STATE OF NORTH CAROLINA COUNTY OF DURHAM	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 08CVS003884
MARK W. OAKESON Plaintiff, v. TBM CONSULTING GROUP, INC., ANAND SHARMA, GARY HOURSELT, WILLIAM SCHWARTZ & DAN SULLIVAN Defendants.	PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

NOW COMES the Plaintiff, Mark W. Oakeson, and offers this memorandum of law in Opposition to the Defendants' Motion to Dismiss and says the following:

I. STATEMENT OF THE CASE

On July 3, 2008 Plaintiff filed his Complaint. After receiving an extension of time to "File and Answer or Otherwise Plead" on July 28, 2008, the Defendants filed a Motion to Dismiss on September 3, 2008, to which this document is responsive. To date, Defendants have yet to file an Answer.

II. LEGAL STANDARD

When ruling on a motion to dismiss under Rule 12(b)(6), the court must determine whether, as a matter of law, the allegations of the complaint ... are sufficient to state a claim upon which relief may be granted. The court must treat the allegations in the complaint as true and must construe the complaint liberally and "must not dismiss the complaint unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in

support of the claim." (emphasis added) *Covenant Equipment Corp. v. Forklift Pro, Inc.*, 2008 NCBC 10 (N.C. Super. May 1, 2008)

III. ARGUMENT

A. PLAINTIFF'S SECOND CAUSE OF ACTION FOR "BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING" SHOULD NOT BE DISMISSED.

As of the time of filing this Motion, Defendants have yet to file an Answer responding to the allegations of the Complaint and therefore have not responded to the Plaintiff's claim for breach of contract to date. As a claim for Breach of Covenant and Good Faith and Fair Dealing is directly related to the Plaintiffs cause of action for Breach of Contract, the court should withhold ruling as to this cause of action at present. *See Club Car, Inc v. Dow Chemical Company*, 2007 NCBC 10 ¶ 31, (N.C. Super. May 3, 2007). (Withholding ruling on claims arising out of contract where the Defendant has not answered the Plaintiff's Complaint and motion to dismiss does not address the issue of contract.)

Secondly, the Defendants have argued that the Plaintiff has not alleged "separate," "distinct" and "identifiable" conduct and damages giving rise to extra-contractual liability. The Plaintiff's complaint is saturated with conduct that can easily and fairly be construed as a course of conduct taken in the absence of good faith and fair dealing, intentional, malicious and in total disregard of the Plaintiff. Further, the Plaintiff has alleged that the Defendant shareholders agreed to use their respective positions and abuse their status and voting power to manipulate the corporation to achieve their personal objectives. In addition the Plaintiff has alleged a separate and distinct cause of action for breach of Fiduciary Duty, which also imposes upon all parties the duty of good faith and fair dealing, a cause of action for civil conspiracy and punitive damages.

Our courts have recognized a cause of action for breach of the duty of good faith and fair dealing. See *Richardson v. Bank of America, N.A.* 182 N.C.App. 531, 557, 643 S.E.2d 410, 426 (2007) citing *Gant v. NCNB,* 94 N.C.App. 198, 379 S.E.2d 865, *disc. review denied,* 325 N.C. 706, 388 S.E.2d 453 (1989); *Eastway Wrecker Service, Inc. v. City of Charlotte*, 165 N.C.App. 639, 599 S.E.2d 410 (2004) (allowing both plaintiff's claims for breach of contract ***and*** breach of the implied covenant of good faith and fair dealing remain pending); *Governors Club, Inc. v. Governors Club Ltd. Partnership* 152 N.C.App. 240, 567 S.E.2d 78, (2002); *Praxair, Inc. v. Airgas, Inc.,* 1999 WL 33545514, 1999 NCBC 9, (N.C. Super. October 20, 1999).

For these and other reasons set forth in the Plaintiff's Complaint, construing the complaint liberally and taking all allegations as true, the Defendants cannot, and have not, demonstrated to a certainty that Plaintiff is entitled to no relief under any state of facts which could possibly be proved in support of the claim. The Plaintiff has alleged sufficient facts to state a claim for Breach of Good Faith and Fair dealing and the Defendant's Motion to Dismiss should be denied.

B. THE PLAINTIFF HAS SUFFICIENTLY STATED A CAUSE OF ACTION FOR "BREACH OF FIDUCIARY DUTY" AND DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED

"In North Carolina, it is well established that a controlling shareholder owes a fiduciary duty to minority shareholders." *Farndale Co., LLC v. Gibellini* 176 N.C.App. 60, 69 (2006). Furthermore this "devolution of unlimited power imposes on holders of the majority of the stock a correlative duty ... to exercise good faith, care, and diligence ... [and] to protect the interests of the holders of the minority of the stock[.]" *Id. at* 69 (internal citations omitted).

Majority shareholders not only owe a fiduciary duty to the corporation but also to each of the minority shareholders. See *Loy v. Lorm Corp.*, 52 N.C. App. 428, 432, 278 S.E.2d 897, 901

(1981). Our Courts acknowledge a separate and individual cause of action by minority shareholders against the majority shareholders in closely held corporations. See *Id.*; *Woolard v. Davenport*, 166 N.C.App. 129, 601 S.E.2d 319 (2004) citing *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C.App. 390 (2000), *disc. review denied,* 353 N.C. 378, 547 S.E.2d 14 (2001) (emphasis added). Where the majority improperly takes advantage of the majority status to act in the absence of good faith care and diligence to the injury of the minority shareholders, they have breached their fiduciary duty. *Farndale Co., LLC* at 70.

Here, the Plaintiff has alleged that the Defendant shareholders agreed among and between themselves to force the Plaintiff to resign as a director, officer, employee and consequently a shareholder of the Corporation.(Comp. ¶ 32, 44) The Defendant Shareholders made it known to the Plaintiff on several occasions that they did not want the Plaintiff to remain with company; that they had the votes to vote him out; that they were resolute in their decision to remove him and that he might as well resign by the end of the month (less than 27 days) or he would be dealt with. (Comp. ¶ 32-35, 46, 54, 69, 72)

Defendant shareholders failed to inform and obtain the input of all of the shareholders and chose to further their own personal agenda. (Comp. ¶ 40-41, 49) The Defendant Shareholders never provided a legitimate business reason for their demand of Plaintiff's resignation (Comp. ¶ 38) and made no effort to comply with the termination provisions of the Plaintiff's employment agreement. (Comp. ¶ 55) The Defendant shareholders, specifically by and through Defendant Sharma, took the extraordinary measure of terminating the Plaintiffs access to the TBM computer system preventing the Plaintiff from being able to perform his job functions. (Comp. ¶ 59-67) Furthermore, the Plaintiff has alleged that each of the Defendant shareholders stood to benefit personally from their conduct. (Comp. ¶ 37)

As a result of the Defendant shareholder's actions, the Plaintiff lost the benefit of the remainder of his employment contract and expected earnings under the ESOP and lost the benefit of the profits of the company he would have received if he were permitted to remain a shareholder.

It is "well established in North Carolina ... that once a minority shareholder challenges the fairness of the actions taken by the majority, the burden shifts to the majority to establish that its actions were in all respects inherently fair to the minority and undertaken in good faith." *Farndale Co., LLC* at 70 *citing Loy,* 52 N.C.App. at 433, 278 S.E.2d at 901. Whether a party has acted in good faith in breach of their fiduciary duty is a question of fact for the trier of fact to determine after consideration of all the circumstances and context in which the party acted *Farndale Co., LLC* at 67-68.

This alleged conduct cannot be consistent with sound business practices and clearly indicates that the Defendant shareholders improperly took advantage of their voting power for the improper purpose of ousting the Plaintiff as a director, shareholder and employee of the Corporation for their own personal gain, all of which is sufficient to maintain a cause of action for Breach of Fiduciary Duty.

For these and other reasons set forth the Plaintiff's Complaint, construing the complaint liberally and taking all allegations as true, the Plaintiff has alleged sufficient facts to state a claim for breach of fiduciary duty and the Defendant's Motion to dismiss should be denied.

C. THE PLAINTIFF HAS SUFFICIENTLY STATED A CAUSE OF ACTION FOR "CIVIL CONSPIRACY" AND DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED.

Courts of North Carolina have certainly recognized a claim for civil conspiracy, even in those cases cited by the Defendants. See *Reid v. Holden* 242 N.C. 408, 415, 88 S.E.2d 125,

130 (N.C.1955)(To create civil liability for conspiracy there must have been an overt act committed by one or more of the conspirators pursuant to the scheme and in furtherance of the objective.) *Dove v. Harvey*, 168 N.C.App. 687, 690, 608 S.E.2d 798, 800 (N.C.App.,2005) (In order to state a claim for civil conspiracy, 'a complaint must allege a conspiracy, wrongful acts done by certain of the alleged conspirators, and injury.')

Recently our Supreme Court has directly addressed the pleading requirements necessary to survive a Motion to Dismiss and state a claim for civil conspiracy. In *State ex rel. Cooper v. Ridgeway Brand Mfg., LLC*, --- S.E.2d ---, 2008WL3915186, 9 (N.C. 2008), the Supreme Court stated that " a complaint sufficiently stated a claim for civil conspiracy when it alleged (1) a conspiracy, (2) wrongful acts done by certain of the alleged conspirators in furtherance of that conspiracy, and (3) injury as a result of that conspiracy."

In a corporate context, a Plaintiff can overcome the intracorporate immunity doctrine exists and maintain cause of action can be against a corporation as well as it's corporate agents when the corporate agent(s) have an "independent personal stake in achieving the corporation's illegal objective." See *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC,* 184 N.C.App. 613, 625, (2007*) affirmed in part reversed on other grounds by State ex rel. Cooper v. Ridgeway Brand Mfg., LLC*, --- S.E.2d ---, 2008WL3915186, 9 (N.C. 2008) *citing Buschi v. Kirven,* 775 F.2d 1240, 1251-52 (4th Cir.1985).

The Plaintiff has plead sufficient allegations to state a claim for civil conspiracy and to overcome the intracorporate immunity doctrine. The Plaintiff has alleged that each of the shareholder defendants was acting outside the scope of their duties as directors and shareholders of the Defendant Corporation. (Comp. ¶ 97) However, the Corporation was so dominated by the

Defendant shareholders that the Corporation could have only acted by and through them, thus making the corporation a separate and acting member of the conspiracy.

