STATE OF NORTH CAROLINA COUNTY OF BUNCOMBE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 08 CVS 6575
W. GREG GREEN and DR. KENNETH ELLINGTON, individually and derivatively on behalf of MedOasis, Inc., Plaintiffs, v. KEN CONDRA, DANIEL PREVOST, MARC MILLER, and PETER FONTAINE, individually and as current or former directors of MEDOASIS, INC., and TIM LONGBINE and DAVID PHILLIPS in their capacities as current or former directors of MEDOASIS, INC., Defendants, and MEDOASIS, INC., a North Carolina Corporation, Nominal Defendant.	**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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Ken Condra, Daniel Prevost, Marc Miller, Peter Fontaine, David Phillips, and Tim Longbine (collectively, "Defendants") submit the following memorandum of law in support of their Motion to Dismiss. For the reasons set forth below, the Court should dismiss Plaintiffs' Complaint with prejudice, pursuant to Rules 12(b)(6) and 9(b) of the North Carolina Rules of Civil Procedure.

I. STATEMENT OF THE CASE.

The case concerns claims for damages and equitable relief involving issues of corporate governance. Plaintiffs W. Greg Green and Dr. Kenneth Ellington (collectively, "Plaintiffs") style their Complaint as a derivative and direct suit based on their dissatisfaction with the outcome of special meeting of MedOasis, Inc.'s ("MedOasis") shareholders that occurred on August 18, 2008. Specifically, Plaintiffs assert seven derivative claims: accounting; breach of fiduciary duty and/or aiding and abetting; constructive fraud; abuse of control; corporate waste, gross mismanagement; unjust enrichment; and rescission against Messrs. Condra and Prevost for rescission. Plaintiffs assert direct claims for breach of fiduciary duty (and/or adding and abetting), and constructive fraud, which are both duplicative of their derivative claims. Plaintiffs also seek a declaratory judgment concerning MedOasis' sale of shares to Messrs. Condra and Prevost, and the voting rights of shares at the August 18, 2008 shareholders' meeting, including shares not owned by any of the parties to this action.

As an initial matter, it is important to note that that Mr. Miller was not a board member at this time. It is also undisputed, and Plaintiffs admit, that Mr. Miller was not a MedOasis officer or employee at this time. In addition, it is also undisputed that Messrs. Fontaine and Phillips are not MedOasis shareholders, officers or employees, nor do they receive any salary in regards to

their position as directors. Mr. Condra is MedOasis' CEO, and Mr. Prevost is its Senior Vice President. Both are directors.

By way of introduction, MedOasis is a North Carolina corporation that provides billing, collections, and practice management services for private anesthesiology practices. MedOasis was formed in 2001, and began servicing Asheville Anesthesia Associates ("AAA") and Gaston Anesthesia Associates ("GAA") as clients. In conjunction, members of AAA and GAA were given shares of MedOasis stock. Dr. Ellington, as a member of AAA, received 26,000 shares. Dr. Ellington served as a director of MedOasis. Mr. Green was MedOasis' first CEO, and also served as a director. Mr. Green was given a total of 200,000 shares while he was CEO.

In November 2005, MedOasis terminated Mr. Green as CEO for dereliction of duty and violation of trust for competing with MedOasis. MedOasis' shareholders also removed Mr. Green and Dr. Ellington as directors due to conflicts of interest, violations of trust, and for competing with MedOasis. Mr. Green and Dr. Ellington retained their collective 226,000 shares.

From 2005 through 2008, MedOasis' relationship with AAA deteriorated. Based on AAA's repeated and unjustified reductions in MedOasis' billing fees, and AAA's disruptive operational meddling, the companies' wound down their relationship and the AAA Management Services Agreement terminated in May 2008. Subject to MedOasis' By-Laws and the AAA members' stock subscription agreements, MedOasis was required to redeem those shares, which it sought to do in June 2008. The AAA shareholders, however, unjustifiably refused to tender their shares.

By August 2008, Green and Ellington had hatched a scheme to take control of MedOasis even though they collectively possessed only 15.7% of the outstanding shares of MedOasis. On August 4, 2008, Green demanded a special shareholders' meeting to unseat the current board of

Messrs. Condra, Prevost, Fontaine, Phillips, and Dr. Longbine. The meeting occurred on August 18, 2008 (the "August 18, 2008 shareholder's meeting") and is central to Plaintiffs' claims. Although Dr. Ellington attempted to vote as proxy for certain AAA members, their shares were in redemption and, thus, had no voting rights. Mr. Green, however, was allowed to vote his shares. Plaintiffs' attempt to unseat the board failed. Plaintiffs objected to the board's decision concerning the voting rights of Dr. Ellington's proxies, and also objected that Messrs. Condra and Prevost were allowed to vote their shares of stock that they owned at that time. On September 10, 2008, Plaintiffs demanded that MedOasis reverse the decisions made at the August 18, 2008 shareholders' meeting, which the company rightfully refused to do.

Plaintiffs' instant suit is no more than an attempt to use the legal process to effectuate a hostile takeover of MedOasis. Plaintiffs ask this Court intervene in MedOasis' business affairs and second-guess the director Defendants' good faith business decisions, and actions they took with respect to MedOasis' corporate process and procedure. Mr. Green and Dr. Ellington now seek to use litigation to effectively gain control of a company free of charge.

