NORTH CAROLINA :	IN THE GENERAL COURT OF JUSTICE
	SUPERIOR COURT DIVISION
MECKLENBERG COUNTY :	07 CVS 5354

JDH CAPITAL, LLC)
)
Plaintiff,)
)
v.)
)
REBECCA D. FLOWERS, DWF)
DEVELOPMENT, INC., and FLOWERS)
PLANTATION FOUNDATION, INC.)
f/k/a FLOWERS PLANTATION, INC.,)
)
Defendants)
_____)

DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

All Defendants, pursuant to Business Court Rule 15, submit this brief in support of *Defendants' Motion for Summary Judgment*.

PRELIMINARY STATEMENT

A. Nature of Case and Course of Proceedings.

JDH Capital, LLC ["JDH"] and defendant Rebecca D. Flowers ["Ms. Flowers"] entered negotiations to form a joint venture for the development of family property owned by Ms. Flowers in Johnston County. JDH claims – and Ms. Flowers disagrees – that a joint venture was formed notwithstanding express language in the letter of intent upon which JDH relies [Comp. ¶ 15] that "[t]his letter of intent does not create any binding contractual rights between Flowers and JDH and shall serve only as an expression of intention between the parties." Based on that contention, JDH filed a fifty-nine paragraph Complaint seeking relief against Ms. Flowers and

two related entities under five different legal theories (Breach of Contract; Unjust Enrichment; Fraud; Negligent Misrepresentation; Unfair and Deceptive Trade Practices).[1]

Extensive discovery has established that JDH's purported claims are without merit as a matter of law on the undisputed facts. While there may be some disputed facts, none of those facts are "material" for purposes of Rule 56 because resolving them in favor of JDH would not change the outcome. Accordingly, Defendants have moved for summary judgment and submit this brief in support of that motion.

B. Factual Background.

1. The Flowers Property.

Ms. Flowers owns approximately 28 acres of property at the intersection of Highway 42 and Buffalo Road in Johnston County ["Property"] which is suitable for commercial/retail development. [Flowers Dep. (Vol. I) 116].[2] The Property has been in the Flowers family for generations, and Ms. Flowers did not want to sell it. [Flowers Dep. (Vol. II) 118; Clarke Dep. 21]. As of 2005, Ms. Flowers had plans (including an architect's design of a building to be known as the "Marketplace") to build a commercial/retail development on the site. [Flowers Dep. (Vol. II) 17].

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[1] While this motion and brief were in preparation, JDH filed a Motion for Leave to Amend, seeking permission to add additional theories and allegations. Defendants will address the new allegations and theories in their response to the Motion to Amend.

[2] All discovery materials and affidavits cited in this brief appear in Defendants' Appendix of Materials in Support of Motion for Summary Judgment filed contemporaneously herewith. Deposition Exhibits (cited herein as "Ex.__" are in Tab A of the Appendix; Deposition testimony is in Tab B; Interrogatory Answers are in Tab. C; Unpublished Cases are in Tab D. Affidavits cited are filed separately.

Len Woodall, an independent certified public accountant in Raleigh, served as Ms. Flowers' accountant and business advisor and he assisted her with the negotiations at issue. [Woodall Aff. ¶2, 3].

Ms. Flowers also owns substantial other property in the vicinity that she is developing for residential purposes, and she has always wanted any development of the Property to have an architectural style and amenities that would enhance the attractiveness of the area for the residential developments. [Flowers Aff. ¶ 2; Hill Dep. (Vol. I), 71-72]. This was more important to her than generating cash flow from the development. [Flowers Dep. (Vol. II), 52].

2. Pre-Letter of Intent Discussions.

In September, 2005, JDH approached Ms. Flowers about purchasing the Property. [Flowers Dep. (Vol. I), 168-169]. Although Ms. Flowers told JDH that the property was not for sale, she advised that she was willing to consider JDH's alternative proposal that the parties enter a joint venture to develop the Property. [Flowers Dep. (Vol. II), 118; Clarke Dep. 21]. She told JDH about her existing plans for the Marketplace and her goals and preferences with respect to any development on the Property. [Clarke Dep. 20-22].

The general concept of the proposed joint venture was that Ms. Flowers would contribute the Property to the joint venture and that JDH would (i) contribute its work and expertise in designing, constructing, obtaining tenants and managing the development and (ii) provide financial guarantees to lenders in order to obtain the construction loans necessary to construct the development. [Ex. 33].