The Plaintiff has alleged that each of the Defendants Shareholders stood to personally gain and had an independent personal stake in achieving their objective of forcing the Plaintiff from the Corporation. (Comp. ¶ 37,103) The Plaintiff has alleged that the Defendant Shareholders time and again threatened to use their combined voting power, together, to oust the Plaintiff (See Comp. generally) and that they agreed by and between each other to take the necessary action to force the Plaintiff out of the company. (Comp. ¶ 32-35, 46, 54, 69, 72) The Plaintiff has alleged that the defendant shareholders agreed by and between themselves, individually and as agents of the corporation to breach its contract with the Plaintiff. (Comp. ¶ 76-83) Plaintiff has alleged that the defendant shareholders agreed by and between themselves, individually and as agents of the corporation to breach their fiduciary duty to the Plaintiff. (Comp. ¶ 90-98)

Plaintiff has alleged that after he was forced to resign as a director, but while an employee, that the defendant shareholders agreed by and between themselves to refuse to allow the Plaintiff access to the computer system. (Comp. ¶60-66) Plaintiff has alleged that after he was forced to resign as a director, but while an employee, that the defendant shareholders agreed by and between themselves to refuse to allow the Plaintiff to remain an employee under some alternative form of employment which would have allowed the Plaintiff to maintain his shares. (Comp. ¶ 36, 43) The Defendant shareholders were all well aware that if they could force the Plaintiff from the Corporation that Plaintiff would be forced to forfeit his shares making them available to each of the Defendant Shareholders. The Plaintiff alleges that each of the directors did infact absorb the Plaintiff shares thereby gaining a direct personal benefit and independent

stake in pursuit of their objectives. (Comp. ¶ 104-105) Lastly, the Plaintiff alleged that he was injured by the actions of one or more of the defendant shareholders and as a result of the conspiracy. (Comp. ¶ 108)

For these and other reasons set forth in the Plaintiff's Complaint, construing the complaint liberally and taking all allegations as true, the Plaintiff has alleged sufficient facts to state a claim for civil conspiracy and the Defendant's Motion to dismiss should be denied.

D. THE PLAINTIFF HAS SUFFICIENTLY STATED A CAUSE OF ACTION FOR "PUNITIVE DAMAGES" AND DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED.

While the Plaintiff recognizes that punitive damages are not generally recoverable solely for breach of contract, however, "where a breach of contract 'smacks of tort because of fraud and deceit involved', North Carolina will allow a party to recover punitive damages." *Club Car* at ¶ 4. The Plaintiff has alleged conduct sufficient to demonstrate the presence of willful, aggravated and malicious behavior and to maintain Plaintiff's claim for punitive damages.

In addition to this conduct attendant to the breach of contract, the Plaintiff has alleged a separate cause of action for breach of fiduciary duty. In *Vanwyk Textile Systems, B.V. v. Zimmer Machinery America, Inc.*, 994 F.Supp. 350 (W.D.N.C. 1997) the Western District of North Carolina held that a Breach of Fiduciary duty coupled with the alleged aggravating factors is sufficient to maintain a cause of action for Punitive Damages. The Plaintiff here has alleged an independent case of action for breach of Fiduciary Duty and alleged sufficient aggravating factors sufficient to survive a motion to dismiss.

The Plaintiff here has alleged sufficient aggravating factors attendant to the breach of contract and in addition to the additional claims for breach of fiduciary duty and civil conspiracy sufficient to survive a motion to dismiss.

In *Smith v. Nationwide Mut. Fire Ins. Co.* 96 N.C.App. 215 (1989) the Court of Appeals stated that:

> "when the breach of contract also constitutes or is accompanied by an identifiable tortious act, the tort committed may be grounds for recovery of punitive damages. [However], ... the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed. This type of aggravated conduct includes fraud, malice, oppression, insult, rudeness, caprice, and willfulness. Punitive damages are also recoverable when the wrong is done in a manner which evinces a ruthless and wanton disregard of the plaintiff's rights."

(internal citations omitted) In *Smith* the Plaintiff alleged only two causes of action, (1) breach of contract and (2) the attendant aggravating factors. The Court of Appeals held that this was sufficient to state a claim for punitive damages based on aggravated and oppressive tortious conduct. The *Smith* Court goes on to hold that whether or not the alleged facts rise to the level of aggravated conduct necessary to support such a claim is a question for the trier of fact to determine.

The Plaintiff has alleged the following facts any of which are sufficient to sufficiently allege the outrageous nature and continuing course of aggravating conduct sufficient to survive a Motion to Dismiss for punitive damages.

Defendant's actions were activated and motivated by a personal ill will toward the Plaintiff. (Comp ¶ 45, 110) The Defendants' actions were carried out with the conscious and intentional disregard of and indifference to the rights of the Plaintiff which each knew would result in injury to the Plaintiff. (Comp ¶ 110) The Defendants acted in the absence of good faith (Comp¶ 84-88). The Defendants engaged in a course of conduct over a period of several months to oust the Plaintiff from the corporation. (Comp ¶ 17-28) The Defendants intentionally broke the employment agreement with the Plaintiff by eliminating Plaintiff's ability to perform his job functions, knowing that he was meeting with a client. (Comp ¶ 58-67) Each of the Defendant

shareholders stood to benefit financially from the departure of the Plaintiff. (Comp ¶ 37, 48) The Defendants did not inform all of the partners and shareholders of meetings with the Plaintiff. (Comp ¶ 41) The Defendant shareholders misused their position as directors, officers and shareholders, even exceeding their authority as actors of the corporation to carry out their personal objectives. (Comp ¶ 48, 91, 97, 104 &105)

North Carolina Courts have held that similarly alleged conduct is sufficient to state a cause of action for punitive damages. See *Dailey v. Integon Insurance Corp.,* 57 N.C.App. 346, 291 S.E.2d 331 (1982). (Plaintiff alleged that the defendant's actions were "willful [sic], oppressive, and malicious" in that defendant intended to stall negotiations so that financial pressures on the Plaintiff would force him to accept a low settlement, were "outrageous" in the misuse of its power and authority, and constituted "reckless and wanton disregard" for Plaintiff's rights under the policy.); *See Also Payne v. N.C. Farm Bureau Mut. Ins. Co.,* 67 N.C.App. 692, 313 S.E.2d 912 (1984)

Furthermore the cause of action should be maintained against the Defendant Corporation and the individual Defendant shareholders. The Defendant shareholders arbitrarily and capriciously set aside their obligations and duties to the corporation and its minority shareholders and improperly used their power as a tool to achieve their own personal objectives. They made no effort what-so-ever to comply with the termination provisions of the Plaintiff's employment agreement and instead did "whatever they had to do" and consciously pressured the Plaintiff until he had no choice but to resign. This is the type of egregious conduct contemplated by § 1D-15 and the corporation and the defendant shareholders should be punished for their actions.

The Defendants singular argument for dismissal of Plaintiff's Punitive damages claim is the absence of aggravated conduct. Construing the Compliant in the light most favorable to the

Plaintiff the Defendants' argument fails. The Plaintiff has set forth multiple allegations of aggravated, malicious and oppressive conduct on behalf of the Defendants, which at the very minimum "could conceivably" support a claim for punitive damages under *Smith,* let alone, "any theory" and the Defendants' motion to dismiss should be denied.

E. PLAINTIFF'S CLAIM FOR UNFAIR AND DECEPTIVE TRADE PRACTICES HAS BEEN DISMISSED.

The Plaintiff has filed contemporaneous herewith a notice of Voluntary Dismissal as to Plaintiff's Claim for Unfair and Deceptive Trade Practices *ONLY.*

IV. CONCLUSION

The Defendants have argued that this is just a breach of contract case, yet it is so much more. This is a case where several majority shareholders conspired to breach a contract acting in the absence of good faith and fair dealing. The majority shareholders manipulated the corporation to carry out their personal objectives and breached their fiduciary duty to the Plaintiff. This is a case where the Defendant shareholders agreed to do what ever it took to oust a minority shareholder without any regard to the corporate formality. This is a case where the Plaintiff has alleged that the Defendant shareholders actions were so aggravated, willful and malicious that they should be punished for their individual conduct. This is much more than a simple breach of contract and the Plaintiff's remaining claims should be allowed to remain. For the reasons stated herein, we respectfully ask that this Court deny the Defendants' Motion to Dismiss.

This the 24th day of September, 2008.

STUBBS, COLE, BREEDLOVE,

PRENTIS & BIGGS, P.L.L.C.

By: /s/ Bryson M. Aldridge

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CERTIFICATE OF COMPLIANCE

The Undersigned herby certifies that the foregoing Memorandum of Law complies with Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court.

STUBBS, COLE, BREEDLOVE,
PRENTIS & BIGGS, P.L.L.C.

By: /s/ Bryson M. Aldridge
Bryson M. Aldridge
NC Bar No. 35120

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document was served upon counsel for all parties by ( ) Federal Express; ( ) Hand Delivery; ( ) Facsimile; (X) United States Mail, first class postage prepaid, addressed as follows:

Gregory W. Brown
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This the 24th day of September, 2008.

STUBBS, COLE, BREEDLOVE,
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Covenant Equipment Corp. v. Forklift Pro, Inc.
N.C.Super.,2008.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of North Carolina,
Mecklenburg County,
Business Court.
COVENANT EQUIPMENT CORPORATION d/b/a Wholesale Fork Lifts, Plaintiffs,
v.
FORKLIFT PRO, INC., Bucky W. Caldwell, Timothy Smith and William Carnie, Defendants.
No. 07 CVS 21932.

May 1, 2008.

{1} This case arises out of Plaintiffs' suit for Misappropriation of Trade Secrets, Unfair and Deceptive Trade Practices, Civil Conspiracy, Breach of Fiduciary Duty, Tortious Interference with Contractual Relations, Fraud, Unjust Enrichment, Conversion, and Breach of Contract.

Baucom, Claytor, Benton, Morgan & Wood, PA by Rex C. Morgan and The Business Law Advisors by Daryl L. Hollnagel for Plaintiffs.
Horack Talley by John W. Bowers for Defendant William Carnie.

ORDER AND OPINION ON DEFENDANT CARNIE'S MOTION TO DISMISS

TENNILLE, Judge.

I.

PROCEDURAL BACKGROUND

*1 {2} This action was filed in Mecklenburg County on November 1, 2007. Defendant Carnie filed the Notice of Designation on January 14, 2008. This action was designated a mandatory complex business case by Order of the Chief Justice of the Supreme Court of North Carolina dated January 15, 2008, and subsequently assigned to the undersigned Chief Special Superior Court Judge for Complex Business Cases by Order dated January 15, 2008.

{3} Defendant Carnie filed motions to dismiss under each of Rules 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6) of the North Carolina Rules of Civil Procedure on February 13, 2008. The Court heard oral arguments on the motions on April 2, 2008.

II.

FACTUAL BACKGROUND

A.

THE PARTIES

{4} Plaintiff Covenant Equipment Corporation, d/b/a Wholesale Fork Lifts ("Plaintiff") is a South Carolina corporation having its principal place of business in York County, South Carolina. Plaintiff is engaged in the business of wholesale, service, and maintenance of used forklifts and related equipment.

{5} Defendant Forklift Pro, Inc. ("Forklift") is a North Carolina corporation having its principal place of business in Pineville, North Carolina.

{6} Defendant Buck W. Caldwell ("Caldwell") is a resident of Mecklenburg County, North Carolina.

{7} Defendant Timothy Smith ("Smith") is a resident of York County, South Carolina.

{8} Defendant William Carnie ("Carnie") is a res-

ident of York County, South Carolina

{9} Forklift, Caldwell, Smith, and Carnie will be referred to collectively as the "Defendants." Caldwell, Smith, and Carnie will be referred to collectively as the "Individual Defendants."

B.

