement was executed. *See Bicket, 138 N.C. at 362* (If there is any question about the interpretation of a contract, "the courts will ordinarily adopt the construction the parties have given the contract *ante litem motam*"). The Turkows never made any effort themselves to make, use, or sell the Invention or license others to do so because they recognized that they had made only a passive investment and their only entitlement was to a percentage of proceeds from the Invention . (See L. Turkow Dep. pp. 101-02).

In short, the language of the Agreement, the testimony of the parties, and the actions taken by the parties after the Agreement was signed all reflect the parties' intention that the Agreement only granted Defendants the right to recover one half percent of all proceeds from the Invention. There is no genuine issue of material fact, and Plaintiffs are entitled to a declaratory judgment as a matter of law.

II. Though Charles Shamoon's Predictions of Negotiating Success with GE Did Not Materialize, Optimistic Projections of Future Business Success Do Not Give Rise to Actionable Misrepresentation Claims

The Turkows contend in their Counterclaims that Mr. Shamoon induced them to enter into the Agreement through the following alleged "misrepresentations": (a) that they were "at the finish line" in negotiations with a potential business partner (GE); and (b) that money could change hands in 60, 90, to 120 days. According to Defendants, these statements give rise to liability for fraud, negligent misrepresentation, unfair and deceptive trade practices, and state securities fraud. Assuming, for purposes of this motion only, the truth of the Turkows' account of their conversation with Mr. Shamoon, they have failed to forecast facts that would allow a jury to find that Mr. Shamoon did anything other than make a generalized honest prediction that

unfortunately did not come true. While it is unfortunate for everyone that Mr. Shamoon's hopes of quickly reaching a business deal with GE did not come to fruition, Mr. Shamoon did not make any guarantees and he cannot be accused of fraud just because he did not have a foolproof crystal ball.

To make out a case of actionable fraud, Defendants would have to show that: (1) Mr. Shamoon made a representation relating to some material past or existing fact; (2) the representation was false; (3) Mr. Shamoon knew it was false or made it recklessly and as a positive assertion; (4) Mr. Shamoon made the representation with the intention that it be acted upon by the Turkows; (5) the Turkows reasonably relied upon the representation and acted upon it; and (6) they suffered injury. *Warfield v. Hicks,* 91 N.C. App. 1, 12, 370 S.E.2d 689, 692-93, *disc. rev. denied*, 323 N.C. 629, 374 S.E.2d 602 (1988) (Citations omitted). Moreover, the false representation must have been definite and specific. *Id*.

Here, the Defendants' fraud counterclaim must be dismissed because: (1) Mr. Shamoon did not misrepresent any definite and specific material past or existing fact; (2) Mr. Shamoon's predictions were not false when made; (3) there is no evidence that Mr. Shamoon's predictions were made dishonestly or recklessly; and (4) to the extent the Turkows relied upon Mr. Shamoon's predictions as if they constituted guarantees of an immediate future return on investment, they were not reasonable to do so.

The only existing "fact" Mr. Shamoon reported was that he was engaged in business negotiations with an original equipment manufacturer. This was true. The representations that the parties were "at the finishing line" in negotiations and that funding could occur within 60, 90, or 120 days were merely general predictions about the likelihood that the negotiations would result in a future license agreement. The Turkows, who were dealing with Mr. Shamoon at arms

length (they had never spoken with him in person before the telephone call at which the alleged misrepresentations were made), were experienced businesspeople who understood that there is no guaranty that business negotiations will result in an agreement until all terms of the agreement are settled and the agreement is completed and signed. (*See* Alan Turkow Dep. p. 30). *See Boyce v. McMahan*, 22 N.C. App. 254, 206 S.E.2d 496 (1974) (Business negotiations do not create binding obligations unless and until the parties have reached agreement on all material and essential terms, and nothing is left to be agreed as a result of future negotiations).

The Turkows do not contend that Mr. Shamoon provided any specific and definite facts that would have provided a reasonable basis for relying upon Mr. Shamoon's alleged general statement about being at the "finish line." For instance, they do not claim that Mr. Shamoon stated what aspects of the potential arrangement with GE had been decided and what remained to be completed in order to "cross" the finish line. Predictions that merely amount to statements of opinion do not give rise to fraud claims. *See Warfield, supra, 91 N.C. App. at 8, 370 S.E.2d at 693* (defendant's "general unspecific statement of opinion about the potential future consequences of using beetle infested beams" did not constitute misrepresentation); *Pittman v. Tobacco Growers Coop. Ass'n*, 187 N.C. 340, 342, 121 S.E. 634, 635 (1924) ("Representations which merely amount to a statement of opinion [about the future] go for nothing").