Both parties expended time and resources exploring the joint venture possibility over an extended period. For example, JDH did not like Ms. Flowers' existing plans because, among other reasons, it did not feature a large grocery store as an anchor tenant. [Hill Dep. (Vol. I) 72-

76]. JDH therefore prepared and transmitted to Ms. Flowers and her civil engineer, Paul Smith, several site plans showing the type of designs in which JDH would be interested. [Hill Dep. (Vol. I), 80-86; Ex. 46, 47, 51. Ms. Flowers, in turn, spent money having her civil engineer, Paul Smith, work with JDH in connection with revisions of the site plans. [Hill Dep. (Vol. II) 242, 251, 262-263; Smith Dep. 20-21].

JDH contends that its transmission of the site plans and related communications constituted a significant delivery to Ms. Flowers of intellectual property and expertise. [Hill Dep. (Vol. II) 408-411]. JDH acknowledges, however, that no contract had been formed between the parties and that it communicated the plans and expertise solely to explore whether Ms. Flowers would be willing to develop the property in a manner acceptable to JDH. [Hill Dep. (Vol. II) 241-242, 263-264, 344-345, 350].

Ms. Flowers told JDH during negotiations that she wanted to resolve as many issues as possible before entering a binding agreement. For example, she sent JDH an e-mail on January 20, 2006 that stressed the need to agree on as many matters as possible relating to the planning for the development before any binding agreement was signed, stating:

> I do want you to understand more than ever . . . this is not a typical situation, I am going to be very cautious as I have sent twenty plus years getting the 3,000 acres [of residential developments] to this point in time. I know that once we are 50/50 . . . even with my architectural approval it is going to be a lot different. Anything that you or I cannot negotiate on . . . needs to be addressed now. The large box shopping center will certainly make more net profit. However the tone of my entire residential of 5,500 families, depends on the class and quality of what we are anticipating doing together. [Flowers Aff. ¶7, Ex. 90]

3. The Letter of Intent.

As discussions proceeded, JDH prepared a proposed letter of intent ["the LOI"]. [Hill Dep. (Vol. I)92-93]. The LOI's original draft was written by JDH – although JDH

representatives disagree among themselves about which of them wrote it. [Hill Dep. (Vol. I) 92-93; Clarke Dep. 26-27]. JDH included in its draft of the LOI the following language:

> Both parties agree to work diligently toward the full execution of limited liability company documents reflecting the terms and conditions agreed upon herein within thirty days of the date of this agreement.
>
> This Letter of Intent does not create any binding, contractual rights between Flowers and JDH and shall serve only as an expression of intention between the parties.

This language was JDH's idea, and it was not requested by Ms. Flowers. [Hill Dep. (Vol. I), 98-100; Clarke Dep. 42]. The final, executed LOI contained the JDH-drafted language disclaiming contractual effect. [Hill Dep. (Vol. I) 103; Ex. 33].

JDH never told Ms. Flowers or Mr. Woodall that the language disclaiming contractual effect meant anything different than its express meaning. [Hill Dep. (Vol. I) 102-104; Clarke Dep. 42-43]. Ms. Flowers and Mr. Woodall therefore understood that the LOI did not create any binding contractual rights and that the binding agreement, if any, would be the formal LLC documents to be executed later. [Woodall Aff. ¶4, 6; Flowers Aff. ¶3, 6]. The formal LLC documents were never executed. [Woodall Aff. ¶12; Flowers Aff. ¶11].

Given the importance of JDH's anticipated guarantee of financing, Mr. Woodall advised JDH that it would be necessary for JDH to provide financial information about itself before the binding agreement was reached. [Hill Dep. (Vol. II) 295; Woodall Aff. ¶8; Ex.56]. As JDH's own expert acknowledges, this was a normal and reasonable condition given the importance of JDH's financial strength to obtaining the financing necessary for the success of the proposed joint venture. [Haggart Dep.207-209]. Although JDH said that it did not object to providing financial information [Hill Dep. Vol. II, pp. 295-296], it never provided all the information despite follow up requests. [Woodall Aff. ¶8].