THE PARTIES' PRIOR DEALINGS

{10} Plaintiff and Wholesale Fork Lifts, Inc.[FN1] entered into an Asset Purchase Agreement in June 2004. (Compl. ¶¶ 6-7; Am. Answer ¶¶ 6-7.) Caldwell was the sole shareholder of Wholesale Fort Lifts, Inc. (Compl. ¶ 7; Am. Answer ¶ 7.) At that time, Caldwell and his wife, Janet Caldwell [FN2], executed non-competition agreements (the "Noncompetition Agreement"). (Compl. ¶ 10; Am. Answer ¶ 10.) Caldwell was employed by Plaintiff from the date of the sale through January 17, 2007. (Compl. ¶ 11; Am. Answer ¶ 11.) Forklift was incorporated June 18, 2007. (Compl. ¶ 12; Am. Answer ¶ 12.) Caldwell owns the majority of outstanding shares and is the registered agent of Forklift. (Compl. ¶ 12; Am. Answer ¶ 12.) Carnie and Smith were employees of Plaintiff and are now employees of Forklift. (Compl. ¶¶ 15-16; Am. Answer ¶¶ 15-16.) Carnie and Wholesale Fork Lifts, Inc. entered into an "Employment, Confidentiality, and Noncompetition Agreement" (the "Employment Agreement") on February 11, 2002, prior to Plaintiff's acquisition of Wholesale Fork Lifts, Inc.'s assets. (Compl.Ex.A.) The Employment Agreement was attached to the Complaint and is incorporated herein by reference. Carnie's employment with Plaintiff ended on or about July 6, 2007. (Compl.¶ 15.) Carnie's employment with Forklift began immediately or shortly thereafter. (Compl.¶ 15.)

FN1. "Wholesale Fork Lifts, Inc." is a non-party entity separate and distinct from Plaintiff. Plaintiff is doing business as "Wholesale Fork Lifts." "Wholesale Fork Lifts, Inc.," when used herein, refers to the separate entity whose assets were purchased by Plaintiff.

FN2. Ms. Janet Caldwell is not a party to this suit.

III.

THE ALLEGATIONS

***2** {11} Plaintiff alleges that the Defendants misappropriated Plaintiff's trade secrets (Compl.¶ 20) in furtherance of a civil conspiracy (Compl.¶ 21) with the intent to compete against Plaintiff in an unfair and deceptive manner, convert Plaintiff's property, misappropriate Plaintiff's trade secrets, and to interfere with Plaintiff's contractual rights (Compl.¶¶ 23, 26). Plaintiff alleges that the Defendants have engaged in unfair and deceptive trade practices (Compl.¶ 23) and intentionally interfered with Plaintiff's contractual relationships (Compl.¶ 37). Plaintiff alleges that the Defendants were unjustly enriched by their actions. (Compl.¶ 52-53.)

{12} Plaintiff alleges that the Individual Defendants breached their fiduciary duty to Plaintiff when they engaged in activities "contrary to the best interests of the Plaintiff" such as the alleged actions took in furtherance of the civil conspiracy (Compl.¶ 31). Plaintiff alleges that the Individual Defendants converted Plaintiff's property. (Compl.¶¶ 33, 55.)

{13} Plaintiff alleges that Caldwell has intentionally breached his Noncompetition Agreement with Plaintiff (Compl.¶¶ 41-42) and has engaged in fraud related to the accelerated payoffs of promissory notes and the promises of retirement while retaining an independent contractor position (Compl.¶¶ 44-50).

{14} Plaintiff alleges that Carnie has breached his Employment Agreement with Wholesale Fork Lifts, Inc. (Compl.¶¶ 59-63.)

IV.

MOTIONS TO DISMISS

{15} Carnie has moved to dismiss the claims against him on several Rule 12 of the North Carolina Rules of Civil Procedure ("Rule 12") motions. First, insufficiency of process under Rule 12(b)(4) of the North Carolina Rules of Civil Procedure ("Rule 12(b)(4)"). (Def.'s Mot. Dismiss 1.) Second, insufficiency of service of process under Rule 12(b)(5) of the North Carolina Rules of Civil Procedure ("Rule 12(b)(5)"). (Def.'s Mot. Dismiss 1.) Third, lack of jurisdiction over the person under Rule 12(b)(2) of the North Carolina Rules of Civil Procedure ("Rule 12(b)(2)"). (Def.'s Mot. Dismiss 2.) And fourth, failure to state a claim under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure ("Rule 12(b)(6)"). (Def.'s Mot. Dismiss 2.) The Court will address the first three motions related to service and jurisdiction before addressing the Rule 12(b)(6) motion.

A.

SERVICE, PROCESS, AND JURISDICTION

{16} Carnie's motions related to service center on three issues. Carnie argues that he should be dismissed because (1) his name was misspelled on the civil summons (Def.'s Br. Supp. Mot. Dismiss 1) although it was spelled correctly on the complaint itself (Pl.'s Br. Opp'n Mot. Dismiss 1), (2) he was not personally served with the civil summons (Def.'s Br. Supp. Mot Dismiss 4) although he knew that he was going to be served and the civil summons was left at his home (Pl.'s Br. Opp'n Mot. Dismiss 2-3), and (3) for the above two reasons the Court has no jurisdiction over him (Def.'s Br. Supp. Mot. Dismiss 6) even though Carnie was the party that filed the Notice of Designation designating this case as a mandatory complex business case before the Business Court (Pl.'s Br. Opp'n Mot. Dismiss 3). For the reasons stated below, the Court DENIES Carnie's motions to dismiss for insufficiency of process, insufficiency of service of process, and lack of jurisdiction.

1.

LEGAL STANDARD

*3 {17} Rule 4 of the North Carolina Rules of Civil Procedure allows for different methods of service of process on a natural person. N.C.R. Civ. P. 4(j)(1). Generally, service can be completed by personally delivering a copy of the summons and complaint or by mailing a copy of the same to the defendant.*Id.* When the copy is personally delivered, it may be given to the defendant, left at the defendant's dwelling "with some person of suitable age and discretion," or left with the defendant's agent. *Id.* at 4(j)(1)(a-b). The summons that is delivered "shall be directed to the defendant."*Id.* at 4(b).

{18} "Where there is a defect in the process itself, the process is generally held to be either voidable or void.... Likewise, if the service is insufficient and unauthorized by law the court does not acquire jurisdiction."*Harris v. Maready,* 311 N.C. 536, 542, 319 S.E.2d 912, 916 (1984) (citing 62 Am.Jur.2d *Process* §§ 21, 30 (1972)). Actual notice, when there is a defect in process or insufficient service, does not remedy the defect or insufficiency. *Id.* at 544, 319 S.E.2d at 917.

{19} There are two requirements of process and service of process that Carnie brings to the Court's attention. First, that the summons be directed to the defendant. Second, that the summons be delivered to the defendant in a certain manner. The Court will address the summons itself first (insufficiency of process), then the service of the summons (insufficiency of service of process).

2.

ANALYSIS

a.

INSUFFICIENCY OF PROCESS

{20} The North Carolina Supreme Court is quoted frequently for the maxim that "[a] suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court."*Hazelwood v. Bailey,* 339 N.C. 578, 584, 453 S.E.2d 522, 525 (1995) (citing *Wiles v. Welparnel Constr. Co.,* 295 N.C. 81, 84-85, 243 S.E.2d 756, 758 (1978)). The Court went on to admonish judges not to "put themselves in the position of failing to recognize what is apparent to everyone else."*Id.*

{21} In *Hazelwood,* the summons listed the incorrect county while the complaint listed the correct county. *Id.* at 585, 453 S.E.2d at 525-26. The Court held that "there was no substantial possibility of confusion" nor were defendants "in fact confused." *Id.* at 585, 453 S.E.2d at 526. The Court relied on *Wiles* and *Harris* in making its decision. *Id.* at 583,453 S.E.2d at 524.

{22} In *Wiles,* the summons was ambiguous as to whether the corporation or the registered agent was being sued. *Wiles,* 295 N.C. at 85, 243 S.E.2d at 758. However, the complaint "clearly indicated" who the defendant was. *Id.* Process was adequate in that situation. *Id.*

{23} In *Harris,* defendant Maready was served with summons directed to C. Roger Harris. *Harris,* 311 N.C. at 541, 319 S.E.2d at 916. The Court found that there was no "substantial possibility of confusion" even though the summons was directed to a different party because Maready's name was in the caption of the summons. *Id.* at 544, 319 S.E.2d at 917. Process was adequate in that situation. *Id.* at 544, 319 S.E.2d at 918

*4 {24} The summons that was issued to Carnie here was directed to "William Currie" instead of "William Carnie." (Def. Br. Supp. Mot. Dismiss Ex. A.) The summons was correctly directed to Carnie's address. (Def. Br. Supp. Mot. Dismiss Ex. A.) The summons' caption correctly identified William Carnie as a defendant in the suit. (Def. Br. Supp. Mot. Dismiss Ex. A.) The complaint attached to the summons correctly identified William Carnie as a defendant in the suit. (Compl.) There can be no question that Carnie understood that a suit had been instituted against him. Defendant Carnie's Motion to Dismiss under Rule 12(b)(4) is hereby DENIED.

b.

INSUFFICIENCY OF SERVICE OF PROCESS AND LACK OF JURISDICTION OVER THE PERSON

{25} Carnie argues that the service of process was insufficient because the sheriff left the summons and complaint at his house but not with him or another person at the residence. (Def .'s Br. Supp. Mot. Dismiss 4-5.) Plaintiff could have served Carnie by either personally delivering the documents or mailing the documents. N.C.R. Civ. P. 4(j)(1). There is a presumption of service when the "return shows legal service by an authorized officer."*Harrington v. Rice,* 245 N.C. 640, 642, 97 S.E.2d 239, 241 (1957). That presumption is rebuttable. *Id.* (citation omitted). The moving party shoulders the burden of proof to rebut service. *Id.* (citation omitted).

{26} Service has been found adequate "despite a failure to manually deliver the process" when the circumstances surrounding the attempt to serve a defendant leads a federal court to find that the defendant was attempting to evade service. *Currie v. Wood,* 112 F.R.D. 408, 409 (E.D.N.C.1986) (citing various examples from federal courts of instances

when leaving the summons and complaint at the respective defendant's residence, though not with a resident, was adequate). In *Currie,* the plaintiff had attempted to serve the defendant pursuant to the Federal and North Carolina Rules of Civil Procedure. *Id.* at 408.The defendant had refused that certified mail service. *Id.* at 409.Plaintiff then attempted to personally serve the defendant. *Id.* Plaintiff attempted to give the defendant an envelope that contained the summons and complaint. *Id.* There was no determination of whether the defendant knew what the envelope contained, but he refused to accept the envelope nonetheless.*Id.* The envelope was left in a vehicle while the defendant watched. *Id.* The defendant's wife received the envelope containing the summons and complaint the following day from the owner of the vehicle. *Id.* The court in *Federal Fin. Co. v. Longiotti,* 164 F.R.D. 419 (E.D.N.C.1996), found that a defendant who had evaded service on several occasions, one of which caused a neighborhood to be evacuated by a bomb squad, was served when an envelope containing the summons and complaint that had been left on the doorstep was handed to defendant's wife. *Id.* at 421.The court found that defendant had "willfully and intentionally avoided service of process."*Id.*

*5 {27} Carnie argues that these federal decisions have no influence over the holding of this Court. (Def.'s Reply.) Carnie and Plaintiff recognize that Rule 4(e)(2) of the Federal Rules of Civil Procedure is "virtually identical" to Rule 4(j)(1) of the North Carolina Rules of Civil Procedure. (Def.'s Reply; Pl.'s Opp'n Mot. Dismiss 5.) In *Wiles,* the Supreme Court cited the purpose of Rule 4 of the Federal Rules of Civil Procedure when it decided that the narrow interpretation of Rule 4(b) of the North Carolina Rules of Civil Procedure should be overruled for a more lenient interpretation of that rule. *Wiles,* 295 N.C. at 84, 243 S.E.2d at 758. The purposes of Rule 4 of the Federal Rules of Civil Procedure and Rule 4 of the North Carolina Rules of Civil Procedure have not changed in the intervening years. *See Hazelwood,* 339 N .C. at 581, 453 S.E.2d at 523. Service of process "provide[s] a ritual that marks the court's assertion of jurisdiction."*Id.* (citing *Harris,* 311 N.C. at 541-42, 319 S.E.2d at 916). When there is an attempt to evade that ritual, this Court will look to interpretations of a virtually identical federal statute for guidance as to this state's statute.