Furthermore, the uncontradicted evidence shows that Mr. Shamoon's predictions were based upon his honest understanding of the status of his negotiations with GE. When he met with GE representatives in Oregon, they advised Mr. Shamoon that the steps GE would have to take before licensing the Invention would be to make sure the technical aspects of the Invention fit with what GE wanted to do, have their counsel review the Patent, and get approval from supervisor Jim Paulson. Just before he spoke with the Turkows, Mr. Shamoon had spoken with

Bonnie Crawford of GE, who stated that every hurdle to an agreement with Mr. Shamoon had been cleared except for approval from Mr. Paulson, and that Mr. Shamoon should contact Bonnie Crawford in two weeks. From this conversation, Mr. Shamoon had strong reason to believe that the final barrier to reaching a license agreement with GE would be cleared in early June 2006. He also had reason to believe, based on his earlier conversation with Sam Southerland, that once GE was prepared to go forward, an agreement could be reached quickly and money could change hands in 60, 90, to 120 days. (Shamoon Aff. ¶¶ 6-7). Because the Defendants have failed to forecast evidence showing that Mr. Shamoon intentionally or recklessly deceived them, their fraud counterclaim must be dismissed. (*See Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 452, 279 S.E.2d 1, 6 (1981) (approving summary judgment dismissing fraud claim based upon alleged false promissory representations because plaintiff failed to forecast "facts upon which a jury could reasonably infer that" plaintiffs did not intend to keep the promises at the time they were made).

Defendants' negligent misrepresentation claim must be dismissed for the same reason the fraud counterclaim is deficient. "[T]he tort of negligent misrepresentation occurs when [1] a party justifiably relies [2] to his detriment [3] on information prepared without reasonable care [4] by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland,* 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988), *reversed on other grounds*, 329 N.C. 646, 407 S.E.2d 178 (1991). Predictions of future business success do not constitute the type of "information" that can form the basis for a negligent misrepresentation claim. *See Jordan v. Earthgrains Baking Cos*., 155 N.C. App. 762, 576 S.E.2d 336, *rev. denied*, 357 N.C. 461, 585 761 (2003) (plaintiffs failed to show that representation by company CEO to employees that the plant where the employees worked was profitable and their jobs were secure was false though

the plant closed five months later because the decision to close the plant had not been made when the CEO spoke). Furthermore, the Turkows were experienced in business and knew that there is no guaranty that business negotiations – no matter how promising – will result in a final agreement until the agreement is signed. If the Turkows relied upon Mr. Shamoon's predictions as a guaranty of immediate future returns, their reliance was unjustified as a matter of law. *See Jordan v. Earthgrains, supra* (reliance by employees on CEO's representations as guarantees about their future job security would have been unreasonable).[4] The Turkows invested in an unproven invention, not a government bond or CD, and they were not entitled to expect a risk free immediate return on the investment.

Finally, Defendants' counterclaim for state securities fraud is similarly deficient. North Carolina's securities fraud statute, like its federal counterpart, prohibits the offer or sale of any security "by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." N.C. Gen. Stat. § 78A-56. Given the opportunity, North Carolina courts would no doubt follow the rule that "projections of future performance not worded as guarantees are generally not actionable under the federal securities laws." *Raab v. General Physics Corp.*, 4 F.3d 286, 290 (4th Cir. Md. 1993). As the Court stated in *Raab*, "[t]he market has risks; the securities laws do not serve as investment insurance. Every prediction of

[4] As set forth in Section III of this Memorandum, the unfair or deceptive trade practices statute does not apply to this case because this case involves Mr. Shamoon's efforts to raise capital to finance the development and marketing of the Invention. Even if the Chapter 75-1.1 did apply to this case, however, summary judgment dismissing the claim would be appropriate because general predictions of future business success do not have the capacity to deceive and they are not unfair or immoral. *Overstreet, supra*, 52 N.C. App. at 452, 279 S.E.2d at 7 (holding that decision granting summary judgment dismissing fraud claim based upon alleged misrepresentations of future events was "substantially dispositive" of the Chapter 75 cause of action).

success that fails to materialize cannot create on that account an action for securities fraud." *Id.* at 291. Courts routinely grant summary judgment dismissing securities law claims based upon general predictions of future success like those made by Mr. Shamoon to the Turkows. *See, e.g. Raab, supra* (company's prediction that low first quarter financial results were temporary and results for remainder of the year would be in line with analysts' expectations did not constitute securities fraud because the statements did not constitute a guarantee that earnings would be forthcoming in particular amounts); *Malone v. Microdyne Corp.*, 26 F.3d 471 (4th Cir. Va. 1994) (statement of "comfort" with an analyst's earnings estimate was immaterial because it constituted a projection of future performance that was not supported by specific statements of fact and was not worded as a guaranty); *Hillson Partners Ltd. P'ship v. Adage, Inc.*, 42 F.3d 204, 206 (4th Cir. Md. 1994) (statements that company was "on target toward achieving the most profitable year in its history" and that a project was "on schedule" were not material); *Marsh Group v. Prime Retail, Inc.*, 46 F.App'x. 140 (4th Cir. Md. 2002) (statement by management that it was "committed" to paying a quarterly dividend and that it felt a "contractual obligation" to continue to pay dividends were projections of future performance and were not actionable because they were not specific and were not guarantees); *Herman v. Legent Corp.*, 1995 U.S. App. LEXIS 5568, *19 (4th Cir. Va. 1995) (statements that approximately 10 large government deals were "in the pipeline" and were "highly-qualified contracts" were mere predictions that did not give rise to securities fraud liability because they were "soft predictions" that were not supported by specific representations of fact and were not worded as guarantees). *Id.* at *21.

Mr. Shamoon's statements regarding negotiations being "at the finish line" and the likelihood of money changing hands within 60, 90, to 120 days were not supported by specific representations of fact and were not worded as guarantees. Rather, these statements were "soft"

predictions of future business performance of a type that cannot give rise to liability for securities fraud. Thus Plaintiffs' claim for securities fraud under N.C. Gen. Stat. § 78A-56 must be dismissed.

III. The Unfair or Deceptive Trade Practices Statute Does Not Apply to Cases Involving Solicitation of Investments

Plaintiffs' claim for unfair or deceptive trade practices under Section 75-1.1 of the North Carolina General Statutes must be dismissed because no claim exists for unfair and deceptive trade practices in the context of soliciting investments to finance business operations. *See Hajmm Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991) (stating that the deceptive trade practices statute does not apply to investment activities engaged in "for the purpose of raising capital in order that the enterprise can either be organized for the purpose of conducting its business activities or, if already a going concern, to enable it to continue its business activities … .").

The issue was recently considered and thoroughly discussed by Judge Diaz in *Latigo Investments II, LLC v. Waddell & Reed Fin., Inc.*, 2007 NCBC 17 (2007). In that case, Motorsports Company was seeking capital from third-party investors. Investor Corporation represented that it was able to provide financing, and it provided a letter from Waddell & Reed attesting to this fact. Motorsports Company and Investor Corporation entered into a contract pursuant to which Investor would provide funding within a certain timeframe. Motorsports Company later discovered that Investor Corporation had never been organized as a corporation, and that it had no capacity to fund the $30 million transaction. Motorsports Company filed suit against Waddell & Reed, alleging claims for breach of contract, fraud, negligent misrepresentation, and unfair and deceptive trade practices ("UDTPA").

Waddell & Reed moved to dismiss the UDTPA claim pursuant to Rule 12(b)(6), and Judge Diaz granted the motion. Judge Diaz's opinion contains a thorough and concise discussion of the applicable case law. Although the quote below is lengthy, it concisely summarizes the applicable precedents:

> In this case, W&R asserts that the transaction at issue was a 'capital-raising' device and, as such, was not 'in or affecting commerce' as that element has been defined under North Carolina law. (Defs.' Mem. […] (citing *Oberlin Capital*, 147 N.C. App. at 61, 554 S.E.2d at 848 (2001); *HAJMM Co. v. House of Raeford Farms, Inc* … .).
>
> *HAJMM* and *Oberlin* have their genesis in the North Carolina Supreme Court's decision in *Skinner v. E. F. Hutton & Co., Inc.*, 314 N.C. 267, 333 S.E.2d 236 (1985). There, the Court held that 'securities transactions are beyond the scope of N.C.G.S. § 75-1.1' in part because securities transactions are 'already subject to pervasive and intricate regulation' under the North Carolina Securities Act and the federal securities laws.
>
> In *HAJMM*, the North Carolina Supreme Court expanded the securities exception to include 'the trade, issuance and redemption of corporate securities or similar financial instruments.'
>
> In *HAJMM*, owners of a turkey farm business sold their interest to an agricultural cooperative. In return, they received revolving fund certificates that became part of the cooperative's capital structure and were shown as stockholder equity on the cooperative's balance sheet.
>
> The former owners of the turkey farm sued to have the certificates retired by the defendant cooperative. In affirming the trial court's dismissal of the UDTPA claim, the *HAJMM* Court concluded that the revolving fund certificates were, in essence, corporate securities, and their purpose was to provide and maintain adequate capital for the enterprises at issue.
>
> According to the Court, the commerce element of a UDTPA claim applies to 'the manner in which businesses conduct their regular, day-to-day activities, or affairs,' while 'the issuance of securities is an extraordinary event done for the purpose of raising capital.' For that reason, the transactions in *HAJMM* were not 'in or affecting commerce' and therefore, were beyond the scope of the UDTPA.
>
> In *Oberlin*, our Court of Appeals expanded the reach of the UDTPA securities exception. In that case, plaintiff Oberlin Capital, L.P. agreed to provide working capital for an automotive parts corporation. Defendants served on the board of the corporation. Oberlin Capital and the corporation executed a loan agreement that provided the corporation with a $1.5 million loan and gave Oberlin Capital a

> future right to purchase stock in the corporation's business. The defendant directors ratified the loan agreement.
>
> The debtor corporation filed for bankruptcy sometime after executing the loan agreement. Oberlin Capital subsequently discovered that the corporation and its directors failed to disclose certain negative financial information about the debtor that would have been material to Oberlin Capital's decision to make the loan. As a result, Oberlin Capital sued the individual directors alleging a host of tort claims and a separate UDTPA claim.
>
> Our Court of Appeals held that '[b]ecause the loan agreement at issue here, which also granted Oberlin the right to purchase stock in [the debtor corporation] in the future, was primarily a capital raising device, it was not 'in or affecting commerce' for the purposes of Chapter 75.'

Latigo, 2007 NCBC at *36-44. (Citations omitted).

In light of the foregoing precedents, Judge Diaz dismissed the UDTPA claim against Waddell & Reed Financial because the transaction between Motorsports Company, Investor Corporation, and Waddell & Reed was "precisely" for the purpose of raising capital for Motorsports Company's business operations.

For exactly the same reason, the Court should dismiss the Defendants' UDTPA claim against the Plaintiffs in this case. The entire purpose of the transaction among the parties was for the Defendants to invest $60,000 in the Invention so that Plaintiffs could raise capital for development and marketing the Invention. (See Shamoon Aff. ¶ 5). The Turkows understood at the time that they were making a passive investment in the Invention. (L. Turkow Dep. pp. 65-66, 101-102, A. Turkow Dep. pp. 44-45). As Judge Diaz emphasized in *Latigo*, the "Court's proper focus under the relevant cases is … 'what is the purpose of the transaction,'" and the "only relevant question for [the Court] is 'whether the transactions at issue involved securities or other financial instruments involved <u>in raising capital</u>.'" *Latigo,* 2007 NCBC 17 at ¶¶ 46-48 (emphasis supplied). As in *Latigo*, the evidence forecast in this case "leaves no doubt that this is

precisely what the parties contemplated here." *Id*. Thus this Court should grant summary judgment dismissing Defendants' UDTPA counterclaim.

CONCLUSION

For the foregoing reasons, Plaintiffs Charles and Deborah Shamoon respectfully request the Court to enter summary judgment declaring that the Agreement only entitled Defendants to one half percent of the proceeds from the Invention, and did not give them any other "ownership" rights in the Invention. Plaintiffs also request the Court to enter summary judgment dismissing all of Defendants' counterclaims.

This the 21st day of September, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** by transmitting a copy of the same via e-mail and first class mail to the following persons at the following mail and e-mail addresses, which are the last mail and e-mail addresses known to me:

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