Mr. Woodall, on behalf of Ms. Flowers, requested that the LOI contain a statement that Ms. Flowers would have final architectural approval on the project. [Woodall Aff. ¶ 7; Hill Dep. (Vol. II) 278-281]. The architectural design was especially important to Ms. Flowers because of the potential impact on her nearby residential developments in addition to her desire to have a high quality development on family land. [Flowers Aff. ¶2; Hill Dep. (Vol.I),72, 76]. JDH agreed that Ms. Flowers would have final decision on architectural matters, but with the caveat that this would be subject to compliance with the project budget. [Hill Dep. (Vol. II), 278-281; Ex.55]. The caveat made the effectiveness of Ms. Flowers' architectural control depend on the budget because her preference for certain architectural attributes could be defeated if the budget did not provide adequate funds. [Id]. Mr. Woodall therefore requested (and JDH agreed) that the LOI provide that JDH would provide a budget for the project so that Ms. Flowers could determine whether the budget would accommodate her architectural preferences before she entered the binding agreement. [Woodall Aff. ¶7; Ex.33].

The parties signed the LOI containing the JDH-drafted language disclaiming the creation of any binding contractual rights on March 29-30, 2006. [Ex.33].

4. Post-Letter of Intent Negotiations.

JDH proposed that its lawyers prepare the proposed LLC documents contemplated by the LOI. [Hill Dep. (Vol. II), 272-273]. JDH had represented that its lawyers had drafted such documents in the past and that it would take "about one week to accomplish [the first draft], and usually two – three weeks to work through" [Id; Ex.53], and JDH-drafted language in the Letter of Intent contemplated that the LLC documents would be negotiated and executed within thirty days after execution of the LOI in late March. [Ex.33].

Notwithstanding its representations, JDH failed to circulate a draft of the proposed LLC agreement until July 20 – almost four months after execution of the LOI. [Hill Dep. (Vol. I), 158-159; Ex.37.] When JDH's attorney finally circulated a 42-page draft agreement (compared with the four-page LOI) on July 20, 2006, the draft (i) omitted at least one term stated in the LOI, and (ii) contained numerous material terms that were not addressed by the LOI, ("new terms"). In addition, the draft contained extended provisions setting forth additional details, terms and conditions with respect to matters addressed by the LOI only in summary form (additional provisions). The omitted, new and/or additional provisions included (but were not limited to) the following:

- Detailed provisions on management of the LLC (7 pages compared with one sentence in LOI). [Compare Ex.37 p.2-8 with Ex. 33, p.1.]
- Provision for sales commissions on sales of any portion of the property (new term). [Ex.37 p.5].
- Provision for Rights-Obligations of Members (new term). [Ex.37, p.8.]
- Detailed provisions on Capital Contributions and Loans (1 ½ pages compared with 2 paragraphs in LOI). [Compare Ex. 37 p.9 with Ex.33 p.1.]
- Provisions for additional capital contributions and steps that JDH, as manager of the LLC, could take to require additional contributions from members (Flowers) (new term). [Ex.37 p.10].
- Omission of LOI-contemplated provision that Flowers would assume the role of managing partner if JDH sells its interest or ownership of JDH (change). [Compare Ex.33 with Ex.37, p.2-8].

- Details on allocations of profits, losses and other special allocations (new terms). [Ex. 37, p.11].
- Detailed provisions on procedure for LLC distributions (2 pages compared with 2 paragraphs in LOI). [Compare Ex.37, p. 15-17 with Ex.33 p. 3.]
- Detailed buy/sell provisions (8 ½ pages) even though JDH was aware that Ms. Flowers would not sell her land under any circumstance (new term). [Ex.37, p.18].
- Detailed provisions on dissolution and liquidation of the company (new term). [Ex.37, p.26].
- Arbitration provision and other "Miscellaneous" provisions not contemplated by LOI (new terms). [Ex.37, p.30].
- Provisions on Representation and Warranties of Members (9 pages) (new term). [Ex.37, p.31.]
- Provision giving JDH unilateral right to withdraw from LLC at any time prior to the contribution of the land and providing that if JDH withdraws from company within this timeframe and property is sold within eighteen months Flowers shall reimburse JDH for costs paid by JDH in connection with the property (new term). [Ex.37, p.38].

Mr. Woodall provided comments on the draft agreement on behalf of Ms. Flowers on August 2, 2006 [Ex.60], but JDH's attorney did not circulate a revised draft of the proposed agreement until September 6, 2006 [Ex.62]. The revised draft still had material terms that were not satisfactory to Ms. Flowers, [Woodall Aff. ¶12; Flowers Aff. ¶11]. No new revised draft was ever circulated, and the formal binding LLC documents contemplated by the LOI were never executed. [Hill Dep. (Vol. II) 327; Ginley Dep. 82-84].