{28} Carnie has submitted three affidavits, one of which was his own, stating that he was at work at the day and time the summons states service was made. (Carnie Aff. ¶ 6; Janet Caldwell Aff. ¶ 5; Smith Aff. ¶ 10.) The Court notes that all of the affiants have an interest in this suit. Carnie and Smith are defendants in this suit. Janet Caldwell is Defendant Caldwell's spouse and an employee of Forklift.

{29} Carnie acknowledges that through his conversations with both Smith and the York County Sheriff's office he was aware that there had been a suit instituted against him and that service had previously been attempted. (Smith Aff. ¶¶ 6-7; Carnie Aff. ¶ 5 .) Carnie refused to sign for the certified mail service. (Def.'s Reply; Pl.'s Br. Opp'n Mot. Dismiss 6.) Carnie refused to answer the York County Sheriff's office's questions about service. (Carnie Aff. ¶ 5; Smith Aff. ¶ 7.) Carnie did receive the summons and complaint on the day the sheriff's office left the documents at his residence. (Carnie Aff. ¶ 6.)

{30} Carnie would have the Court believe that this series of events was not an attempt to evade service. The Court disagrees. The Court finds that the circumstances surrounding service show that Carnie was attempting to evade service. The Court finds that the service of process on Carnie was adequate. For the above reasons, the Court hereby DENIES Defendant Carnie's Motion to Dismiss for Insufficiency of Service of Process under Rule 12(b)(5). The Court finds that the service of process was adequate and hereby DENIES Defendant Carnie's Motion to Dismiss for Lack of Jurisdiction of the Person under Rule 12(b)(6). Even if the service of process was not adequate, the Court finds for the below reasons that the filing of a Notice of Desig-

nation in an action constitutes a general appearance for the purpose of personal jurisdiction.

***6** {31} "Jurisdiction of the court over the person of a defendant is obtained by service of process, voluntary appearance, or consent."*Grimsley v. Nelson,* 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996) (citation omitted). A party waives the defenses of improper venue, insufficiency of process, or insufficiency of service of process if it does not raise such defenses either in a Rule 12 motion made prior to responsive pleading or in its responsive pleading. N.C.R. Civ. P. 12(b), (h). Further, a North Carolina court has jurisdiction over a defendant even in the absence of service of process if the defendant has made a general appearance in the action. N.C. Gen.Stat. § 1-75.7 (LEXIS through 2007 legislation) ("Section 1-75.7"); *see also Simms v. Mason's Stores, Inc.,* 285 N.C. 145, 157, 203 S.E.2d 769, 777 (1974) (construing Rule 12 with Section 1-75.7 to find that Rule 12"did not abolish the concept of the voluntary or general appearance").[FN3]

> FN3. The *Simms* Court held that a request for extension of time constituted a general appearance. That holding has been superseded by statute.

{32} "[A] general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person."[FN4]*In re Blalock,* 233 N.C. 493, 504, 64 S.E.2d 848, 856 (1951); *see also Barnes v. Wells,* 165 N.C.App. 575, 579-80, 599 S.E.2d 585, 588-89 (2004) (citing various actions that the Court of Appeals has found to constitute a general appearance including submitting financial documents, appearing at a divorce hearing, moving for change of venue, counsel's participation in an in-chambers conference, and moving to disqualify counsel). The general appearance waiver of personal jurisdiction found in Section 1-75.7 is particular to Rule 12 jurisdictional motions. *Simms,* 285 N.C. at 157, 203 S.E.2d at 777 (explaining that Rule 12 and Section 1-75.7 must be construed together since they are part of the same enactment; and that after a defendant has made a general appearance, he may not assert the defense that the court has no jurisdiction over his person under Rule 12); *Swenson v. Thibaut,* 39 N.C.App. 77, 89, 250 S.E.2d 279, 288 (1978) (noting that absent Section 1-75.7 being construed with Rule 12, a general appearance would not constitute waiver of jurisdictional defenses).*Cf. Sony Ericsson Mobile Commc'ns. USA, Inc. v. Agere Sys., Inc.,* 2007 NCBC 28 ¶¶ 15-17 (N.C.Super.Ct. Aug. 27, 2007), http://www.n cbusinesscourt.net/opinions/2007NCBC2 8.pdf (holding that the filing of a Notice of Designation did not constitute waiver of the defense of venue under Rule 12(b)(3)).[FN5]

> FN4. However, "obtaining an extension of time within which to answer or otherwise plead" is not a general appearance. N.C. Gen.Stat. § 1-75.7(1).
>
> FN5. The Court notes that the Court in *Sony Ericsson* was hearing a motion on improper venue which, unlike the jurisdictional defenses, is not read in conjunction with the general appearance provisions of Section 1-75.7

{33} Carnie attempts to support his position that a Notice of Designation is not a general appearance by arguing that the process of designating a case a mandatory complex business case is analogous to the removal process for federal court. (Def.Reply.) The Federal Rules of Civil Procedure have no analog to Section 1-75.7. *Simms,* 285 N.C. at 156-57, 203 S.E.2d at 777 (finding that there is "no counterpart in the federal practice" to Section 1-75.7).

***7** {34} The federal removal process allows a state civil action to be removed to a federal district court having original jurisdiction. 28 U.S.C. § 1441(a) (LEXIS through Apr. 9, 2008 legislation). Removal of a state action to a federal court is a question of jurisdiction. *See id.*The Business Court is a Superior Court of general jurisdiction. *Sony Ericsson Mobile Commc'ns. USA, Inc.,* 2007 NCBC at ¶ 16. Fil-

ing a Notice of Designation is more akin to filing a motion than federal removal: first, the moving party files the motion (Notice of Designation); then, the motion can be objected to within a certain time period (Opposition to Designation); finally, the judge decides the motion (Order on Designation).*See*N.C. Gen.Stat. § 7A-45.4. The party filing the Notice of Designation has invoked the authority of the Court.

{35} The Court finds that the filing of a Notice of Designation in an action constitutes a general appearance for the purposes of personal jurisdiction. The Court acknowledges that this may not have been readily apparent at the time Carnie filed the Notice of Designation.[FN6]For the above reasons, the Court hereby DENIES Defendant Carnie's motions to dismiss for insufficiency of service of process and for lack of jurisdiction over the person. This Order makes it clear that a Notice of Designation constitutes a general appearance for the purposes of personal jurisdiction unless an objection to personal jurisdiction is contained therein.

> FN6. Because the Court has granted the Rule 12(b)(6) motion to dismiss, there are no statute of limitations issues which would arise if Carnie were served with a new summons and complaint.

B.

RULE 12(b)(6)

1.

LEGAL STANDARD

{36} The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the pleading against which the motion is directed.*Sutton v. Duke,* 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). In *Branch Banking & Trust Co. v. Lighthouse Financial Corp.,* 2005 NCBC 3 (N.C.Super.Ct. July 13, 2005), http://www.ncbusinesscourt.net/opinions/2005NCBC3 .htm, this Court summarized the 12(b)(6) standard as follows:

> When ruling on a motion to dismiss under Rule 12(b)(6), the court must determine "whether, as a matter of law, the allegations of the complaint ... are sufficient to state a claim upon which relief may be granted."In ruling on a motion to dismiss, the court must treat the allegations in the complaint as true. The court must construe the complaint liberally and must not dismiss the complaint unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. When considering a motion under Rule 12(b)(6), the court is not required to accept as true any conclusions of law or unwarranted deductions of fact in the complaint. When the complaint fails to allege the substantive elements of some legally cognizable claim, or where it alleges facts which defeat any claim, the complaint should be dismissed under Rule 12(b)(6).

Branch Banking & Trust Co., 2005 NCBC at ¶ 8 (citations omitted).

***8** {37} Furthermore, the Court may not consider "extraneous matter" outside the complaint, or else the Rule 12(b)(6) motion will be converted into a Rule 56 motion for summary judgment. *See, e.g., Fowler v. Williamson,* 39 N.C.App. 715, 717, 251 S.E .2d 889, 890-91 (1979). However, the Court may consider documents the moving party attaches to a 12(b)(6) motion which are the subject of the challenged pleading and specifically referred to in that pleading, even though they are presented to the Court by the moving party. *See Oberlin Capital, L.P. v. Slavin,* 147 N.C.App. 52, 60, 554 S.E.2d 840, 847 (2001) (considering a contract on a 12(b)(6) motion even though the contract was presented by the movant). The Court is not required to accept as true "any conclusions of law or unwarranted deductions of fact."*Id.* at 56, 554 S.E.2d at 844. Thus the Court can reject allegations that are

contradicted by the supplementary documents presented to it. *See E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship,* 213 F.3d 175, 180 (4th Cir.2000) (stating that the court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments").

2.

ANALYSIS

{38} Carnie's Rule 12(b)(6) motion asks the Court to dismiss Plaintiff's Tenth Cause of Action, Breach of Contract, as to him. The contract Carnie is accused of breaching is the Covenants Against Competition portion of the Employment Agreement between Carnie and Wholesale Forklifts, Inc. which was entered into on February 11, 2002. Plaintiff and Wholesale Fork Lifts, Inc. entered into an Asset Purchase Agreement on June 3, 2004.[FN7]Carnie was employed by Plaintiff from the date of the Asset Purchase Agreement. Carnie left the employment of Plaintiff in July 2007 and entered into employment with Forklift immediately or shortly thereafter.

> FN7. The Employment Agreement and the Asset Purchase Agreement were considered by the Court. The Employment Agreement was attached to the complaint. The Asset Purchase Agreement was attached by the moving party to the motion.