The Court should reject Plaintiffs' unjustifiable attempts to wrest control of MedOasis. The Complaint fails to state claims upon which relief can be granted. The Court should dismiss the Complaint on the following grounds:

- The Court should dismiss Plaintiffs' derivative claims (Counts I-VIII) for failure to state claim upon which relief can be granted in favor of MedOasis. Plaintiffs' complaint, while ostensibly crafted as a demand for damages inflicted upon MedOasis, is based instead on Plaintiffs' allegations that they themselves were somehow unfairly treated.

- The Court should dismiss all of Plaintiffs' claims, because they fail to make any factual allegations that could overcome the Defendants' immunity under the business judgment rule. Plaintiffs do not plead any factual allegations demonstrating that any Defendant acted in bad faith, was uninformed, or did not believe he was acting in the best interests of MedOasis.

- The Court should dismiss Counts II, IV, and VI because Plaintiffs fail to state a claim upon which relief can be granted for their derivative claims styled as "abuse of control," "gross mismanagement," and "corporate waste" because North Carolina law does not recognize such assertions as distinct torts. Rather, those allegations are mere descriptions of alleged conduct that is duplicative of, or encapsulated within, Plaintiffs' other claims.

- The Court should dismiss Count VII because Plaintiffs fail to state a claim for unjust enrichment. Plaintiffs fail to allege which particular Defendant was unjustly enriched, nor do they identify the benefit such Defendant purportedly obtained from MedOasis.

- The Court should dismiss Count VIII pursuant to Rule 12(b)(6) and Rule 9(b). Plaintiffs fail to state a claim upon which relief can be granted for rescission against Messrs. Condra and Prevost. Although Plaintiffs allege that the stock distributions to Messrs. Condra and Prevost occurred as a result of fraud or deceit, Plaintiffs fail to allege the circumstances of the alleged fraud with the particularity required pursuant to Rule 9(b).

- The Court should dismiss all claims against Messrs. Condra, Prevost, Fontaine, or Miller in their individual capacities for failure to state a claim upon which relief can be granted. Plaintiffs do not set forth factual allegations that could overcome the immunity these current and former director Defendants possess pursuant to North Carolina law and MedOasis' articles of incorporation.

- The Court should dismiss all causes of action against Mr. Miller in particular. Plaintiffs' Complaint centers on actions taken at the shareholders' meeting on August 18, 2008. Mr. Miller was not a director or officer on that date. Plaintiffs plead no facts that identify any particular conduct that Mr. Miller undertook, himself, which purportedly gives rise to its claims.

- The Court should dismiss Count IX because Plaintiffs fail to state a direct claim upon which relief can be granted for breach of fiduciary duty because Plaintiffs do not allege the existence of a recognizable fiduciary duty that the director Defendants owe to Plaintiffs as minority shareholders.

- The Court should dismiss Count X because Plaintiffs fail to state derivative or direct claims for constructive fraud. Count X also sounds in fraud and should be dismissed for the reason that Plaintiffs fail to allege the circumstances of the alleged fraud and deceit with the requisite particularity.

On January 16, 2008, Defendants designated this action to the North Carolina Business Court. On January 21, 2009, the Court granted Defendants an extension of time to February 27, 2009 to formally respond to the Complaint. Therefore, this Motion is timely.

II. ARGUMENT.

A. Standard of Review.

In evaluating a motion to dismiss under Rule 12(b)(6), the Court must presume that the well-pleaded allegations set forth in the complaint are true. *Smith v. Ford Motor Co.*, 289 N.C. 71, 83, 221 S.E.2d 282, 290 (1976). However, the Court may consider documents that the Defendants attaches to a Rule 12(b)(6) motion "which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are specifically presented by the defendant." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001). When considering a motion to dismiss for failure to state a claim, the Court "is not required to accept as true any conclusions of law or unwarranted deductions of fact in the complaint." *Winters v. First Union Corp.*, 2001 WL 34000144, at *10 (N.C. Super. Ct. July 12, 2001) (Tennille, J.) Conclusory allegations that are contradicted by the documents central to the claims asserted must be rejected. *Braswell v. Haywood Regional Medical Center*, 352 F. Supp. 2d 639, 653 (W.D.N.C. 2005).[1]

B. The Court Should Dismiss Plaintiffs' Derivative Claims (Counts I-VIII) Because Plaintiffs Fail To State A Derivative Claims For Damage To MedOasis.

Plaintiffs style their Complaint as partially derivative, brought ostensibly to seek relief for damages inflicted upon MedOasis. The gravamen of Plaintiffs' Complaint, however, is Plaintiffs' grievance that Mr. Green and Dr. Ellington, themselves, were treated unfairly. This is not a proper derivative suit. Thus, as to Plaintiffs' derivative claims, Plaintiffs fail to state a

[1] *See Turner v. Duke Univ.*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989) (because North Carolina Rules of Civil Procedure are substantially similar to Federal Rules, it is proper for North Carolina courts to look to federal cases for interpretive guidance).

claim upon which relief can be granted and the Court should dismiss Counts I-VIII with prejudice, pursuant to North Carolina Rule of Civil Procedure 12(b)(6).

"A 'derivative proceeding' is a civil action brought…'in the right of' a corporation…while an individual action is…[brought] to enforce a right which belongs to [plaintiff] personally." *Norman v. Nash Johnson & Sons' Farms, Inc.,* 140 N.C. App. 390, 395, 537 S.E.2d 248, 253 (2000) (emphasis added). *See also Stewart v. Kopp,* 118 N.C. App. 161, 454 S.E.2d 672 (1995) (derivative action against homeowners' association not properly brought where plaintiff does not allege injury to the association or seek to recover on its behalf).

Whether a claim is derivative or direct depends solely upon two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders individually); and (2) who would receive the benefit of the recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.,* 845 A.2d 1031 (Del. 2004). In applying this test, the court must look at the nature of the wrong alleged, not merely at the form of words used in the complaint. *In re Syncor Int'l Corp. S'holders Litig.,* 857 A.2d 994, 997 (Del. Ch. 2004).[2]

Here, Plaintiffs fail to plead proper derivative claims. Mr. Green and Dr. Ellington contend that the Defendants' alleged conduct violated their personal rights. Plaintiffs do not allege any facts, which, even accepted as true, would show that that Defendants' alleged conduct caused injury to MedOasis. Rather, the Complaint sets forth only Plaintiffs' individual and personal claims that the Defendants treated them unfairly with respect to the outcome of the August 18, 2008 shareholders' meeting. This is a classic example of a direct, not a derivative

[2] The Court may consider decisions from Delaware for guidance in matters involving corporate law because of the special expertise and body of case law developed in the Delaware Chancery Court and the Delaware Supreme Court. *First Union Corp. v. Suntrust Banks, Inc.*, 2001 WL 1885686, at *8, No. 01-CVS-10075, 01-CVS-8036, CIV. A. 01-CVS-4486 (N.C. Super. Ct. 2001) (J. Tennille).

claim. *See Gentile v. Rossette,* 906 A.2d 91, 2006 WL 2388934, at *7 (Del. 2006) (finding public shareholders directly harmed by dilution of voting power redistributed to controlling shareholder).

Although Plaintiffs cloak their allegations with overtones of corporate waste and "gross mismanagement," this is simply smokescreen. There are no factual allegations in the Complaint concerning actual damages to the company. The Court should not be mistaken about what this case truly concerns, which is Plaintiffs' attempt to seek a judicial decree that they control the majority of MedOasis' outstanding shares. Mr. Green and Dr. Ellington undertook a course of action designed to wrest control of MedOasis from the current Board of Directors and to place it in their hands, and now ask the Court to reverse their failed effort.

To conclude that Plaintiffs are seeking redress on behalf of themselves, not MedOasis, the Court need look no further than their September 10, 2008 written demand on MedOasis (the "Demand Letter"). *See* Ex. A, attached.[3] Plaintiffs state their disagreements with the decisions made at the August 18, 2008 shareholders' meeting. Plaintiffs do not reference "corporate waste" or "mismanagement," nor particular damages that MedOasis allegedly suffered. Plaintiffs demanded only a reversal of the Boards' decision at the August 18, 2008 shareholders' meeting. Importantly, Plaintiffs' final sentence clarifies this point: "As you know, this firm has been retained to file suit to enforce Mr. Green and Dr. Ellington's rights if the Company remains unwilling to act." *Id.* (emphasis added).

MedOasis did not agree to Plaintiffs' demands and they filed this suit—to enforce, in their own words, their rights. Thus, Plaintiffs' claims are not derivative. As such, the Court

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[3] Because Plaintiffs reference and rely upon the Demand Letter in their Complaint, the Court may properly consider this document in regards to Defendants' Rule 12(b)(6) motion. *Oberlin Capital*, 147 N.C. App. at 60, 554 S.E.2d at 847 (the Court may consider documents the defendant attaches to a Rule 12(b)(6) motion "which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are specifically presented by the defendant.")

should dismiss Counts I-VIII with prejudice for failure to state claims upon which relief can be granted pursuant to Rule 12(b)(6).

C. The Court Should Dismiss The Complaint In Its Entirety Because Plaintiffs Fail To Plead Facts That Could Overcome The Presumption Of The Business Judgment Rule.

As directors of MedOasis, the Defendants are protected from liability pursuant to the business judgment rule under North Carolina law. Based on a proper application of the business judgment rule, Plaintiffs fail to state any claims upon which relief can be granted.

Plaintiffs allege disagreements with certain business decisions that MedOasis took. Plaintiffs state that MedOasis terminated the Management Services Agreement with AAA. Compl. at ¶ 30. Plaintiffs then cry foul that MedOasis attempted to redeem the AAA members' shares even though MedOasis' by-laws and the AAA members' subscription agreements required it. *Id.* at ¶¶ 31-36; Compl. at Ex. B. Plaintiffs also allege that MedOasis improperly awarded shares of stock to Condra as CEO. *Id.* at ¶ 29. Plaintiffs also contest MedOasis' subsequent sale of stock to Messrs. Condra and Prevost at $0.17 per share. *Id.* at ¶ 41. Finally, Plaintiffs seek judicial review of MedOasis' decisions at the August 18, 2008 shareholders' meeting. *Id.* at ¶¶ 49-50. North Carolina law, however, protects Defendants' business decisions from collateral attack pursuant to the business judgment rule.

The business and affairs of a corporation are managed by or under the direction of its board of directors. "[A]ll corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors." N.C. Gen. Stat. § 55-8-01(b). Section 55-8-30 also provides that "[a] director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties…"(1) [i]n good faith; (2) [w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) [i]n a manner he reasonably believes to be

in the best interests of the corporation." *Id.* at § 55-8-30(a),(d). Additionally, "[t]he duties of a director weighing a change of control situation shall not be any different, nor the standard of care any higher, than otherwise provided in this section." *Id.* at § 55-8-30(d). Finally, according to the preeminent treatise on North Carolina corporate law, "[t]he "internal affairs" of a corporation [include] such matters as…the sale or redemption by the corporation of its shares or other securities…." Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 32.05 n. 1 (7th ed.2002).

Section 55-8-01 embodies but does not abrogate the common law of the business judgment rule. *See State ex rel. Long v. ILA Corp.*, 132 N.C. App. 587, 601, 513 S.E.2d 812, 821 (1999). Specifically, "the business judgment rule operates primarily as a rule of evidence or judicial review and creates, first, an initial evidentiary presumption that in making a decision the directors acted with due care (i.e., on an informed basis) and in good faith in the honest belief that their action was in the best interest of the corporation, and second, absent rebuttal of the initial presumption, a powerful substantive presumption that a decision by a loyal and informed board will not be overturned by a court unless it cannot be attributed to any rational business purpose." *Id.* at 602, 513 S.E.2d at 821-22 (emphasis added).

The business judgment rule thus serves to protect and promote the role of the board as the ultimate manager of the corporation. Because courts are ill equipped to engage *in post hoc* substantive review of business decisions, "the business judgment rule protects corporate directors from being judicially second-guessed when they exercise reasonable care and business judgment." *HAJMM Co. v. House of Raeford Farms,* 94 N.C. App. 1, 10, 379 S.E.2d 868, 873 (1989), *aff'd in part, rev'd in part on other grounds,* 328 N.C. 578, 403 S.E.2d 483 (1991).

To survive a motion to dismiss, the complaint must allege, in other than conclusory

terms, that the directors were inattentive or uninformed, acted in bad faith or that the board's decision was unreasonable. *Winters*, 2001 WL 34000144, at *3. Absent specific allegations of bad faith or inattentiveness, Defendants' decisions are entitled to a presumption of reasonableness and Plaintiffs must specifically plead facts that would overcome that presumption. *Id.* If Plaintiffs fail to meet the minimum requirements, as they do here, the Court should uphold the board's decision "unless it cannot be attributed to any rational business purpose." *ILA Corp.,* 132 N.C. App. at 602, 513 S.E.2d at 821-22.

Here, Plaintiffs fail to allege specific facts to overcome the presumption of the business judgment rule. Plaintiffs do not offer a single specific factual allegation that would demonstrate that any of the individual Defendants acted in their respective self-interests, in bad faith, or that the Defendants did not believe that they were acting in the best interests of MedOasis. Rather, Plaintiffs offer nothing more than conclusions of law.

Plaintiffs conclude that MedOasis' termination of the Management Services Agreement with AAA served "no legitimate business purpose," based on nothing more than their "information and belief" that Defendants' motive was to redeem the MedOasis shares then-owned by certain doctors and employees affiliated with AAA. Compl. at ¶ 30. Plaintiffs' supposition is based on nothing more than the fact that after the termination of the AAA agreement, MedOasis sought to redeem the AAA members' shares—an obligation MedOasis had pursuant to its By-Laws, and pursuant to the AAA members' contractual obligations. Compl. at ¶ 28. On its face, the board's decision was a rational business purpose and was subject to much deliberation. *See* MedOasis Board Minutes, dated December 17, 2007, attached as Ex. B.[4]

[4] Plaintiffs specifically reference and rely upon the minutes of the MedOasis board from 2006-2008 in their Complaint. Compl. at ¶ 25. Thus, the Court's consideration of the minutes attached as Exs. B and C is proper on a Rule 12(b)(6) motion to dismiss. *Oberlin Capital*, 147 N.C. App. at 60, 554 S.E.2d at 847.

Plaintiffs' circular and self-serving conclusion is not a factual allegation that Defendants knew that the termination of the AAA relationship was not in MedOasis' best interests, and acted anyways.

There can be no doubt that a rational business purpose is served by issuing shares of company stock to key executives as an incentive to further grow the company. Thus, on its face, MedOasis' decision to issue and sell stock to Messrs. Condra and Prevost is an action it took in the best interests of MedOasis. Plaintiffs fail to allege any facts that Messrs. Prevost and Condra's shares were obtained in bad faith. Plaintiffs' do not even found their specific attempt to invalidate the 60,000 shares awarded to Mr. Condra as CEO upon a single factual allegation that those particular shares were issued in bad faith. In addition, Plaintiffs do not plead that the additional 140,000 shares sold to Messrs. Condra and Prevost (in contrast to Mr. Green and Dr. Ellington's shares that were given to them for no monetary payment) were done in absence of a rational business purpose.

The Complaint centers on the August 18, 2008 shareholder's meeting. *See* Minutes, dated August 18, 2007, attached as Ex. C. Plaintiffs do not set forth factual allegations demonstrating that MedOasis' decision was made in bad faith, was done in Defendants' self-interest, or was taken with knowledge that it was not in the best interests of MedOasis. Instead, Plaintiffs incorporate the board's decisions into the remainder of the Complaint, and conclude in general terms that Defendants' actions were made in "bad faith" or to "divert assets to themselves" or were examples of "self-dealing." Coml. at ¶¶ 49-51. The Court should not take Plaintiffs' conclusions of law and hollow assertions as true in determining Defendants' Rule 12(b)(6) motion. *Sutter v. Duke,* 277 N.C. 94, 176 S.E.2d 161 (1970). Plaintiffs allege no facts that specify the assets that were purportedly diverted to Defendants (or to which Defendant), or

which Defendant, if any, engaged in self-dealing through these actions, or how that was somehow accomplished.

In sum, Plaintiffs do not plead any factual allegations that would overcome the presumption of the business judgment rule, and the Court should, accordingly, dismiss the Complaint.

D. Plaintiffs Cannot Properly Maintain Separate And Distinct Causes Of Action For "Abuse of Control," "Gross Mismanagement," Or "Corporate Waste."