Delays and problems also arose with respect to JDH's preparation of the project budget. As noted above, the LOI contemplated that JDH would prepare the budget, and the draft LLC agreement contemplated that the budget would be an exhibit to that agreement. [Ex.33; Ginley Dep. 69, 80-81]. Although JDH had represented that it would be able to provide the budget in early April, it did not circulate a preliminary proposed budget until June 12. [Ex.38; Flowers Aff. ¶10]. Without consulting with Ms. Flowers, JDH had elected to have much of the work on the budget done by an outside consulting firm rather than JDH employees. [Hill Dep. (Vol. II) 312-313; Flowers Aff. ¶10]. If that work had been done by JDH itself as contemplated by the LOI, the expense would have been borne by JDH. [Id.]. JDH anticipated, however, that the cost of the outside consultant would be paid by the joint venture if it was formed, thus shifting 50% of the cost to Ms. Flowers. [Hill Dep. (Vol. II) 313-314]. As more fully discussed below, JDH later proposed budget changes materially adverse to Ms. Flowers.

During the Summer and Fall of 2006, Ms. Flowers' engineer, Paul Smith worked on engineering drawings for the project based on the site plans previously exchanged. JDH representatives had some communications with Mr. Smith about the plans, but those communications consisted of nothing more than occasional correspondence informing Mr. Smith that his drawings and designs looked good. [Smith Aff. ¶ 8]. Although Mr. Smith had tendered to JDH a proposed contract to be executed by the anticipated joint venture, he never received back an executed copy of that contract, and Ms. Flowers in fact paid for all of his work. [Smith Dep. 47, 67; Smith Aff. ¶¶ 7-10]

On most projects, JDH typically expends considerable time obtaining licenses, permits, zoning changes, and other governmental approvals (to which JDH refers as "entitlements"). [Hill Dep. Vol. I, 406]. On this project, however, that work was done primarily by Ms. Flowers

and/or persons whom she paid. [See generally Ball Dep. 67-80]. Ms. Flowers had already obtained significant government consents before JDH came on the scene [Flowers Aff. ¶2]; and Paul Smith, whom Ms. Flowers paid, did the entitlement work that was done while negotiations proceeded. [Smith Aff. ¶ 9-10; Ball Dep. 67-80]. A critical governmental permission for a successful grocery store was to make beer and wine sales on the premises legal. [Hill Dep. (Vol. I), 170]. When JDH declined to assist on this issue [Hill Dep. (Vol. I) 172-173], Ms. Flowers incurred the burden and expense of successfully obtaining passage of a referendum for that purpose. [Flowers Dep. (Vol. II) 106-108].

JDH sent solicitation packages to Lowes Foods in April 2006 and Harris Teeter on July 5, to ascertain potential interest in leasing grocery store space in the project. [Hill Dep. (Vol. II) 271-272]. For the most part, these packages consisted of boilerplate printouts from services to which JDH subscribed. [Hill Dep. (Vol. I) 54-55, 147-149; Haggart Dep. 156-157]. According to JDH's own expert, the only part of these packages that might have taken substantial time and effort to create was a one-page housing survey [Haggart Dep. 164-165], and the record reflects that JDH had done most of that survey in February of 2006 – well before the LOI was executed. [Ex.88 (JDH-723]

As matters progressed after execution of the LOI, Ms. Flowers became more and more concerned about JDH's commitment to the project. As noted above, JDH delayed by months in circulating drafts of the proposed operating agreement and the proposed budget, and neither was finalized by the fall of 2006. While these delays were ongoing, Ms. Flowers also became concerned about JDH's proposal to have one of its employees in Charlotte handle efforts to lease space in the development rather than having someone on site who could handle crucial face-to-face dealings with prospective tenants. [Flowers Aff. ¶12; Flowers Dep. (Vol. II) 90-91; Crayton

Dep. 48-49; Ex. 64, 65 and 66.] There were also gaps in communications with JDH. By August 9, for example, Ms. Flowers was reduced to sending an e-mail reflecting her concern about not having heard from JDH: "Are you still there???" [Ex. 106]. By September, 2006, Ms. Flowers had begun to express concerns to David Hill about JDH's commitment to the project and the proposed joint venture and JDH's ability to perform as previously represented. [Flowers Aff. ¶10, 11].