{39} The Employment Agreement is governed by the laws of South Carolina. (Employment Agreement ¶ 9.) North Carolina will give effect to a contractual provision agreeing to a different jurisdiction's substantive law. *Tanglewood Land Co. v. Byrd,* 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980). However, North Carolina will not give effect to a choice of law provision if the "law of the chosen state would be contrary to a fundamental policy" of North Carolina.*Cable Tel. Servs. v. Overland Contracting, Inc.,* 154 N.C.App. 639, 643, 574 S.E.2d 31, 34 (2002). Noncompetition agreements such as the contractual provision at issue here are generally disfavored in both North and South Carolina. *Compare Rental Unif. Serv., Inc. v. Dudley,* 301 S.E.2d 142 (S.C .1983), *with United Lab., Inc. v. Kuykendall,* 322 N.C. 643, 370 S .E.2d 375 (1988). The requirements for a noncompetition agreement to be enforceable are similar in both North and South Carolina. *Compare Stringer v. Herron,* 424 S.E.2d 547 (1992),[FN8]*with United Lab.,* 322 N.C. at 649-50, 370 S.E.2d at 380.[FN9]In terms of consideration, both North and South Carolina agree that additional consideration is necessary for a noncompeititon agreement to be enforceable when an at-will employment relationship already exists. *See Poole v. Incentives Unlimited, Inc.,* 548 S.E.2d 207, 209 (S.C.2001) (citing with approval North Carolina as an example of requiring additional consideration when the noncompetition agreement is entered into after the initiation of employment). South Carolina has ruled that contracts can be assigned. *Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.,* 518 S.E.2d 44, 46 (S.C.1999). However, it does not appear that South Carolina has directly ruled on the assignability of noncompetition agreements.[FN10]In *Riedman Corp. v. Jarosh,* 345 S.E.2d 732 (S .C.App.1986), *aff'd*349 S.E.2d 404 (S.C.1986), the South Carolina Court of Appeals did not reach the issue of whether the new employer who bought the original employer/party to the noncompetition agreement had standing to "seek any benefits" under the noncompetition agreement. *Id.* Unfortunately, the facts in *Riedman* are sparse and do not give guidance for applying it to the case at bar. Without guidance from South Carolina courts, this Court turns to North Carolina law.

> FN8. The court held that a "covenant not to compete will be upheld if it is: (1) necessary for the protection of the legitimate interest of the employer; (2) reasonably limited in its operation with respect to time and place; (3) not unduly harsh and oppressive in curtailing the legitimate efforts

of the employee to earn a livelihood; (4) reasonable from the standpoint of sound public policy; and (5) supported by a valuable consideration."*Stringer,* 424 S.E.2d at 548 (citations omitted).

FN9. The court held that "restrictive covenants between an employer and employee are valid and enforceable if they are (1) in writing; (2) made part of a contract of employment; (3) based on valuable consideration; (4) reasonable both as to time and territory; and (5) not against public policy."*United Lab.,* 322 N.C. at 649-50, 370 S.E.2d at 380 (citations omitted).

FN10. The South Carolina Court of Appeal has ruled however that noncompetition agreements are not marital assets subject to equitable distribution. *Ellerbe v. Ellerbe,* 473 S.E.2d 881, 886 (S.C.Ct.App.1996).

*9 {40} This Court has recently found that a noncompetition agreement that has been sold as part of an asset sale, as opposed to the sale of a business, gives the buyer the right to enforce the noncompetition agreement as of the date of the sale but not to enforce the noncompetition agreement as if it had been entered into originally by the buyer. *Better Bus. Forms & Prods., Inc. v. Craver,* 2007 NCBC 34 ¶ 33 (N.C.Super.Ct. Nov. 1, 2007) http://www.ncbusinesscourt.n et/opinions/110107ÖrderMotion0 toD is miss ebpage.pdf. In other words, the buyer of a noncompetition agreement does not step fully into the shoes of the original employer because the buyer is a new employer. Instead, the buyer can either enforce the noncompetition agreement or enter into a new noncompetition agree- ment.

{41} In this case, Plaintiff entered into an Asset Purchase Agreement with Carnie's original employer, Wholesale Fork Lifts, Inc. No where in the pleadings is it asserted that Plaintiff renegotiated the Employment Agreement between Wholesale Fork Lifts, Inc. and Carnie or entered into a new noncompetition agreement with Carnie when he began his employment with Plaintiff. Plaintiff has the right to enforce the Employment Agreement, including the Covenants Against Competition provision, from the point of the asset sale on June 3, 2004. Carnie left the employment of Plaintiff on or about July 6, 2007, and began his employment with Forklift immediately or shortly afterwards. The Covenants Against Competition provision of Carnie's Employment Agreement expired two years after his employment with Wholesale Fork Lifts, Inc. was terminated-June 3, 2006. Regardless of whether the Covenants Against Competition provision was enforceable, it has since expired.

{42} This holding, as the holding in the *Craver* case, provides buyers who choose to purchase assets rather than stock with the ability to enforce covenants against employees of the selling company.[FN11]It also requires the buyer, if it chooses to do so, to negotiate a new restrictive covenant with the employee, the consideration for which would be the new employment. This policy is fair because the buyer may have a business which substantially changes the nature and scope of the restriction originally agreed to by the employee.

FN11. The Court notes there is a clear difference between an asset purchase and a stock purchase.

{43} For the reasons stated above, the Court hereby GRANTS Defendant Carnie's Motion to Dismiss under Rule 12(b)(6) as it applies to the claims based upon the restrictive covenant in his employment contract. The Court is not dismissing the claims directed to Carnie based upon other alleged violations of his employment contract.

V.

CONCLUSION

{44} Based on the foregoing, it is hereby

ORDERED, ADJUDGED, and DECREED:

1. Defendant Carnie's Motion to Dismiss for Insufficiency of Process under 12(b)(4) is DENIED;

2. Defendant Carnie's Motion to Dismiss for Insufficiency of Service of Process under 12(b)(5) is DENIED;

3. Defendant Carnie's Motion to Dismiss for Lack of Jurisdiction Over the Person under 12(b)(2) is DENIED;

***10** 4. Defendant Carnie's Motion to Dismiss for Failure to State a Claim under 12(b)(6) is GRANTED as it applies to the claims based upon the restrictive covenant in his employment contract.

N.C.Super.,2008.
Covenant Equipment Corp. v. Forklift Pro, Inc.
Not Reported in S.E.2d, 2008 WL 1945973 (N.C.Super.), 2008 NCBC 10

END OF DOCUMENT

C
Club Car, Inc. v. Dow Chemical Co.
N.C.Super.,2007.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of North Carolina,
Mecklenburg County,
Business Court.
CLUB CAR, INC., Plaintiff,
v.
The DOW CHEMICAL COMPANY, Defendant.
No. 06 CVS 15530.

May 3, 2007.

Helms, Mulliss & Wicker, P.L.L.C., by Richard H. Conner, III and Douglas W. Ey, Jr., for Plaintiff Club Car, Inc.
Mayer, Brown, Rowe & Mawe, L.L.P., by Eric H. Cottrell and Mary K. Mandeville, for Defendant The Dow Chemical Company.

ORDER

DIAZ, Judge.
***1** {1} The Court heard this matter on 1 March 2007 on the Defendant's Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure (the "Motion"). Defendant seeks dismissal of the Plaintiff's Second and Third Claims for Relief, alleging negligent misrepresentation and a violation of the North Carolina Unfair and Deceptive Trade Practices Act (the "UDTPA"), respectively. After considering the Complaint, the parties' briefs, and the arguments of counsel, the Court **DENIES** the Motion.

I.

PROCEDURAL BACKGROUND

{2} Plaintiff Club Car, Inc. ("Club Car") filed its Complaint on 8 August 2006.

{3} Defendant The Dow Chemical Company ("Dow Chemical") filed the Motion on 27 November 2006.

{4} The case was transferred to the North Carolina Business Court and assigned to me as a complex business case by order of the Chief Justice of the North Carolina Supreme Court dated 12 December 2006.

{5} On 27 December 2006, Dow Chemical filed a brief in support of the Motion.

{6} Club Car filed a brief in opposition to the Motion on 19 January 2007, and Dow Chemical filed a reply brief on 1 February 2007.

{7} On 1 March 2007, the Court heard oral arguments on the Motion.

II.

THE FACTS

{8} The following facts are taken from Club Car's Complaint, which the Court accepts as true for purposes of the Motion.

{9} Club Car is a Delaware corporation with its headquarters located in Augusta, Georgia. (Compl.¶ 2.) Club Car manufactures and sells golf cars. (Compl.¶ 1.)

{10} Dow Chemical is a Delaware corporation with its headquarters located in Midland, Michigan. (Compl.¶ 2.) Dow Chemical is a manufacturer and supplier of plastics and other chemical products. (Compl.¶ 2.)

{11} The claims in this case arise from Club Car's

2003 introduction of a line of premium golf cars known as the "Precedent" line. (Compl.¶ 3.) The Precedent line includes a distinctive, uniform dark gray underbody fashioned from compression-molded plastic through a process developed in Germany. (Compl.¶¶ 5, 8.) The underbody is designed so as not to require painting, and its molded components are intended to resist long-term exposure to the elements without fading or becoming discolored. (Compl.¶¶ 5-6.)

{12} Club Car selected non-party Meridian Automotive Systems-Composite Operations, Inc. ("Meridian") to manufacture the compression molding for the rear underbody and other molded parts of its Precedent line. (Compl.¶ 10.)

{13} The principal materials used to make the compression-molded parts formulation are glass fibers, polypropylene resin, and the "masterbatch," which consists of numerous additives that produce the performance characteristics of the molded parts (collectively, the "raw materials"). (Compl.¶ 11.)

{14} Club Car initially relied on a number of suppliers, including Dow Chemical, to provide the raw materials to Meridian. (Compl.¶ 12.)

*2 {15} Sometime in early 2003, however, Club Car accepted Dow Chemical's proposal to serve as Meridian's exclusive supplier of the raw materials. (Compl.¶ 13.) According to Club Car, it did so based on Dow Chemical's assurance that the raw materials would meet Club Car's performance specifications for the production of the compression-molded parts, including satisfactory compliance with a test that measures a molded part's resistance to prolonged sunlight (the "Test"). (Compl.¶¶ 16-17.)

{16} In or around August 2003, Dow Chemical represented to Club Car that it had developed a formulation of the raw materials that met Club Car's specifications. (Compl.¶ 18.) Dow Chemical supplied the raw materials to Meridian, who used them to produce the molded parts for the Precedent line. (Compl.¶¶ 19-20.) Thereafter, Club Car incorporated the molded parts into the Precedent line before introducing them to the market. (Compl.¶ 20.)

{17} In or around June 2004, Club Car discovered that, over time, portions of the dark gray underbodies of the Precedent line golf cars tended to fade to a chalky white color, contrary to the intended design. (Compl.¶ 21.)

{18} Following an investigation, Club Car concluded that: (1) the presence of zinc oxide in the resin supplied by Dow Chemical was the cause of discoloration; (2) Dow Chemical had not performed the Test properly; and (3) without notifying Club Car, Dow Chemical had altered the product formulation for the raw materials such that they failed to meet the required specifications. (Compl.¶ 23.)

{19} Although Dow Chemical initially cooperated with Club Car's investigation, it denied that the raw materials contained zinc oxide. (Compl.¶ 24.) Club Car also alleges that Dow Chemical failed to promptly provide it with all of the Test results that Dow Chemical had in its possession, thereby delaying and hindering the investigation into the cause of the weathering problem. (Compl.¶ 24.)

{20} Club Car's Complaint asserts three claims for relief: (1) breach of express warranties, (2) negligent misrepresentation, and (3) violation of the UDTPA. (Compl.¶¶ 30-47.)

{21} Club Car seeks damages for the costs of repairing over 36,000 allegedly defective Precedent line golf cars, including expenses for: (1) engineering, consulting, and investigation of the discoloration, and (2) labor and materials to paint the parts and to rework those golf cars that had already been assembled. (Compl.¶ 28.) Club Car also seeks recovery of its lost profits. (Compl.¶¶ 27-28.)

III.

CONCLUSIONS OF LAW

A.

STANDARD OF REVIEW

{22} The essential question on a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure"is whether the complaint, when liberally construed, states a claim upon which relief can be granted on any theory."*Oberlin Capital, L.P. v. Slavin,* 147 N.C.App. 52, 56, 554 S.E.2d 840, 844 (2001) (citation omitted) (emphasis in original). On a motion to dismiss, the complaint's material factual allegations are taken as true. *Id.* (citing *Hyde v. Abbott Labs., Inc.,* 123 N.C.App. 572, 575, 473 S.E.2d 680, 682 (1996)).

*3 {23} When ruling on a Rule 12(b)(6) motion, the trial court should liberally construe the complaint and should not dismiss the action unless "it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim."*Davis v. Messer,* 119 N.C.App. 44, 51, 457 S.E.2d 902, 906-07 (1995) (citations omitted).

B.

ANALYSIS

{24} This is the second time that I have attempted to unravel the mysteries of the economic loss doctrine. In *Hospira, Inc. v. AlphaGary, Inc.,* No. 05-CVS-6371 (N.C.Super.Ct. Feb. 16, 2006), the Court denied defendant AlphaGary, Inc.'s Rule 12(b)(6) motion to dismiss fraud and related tort-based claims arising from the sale of an allegedly defective product.

{25} I concluded there that North Carolina recognizes the economic loss doctrine, which generally bars a tort action

against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract.

Hospira, slip op. at 5 (quoting *Spillman v. Am. Homes of Mocksville, Inc.,* 108 N.C.App. 63, 65, 422 S.E.2d 740, 741-42 (1992)).

{26} I also noted that, while the economic loss doctrine is easily stated as a general principle, the breadth of its application in North Carolina has been less than uniform. After canvassing the relevant cases, I gleaned six guideposts regarding the scope of the doctrine in North Carolina:

1. A tort action generally will not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. *N.C. State Ports Auth. v. Lloyd A. Fry Roofing Co.,* 294 N.C. 73, 82, 240 S.E.2d 345, 350-51 (1978).

2. Where the contract involves the sale of goods, the Uniform Commercial Code will, at a minimum, bar negligence claims seeking recovery for damages to the product itself, even as to remote manufacturers who are not in privity of contract. *Moore v. Coachmen Indus., Inc.,* 129 N.C.App. 389, 401-02, 499 S.E.2d 772, 780 (1998); *Reece v. Homette Corp.,* 110 N.C.App. 462, 466, 429 S.E.2d 768, 770 (1993).

3. That bar, however, does not extend to claims alleging negligent misrepresentation. *See Wilson v. Dryvit Sys., Inc.,* 206 F.Supp.2d 749 (E.D.N.C.2002), *aff'd,*71 F. App'x 960 (4th Cir.2003).

4. Moreover, where a breach of contract " 'smack[s] of tort because of the fraud and deceit involved,' " North Carolina law will allow a party

to pursue punitive damages based on the fraudulent act. *See Zubaidi v. Earl L. Pickett Enters., Inc.,* 164 N.C.App. 107, 115, 595 S.E.2d 190, 194 (2004) (quoting *Oestreicher v. Am. Nat'l Stores, Inc.,* 290 N.C. 118, 136, 225 S.E.2d 797, 808-09 (1976)).

*4 5. The North Carolina appellate courts have yet to extend the application of the economic loss doctrine to bar claims based on fraud.*Coker v. DaimlerChrysler Corp.,* 172 N.C.App. 386, 405, 617 S.E.2d 306, 318 (2005) (Hudson, J., dissenting), *aff'd per curiam,*360 N.C. 398, 627 S.E.2d 461 (2006).[FN1]

> FN1. In *Coker v. DaimlerChrysler Corp.,* 2004 NCBC 1 (N.C.Super.Ct. Jan. 5, 2004), Chief Business Court Judge Ben Tennille applied the economic loss doctrine to bar claims for common law fraud and unfair trade practices arising from the sale of an allegedly defective automobile, stating that to do otherwise would "eviscerat[e] the contract/warranty system [of adjudicating liability] now in place."*Coker,* 2004 NCBC 1, at ¶ 13. The North Carolina Court of Appeals affirmed Judge Tennille's order on other grounds, however, and the North Carolina Supreme Court's *per curiam* decision did not reach the issue.

6. But, North Carolina courts must remain vigilant against a party's unsupported attempt to engraft tort liability on what is at bottom a breach of contract action. *See Broussard v. Meineke Disc. Muffler Shops, Inc.,* 155 F.3d 331, 346 (4th Cir.1998). *Hospira,* slip op. at 8-9.

{27} I declined in *Hospira* to dismiss plaintiff's fraud, negligent misrepresentation, and UDTPA claims because the complaint (1) did not allege a contract between the parties, and (2) alleged sufficient facts in aggravation to support the tort-based claims. *Hospira,* slip op. at 10-14.

{28} At bottom, the economic loss doctrine's rationale rests on risk allocation. *AT & T Corp. v. Med. Review of N.C., Inc.,* 876 F.Supp. 91, 93 (E.D.N.C.1995). At least in that regard, this case is different from *Hospira* because Club Car's Complaint alleges that the parties chose to allocate the risk of non-performance via a series of express warranties. (Compl.¶¶ 30-34.)

{29} More specifically, Club Car asserts that it selected Dow Chemical as its supplier of raw materials for the compression-molded parts and that it did so pursuant to Dow Chemical's express "affirmations of fact, promises, [and] descriptions of the product [that] formed part of the basis of the bargain."(Compl.¶ 32.).

{30} Club Car does not dispute that the damages it seeks in this case constitute economic loss under North Carolina law. (Mem. of Law in Opp'n to Def.'s Mot. to Dismiss 5.) In light of that concession, and given Club Car's claim that it has a remedy for breach of express warranties, the guideposts set out in *Hospira* suggest that Club Car's second and third claims for relief fail as a matter of law. *See Atl. Coast Mech. Inc. v. Arcadis,* 175 N.C.App. 339, 343, 623 S.E.2d 334, 338 (2006) (stating that an express warranty is contractual in nature and that breach of such a warranty does not depend upon proof of negligence, but arises out of the contract); *see also Terry's Floor Fashions, Inc. v. Georgia-Pacific Corp.,* No. 5:97-CV-683-BR(2), 1998 U.S. Dist. LEXIS 15392, at *10 (E.D.N.C. July 23, 1998) (denying Rule 12(b)(6) motion to dismiss breach of warranty claims, but dismissing claims alleging negligence and violations of the UDTPA, stating that "when a plaintiff seeks recovery for damage to a product that is the subject of the contract between the parties, a plaintiff is limited to a contract or warranty action"); *Spillman,* 108 N.C.App. at 65, 422 S.E.2d at 741-42.

{31} The Court defers dismissal of the claims here, however, because it is unclear whether Club Car has a contractual remedy. Dow Chemical has yet to answer the allegations of the Complaint, and its

brief in support of its motion to dismiss is cryptic as to the scope of the express warranties alleged by Club Car. (*See* Def.'s Brief in Supp. of Mot. to Dismiss Pl.'s Second and Third Claims for Relief 7 (stating that "whether the bargains Club Car struck in connection with the manufacture and sale of the compression molded parts provide a contractual remedy against Dow [Chemical] is a question for another day").)

***5** {32} Absent an express allocation of risk between the parties, it remains an open question whether Club Car may pursue tort and UDTPA claims arising from Dow Chemical's alleged negligent misrepresentations regarding the performance specifications of the raw materials. *See Wilson,* 206 F.Supp.2d 749 (holding that economic loss doctrine does not apply to bar a negligent misrepresentation claim); *Forbes v. Par Ten Group, Inc.,* 99 N.C.App. 587, 601, 394 S.E.2d 643, 651 (1990) (allowing claim for UDTPA violation to proceed based on negligent misrepresentations); *see also Lord v. Customized Consulting Specialty, Inc.,* No. COA06-725, 2007 N.C.App. LEXIS 782, at *1, 2007 WL 1119345 (N.C.Ct.App. Apr. 17, 2007) (holding that "the economic loss rule does not operate to bar a negligence claim in the absence of a contract between the parties").

{33} Club Car's Complaint alleges that: (1) Dow Chemical provided false and/or deceptive information to it regarding the performance specifications of the raw materials used to manufacture component parts of a line of golf cars, (2) Dow Chemical owed it a duty of care with respect to that information, (3) Club Car justifiably relied on the information to its detriment and was deceived by Dow Chemical's conduct, and (4) Dow Chemical's deceptive conduct was in and affected commerce. (Compl.¶¶ 35-47.) Consistent with the *Wilson* and *Forbes* decisions, these allegations are sufficient to make out claims for negligent misrepresentation and a violation of the UDTPA.

{34} Moreover, that Club Car has also pleaded contractual relief for breach of express warranties is of no legal moment, at least not at this stage. Subject to the requirements of Rule 11, our rules of civil procedure allow a pleader to "state as many separate claims or defenses as he has regardless of consistency[.]"N.C.G.S. § 1A-1, Rule 8(e)(2); *see Hendrix v. Hendrix,* 67 N.C.App. 354, 357, 313 S.E.2d 25, 27 (1984) (Phillips, J., concurring) ("The main reason for permitting inconsistent claims to be alleged is so that litigants can investigate and assess them before having to decide-or before the court decides for them-which inconsistent claim is supportable and which is not.").

{35} Accordingly, the Court declines to dismiss the second and third claims for relief at this time because Club Car may be entitled to relief in tort and under the UDTPA in the absence of a contractual remedy.

CONCLUSION

{36} The Court DENIES the Motion.

This the 3rd day of May, 2007.

N.C.Super.,2007.
Club Car, Inc. v. Dow Chemical Co.
Not Reported in S.E.2d, 2007 WL 2570088 (N.C.Super.), 2007 NCBC 10

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Praxair, Inc. v. Airgas, Inc.
N.C.Super.,1999.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of North Carolina, Mecklenburg County,
Business Court.
PRAXAIR, INC., Plaintiff,
v.
AIRGAS, INC., National Welders Supply Company, Inc., J.A. Turner, Jr., Judith Carpenter, and Errol Sult, Defendants.
No. 98-CVS-8571.

Oct. 20, 1999.

{1} This matter is before the Court on Plaintiff's Motion for Leave to File Amended Complaint and for Substitution of Party and Plaintiff's Motion to Clarify or Reconsider this Court's May 26, 1999 order. For the reasons set forth below, Plaintiff's Motion for Leave to File Amended Complaint and for Substitution of Party is denied, except to the extent it seeks to substitute Mark Bernstein and Judith Carpenter as co-executors for the estate of J.A. Turner, Jr. Furthermore, Plaintiff's Motion to Clarify or Reconsider is denied.

Womble Carlyle Sandridge & Rice, P.L.L.C., by William C. Raper, Debbie W. Harden and Carol W. Exum; Sidley & Austin, by Nathan P. Eimer, Faith E. Gay and Lisa S. Meyer, for Plaintiff Praxair, Inc.
Robinson, Bradshaw & Hinson, P.A., by John R. Wester, Mark W. Merritt, and Julian H. Wright, Jr.; Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves, L.L.C., by Broox G. Holmes and Edward A. Dean, for Defendant Airgas, Inc.
James, McElroy & Diehl, P.A., by Edward T. Hinson, Jr., Richard B. Fennell, Ann L. Lester and Jennifer A. Youngs, for Defendants National Welders Supply Company, Inc., J.A. Turner, Jr., Judith Carpenter and Errol Sult.

ORDER AND OPINION

TENNILLE.

I. Factual Background

*1 {2} On June 16, 1998, Praxair, Inc. filed this action in North Carolina [FN1] against Defendants claiming that a Joint Venture Agreement dated June 1996 (the "JVA") entered into between Airgas, Inc., National Welders Supply Company, Inc. ("National Welders") and the Turner family, pursuant to which Airgas acquired 47 percent of the voting capital stock of National Welders, violated a Right of First Refusal Agreement dated March 25, 1991 (hereinafter the "RFR") between the Turners, National Welders, and Praxair's predecessor in interest Union Carbide Industrial Gases, Inc. Defendants filed motions to dismiss pursuant to Rule 12(b)(6) and Rule 12(c) of the North Carolina Rules of Civil Procedure contending that the terms of the JVA did not, on their face, violate the RFR and that plaintiff's claims should therefore be dismissed. By Order dated May 26, 1999, this Court found that the terms of the JVA did not, on their face, violate the RFR. Accordingly, the Court dismissed the plaintiff's claims to the extent that they could be read to assert a cause of action for breach of contract based upon a legal interpretation of the express language of the JVA and the RFR.

FN1. In June 1996 Praxair sued Airgas in state court in Alabama asserting essentially the same claims asserted in the original complaint in the North Carolina action. Praxair dismissed its suit in Alabama when it filed the North Carolina action.

{3} Additionally, Praxair contended in its original Complaint that National Welders and the Turner Family violated Praxair's rights under paragraph 3 of the RFR because the JVA was a "sham transac-

tion" designed to hide the fact that the Turners had secretly agreed to sell National Welders to Airgas in a two step transaction. (Compl. Para. 1, Nature of the Action.) Praxair contends that this "sham transaction" is the basis for: (1) a breach of contract claim against National Welders and the Turner Family, (2) a claim for tortious interference with contract against Airgas, (3) a claim for tortious interference with economic advantage against Airgas, (4) an unfair trade practice claim against National Welders, Airgas and all individual defendants, and (5) a claim for civil conspiracy against all defendants. The Court found that plaintiff successfully pled facts supporting a claim for breach of contract based on the theory that Airgas, National Welders and the Turners entered into a side agreement or oral understanding that may in fact be contrary to the express terms of the Joint Venture Agreement.

{4} Praxair has filed a motion seeking reconsideration of the Court's Order of May 26, 1999 on the grounds that the Court committed errors of law in that order. While not required to reconsider its previous order, the Court, in its discretion, has done so to determine if any error of law was committed.

{5} Praxair also filed a Motion seeking to amend its complaint (1) to allege that other provisions of the JVA not previously asserted to constitute violations of the RFR support a claim for breach of contract and (2) to recast some of its early claims that the JVA itself violated the RFR. The Court has reviewed those allegations and finds that as a matter of law, the JVA provisions cited in the proposed amendment do not give rise to a claim for breach of contract based on the express language of the JVA and the RFR, and that therefore it would be futile to amend the complaint to add the new allegations. Thus, the motion to amend to add those new allegations is denied.

*2 {6} Since the institution of this action, Mr. J.A. Turner, Jr. has died. It is proper to substitute the administrators of his Estate as parties. Therefore, that portion of the motion to amend which seeks to join Mr. Bernstein and Mrs. Carpenter is granted.

II. Applicable Legal Standards

{7} The standard for testing the sufficiency of a complaint under Rule 12(b)(6) and Rule 12(c) is the same. All well-pleaded facts in the complaint must be accepted as true and the plaintiff is entitled to all permissible inferences to be drawn from those facts. The motions should be denied unless it is clear that plaintiff is not entitled to any relief under any statement of the facts. *Arroyo v. Scottie's Professional Window Cleaning, Inc.,* 120 N.C.App. 154, 461 S.E.2d 13 (1995) and *Hedrick v. Rains,* 121 N.C.App. 466, 466 S.E.2d 281 (1996). Judgment should be entered on such motions only when it is clear that there are no disputed facts and defendant is entitled to judgment as a matter of law. However, where the Court can construe the plain and unambiguous language of a contract to determine if it has been breached, judgment on the pleadings may be appropriate. *DeTorre v. Shell Oil Co.,* 84 N.C.App. 501, 353 S.E.2d 269 (1987).

{8} Praxair asks this Court to reconsider its order of May 26, 1999. This Court's May 1999 order did not determine the entire controversy between the parties and thus was interlocutory. *Ave v.. Westview Capital, L.C.,* 130 N.C.App. 332, 334, 502 S.E.2d 879, 881 (1998). To justify revision of an interlocutory order, plaintiff must point to: (1) an intervening change in the controlling law, (2) the availability of new evidence and (3) the need to correct a clear error of law or prevent injustice. *See*18 Wright, et al., *Federal Practice and Procedure* § 4478 (1981).

{9} In addition, Praxair seeks leave of this Court to amend its complaint. Amendment of pleadings after a response has been served is only by "leave of the court ... and leave shall be freely given when justice so requires."N.C. Gen.Stat. § 1A-1, Rule 15(a). A motion for leave to amend is within the discretion of the judge, and "(a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, or (e) repeated failure to cure defects by previous amendments" constitute reasons justifying a denial of the motion.*Id.*

{10} In ruling on the pending motions, the Court reviewed and considered the Joint Venture Agreement as well as the RFR. In reviewing the RFR and the Joint Venture Agreement, the Court has again applied a rule of construction that restrictions on the alienation or transfer of stock are disfavored and should be strictly construed. *See Bryan Barber Realty, Inc v. Fryar,* 120 NC App. 178, 461 S.E.2d 29 (1995). That application is also appropriate here because the restrictions on transfer may have anti-competitive impacts as well.

III. Plaintiff's Motion to Reconsider is Denied

***3** {11} Praxair has failed to identify any grounds in support of its Motion to Reconsider. In the original complaint, the plaintiff alleged that the Joint Venture Agreement itself constituted a breach of the RFR. In its prior ruling, the Court found that the execution of the JVA did not violate Praxair's rights set forth in the RFR. Praxair requested that the Court reconsider its holding. The Court has carefully reviewed the additional arguments made by Praxair in its Motion to Reconsider. This Court affirms its earlier holding that when the provisions of the JVA are given their logical and normal meanings, the JVA does not support a claim for breach of the RFR.

A. The express terms of the Joint Venture Agreement do not violate Praxair's rights in the RFR.

{12} The Joint Venture Agreement was successfully drafted to avoid violating the express terms of the RFR. First, the Joint Venture Agreement expressly provided that Airgas would acquire only 47 percent of National Welders voting shares. That percentage does not trigger any rights in Praxair under the RFR. In addition, as a safety net, the Joint Venture Agreement specifically provided that the preferred stock delivered to the Turners "shall exceed fifty percent (50%) of the voting capital stock of [National Welders] that will be actually outstanding, and that will be outstanding on a fully diluted basis."*See* Jt. Venture Agmt. Para. 2.4.2.

{13} Plaintiff redirects the Court's attention to paragraph (3)(a)(x) of the RFR, claiming that the Court did not consider whether such provision was breached by the Joint Venture Agreement. In its May 26, 1999 Opinion, this Court considered paragraph (3) of the RFR in its entirety and held that no terms of the RFR were violated by the Joint Venture Agreement. Paragraph (3)(a)(x) of the RFR prohibits National Welders from transferring "substantially all of the assets" of National Welders. The Joint Venture Agreement does not provide for the transfer of any of the assets of National Welders; rather, National Welders has maintained ownership of all its assets. If Praxair proves that the JVA was a sham transaction designed to cover up an agreement to transfer ownership of National Welders to Airgas, it will have established the transfer of "beneficial ownership" of the assets of National Welders. The language of the agreement itself does not do that. Accordingly, paragraph (3)(a)(x) of the RFR was not violated by the Joint Venture Agreement.

{14} Additionally, Praxair continues to argue that the Joint Venture Agreement expressly violates the terms of the RFR because Airgas should be deemed to have acquired 100 percent of the voting stock in National Welders when the agreement was signed. Praxair's argument is based upon its interpretation of the definitions of "Fully Diluted Basis" and "Shares" in the RFR. In its Motion to Reconsider, Praxair submits that the Court misunderstood its argument that the express terms of the RFR were breached based on the Fully Diluted provision in the RFR. The Court did not misunderstand Plaintiff's argument; it rejected it. Plaintiffs argue that in determining whether there has been a change of ownership based on a Fully Diluted Basis, the Court must consider the effect of each choice available to the Turners after 2006. According to the Plaintiff's argument, if any choice made by the Turners will result in Airgas acquiring over 50 percent of the voting stock, the Joint Venture Agree-

ment violates the RFR.

*4 {15} Thus, Praxair urges the Court to interpret the Joint Venture Agreement provisions which give the Turners certain rights as actually creating an option in Airgas to obtain shares in National Welders. The Court does not agree with Plaintiff's interpretation of the definition of "Fully Diluted Basis." According to the language of the RFR, "Fully Diluted Basis" is determined by "giving effect to the exercise of any and all *options, warrants and securities* which are convertible into *shares*." RFR (3)(d) (emphasis added). "Shares" is defined as National Welders authorized capital stock. The Joint Venture Agreement does not give Airgas any "option" as that term is used in the RFR. Instead, the Joint Venture Agreement gives the Turners the choice of doing four things after July of 2006:(1) they may exchange with National Welders their preferred shares for Airgas common shares; (2) they may redeem their preferred shares for cash from National Welders; (3) they may hold their preferred voting stock and collect a 5 percent dividend; or (4) they may sell some or all of their shares if they can find a market for such a security. Each of these choices is exercisable only by the Turners, not Airgas. Although the choice made by the Turners may result in Airgas acquiring over 50 percent of National Welders' common stock, their contractual right does not result in the creation of options, warrants or any other security convertible into or exchangeable for shares of stock in National Welders. In short, the Turners' choices belong to them alone; the JVA does not create any option in Airgas.

{16} While the Joint Venture Agreement by its express terms does not violate the express terms of the RFR, the complaint contains allegations that Airgas and the Turners have entered into an agreement that is not limited to, and may in fact be contrary to or alter, the express terms of the Joint Venture Agreement. If the Turners actually agreed to exercise their options in such a way that Airgas would end up owning National Welders the RFR would be breached.

{17} To the extent that the complaint can be read to assert a cause of action for breach of contract based upon diminishment of value of the RFR by entry into the Joint Venture Agreement, the complaint does fail to state a cause of action. The RFR is specific with respect to the conditions that give rise to Praxair's right to meet an offer for purchase of a controlling interest in National Welders. The RFR left National Welders and the Turners free to enter into any other business arrangement that did not trigger Praxair's rights. If any such arrangements diminished the value of Praxair's rights under the RFR, or even made it less likely that Praxair would ever have the opportunity to exercise its right of first refusal, they would not give rise to a cause of action for breach of contract if they did not trigger the obligation to give Praxair its right of first refusal.

B. The Joint Venture Agreement does not on its face breach the duty of good faith.

*5 {18} Plaintiff's claim for breach of the implied duty of good faith rests on its characterization of the transaction between Airgas and National Welders as a transfer of beneficial ownership. Again, the Court does not accept this characterization absent proof that there was an agreement that altered the express terms of the JVA. Although the execution of the Joint Venture Agreement certainly made it less likely that Praxair would have the opportunity to exercise its right of first refusal during the term of the agreement and thus diminished the potential value of Praxair's rights under the RFR, it did not violate any of the express terms of the RFR. While the Court understands that a breach of the express terms of an agreement need not be shown to maintain a claim for breach of the implied duty of good faith, the Court declines to read into the RFR a duty that does not exist therein. The RFR specifically identifies the conditions that give rise to Praxair's right to match an offer for purchase of a controlling interest in National Welders. By identifying such conditions, the RFR left the Turners and National Welders free to enter into arrangements that fell

outside of the conditions enumerated in the RFR, even if such arrangements in fact diminished the potential value of the rights under the RFR or reduced the likelihood that Praxair would ever have the opportunity to exercise its right of first refusal. Accordingly, the Court holds that the plaintiff failed to state a cause of action for breach of the implied duty of good faith to the extent that claim rests upon the existence and implementation of the express terms of the Joint Venture Agreement. Count One of the complaint does state a cause of action for breach of contract and breach of duty of good faith and fair dealing in that it alleges that the Turner Family, National Welders and Airgas have agreed that 100 percent of National Welders stock will be sold to Airgas in a two-step transaction beginning in 1996 and ending shortly after Praxair's Right of First Refusal expires in 2006. It is the existence of that agreement which Praxair must prove.

C. The Court's ruling on Plaintiff's Tortious Interference with Contract, Unfair and Deceptive Trade Practice and Conspiracy Claims was not dependent on the Court's decision that the RFR did not expressly violate the Joint Venture Agreement

1. Count Two for Tortious Interference with Contract against Airgas should not be dismissed entirely, but is limited in its scope.

{19} This Court's decision to dismiss plaintiff's tort claims did not rest solely on a finding that the express terms of the Joint Venture Agreement were not violated. The Court is aware of the rule of law that states that proof of breach of contract is not necessary to support a claim for tortious interference with contract. *Lexington Homes, Inc. v. W.E. Tyson Builders, Inc.,* 75 N.C.App. 404, 411, 331 S.E.2d 318, 322 (1985). The elements of a claim for tortious interference of contract are: (1) that a valid contract exists; (2) that the third party had knowledge of the contract; (3) that the third party intentionally induced the third person not to perform his contract; (4) that in so doing, the third party acted without justification; and (5) that actual damage resulted. *Id.* at 410.Thus, while breach of contract need not be shown, plaintiff must allege facts that support a finding that the third party induced nonperformance of the contract and that the third party acted without justification. Plaintiff has failed to plead facts in support of such findings. While the potential value of the RFR in the hands of the plaintiff may be diminished by the Joint Venture Agreement, it is still subject to performance. In addition, there is no indication that Airgas was not justified in negotiating with National Welders. The existence of the JVA does not result in the nonperformance of National Welders' obligation to give Praxair a right of first refusal.

***6** {20} This Court sees a distinction between wrongful acts which "disrupt and impede" a party's contract rights and justifiable acts that diminish the value of such rights. "An act is justified ... if 'the defendant is acting for a legitimate business purpose' because 'competition in business constitutes justifiable interference in another's business relations and is not actionable so long as it is carried on in furtherance of one's own interests and by means that are lawful.' " *English Boiler & Tube, Inc. v. W.C. Rouse & Son, Inc.,* No. 97-2397, 1999 U.S.App. LEXIS 2725 at *20 (4th Cir. Feb. 23, 1999). "Absent proof that a competitor has acted maliciously or otherwise unlawfully, courts should be reluctant to impose liability for conduct that can be characterized fairly as legitimate competition...." *Id.* at *22.Airgas had a legitimate right to negotiate with and bid for National Welders or to enter into other business arrangements with National Welders. There was nothing in the RFR that prohibited those actions, and Airgas was legally free to compete with Praxair in the acquisition of National Welders and similar companies. It therefore had a lawful justification for its acts, and Praxair's complaint fails to state a cause of action because its is missing the critical element of lack of justification required under a cause of action for tortious interference with contract.

{21} Plaintiff has alleged that Airgas, acting with

knowledge of the RFR and without justification, damaged Praxair by intentionally inducing National Welders and the Turner Family to breach their obligation. Since the complaint states a cause of action for breach of contract based upon the allegation that an agreement outside of the Joint Venture Agreement exists for the sale of 100 percent of National Welders stock to Airgas, Count Two should not be dismissed. If such an agreement is proven, it could provide the basis for a claim of tortious interference with contract. If the alleged agreement is not proven, Count Two will fail.

2. Count Four for Unfair Trade Practices against National Welders, Airgas, the Turner Shareholders and Sult states a limited cause of action for violation of N.C. Gen.Stat. § 75-1.1 against the Defendants other than Sult.

{22} Tortious interference with a competitor's right of first refusal to buy a business which both competitors are interested in acquiring constitutes an unfair trade practice. Again, it is not a tort to negotiate agreements with a party to a right of first refusal. Airgas acted lawfully and justifiably as a competitor of Praxair in the negotiation of the Joint Venture Agreement. Thus, to the extent plaintiff's claim under the Unfair Trade Practices Act, N .C.G.S. Chapter 75, relies on the agreement as embodied in the Joint Venture Agreement, the claim fails. To the extent the complaint can be read to allege that the Joint Venture Agreement was a sham and a disguise to conceal the real agreement between the Turners and Airgas (that the Turners would not exercise any rights under the Joint Venture Agreement which would prohibit Airgas from obtaining 100 percent of the stock of National Welders), it states a claim for violation of Chapter 75. It follows that the claim against Mr. Sult, who is not alleged to be a party to any agreement at issue, should be dismissed.

3. Count Five for Civil Conspiracy states a limited cause of action against National Welders, the Turners and Airgas, but not Mr. Sult. Therefore, it also supports a claim for punitive damages.

*7 {23} To the extent the complaint can be read to allege that the Joint Venture Agreement was a sham and a disguise to conceal the real agreement between the Turners and Airgas (that the Turners would not exercise any rights under the Joint Venture Agreement which would prohibit Airgas from obtaining 100 percent of the stock of National Welders), it states a claim for fraud and civil conspiracy to commit fraud. If the fraud claim can be proven, it would support a claim for punitive damages. Upon proof of the alleged "side agreement," Plaintiffs may present evidence of the claim of conspiracy. The allegations in the complaint are insufficient to support a claim for civil conspiracy against Mr. Sult and should be dismissed.

IV. Plaintiff's Motion for Leave to File an Amended Complaint is Denied.

{24} Plaintiff's original complaint was filed on June 16, 1998. Now, after a substantial number of their claims have been dismissed, Plaintiff requests leave to amend its complaint. A motion for leave to amend is within the discretion of the court and will be denied where such amendments would be futile and cause delay. *See supra.*This Court's holding that the express terms of the Joint Venture Agreement do not violate the RFR was based on a review of the language of both the Joint Venture Agreement and the RFR. Any restructuring of the complaint will not negate this Court's finding that there was no breach based on the express terms of these agreements. Thus, any attempt to amend the complaint in that regard would be futile. Additionally, plaintiff's failure to seek to amend the complaint until after this Court's hearing and decision on the summary judgment motion constitutes undue delay. In fact, many of the proposed additions to plaintiff's complaint are an attempt to cure shortcomings in its claim as identified by this Court in its May 26, 1999 Order.

{25} Plaintiff's amended complaint focuses new attention on a specific provision in the RFR. Now, over three years after the institution of Praxair's original action against Airgas, plaintiff argues that the JVA violated paragraph (3)(a)(x) of the RFR. Plaintiff failed to make such argument in its original complaint in the Alabama action, nor did the complaint in this action contain such an allegation. Plaintiff did direct the Court's attention to paragraph 3(a)(x) in a footnote contained in plaintiff's brief in opposition to defendants' motion to dismiss. The fact that plaintiff only now attempts to formally allege breach of paragraph (3)(a)(x) constitutes undue delay. In addition, the attempt to amend the complaint by alleging breach of paragraph (3)(a)(x) after such argument was brought to the Court's attention in plaintiff's brief opposing defendants' motion to dismiss is futile. After losing on summary judgment with respect to certain claims, plaintiff cannot now seek to add facts or allegations which purport to strengthen the weaknesses of its claims identified by the Court. Accordingly, the Court denies plaintiff's motion for leave to file an amended complaint.

IV. Plaintiff's Motion for Substitution of a Party

*8 {26} Pursuant to North Carolina Rule of Civil Procedure 25(a), Mark R. Bernstein and Judith Carpenter, Co Executors of the Estate of J.A. Turner, Jr., may be substituted as defendant in the place of J.A. Turner, Jr. *See*N.C.G.S. § 28A-18-1(a).

V. Conclusion

{27} The express terms of the JVA do not violate the terms of the RFR. A restraint on the transfer of ownership must be strictly construed, particularly where the restraint may also have the capacity to limit competition in the market place. Accordingly, construction of the RFR must be limited to its express terms. The RFR provides limited rights to Praxair under specific conditions. The drafters of the JVA were successful in avoiding triggering Praxair's rights under the RFR primarily because the agreement left Airgas with the risk that whoever owned or controlled the Turner Family stock in 2006 could elect to retain ownership of the stock or sell it to someone else. The written agreement provided no guarantee that Airgas would acquire 50 percent of National Welders' capital stock. Instead, it left the Turner Family completely free to choose its course of action based upon the circumstances in existence in the year 2006. If, however, the Turners and Airgas have agreed outside of the JVA that the Turners will sell or exchange their National Welders stock for Airgas stock or cash regardless of the conditions in 2006, Praxair's contractual rights have been violated. That breach, combined with an effort to disguise the true agreement, would support the causes of action for breach of the RFR, tortious interference, unfair trade practices and civil conspiracy.

{28} Based upon the foregoing, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. Plaintiff's Motion to Reconsider is denied.

2. Plaintiff's Motion for Leave to File an Amended Complaint is denied.

3. Plaintiff's Motion to substitute Mark Bernstein and Judith Carpenter as co-executors for the estate of J.A. Turner is granted.

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