Plaintiffs' so-called claims for "abuse of control," "gross mismanagement" and "corporate waste" fail because North Carolina does not recognize such independent torts. Indeed, Defendants can find no authority that independent causes of action or torts can be based on such general assertions. Instead, Plaintiffs' cursory allegations are overlapping and redundant descriptions of conduct that Plaintiffs allege arise from Defendants' purported breaches of fiduciary duties and legal obligations as directors of MedOasis. Indeed, Plaintiffs' allegations appear to be entirely subsumed by their other causes of action. As such, the Court should dismiss Counts III, IV and VI pursuant to Rule 12(b)(6).

E. Plaintiffs Fail To State A Claim For Unjust Enrichment.

The Court should dismiss Plaintiffs' claim for unjust enrichment because Plaintiffs fail to state a clam upon which relief can be granted. To recover for unjust enrichment, Plaintiffs must show that MedOasis conferred a benefit on a particular Defendant, that such Defendant consciously accepted the benefit, and that the benefit was not conferred gratuitously or by an interference in the affairs of the Defendant. *See Southeastern Shelter Corp. v. BTU, Inc.,* 154 N.C. App. 321, 330, 572 S.E.2d 200, 206 (2002); *Booe v. Shadrick,* 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988). "The doctrine of unjust enrichment was devised by equity to exact the return of, or payment for, benefits received under the circumstances where it would be unfair for

the recipient to retain them without the contributor being repaid or compensated." *Collins v. Davis*, 68 N.C. App. 588, 591, 315 S.E.2d 759, 7671 (1984).

Plaintiffs wholly fail to properly state a claim for relief for unjust enrichment. Plaintiffs do not allege which particular Defendant was unjustly enriched, nor do they identify the benefit such Defendant purportedly obtained from MedOasis with respect to the actions at issue in the Complaint. Plaintiffs instead conclude in very general terms that all Defendants, collectively, were unjustly enriched "in the form of unjustified salaries, benefits, bonuses, stock issues or grants and other emoluments of office." Plaintiffs' vague pleading of some collective enrichment cannot suffice.

Messrs. Condra and Prevost are officers and shareholders. Compl. at ¶¶ 5-6. Not surprisingly, they are compensated for managing the company's day-to-day operations. Plaintiffs' claims, however, concern MedOasis' decisions with respect to the August 18, 2008 shareholders' meeting, not Messrs. Condra and Prevost's employment. Plaintiffs fail to plead that Mr. Condra and Mr. Prevost received an unjustified benefit.

Although the Complaint is focused on actions taken by MedOasis' board, it is important for the Court to note that Mr. Miller was not a director or even an officer of MedOasis by August 2008. Compl. at ¶ 7; and Ex. C hereto. Plaintiffs fail to allege that Mr. Miller, personally, was somehow unjustly enriched or what form such enrichment could have possibly took.

Messrs. Phillips and Fontaine are not shareholders of MedOasis, nor are they employees or officers. Compl. at ¶¶ 8, 10. Neither is paid a salary for his services on MedOasis' board (as is true with respect to all Defendants). Plaintiffs fail to allege the salaries, benefits, bonuses, stock issues that Messrs. Phillips and Fontaine allegedly obtained improperly from MedOasis.

Finally, Dr. Longbine is a director and shareholder of MedOasis, not an employee. Compl. at ¶ 9. Plaintiffs do not allege that Dr. Longbine's shares were somehow improperly obtained. Indeed, it is undisputed that his shares equal those issued to other GAA members. Plaintiffs fail to allege that Dr. Longbine, personally, was somehow unjustly enriched or what form such enrichment could have possibly took. In short, Plaintiffs completely fail to state a claim that any of the Defendants were unjustly enriched by the conduct alleged in the Complaint.

F. The Court Should Dismiss Plaintiffs' Claim For Rescission (Count VIII) Pursuant to Rule 9(b) Because Plaintiffs Fail To Allege The Defendants' Alleged Fraud or Deceit With The Requisite Particularity.

Plaintiffs have not plead a viable claim for rescission, and the Court should dismiss this claim with prejudice pursuant to Rules 12(b)(6) and 9(b). Plaintiffs seek to rescind all contracts "which provide for issuance of stock to the Officer Defendants." Compl. at ¶¶ 92-94. Although Plaintiffs do not specify, it appears that they seek the rescission of the 60,000 shares that MedOasis awarded to Mr. Condra upon his election as CEO, and the 140,000 shares MedOasis sold to Messrs. Condra and Prevost at $0.17 per share as incentive to manage the company for growth. *Id.* at ¶¶ 29, 42. Plaintiffs' rescission claim clearly sounds in fraud: "the stock issued in exchange for alleged promissory notes between the Officer Defendants was obtained through Defendants' fraud, deceit, and abuse of control." *Id.* at ¶ 93. Plaintiffs, however, fail to plead the elements of the alleged fraud and deceit with the particularity required by Rule 9(b).

"In all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." N.C. Gen. Stat. § 1-A1(b), Rule 9(b); *Calloway v. Wyatt*, 246 N.C. 129, 97 S.E.2d 881 (1957). It is not sufficient to allege the elements of fraud in general terms. *Myrtle Apartments, Inc. v. Lumbermen's Mut. Cas. Co.*, 258 N.C. 49, 127 S.E.2d 759 (1962); *Eastern Steel Products Corp. v. Chestnutt*, 252 N.C. 269, 113 S.E.2d 587 (1960). Rule 9(b)'s particularity requirement is met by alleging time, place, and content of the fraudulent

representation, identity of the person making the representation, and what was obtained as a result of the fraudulent acts or representations. *S.N.R. Management Corp. v. Danube Partners 141, LLC*, ___ N.C. App. ___, 659 S.E.2d 442, 450 (2008) (complaint did not allege fraud claims with requisite particularity; plaintiff did not allege time or place of purported fraudulent representations, content of purported fraudulent representations, and did not state with sufficient particularity what was obtained as a result of fraud); *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 39, 626 S.E.2d 315, 321 (2006) (counterclaim dismissed for failure to plead fraud with requisite particularity).

Here, Plaintiffs completely fail to allege the alleged circumstances of the alleged fraud that would somehow justify rescission.[5] Plaintiffs do not identify a single misrepresentation or omission in connection with these transactions. Plaintiffs do not allege who made the misrepresentation, or where it occurred, or when it was allegedly made. Accordingly, the Court should dismiss Plaintiffs' rescission claim for failure to state a claim pursuant to Rule 12(b)(6), and for failure to satisfy the pleading requirements of Rule 9(b).

G. Plaintiffs Fail To State A Claim Against Messrs. Condra, Prevost, Fontaine and Miller In Their Individual Capacities.

Plaintiffs sue Messrs. Condra, Prevost, Miller and Fontaine in their individual capacities, as well as in their capacities as current of former directors. Plaintiffs, however, fail to properly plead sufficient facts to proceed against these Defendants in their individual capacities under North Carolina law.

As discussed above, N.C. General Statute § 55-8-30 sets forth the legal duties of directors to a North Carolina corporation. North Carolina law also clearly provides that "[a] director is not

[5] Plaintiffs' prayer for relief seeks to invalidate the 60,000 shares that MedOasis awarded to Mr. Condra as CEO, but Plaintiffs fail to include this issuance in Count VIII or allege that it was obtained through fraud and deceit. Compl. at ¶¶ 92-94. Nowhere do Plaintiffs even attempt to justify this relief.

liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section [55-8-30]." *Id.*

In addition, "the [company's] articles of incorporation may set forth any provision that under this Chapter is required or permitted to be set forth in the bylaws, and may also set forth… [a] provision limiting or eliminating the personal liability of any director arising out of an action whether by or in the right of the corporation or otherwise for monetary damages for breach of any duty as a director." N.C. Gen. Stat. § 55-2-02(b)(3). MedOasis' articles of incorporation provide this immunity: "A director of the corporation shall not be personally liable to the corporation or otherwise for monetary damages for breach of any duty as a director, except for liability with respect to (i) acts or omissions that the director at the time of such breach knew or believed were clearly in conflict with the best interests of the corporation; (ii) any liability under N.C. Gen. Stat. § 55-8-3; or (iii) any transaction from which the director derived an improper personal benefit." *See* Compl. at Ex. A.

Plaintiffs fail to plead facts indicating that Defendants did not perform their duties either (1) in good faith, (2) in the honest belief that the action taken was in the best interest of the company, or (3) on an informed basis. Plaintiffs also fail to plead facts that any of the individual Defendants derived an improper personal benefit. Plaintiffs do not specify which Defendant received a personal benefit or what the benefit was. Plaintiffs do not allege sufficiently any wrongful action taken by Messrs. Condra, Prevost, Miller, or Fontaine in particular. Rather, every allegation in the Complaint is made against these four defendants collectively with Mr. Phillips and Dr. Longbine (or generally to MedOasis or the "Company"), and solely in their capacities as directors. For example, Plaintiffs allege simply that "Defendants have pursued or joined in the pursuit of a common course of conduct and acted in concert with one another" and

that "Defendants collectively and individually initiated a course of conduct which was designed to and did: maintain Defendants' executive and directorial positions at MedOasis." Compl. at ¶ 60-61.

Plaintiffs consistently lump Defendants together as a collective entity throughout their Complaint. Plaintiffs do not clarify how and to what extent each Defendant actively and personally participated in the alleged wrongdoing. Accordingly, dismissal of Plaintiffs' claims against Messrs. Condra, Prevost, Miller and Fontaine in their individual capacities is warranted. *See Oberlin Capital, LP v. Slavin*, 147 N.C. App. 52, 57, 554 S.E.2d 840, 845 (2001) (dismissing claims against defendant directors in their individual capacities because complaint failed to allege the specific wrongful action taken by each particular defendant).

In contrast to Plaintiffs' general conclusions, the Complaint on its face demonstrates that Defendants complied with their duties pursuant to North Carolina law and MedOasis' articles of incorporation. The board distributed shares of stock to Messrs. Condra and Prevost pursuant to its statutory rights pursuant to N.C. Gen. Stat. § 55-6-40, as it did when it gave Mr. Green his 200,000 shares. The decision was made to proceed with winding-down MedOasis' relationship with AAA after careful deliberation by the MedOasis board of directors. *See* Ex. B. Across several months, MedOasis made every effort to repair the deterioration of its relationship with AAA, but in the end, MedOasis decided that AAA's unreasonable operational and financial demands were too disruptive and financially disadvantageous to the future prospects of MedOasis.

The board made its decisions at the August 18, 2008 shareholders' meeting with respect to the voting rights of MedOasis' shareholders in reliance on the terms of MedOasis' By-Laws, and the AAA members' subscription agreements. Ex. C. Plaintiffs simply disagree with those

decisions. They do not plead any affirmative facts Plaintiffs were somehow acting with knowledge that their decisions were not in the best interests of MedOasis, were in bad faith, or that the directors were somehow uninformed. Defendants' actions described in the Complaint were clearly taken in their capacities as directors of MedOasis. Importantly, Mr. Miller was not even a director at this time. Fontaine was not a shareholder, employee or officer. Neither receives a salary from MedOasis. Plaintiffs fail to properly plead any facts that allow them to proceed against Messrs. Condra, Prevost, Miller, and Fontaine in their personal capacities.

H. Plaintiffs Fail To State Any Claims Against Mr. Miller.

It is abundantly clear that Plaintiffs fail to plead any claims for relief against Mr. Miller. Plaintiffs' Complaint centers on their disagreement with actions taken by MedOasis at the August 18, 2008 shareholder's meeting. On August 18, 2008, Mr. Miller was not a director of MedOasis. *Id.* He was also not an employee or an officer. Compl. at ¶ 7. Plaintiffs fail to allege with specificity any particular actions Mr. Miller took that give rise to any of Plaintiffs' clams. Thus Plaintiffs fail to state claims upon which relief can be granted against Mr. Miller. The Court should, accordingly, dismiss all claims against Mr. Miller and release him from this suit.

I. Plaintiffs' "Direct" Breach Of Fiduciary Duty Claim Fails To State A Claim Upon Which Relief Can Be Granted.

Plaintiffs assert a direct claim for fiduciary duty that is identical to its so-called derivative for the same alleged breach. The Court, however, should dismiss Plaintiffs' direct breach of fiduciary duty claim for failure to state a claim upon which relief can be granted.

The duty of a director is set out in Section 55-8-30 of the North Carolina General Statutes: "A director shall discharge his duties as a director, including his duties as a member of a committee: (1) In good faith; (2) With the care an ordinarily prudent person in a like position

would exercise under similar circumstances; and (3) In a manner he reasonably believes to be in the best interests of the corporation." *Id.* (emphasis added). There is nothing in this language that imposes on a director a duty, much less a fiduciary duty, to a minority shareholder that is different from the duty to the corporation as a whole. *See id.* § 55-8-30(a)(3) (requiring officer to act in the best interests of the corporation). The Official and North Carolina Comments to section 55-8-30 regarding conduct of directors, confirm that there is no fiduciary duty and no separate duty owed by a director to a minority shareholder. "Former G.S. 55-35 provided that officers and directors stand in a fiduciary relation 'to the corporation and its shareholders.' The drafters decided not to bring forward the words 'and its shareholders' in order to avoid any interpretation that that there is a duty running directly from directors to the shareholders that would give shareholders a direct right of action on claims that should be asserted derivatively." North Carolina Comment, N.C. Gen. Stat. § 55-8-30 (emphasis added).

As these provisions make clear, the director Defendants owe no independent duty to either Plaintiff as minority shareholders apart from their respective duties to the corporation. To the contrary, the Defendants were required to act only "in good faith" and "[i]n a manner he reasonably believe[d] to be in the best interests of the corporation." N.C. Gen. Stat. § 55-8-42(a)(1),(3). As explained in Section II.C, above, Plaintiffs do not allege facts that demonstrate that any of the individual Defendants violated these standards. Dismissal, therefore, is warranted.

Finally, for a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties, *Harrold v. Dowd,* 149 N.C. App. 777, 783, 561 S.E.2d 914, 919 (2002) citing *Curl v. Key,* 311 N.C. 259, 264, 316 S.E.2d 272, 275 (1984), and, as discussed above, no such relationship exists between a director and a shareholder. Because Plaintiffs fail to allege an

essential element of their claim, their direct claim for breach of fiduciary duty fails to state a claim upon which relief can be granted. *See Oberlin Capital, L.P. v. Slavin,* 147 N.C. App. 52, 56, 554 S.E.2d 840, 844 (2001) (holding that when the complaint fails to allege the substantive elements of some claim, the complaint must be dismissed). Accordingly, Plaintiffs' claim for breach of fiduciary duty fails to state a claim upon which relief can be granted. The Court should dismiss this claim with prejudice.

J. Plaintiffs Fail To State A Claim For Constructive Fraud.

Plaintiffs also assert identical constructive fraud claims, both derivatively and directly. The Court should dismiss both claims pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted, and for failure to plead fraud with the required particularity set forth in Rule 9(b).

To properly plead a cause of action for constructive fraud, Plaintiffs must "allege facts and circumstances (1) which created the relation of trust and confidence, and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Terry v. Terry,* 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981) (quotation omitted) (emphasis added). "Implicit in the requirement that a defendant '[take] advantage of his position of trust to the hurt of plaintiff' is the notion that the defendant must seek his own advantage in the transaction; that is, the defendant must seek to benefit himself." *Barger v. McCoy Hillard & Parks,* 346 N.C. 650, 666, 488 S.E.2d 215, 224. "[I]n order for defendants to take advantage of plaintiffs, plaintiffs must be deceived." *Jay Group, Ltd. v. Glasgow,* 139 N.C. App. 595, 600, 534 S.E.2d 233, 236 (2000) (citing *Jordan v. Crew,* 125 N.C. App. 712, 720, 482 S.E.2d 735, 739 (1997)) (plaintiffs' constructive fraud claim was nonexistent because plaintiffs were never deceived by defendant, an essential element of

constructive fraud). Plaintiffs' complaint must allege facts and circumstances that show that the Defendants sought to (1) take advantage of Plaintiffs, (2) wrongfully benefitted from Plaintiffs, and (3) deceive and, in fact, deceived Plaintiffs.

"The requirement of a benefit to defendants is implicit throughout the cases allowing constructive fraud claims." *Barger,* 346 N.C. at 667, 488 S.E.2d at 224-25 (fact that accountant and accounting firm obtained the benefit of their continued relationship with plaintiffs was insufficient to establish a claim for constructive fraud). "[I]t is not sufficient for plaintiff to allege merely that defendant had won his trust and confidence and occupied a position of dominant influence over him. Nor does it suffice for him to allege that the deed in question was obtained by fraud and undue influence." *Rhodes v. Jones,* 232 N.C. 547, 548-49, 61 S.E.2d 725, 726 (1950) (internal citations omitted); *see also Burgess v. First Union Nat'l Bank of North Carolina,* 150 N.C. App. 67, 73, 563 S.E.2d 14, 18 (2002) (citing *Terry,* 302 N.C. 77, 273 S.E.2d 674; *Barger,* 346 N.C. 650, 488 S.E.2d 215) ("This Court held that Lloyd and Frank's Estate 'have proffered no evidence that First Union sought to benefit itself from its alleged fraud[,]' this being an essential element of both active and constructive fraud"); *Sharp v. Gailor,* 132 N.C. App. 213, 216, 510 S.E.2d 702, 704 (1999) (plaintiff came close to alleging constructive fraud, but was missing an allegation that defendant took advantage of her position of trust for the purpose of benefitting herself, thus the acts alleged failed to state a claim for constructive fraud).

Plaintiffs here fail to allege the essential elements of a claim for constructive fraud. Plaintiffs do not allege facts and circumstances that create a relationship of trust and confidence between Plaintiffs and any of the Defendants. Plaintiffs also fail to allege <u>facts and circumstances</u> leading toward the closing of the transaction in which Defendant somehow caused Plaintiffs or MedOasis damage by taking advantage of that position. Plaintiffs moreover fail to

allege that the Defendants somehow took advantage of that relationship, and sought to personally but wrongfully benefit from their alleged conduct. Plaintiffs also do not allege facts that the Defendants deceived Plaintiffs or MedOasis. Plaintiffs merely conclude in summary fashion that Defendants breached "their duty of candor" and "concealed material facts" from Plaintiffs. Compl. at ¶ 102. Plaintiffs' conclusions of purported duties of candor to Plaintiffs do not come close to pleading the requisite elements for constructive fraud.

In addition, Plaintiffs fail to plead the alleged fraud supporting their clam with the required particularity pursuant to Rule 9(b). Although constructive fraud typically does not require the strict pleading requirements of actual fraud, *Patuxent Development Co. v. Bearden,* 227 N.C. 124, 128, 41 S.E.2d 85, 87 (1947), Plaintiffs here allege that their constructive fraud claim is based on Defendants' "concealment of material facts" concerning the state of MedOasis' business and assets. Compl. at ¶¶ 83, 102. Plaintiffs fail, however, to plead the material omissions with any degree of specificity required by Rule 9(b). For this alternative reason, the Court should dismiss Plaintiffs' direct and derivative constructive fraud claims.

K. The Court Should Dismiss Plaintiffs' Derivative And Direct Claims For Breach of Fiduciary Duty and Constructive Fraud For the Alternative Reason That Plaintiffs Cannot Proceed On Those Causes Of Action In Both Their Personal Capacity And As Derivative Plaintiffs On Behalf Of MedOasis.

Plaintiffs assert duplicative claims for breach of fiduciary duty and for constructive fraud as both direct claims, and derivatively. The Court should not permit Plaintiffs to proceed upon identical claims for recovery both as individuals and in their capacity as shareholders.

"Where two inconsistent causes of action are improperly joined in the same complaint, it is proper to require the plaintiff to adopt one and abandon the other, or to reform the complaint so as to make it square with the rules of good pleading." *F.E. Lykes & Co. v. Grove*, 201 N.C. 254, 159 S.E. 360 (1931). The doctrine of the election of remedies prevents "'double redress for

a single wrong.'" *United Labs., Inc. v. Kuykendall,* 335 N.C. 183, 191, 437 S.E.2d 374, 379 (1993) (quoting *Smith v. Gulf Oil Corp.,* 239 N.C. 360, 368, 79 S.E.2d 880, 885 (1954)). "[T]he underlying basis" of this rule is "the maxim which forbids that one shall be twice vexed for one and the same cause." *Smith,* 239 N.C. at 368, 79 S.E.2d at 885.

As plead, Plaintiffs contend that the damages they allegedly suffered as individuals are identical to the damages suffered by MedOasis, and for whom they claim to represent as shareholders. Plaintiffs do not specify what monetary damages they have suffered individually, and how those damages are somehow distinct from those alleged suffered by the company. Accordingly, it is impermissible for Plaintiffs to seek the same relief individually that they seek as a shareholder in favor of MedOasis.

IV. CONCLUSION

Based on the foregoing, Defendants respectfully request that the Court dismiss Plaintiffs' Complaint with prejudice. Plaintiffs fail to plead viable causes of action that permits the Court to second-guess Defendants' actions taken in good faith for purposes of governing its business.

Dated: February 27, 2009

Respectfully submitted,

/s/ Gregory W. Brown

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS** is compliant with the seven thousand five hundred (7500) word count limit specified in Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court.

/s/ Gregory W. Brown

Gregory W. Brown

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of February, 2009, the foregoing **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS** was served on the following persons via the North Carolina Business Court's electronic filing system, email, and first class mail addressed to the following counsel of record:

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