In the Fall of 2006, significant concerns arose about the budget was to be an exhibit to the final agreement and which had never been finalized. JDH circulated a proposed revision of the budget that significantly reduced the amounts allocated for roadwork and certain architectural features, such as a clock tower, that were important to Ms. Flowers, and JDH told Ms. Flowers that any upgrade to the architectural features would be charged to her, rather than treat it as a shared expense. [Flowers Aff. ¶16; Flowers Dep. (Vol. II), 121-122; Hill Dep. (Vol. II), 359-361]. Ms. Flowers' concerns about this change were summarized in an e-mail to JDH on December 27:

> David, Len and I have discussed extensively several issues that were (sic) our original agreement that have changed. I want to verify that your understanding is that they have changed. First, the main street extension to the circle with the clock tower and out to Flowers Parkway and Buffalo Road was going to be a shared expense as it serves the purpose of transportation of shoppers from the residential to the commercial and from the shoppers outside traffic to the commercial by way of Buffalo. Now, that is no longer a part of the proposed agreement. The clock tower is approximately $350,000. Originally, you had included one hundred and some thousand. Now you propose dropping it to $75,000. So there is only $75,000 total in your now (sic) proposal for all the above as far as your participation.
>
> Secondly, sharing in the broker's commission is not in our original understanding but it is in the budget.

> You have indicated that if upgrades are in the proposed architectural, it will be paid for by me, as opposed as a shared expense. We still do not have an agreement on architectural, therefore I do not know what the architectural standard agreement will be. But I do sense that I am going to want more than what you will consider standard.
>
> I would like a more clear understanding of the widening of Hwy 42 and Buffalo as well as the inner loop as it relates to shared expense.

[Ex. 70]. Ms. Flowers had clearly communicated to JDH from the beginning that this type of architectural issue was very important to her.

Throughout the negotiations, Ms. Flowers and her representatives sent communications to JDH that reflected her understanding that the parties did not yet have a final deal by (i) indicating her willingness to move forward without JDH if an agreement could not be reached, (ii) stating conditions to be satisfied before entering a final agreement, and (iii) referring to the discussions as relating to the proposed agreement or other similar terms. For example:

- Ex. 56: e-mail from Len Woodall that JDH financial information would need to be provided before the parties reached a binding agreement.
- Ex. 13: - e-mail from Ms. Flowers to David Hill expressing concern about the delay in proposed budget and stating, "the Marketplace needs to start this summer or I must begin alone…"
- Ex. 41: e-mail from Ms. Flowers to David Hill stating, among other things, "The agreement for phase one needs to take place and construction begin, or I need to develop phase one. Answers to the above questions should be reviewed by emailed [sic] this week in order to determine now if we are on the same page."
- Ex. 65: e-mail from Ms. Flowers to David Hill stating, among other things, "… I am totally involved here hands on because I know what it is going to take for all

three developments that I am doing. I must have a partner that is involved and planning constantly…I am hesitant to go forward with any agreement until I see the needed effort it is going to take."

- Ex. 66: e-mail from Ms. Flowers to David Hill stating, among other things, "David, I appreciate all of your explanation in regard to a 'typical retail developer'. We've discussed in each and every meeting why this is not typical. We, however, do not have a mutually agreed upon partnership as of this date. I will only go forward with this when I see the effort to least [sic] space. I will not wait to begin building as I have told you in the past that commercial and residential must commence simultaneously."
- Ex. 28: e-mail from Ms. Flowers to David Hill stating, among other things, "Please understand that I appreciate all of your interest, David, and efforts. However, there must be a very powerful reason for us to enter an agreement which involves ownership as I have extended over twenty five years to get us to this point."

Prior to the termination of negotiations in mid-January 2007, JDH never disputed any of these statements by asserting that the LOI, alone or in conjunction with other matters, constituted a binding contract. To the contrary, JDH's lead principal on the project, David Hill, responded to Ms. Flowers' e-mail that "we do not have a mutually agreed upon partnership" by stating that "[w]e did a large amount of work upfront, but not enough to establish a meeting of the minds on all key issues." [Ex. 28 (emphasis added); Flowers Aff. ¶15]. Similarly, the attorney for JDH referred JDH's need to conduct due diligence on the project when he circulated the draft operating agreement [Ex. 115]. In the same e-mail, Mr. Hill stated: "until we can consummate a partnership agreement that is based upon a solid understanding of the expectations and

responsibilities of both parties and agree on solid development and leasing plan, we cannot proceed with work on this project." [Ex. 28].

In mid-January of 2007, the ongoing uncertainty, disagreements and concerns about her proposed relationship with JDH lead Ms. Flowers to notify JDH that she was discontinuing negotiations. JDH then claimed, for the first time, that a binding agreement already had been formed and this litigation followed.

JDH seeks to recover alleged damages in excess of $5 Million based on the foregoing facts. [Plaintiff's Response to Rebecca D. Flowers' First Set of Interrogatories, pp. 18-19]. JDH bases that figure on JDH's estimate of its profits on the Project over a period of years, assuming that (i) all phases of the Project were fully built as designed, (ii) the construction costs conformed to JDH's preliminary estimate, (iii) the Project was successful in obtaining full occupancy at target lease rates equivalent to those in shopping centers closer to the center of urban areas, and (iv) other developments that conform to JDH's projections. [Hill Dep. (Vol. II) 370-373, 382-384]. JDH acknowledges, however, that it did not bear most of the burden and expense that would have been necessary to earn such profits. It (i) did not fully perform all architectural and design work, (ii) did not construct the shopping center, (iii) did not perform all leasing activities, (iv) did not manage the Project after construction and (v) most importantly, did not bear the economic risks of development, such as guaranteeing financing for the project. [Hill Dep. (Vol. II) 370-373, 382-384, 388-392].

ARGUMENT

I. JDH's Purported Claims Against Ms. Flowers Are Defective as a Matter of Law on the Undisputed Facts.

A. The Parties Never Entered a Final, Binding Joint Venture Agreement.

JDH cannot prevail on its breach of contract [Comp., First Claim for Relief] because, as a matter of law on the undisputed facts, it cannot establish the existence and terms of the contract. The Letter of Intent expressly states, in language drafted by JDH, that it does not create any contractual rights, and the limited liability company agreement contemplated by the LOI was never executed.

Under North Carolina law, no binding contract is formed by a preliminary agreement, such as the LOI at issue here, which contemplates that a subsequent more complete agreement will be negotiated and executed at a later time. *Boyce v. McMahan,* 285 N.C. 730, 208 S.E.2d 692 (1974) (affirming reversal of superior court judgment enforcing preliminary agreement). The Supreme Court in *Boyce* held that the preliminary agreement did not constitute a binding contract even though there was no express disclaimer of contractual intent in the preliminary agreement. *A fortiori,* no binding contract is created by a letter of intent which, as here, expressly disclaims the creation of "any binding contractual rights . . ."

This Court followed *Boyce* in dismissing as a matter of law claims asserted under a similar letter of intent in *Durham Coca-Cola Bottling Co. v. Coca-Cola Bottling Co.,* No. 99-CVS-2459, 2003 N.C.B.C. 3, (Durham County Apr. 28, 2003). In holding that no contract was created this Court expressly relied on (a) the document's internal reference to itself as a "letter of intent," (b) the LOI's reference to the intent to enter a definitive agreement at a later date, (c) the absence of any language in the LOI reflecting an intent to be bound, (d) the substantial length of the unsigned draft definitive agreement compared with the brevity of the LOI and (e) the numerous terms left open by the LOI but addressed in the unsigned definitive agreement.

Each of the factors that the Court found controlling in *Durham Coca-Cola* is present here: The LOI (i) refers to itself as a Letter of Intent, (ii) expressly contemplates that the parties

will enter a definitive agreement later, (iii) contains no language reflecting an intent to be bound (and states the contrary), (iv) was only four pages compared with the 42-page unsigned definitive agreement and (v) did not address numerous issues covered in the unsigned draft of the definitive agreement. [Ex. 33]. Indeed, JDH's claims here are weaker than those in *Durham Coca-Cola* because the LOI here expressly disclaimed creation of any contractual rights. In contrast, similar language was deleted from the document at issue in *Durham Coca-Cola*. 2003 N.C.B.C. at 34.

The North Carolina decisions in *Boyce* and *Durham Coca-Cola* are consistent with extensive and well-considered authority in other jurisdictions. *See, e.g., 168th & Dodge, LP v. Rave Reviews Cinemas, LLC,* 501 F.3d 945 (8th Cir. 2007) (affirming dismissal of claims based on LOI that disclaimed contractual effect); *ShowMe Technologies, Inc. v. Nobska Group, LLC,* No. 05-2425. 190 Fed. Appx. 298, 2006 WL 2010870, (4th Cir. July 18, 2006) (affirming dismissal of breach of contract and negligent misrepresentation claims based on LOI that, as here, expressly disclaimed contractual effect); *Adjustrite Systems, Inc. v. GAB Bus. