NORTH CAROLINA	)	IN THE GENERAL COURT OF JUSTICE
	)	SUPERIOR COURT DIVISION
FORSYTH COUNTY	)	09 CVS 4007

BB&T BOLI PLAN TRUST,	)	
	)	
Plaintiff,	)	
	)	**BRIEF OF DEFENDANT CLARK CONSULTING, INC. IN SUPPORT OF ITS MOTION TO DISMISS THE FIRST AMENDED COMPLAINT**
vs.	)	
	)	
MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY and CLARK CONSULTING, INC.,	)	
	)	
	)	
Defendants.	)	

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Defendants.	)	

NOW COMES Defendant Clark Consulting, Inc. ("Clark") and submits its brief in support of its Motion to Dismiss the First Amended Complaint ("FAC") pursuant to North Carolina Rule of Civil Procedure 12(b)(6).

INTRODUCTION

BB&T BOLI Plan Trust ("BB&T") is a sophisticated investor. In 2006, like many other sophisticated investors, BB&T sought to enhance its investment returns by investing in a hedge fund known as Falcon Strategies LLC ("Falcon Fund"). Over the next two years, like many other sophisticated investors, BB&T saw the value of its investment decline as the capital markets experienced their worst period of turmoil in years.

BB&T now seeks to shift the consequences of its own investment decisions onto Massachusetts Mutual Life Insurance Company ("MassMutual"), which issued the variable bank-owned life insurance ("BOLI") policy that served as the vehicle for BB&T's investment in the Falcon Fund, and Clark, which brokered BB&T's purchase of that policy. For the following reasons, the Court should dismiss BB&T's claims against Clark.

BB&T's right to recovery is limited to contract, but no such claim exists or is asserted against Clark. BB&T's claims are premised on alleged "rights" under which the funds it invested in the Falcon Fund should, without any action by BB&T, have been reallocated to a more conservative investment. According to BB&T, these "rights" and any corresponding obligations were governed by certain agreements.[1] Yet, Clark was not a party to any of these agreements. Therefore, BB&T has no claim against Clark based on the alleged denial of these "rights."

Moreover, BB&T has no standing to enforce the key agreement on which it bases this action, the Stable Value Agreement ("SVA"). BB&T is neither a party to, nor a third-party beneficiary of, the SVA, which contains an express no-third-party-beneficiary provision. BB&T's claims also fail because the SVA explicitly provided that Bank of America ("BOA") had sole discretion to determine if and when to commence a forced reallocation of BB&T's Falcon Fund investment, and Clark had no authority over how BOA exercised this discretion.

Finally, in an effort to overcome the fact that Clark was not a party to any of the applicable agreements, BB&T brings several common-law claims and a claim under North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA"). These counts fail because BB&T has not pled them sufficiently.

FACTS[2]

BB&T is a Delaware trust, acting through its trustee, Wilmington Trust Company, a Delaware corporation. FAC ¶ 15. It was created to purchase a BOLI policy. Id. ¶ 87. In 2006,

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[1] The Court may consider these agreements without converting Clark's Motion into one for summary judgment. See Part II infra.

[2] Clark disputes many of BB&T's factual assertions, but, solely for purposes of this Motion, Clark assumes the truth of all well-pled facts. See Part II infra.

BB&T investigated purchasing a BOLI policy from MassMutual. Id. ¶ 35. It obtained from Clark, an insurance broker, a Confidential Private Placement Memorandum ("PPM"), which summarized the terms of a BOLI policy being offered by MassMutual. Id. ¶¶ 36-38.

Attached as an exhibit to the PPM was the SVA, which MassMutual was willing to enter into with BOA. Id. ¶¶ 37-38. The SVA would smooth the earnings the BOLI investor reported and would provide a finite amount of protection against declines in market value of the BOLI investment. Id. ¶¶ 27-29. The only parties to the SVA were MassMutual and BOA. The SVA expressly provided that MassMutual and BOA did not intend to confer rights on any third-party beneficiary. See Stable Value Agreement (attached as Exhibit A to Clark's Motion to Dismiss), Section 21 at page 25.

In August 2006, BB&T submitted an application to purchase a BOLI policy and paid approximately $112.5 million in premiums. FAC ¶ 40. MassMutual sent BB&T a letter (the "Letter Agreement") acknowledging receipt of its application and premium payment and confirming that a BOLI policy had been issued to BB&T. Id. ¶ 44.

BB&T elected to allocate one half of its premiums to a subaccount where they would be invested in the Falcon Fund and subject to the terms of the SVA. Id. ¶¶ 41-43. According to BB&T, after this initial allocation decision, it was precluded under the regulatory structure governing BOLI policies from directly managing its Falcon Fund investment. Id. ¶ 7; see also id. ¶ 92. Under the terms of its policy with MassMutual ("BOLI Policy"), however, BB&T was free at any time to reallocate its premiums to a different subaccount if it so wished.

In contrast, under the SVA, if certain Falcon Fund performance measures were not met, BOA could unilaterally force a reallocation of BB&T's premiums out of the Falcon Fund regardless of BB&T's wishes. See SVA, Section 2 (C) at page 3 and Definition of "Reallocation

Event" at page 33. The SVA explicitly provided that BOA ultimately had sole discretion to determine whether a Reallocation Event occurred. See id. ("[n]otwithstanding the foregoing, [BOA] may elect...that the occurrence of any of the events or conditions described in clauses (i) through (vii) (inclusive) immediately above shall not give rise to a Reallocation Event"). BB&T ignores this language and instead incorrectly asserts that these discretionary reallocation provisions were mandatory and were for the benefit of not only BOA but BB&T as well. FAC ¶ 31.

BB&T alleges that the first of two Reallocation Events occurred on August 31, 2007, and that BOA did not elect otherwise. Id. ¶¶ 52-53. MassMutual did not liquidate BB&T's Falcon Fund investment and did not notify BB&T that a Reallocation Event had occurred. Id. ¶¶ 57-58. Clark did not notify BB&T that a Reallocation Event had occurred or act to ensure that MassMutual liquidated BB&T's Falcon Fund investment. Id. ¶¶ 67-68. Instead, according to BB&T's allegations, Clark represented to BB&T that no Reallocation Event triggers had been "hit yet" as of August 2007. Id. ¶ 69. This representation was allegedly made by a Clark employee in North Carolina to BB&T's grantor in North Carolina, which allegedly served as BB&T's agent for the purpose of communicating with Clark about the BOLI Policy. Id. ¶¶ 36, 59, 69, 70, 72, 85.

BB&T alleges that the second Reallocation Event occurred during November 2007, and that BOA did not elect otherwise. Id. ¶¶ 60-61. MassMutual did not liquidate BB&T's Falcon Fund investment. Id. ¶ 62. Clark did not notify BB&T that a Reallocation Event occurred or act to ensure that MassMutual liquidated BB&T's Falcon Fund investment. Id. ¶ 70. BB&T alleges that it only learned of the Falcon Fund's poor performance from Clark in December 2007. Id. ¶ 72.

BB&T alleges that Clark intentionally deceived BB&T about the alleged August and November 2007 Reallocation Events. Id. ¶ 80. BB&T alleges, solely on information and belief, that Clark feared losing commissions on BB&T's Falcon Fund investment, and on the Falcon Fund investments of two other BOLI policy owners, if BB&T's premiums were transferred out of the Falcon Fund. Id. ¶¶ 81-84.

BB&T alleges that Clark became BB&T's fiduciary because BB&T was "precluded from acting directly to protect the value of the investment in the Falcon [F]und." Id. ¶ 92. As a consequence of BB&T's alleged helplessness, BB&T asserts that it "reposed special confidence" in Clark and was "entirely dependant" on Clark to "protect" BB&T's investment, and as a result Clark became BB&T's "trusted advisor." Id. BB&T further alleges that its interests and Clark's interests were aligned because Clark's commissions depended on the success of BB&T's Falcon Fund investment. Id. ¶ 93.

According to BB&T, had Clark notified it of the alleged Reallocation Events, it would have acted to ensure that its Falcon Fund investment was liquidated through a mandatory or negotiated liquidation in which contractual waiting periods and advance notice requirements governing transfers would have been waived. Id. ¶¶ 54, 102.

ARGUMENT

I. DELAWARE SUBSTANTIVE LAW AND NORTH CAROLINA PROCEDURAL LAW APPLY TO ALL COUNTS AGAINST CLARK AND THE REQUEST FOR PUNITIVE DAMAGES.

A. DELAWARE SUBSTANTIVE LAW AND NORTH CAROLINA PROCEDURAL LAW GOVERN BB&T'S TORT CLAIMS.

Determining which state's law applies is procedural; therefore, North Carolina's conflict of laws rule applies. Boudreau v. Baughman, 322 N.C. 331, 335, 368 S.E.2d 849, 853-54 (1988). In North Carolina, *lex loci delicti* – the law of the situs of the claim – governs tort

claims. See Hensley v. National Freight Transp., Inc., 668 S.E.2d 349, 351 (N.C. App. 2008). Where the injury occurred is the situs of the claim. Boudreau, 322 N.C. at 335, 368 S.E.2d at 854.

Here, BB&T's alleged injury occurred in Delaware. BB&T is a Delaware trust with its principal place of business in Delaware, and acts through its trustee, the Wilmington Trust Company, a Delaware corporation. FAC ¶ 15. BB&T purchased the BOLI Policy, holds legal title to that property, and is the party legally responsible for making decisions about that property. As a result, the duties allegedly breached by Clark were owed to BB&T in Delaware, and the misrepresentations allegedly made by Clark were ultimately intended for BB&T in Delaware.

Although BB&T strains throughout the FAC to relate its alleged injuries to North Carolina, BB&T's North Carolina grantor did not purchase the BOLI Policy. Instead, the grantor consciously created a Delaware entity to purchase the BOLI Policy in order to subject this transaction to the protections of Delaware law. Therefore, a Delaware trust is the plaintiff in this case. BB&T's grantor cannot inject North Carolina law into this lawsuit simply because it is now more convenient.

Despite BB&T's allegation that the grantor acted as its agent in communicating with Clark about the BOLI Policy (FAC ¶¶ 36, 59, 69, 70, 72, 85), those communications were still directed to BB&T, a Delaware trust. Likewise, BB&T's allegation that it acted at the grantor's direction (FAC ¶ 87) does not change the fact that BB&T purchased the BOLI Policy, holds legal title to that property, and is the party legally responsible for making decisions about that property.

Similarly, BB&T's allegations that hundreds of communications occurred in North Carolina and that Clark's servicing center is located in North Carolina (FAC ¶ 85) do not change the fact that the duties allegedly owed by Clark were owed to BB&T, a Delaware trust, and that the misrepresentations allegedly made by Clark were directed to BB&T, a Delaware trust. Lastly, BB&T's allegation that the BOLI Policy insured the lives of a number of North Carolina residents and workers (FAC ¶ 1) is a red herring because it is BB&T, a Delaware trust, not the families of the insureds, that receives the death benefits.

For the foregoing reasons, BB&T fails to plead facts showing that BB&T's harm occurred in North Carolina. Delaware is the "situs of the claim." Thus, the Court should apply Delaware substantive law to those claims.[3]

B. DELAWARE SUBSTANTIVE LAW AND NORTH CAROLINA PROCEDURAL LAW GOVERN BB&T'S UDTPA CLAIM.

A UDTPA claim is a creature of statute, and therefore is neither wholly tortious nor wholly contractual. Stetser v. Tap Pharm. Prods., Inc., 165 N.C. App. 1, 15, 598 S.E.2d 570, 580 (2004). The conflict of law rule regarding the substantive law applied to UDTPA claims is subject to a split of authority in North Carolina. Id. It has been held that the law of the state with the most significant relationship to the occurrence giving rise to the action governs. See Andrew Jackson Sales v. Big-Lot Stores, 68 N.C. App. 222, 225, 314 S.E.2d 797, 799 (1984). That holding was criticized in a subsequent case holding that the law of the state where the injuries are sustained governs. See United Virginia Bank v. Air-Lift Assocs., 79 N.C. App. 315, 321, 339 S.E.2d 90, 93 (1986).

[3] The Court should apply North Carolina procedural law to Counts I through IV and VI, see Boudreau, 322 N.C. at 335, 368 S.E.2d at 853-54 (remedial or procedural rights are determined by the law of the forum).

Here, Delaware substantive law applies either way. As stated in Part I.A., BB&T's alleged injury occurred in Delaware. Moreover, Delaware has the most significant relationship to the property and events at issue, and a greater interest than North Carolina in protecting BB&T, a trust located in and organized under Delaware law, and its trust property from the alleged wrongdoing of another Delaware corporation, Clark. While North Carolina law governs any procedural issues regarding BB&T's UDTPA claim, see Boudreau, 322 N.C. at 335, 368 S.E.2d at 853-54, Delaware law governs the substantive issues raised by this claim.

C. DELAWARE SUBSTANTIVE LAW AND NORTH CAROLINA PROCEDURAL LAW GOVERN BB&T'S REQUEST FOR PUNITIVE DAMAGES.

The law of the state where the injury occurred determines what damages are available. Stetser, 165 N.C. App. at 15, 598 S.E.2d at 580. As stated above, BB&T's alleged injuries occurred in Delaware. Consequently, while North Carolina law applies to any procedural issues, Delaware substantive law governs BB&T's entitlement to punitive damages.

II. THE COURT SHOULD DISMISS BB&T'S SUIT BECAUSE IT FAILS TO ASSERT ANY CLAIMS UPON WHICH RELIEF MAY BE GRANTED.

A Rule 12(b)(6) motion to dismiss tests the complaint's legal sufficiency. N.C.G.S. § 1A-1, Rule 12(b)(6); Sterner v. Penn, 159 N.C. App. 626, 628-29, 583 S.E.2d 670, 672 (2003). Dismissal is proper "(1) when the face of the complaint reveals that no law supports plaintiff's claim; (2) when the face of the complaint reveals that some fact essential to plaintiff's claim is missing; or (3) when some fact disclosed in the complaint defeats plaintiff's claim." Id. at 628, 583 S.E.2d at 672.

The Court need not accept legal conclusions as true, Miller v. Rose, 138 N.C. App. 582, 592, 532 S.E.2d 228, 235 (2000), nor allegations that are "merely conclusory, unwarranted

deductions of fact, or unreasonable inferences." Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs., 174 N.C. App. 266, 274, 620 S.E.2d 873, 880 (2005).

Courts may consider external matters, such as operative agreements referred to and relied on by the plaintiff but not attached to the complaint, without converting a motion to dismiss into one for summary judgment. Coley v. North Carolina Nat'l Bank, 41 N.C. App. 121, 126, 254 S.E.2d 217, 220 (1979) (plaintiff "cannot complain of surprise" when court considers instrument on which plaintiff sues, although it is not reproduced or incorporated by reference in complaint).

A. BB&T'S RIGHT TO RECOVERY IS LIMITED TO CONTRACT, AND BB&T ASSERTS NO BREACH OF CONTRACT CLAIM AGAINST CLARK.

The Court should dismiss the FAC in its entirety because (1) BB&T asserts no contractual right to recovery from Clark, (2) BB&T has no standing to enforce the SVA where BB&T is neither a party to nor a third-party beneficiary of the SVA, and (3) BOA had sole discretion over designation of a Reallocation Event.

1. BB&T's Claims Fail Because BB&T's Right to Recovery is Limited to Contract.

Clark was not a party to any of the agreements BB&T alleges governed its Falcon Fund investment. Not surprisingly, therefore, BB&T does not assert a breach of contract claim against Clark. The claims asserted against Clark are nothing more than impermissible attempts to use tort and consumer protection law to pursue a recovery that could only be based in contract.

BB&T alleges that Clark failed to monitor its Falcon Fund investment to detect and to notify BB&T when a Reallocation Event occurred, failed to act to transfer BB&T's premiums when the investment's performance triggered Reallocation Events in August and November 2007, failed to timely advise BB&T of these occurrences so that BB&T could act to protect itself, and failed to ensure that MassMutual fulfilled the same obligations. FAC ¶¶ 66-70.

BB&T further alleges that, regardless of whether a Reallocation Event occurred, Clark failed to advise BB&T to elect a reallocation. Id. ¶ 70.

Therefore, each claim is based upon BB&T's assertion of certain reallocation "rights," which according to BB&T, are governed by certain agreements, including the BOLI Policy, the SVA, the Letter Agreement, and the PPM.[4] Id. ¶¶ 37-38, 41, 44, 46-49. Clark was not a party to any of these agreements, which established the investment guidelines for BB&T's premiums, defined what constituted a mandatory or elective reallocation, and outlined the provisions for liquidating the Falcon Fund investment. The corresponding "obligations" owed to BB&T if its Falcon Fund investment failed to meet certain expectations also existed solely under these agreements. Therefore, BB&T's claims based on the alleged breach of those obligations sound in contract, not in tort.

Generally, where an action is based entirely on a failure to perform a contract, and not a violation of an independent legal duty, a plaintiff must sue in contract. Pinkert v. Olivieri, P.A., 2001 WL 641737, at *5 (D. Del. May 24, 2001) (citing Garber v. Whittaker, 174 A. 34, 36 (Del. Super. 1934)); see also Brasby v. Morris, 2007 WL 949485, at *6 (Del. Super. Mar. 29, 2007) (dismissing negligence and fraud claims in case concerning failure to perform a construction contract as barred by the economic loss doctrine, which "prohibits certain claims in tort where overlapping claims based in contract adequately address the injury"); Christiana Marine Serv. Corp. v. Texaco Fuel & Marine Mktg., 2002 WL 1335360, at *5 (Del. Super. June 13, 2002) ("courts have expanded the [economic loss] doctrine's application beyond its original scope to any kind of dispute arising from a commercial transaction where the alleged damages do no harm to person or to property other than the bargained for item").

[4] BB&T alleges that the PPM is a contract between it and MassMutual (FAC ¶ 31), but the PPM is simply a disclosure document summarizing the BOLI Policy's features.

Here, BB&T's tort counts against Clark even mirror its breach of contract claim against MassMutual. See, e.g., FAC ¶¶ 81, 86, 101. Accordingly, BB&T's claims against Clark should be dismissed because the only claim based on BB&T's allegations is a contract claim, and Clark was not a party to any contract at issue.

2. BB&T's Claims Fail Because BB&T Lacks Standing to Enforce the SVA where BB&T was not a Party to nor a Third-Party Beneficiary of the SVA.

The SVA is the key agreement on which BB&T premises its lawsuit. It defined what constituted a "Reallocation Event" and governed whether BB&T's Falcon Fund investment would be liquidated if one of the triggers in the definition occurred. Yet, BB&T is not a party to the SVA. "A stranger to a contract" acquires no rights thereunder unless it is the intention of the parties to confer a benefit upon such a third-party." Guardian Const. Co. v. Tetra Tech Richardson, Inc., 583 A.2d 1378, 1386 (Del. Super. 1990).

"To qualify as a third party beneficiary of a contract, (a) the contracting parties must have intended that the third party beneficiary benefit from the contract, (b) the benefit must have been intended as a gift or in satisfaction of a pre-existing obligation to that person, and (c) the intent to benefit the third party must be a material part of the parties' purpose in entering into the contract." E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 196 (3d Cir. 2001) (applying Delaware law). It is not enough that the third party receives a benefit; the contracting parties must intend that the contract be made for the third party's benefit. See Delmar New, Inc. v. Jacobs Oil Co., 584 A.2d 531, 534 (Del. Super. 1990) (a third party who benefits indirectly from a contract's performance has no rights thereunder).

BB&T can hardly show the requisite intent or other indicia of third-party beneficiary status where Section 21 of the SVA, entitled "NO THIRD PARTY BENEFICIARY," expressly disclaims any third-party-beneficiary benefits:

> The terms and conditions of the Agreement are intended solely for the benefit of the Issuer [Stable Value Provider BOA] and the Carrier [MassMutual] and their respective successors and permitted assigns and it is not the intention of the Issuer or the Carrier to confer third-party beneficiary rights upon any other person or entity.

SVA at 25. Such clauses are enforceable. See Kronenberg v. Katz, 872 A.2d 568, 605-06 (Del. Ch. 2004); see also In re Stone & Webster, 373 B.R. 353, 367 (Bankr. D. Del. 2007) (applying Delaware law) ("there is significant American case law authority for enforcement of [] no third-party beneficiary provisions"). Because BB&T is not a party to nor a third-party beneficiary of the SVA, BB&T has no standing to assert any claim against Clark based on the SVA's alleged breach.

3. BB&T's Claims Fail Because BOA Had Sole Discretion Over Designation of a Reallocation Event.

Even if BB&T had standing to enforce the SVA, BB&T's claims against Clark still fail because BOA had the sole discretion to determine whether the occurrence of a triggering event would constitute a Reallocation Event. See SVA at 33. BB&T does not allege any facts showing that Clark had any authority over BOA or BOA's decisions in this regard.

Moreover, BB&T does not cite any SVA provision that allowed or obligated Clark to transfer BB&T's premiums out of the Falcon Fund following a Reallocation Event – because there is none. The Court should not create such rights or obligations when the express terms of the SVA contain none. See O'Brien v. Progressive N. Ins. Co., 785 A.2d 281, 288 (Del. 2001) (effect must be given to the plain meaning of a clear and unambiguous contract); Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co., 1997 WL 525873, at *5 (Del. Ch. Aug.

13, 1997) (court will not imply contractual obligations unless "necessarily involved in the contractual relationship so that the parties must have intended them and have only failed to express them because they are too obvious to need expression").

B. BB&T'S CLAIMS FAIL TO PLEAD FACTS SUFFICIENT TO STATE A CLAIM UNDER RULE 12(B)(6).

1. Count I Fails to State a Claim for Breach of Fiduciary Duty.

Now describing Clark as BB&T's "trusted adviser" upon whom BB&T was "entirely dependant" and in whom BB&T "reposed special confidence" (FAC ¶ 92), BB&T asserts that Clark "undertook" a fiduciary duty to BB&T to ensure that the parties complied with the written agreements governing the transaction (id. ¶ 66) and to monitor BB&T's Falcon Fund investment (id. ¶¶ 92, 96).

The facts pled actually show, however, an arm's-length commercial relationship between two sophisticated business entities – a trust created by a hundred-billion-dollar bank that wanted to enjoy millions of dollars in special tax benefits, and an insurance broker. The only allegations that even attempt to describe the relationship as more are the assertions that BB&T was unable to monitor its Falcon Fund investment. Id. The FAC is devoid, however, of any allegations showing that Clark had any greater ability than others to monitor BB&T's Falcon Fund investment. Indeed, because the FAC makes clear that Clark was not a party to any of the relevant agreements, the FAC demonstrates that Clark had even less ability than BB&T to ensure that the parties complied with the written agreements governing the transaction or to monitor BB&T's Falcon Fund investment. As described in more detail below, the FAC falls far short of alleging a basis for concluding that BB&T and Clark had the kind of special relationship that the law governing fiduciaries was designed to protect.

To state a claim for breach of fiduciary duty, the plaintiff must allege well-pled facts that a fiduciary relationship existed. York Lingings v. Roach, 1999 WL 608850, at *2 (Del. Ch. July 28, 1999). "A fiduciary relationship is a situation where one person reposes special trust in another or where a special duty exists on the part of one person to protect the interests of another." Wal-Mart Stores, Inc. v. AIG Life Ins. Co., 901 A.2d 106, 114 (Del. 2006). "A fiduciary implies a dependence, and a condition of superiority, of one party to another ... [and] generally requires 'confidence reposed by one side and domination and influence exercised by the other.'" Wal-Mart Stores, Inc. v. AIG Life Ins. Co., 872 A.2d 611, 624-25 (Del. Ch. 2005), aff'd in part and rev'd in part, 901 A.2d 106 (Del. 2006). "Fiduciary duties are the highest impose[d] by law, and should be cautiously imposed by Courts." Mentis v. Delaware Am. Life Ins. Co., 1999 WL 744430, at *3-4 (Del. Super. July 28, 1999). As such, fiduciary duties typically do not arise in an arm's-length business relationship between sophisticated parties, and "it is vitally important that the exacting standards of fiduciary duties not be extended to quotidian commercial relationships." Wal-Mart, 901 A.2d at 114; see also Addy v. Piedmonte, 2009 WL 707641, at *17 (Del. Ch. Mar. 18, 2009) (same).

The Delaware Supreme Court's decision in Wal-Mart is on point. The plaintiff purchased corporate-owned life insurance (or COLI, similar to BOLI). Wal-Mart, 901 A.2d at 110-11. When certain tax benefits did not materialize, the plaintiff sued its COLI brokers. Id. The court upheld dismissal of the breach of fiduciary duty claim because there were no well-pled facts demonstrating anything more than a typical commercial relationship. Id. at 110, 113-14. The court cited the lack of well-pled facts indicating: (1) the parties' alignment of interests, (2) the brokers' exertion of control or domination over the plaintiff, or (3) self-dealing by the

brokers. Id. at 113-14. The plaintiff's bald assertion that it "placed trust" in the brokers who failed to disclose material information about the COLI plans did not state a claim. Id.

Here, BB&T fails to allege any well-pled facts indicating an alignment of interests with Clark. In Wal-Mart, the plaintiff was "trying to avoid paying the taxes it owed, while the broker-defendants were trying to make money by brokering the sale of the COLI policies." Id. at 114. Similarly, BB&T purchased the BOLI Policy to "offset the cost of wide-ranging employee benefit expenses," while Clark sought to earn commissions. FAC ¶¶ 9, 18, 66. BB&T's assertion that its interests were aligned with Clark because the size of Clark's commissions were tied to the success of BB&T's Falcon Fund investment does not change this reality. See Crosse v. BCBSD, Inc., 836 A.2d 492, 495 (Del. 2003) (affirming dismissal of breach of fiduciary duty claim where interests of group health insurer and plan participants were only "theoretically aligned" because insurer had interests that benefitted it to participants' disadvantage).

BB&T also fails to allege any well-pled facts indicating that Clark exerted control or domination over BB&T or anyone else involved in the transaction. BB&T's rights concerning its Falcon Fund investment were outlined in written agreements provided to BB&T. The BOLI Policy gave BB&T the unfettered ability to reallocate its premiums to a different subaccount if it so wished. In contrast, Clark was a party to none of the agreements at issue and had no control over BB&T's Falcon Fund investment, no power to direct MassMutual or BOA to act, and no control over whether BOA would elect to designate a triggering event as a Reallocation Event. As a result, Clark owed no fiduciary duty to BB&T. See Johnson v. Chupp, 2003 WL 292168, at *2 (Del. Super. Feb. 11, 2003) (granting summary judgment for real estate agent in suit by buyer where agent owed no fiduciary duty to inspect property because agent had no more control over seller's property than buyer); Forsythe v. ESC Fund Mgmt., Co., 2007 WL 2982247, at *10 (Del.

Ch. Oct. 9, 2007) (motion to dismiss denied where investment documents gave rise to a fiduciary duty because, unlike Clark, defendants had authority to purchase and sell investments and to ratify investment decisions).

BB&T also fails to allege any facts indicating self-dealing by Clark. In Wal-Mart, the Court emphasized that, under the agreements in that case, the brokers had no access to the assets in question (and thus lacked even the "*power*" to engage in self-dealing), and that the plaintiff did not assert that the brokers "could do anything except *advise*" about its COLI purchase. Wal-Mart, 872 A.2d at 628 (emphasis in original). Similarly, under the agreements in this case, Clark had no access to the assets invested in the Falcon Fund, and BB&T does not assert that Clark was empowered to do anything except advise BB&T. Indeed, the only financial motive BB&T attributes to Clark is that Clark wished to continue receiving commissions on BB&T's investment. Clark's acceptance of such payments in an ordinary commercial transaction, however, does not establish that it sought its own advantage at BB&T's expense. See Sterner v. Penn, 159 N.C. App. at 631-32, 583 S.E.2d at 674 (affirming dismissal of constructive fraud claim, which required a showing that defendants took advantage of a special relationship of trust or confidence, where the only benefit alleged was receipt of commissions).

Because BB&T's factual allegations fall far short of showing the existence of a fiduciary relationship, this claim must be dismissed. See Wal-Mart, 872 A.2d at 628 (assertion that Wal-Mart "relied on or 'trusted in' the assurances and expertise of the broker-defendants" was insufficient to establish a fiduciary relationship).

2. Count II Fails to State a Claim for Aiding and Abetting Breach of Fiduciary Duty.

BB&T alleges that "Clark knew of the existence and breach of MassMutual's fiduciary duty to BB&T TRUST, and knowingly provided substantial assistance to MassMutual in its

breach of that duty." FAC ¶ 106. This conclusory allegation fails to satisfy BB&T's pleading burden. To survive a motion to dismiss, the plaintiff must allege facts showing: (1) a fiduciary relationship; (2) breach of fiduciary duty; (3) knowing participation in that breach; and (4) damages from concerted action with the fiduciary. Malpiede v. Townson, 780 A.2d 1075, 1096 (Del. 2001); Globis Partners, L.P. v. Plumtree Software, Inc., 2007 WL 4292024, at *15 (Del. Ch. Nov. 30, 2007). This standard is a "stringent one." Allied Capital Corp. v. GC-Sun Holdings, L.P., 910 A.2d 1020, 1038-39 (Del. Ch. 2006).

For the reasons stated in MassMutual's Motion to Dismiss Plaintiff's First Amended Complaint and supporting brief, which Clark adopts and incorporates here, BB&T fails to establish that MassMutual owed any fiduciary duty. Therefore, BB&T cannot satisfy the first and second elements. For that reason alone, Count II should be dismissed as to Clark.

Even assuming that MassMutual owed and breached a fiduciary duty, there are no factual allegations to support the conclusory assertion that Clark knowingly participated in that breach. Mere participation is not actionable. See In re Radnor Holdings Corp., 353 B.R. 820, 844 (D. Del. 2006) (applying Delaware law). Rather, the complaint must allege facts showing "an understanding between the parties with respect to their complicity." HMG/Courtland Props, Inc. v. Gray, 749 A.2d 94, 121 (Del. Ch. 1999); see also Malpiede, 780 A.2d at 1097-98 (knowing and intentional complicity are "essential" and can only be established by facts showing that the defendant conspired with, or otherwise caused or induced, the fiduciary to take the challenged actions).

Here, no facts are alleged suggesting complicity. The factual allegations, as opposed to the conclusory assertions, describe nothing more than an arm's-length commercial relationship between Clark and MassMutual. BB&T's allegations fall far short of satisfying its pleading

burden and cannot survive a motion to dismiss. See In re Santa Fe Pacific Corp. Shareholder Litig., 669 A.2d 59, 72 (Del. 1995) (conclusory assertion of defendant's knowledge and participation, without facts supporting inference of complicity, insufficient to survive motion to dismiss).

3. Count III Fails to State a Claim for Negligence.

To state a negligence claim, the plaintiff must allege that the defendant breached a duty of care owed to the plaintiff and that the breach proximately caused the plaintiff's injury. See New Haverford P'ship v. Stroot, 772 A.2d 792, 798 (Del. 2001). BB&T does not allege that Clark negligently breached any duty other than the fiduciary duties alleged in Count I. Compare FAC ¶ 96 with ¶ 110. Therefore, for the reasons stated in Part II.B.1, BB&T fails to allege well-pled facts establishing that Clark owed any duties of care to BB&T. See Wal-Mart, 901 A.2d at 117 (affirming dismissal of negligence claim as just "another version of the rejected breach of fiduciary duty claim, but with a different label").

4. Count IV Fails to State a Claim for Negligent Misrepresentation.

BB&T alleges that Clark failed to exercise reasonable care in concluding that no Reallocation Event occurred in August 2007, and misrepresented this fact to BB&T. FAC ¶¶ 116-18. To state a negligent misrepresentation claim, BB&T had to allege that: (1) Clark owed a pecuniary duty to provide accurate information about the alleged August Reallocation Event; (2) Clark failed to exercise reasonable care in determining whether the alleged August Reallocation Event occurred; (3) Clark misrepresented that no Reallocation Event occurred; (4) BB&T justifiably relied on Clark's misrepresentation; and (5) BB&T suffered damages. See H-M Wexford LLC v. Encorp, Inc., 832 A.2d 129, 147 n.44 (Del. Ch. 2003); Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P., 2006 WL 1494360, at *5 (Del. Ch. May 24, 2006).

BB&T fails to plead facts supporting its allegation that Clark failed to exercise reasonable care. FAC ¶¶ 69, 118, 121. The SVA provided that BOA had sole discretion over designation of a Reallocation Event, notwithstanding the occurrence of circumstances meeting the definition of a Reallocation Event. Therefore, Clark did not act unreasonably in representing that no Reallocation Event occurred. Id. ¶ 69.

In addition, BB&T fails to allege facts showing that it justifiably relied on Clark. It is not reasonable to infer that a sophisticated entity like BB&T was justified in relying on a single vague statement that a Reallocation Event trigger had not been "hit yet" (id.), when it knew that BOA had sole discretion to determine whether the occurrence of a triggering event would constitute a Reallocation Event. See SVA at page 33 (definition of "Reallocation Event"); cf. H-M Wexford, 832 A.2d at 142 (sophisticated plaintiff could not have justifiably relied on projections in document containing disclaimer that information contained therein had not been reviewed and no assurances were given).

Moreover, given that BB&T knew that the occurrence of a Reallocation Event was discretionary with BOA, it was not justifiable for BB&T to rely without further inquiry. A negligent misrepresentation claim fails where the plaintiff, charged with what it would have learned had it inquired, is not justified in relying on a single vague statement as the "sole direction for its future conduct." Outdoor Technologies, Inc. v. Allfirst Financial, Inc., 2001 WL 541472, at *6 (Del. Super. Apr. 12, 2001). In Outdoor Technologies, the court granted summary judgment for the defendant bank on a negligent misrepresentation claim concerning a failed attempt by the plaintiff to negotiate a corporate check a few days before the issuer declared bankruptcy. Id. at *1-2. A bank representative advised the plaintiff that "proper authorization" was needed. Id. at *2. If the plaintiff had asked what that meant, it could have obtained proper

authorization in time. Id. at *6. Here, there are no allegations of what further inquiry BB&T made. Thus, BB&T's reliance on a single vague statement to inform its own decision-making about its Falcon Fund investment was unjustified.

Furthermore, BB&T has not shown justifiable reliance merely by alleging that, if it had known that a triggering event had occurred, it would have acted to liquidate its Falcon Fund investment through a mandatory or negotiated liquidation. Such action contradicts the relevant documents and is purely hypothetical. FAC ¶ 119. As discussed above, the SVA provided that BOA ultimately had sole discretion to determine whether the occurrence of a triggering event would give rise to a Reallocation Event. BB&T does not allege any facts in support of its negotiated liquidation theory showing that waivers of the contractual waiting periods and advance notice requirements were possible. BB&T cannot assert now with "the benefit of hindsight" that it would have taken certain action, but fail to include contemporaneous facts in the FAC to show that such action was possible. See Big Lots Stores, Inc. v. Bain Capital Fund VII, LLC, 922 A.2d 1169, 1178 (Del. Ch. 2006) (dismissing fraud claim, which also requires justifiable reliance, where plaintiff claimed it was induced not to sue to block a transaction that rendered plaintiff's note uncollectible, because plaintiff pled no contemporaneous facts showing it had a colorable right to stop the transaction or contemplated suit). Stripped of its unsupported and hypothetical allegations, the FAC fails to state any facts showing that BB&T justifiably relied.

5. Count VI Fails to State a Claim for Fraud.

To state a fraud claim, the plaintiff must allege: (1) a false representation of fact or material omission; (2) made with knowledge or belief that the representation was false or made with reckless indifference as to its truth; (3) intent to induce the plaintiff's reliance; (4) the

plaintiff's justifiable reliance; and (5) resulting harm. See Anglo, 829 A.2d at 158. Fraud by omission arises only where there is a duty to speak or a duty to disclose to prevent statements actually made from being misleading. See Stephenson v. Capano Dev., Inc., 462 A.2d 1069, 1074 (Del. 1983). Rule 9(b) requires that each element be pled with particularity. See N.C.G.S. § 1A-1, Rule 9(b); Hunter v. Spaulding, 97 N.C. App. 372, 377, 388 S.E.2d 630, 634 (1990).

BB&T alleges that Clark (i) misrepresented that no Reallocation Event occurred in August 2007, and (ii) failed to timely notify BB&T that a Reallocation Event occurred in November 2007. FAC ¶¶ 129-31. Regarding the latter, for the reasons stated in Part II.B.1, Clark did not owe a duty to notify BB&T that a Reallocation Event trigger had been "hit," and BB&T does not allege that Clark made any misleading statements about the alleged November Reallocation Event that Clark was under a duty to correct. Therefore, BB&T fails to satisfy the first element of its claim of fraud by omission concerning the alleged November Reallocation Event.

BB&T also fails to satisfy the other elements of its fraud claim regarding both alleged Reallocation Events. BB&T fails to plead particular facts to support its bald allegation that Clark knew the alleged representations were false or made with reckless indifference as to the true status of the Falcon Fund. The SVA stated that BOA had sole discretion over designation of a Reallocation Event, notwithstanding the occurrence of one of the triggering events. Therefore, Clark did not knowingly or with reckless indifference make a misrepresentation or material omission regarding the alleged Reallocation Events.

BB&T also fails to state particular facts showing that Clark intended to induce BB&T not to act to transfer its premiums through a mandatory or negotiated liquidation. FAC ¶ 132. Clark could not have intended to induce BB&T not to take action that BB&T simply could not have

taken. The SVA provided that BOA ultimately had sole discretion over designation of a Reallocation Event, and BB&T does not allege any facts showing that waivers of the contractual waiting periods and advance notice requirements were possible to support its negotiated liquidation theory.

BB&T also fails to plead particular facts showing that it justifiably relied. FAC ¶ 133. Reliance is "the type of information that would be particularly within [plaintiff's] control." See Anglo, 829 A.2d at 159. It is not reasonable to infer that a sophisticated entity like BB&T was justified in relying on a single vague statement or omission regarding the alleged Reallocation Events when it knew that BOA had sole discretion over whether a triggering event would constitute a Reallocation Event. See H-M Wexford, 832 A.2d at 142.

Moreover, there was no justifiable reliance where BB&T could not have taken the action it alleges it was fraudulently induced not to take. BB&T had no power to effect a mandatory liquidation and there are no allegations regarding the feasibility of obtaining waivers of the timing requirements. See Big Lots, 922 A.2d at 1178. Stripped of these unsupported and hypothetical allegations, the FAC is "glaringly insufficient to meet the particularity requirement of Rule 9(b)." Anglo, 829 A.2d at 159 (dismissing fraud claim where justifiable reliance element was pled in a conclusory fashion).

BB&T also fails to state particular facts that Clark's alleged fraud caused BB&T's injury. It is not enough for BB&T to aver that Clark made a false representation or material omission and then jump to the conclusion that either caused the value of BB&T's Falcon Fund investment to decline. Id. BB&T glosses over the logical step linking its reliance and injury. Id.

6. Count VII Fails to State a UDTPA Claim.

BB&T alleges that the same misconduct giving rise to its other claims also violated North Carolina's UDTPA. FAC ¶¶ 137, 139. Violation of a North Carolina statute is not actionable under Delaware law. Because Delaware law applies, BB&T cannot recover under North Carolina's UDTPA.

Even if North Carolina law applied, BB&T's UDTPA claim still fails. To state a claim, the plaintiff must show "(1) an unfair or deceptive act, or practice, or unfair method of competition, (2) in or affecting commerce, and (3) which proximately caused actual injury to the plaintiff or his business." Bob Timberlake Collection, Inc. v. Edwards, 176 N.C. App. 33, 42, 626 S.E.2d 315, 323 (2006). BB&T's UDTPA claim fails because, as stated in Parts II.B.1 through II.B.5, BB&T fails to allege facts sufficient to make out its other claims.

Count VII also fails because the alleged wrongdoing falls outside the UDTPA's scope, which protects North Carolina's consuming public. See Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 520 (4th Cir. 1999) (applying North Carolina law); Philips v. Triangle Women's Health Clinic, 155 N.C. App. 372, 377-78, 573 S.E.2d 600, 604 (2002); Durling v. King, 146 N.C. App. 483, 488, 554 S.E.2d 1, 4 (2001) ("fundamental purpose of G.S. §75-1.1 is to protect the consuming public"). A trust established by a hundred-billion-dollar bank to enjoy millions of dollars in special tax benefits is not a member of the "consuming public." Nevertheless, even if a BOLI trust could qualify, here the grantor chose to establish a Delaware trust acting through a Delaware trustee to avail itself of the advantages of forming the entity in Delaware. Consequently, there is no basis for extending the UDTPA to reach this transaction.

Finally, Count VII fails because a claim under the UDTPA cannot be premised on a breach of contract (even an intentional breach) absent substantial aggravating circumstances.

See Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 347 (4th Cir. 1998); Griffith v. Glen Wood Co., 184 N.C. App. 206, 217, 646 S.E.2d 550, 558 (2007); Bob Timberlake Collection, Inc., 176 N.C. App. at 42, 626 S.E.2d at 323; Branch Banking & Trust Co. v. Thompson, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992). Here, even BB&T's tort claims are merely breach of contract claims employing different labels, and BB&T fails to allege any particularized facts to justify extending the UDTPA to this contract dispute.

III. BB&T FAILS TO PLEAD A RIGHT TO RECOVER PUNITIVE DAMAGES.

Punitive damages are awarded to punish behavior that is outrageous because of "evil motive" or "reckless indifference to the rights of others." Strauss v. Biggs, 525 A.2d 992, 999 (Del. 1987). "Mere inadvertence, mistake, or errors of judgment which constitute mere negligence will not suffice." Tackett v. State Farm Fire and Cas. Ins. Co., 653 A.2d 254, 265 (Del. 1995). North Carolina Rule of Civil Procedure 9(k) requires that, "[a] demand for punitive damages shall be specifically stated," and the aggravating factor that supports the award "shall be averred with particularity." At least one of the following aggravating factors must be alleged: (1) fraud; (2) malice; or (3) willful or wanton conduct. In re Brokers, Inc., 396 B.R. 146, 169 (M.D.N.C. 2008) (citing Rule 9(k)).

BB&T has not pled with particularity any of the required aggravating factors. As stated in Part II.B.5, BB&T fails to state a claim for fraud. BB&T also fails to allege that Clark acted with malice. "Malice as used in reference to exemplary damages is not simply the doing of an unlawful or injurious act; it implies that the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations." Shugar v. Guill, 51 N.C. App. 466, 476, 277 S.E.2d 126, 133 (1981). BB&T's assertion that Clark acted wrongly for fear of losing

its commissions does not rise to this level. Clark had no control over designation of a Reallocation Event, which was at BOA's sole discretion under the terms of the SVA.

BB&T also fails to allege that Clark acted recklessly, willfully or wantonly. See, e.g., FAC ¶¶ 103, 108. These terms "imply a knowledge and present consciousness that injury must result from a wrongful action done or from a duty omitted." Shugar, 51 N.C. App. at 476, 277 S.E.2d at 133. Given BOA's discretion over designation of a Reallocation Event and the absence of facts alleging the feasibility of getting waivers of the timing restrictions, BB&T fails to show that Clark could have known or had the present consciousness that BB&T would necessarily be harmed.

CONCLUSION

Accordingly, Clark Consulting, Inc. respectfully requests that the Court grant its Motion to Dismiss the First Amended Complaint in its entirety.

This the 11th day of September, 2009.

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CERTIFICATE OF COMPLIANCE WITH RULE 15.8

I, G. Gray Wilson, certify that the foregoing **BRIEF OF DEFENDANT CLARK CONSULTING, INC. IN SUPPORT OF ITS 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.

This the 11th day of September, 2009.

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CERTIFICATE OF SERVICE

I, G. Gray Wilson, hereby certify that on this date I served a copy of the foregoing **BRIEF OF DEFENDANT CLARK CONSULTING, INC. IN SUPPORT OF ITS MOTION TO DISMISS THE FIRST AMENDED COMPLAINT** upon counsel of record by email transmission as stipulated by the parties as follows:

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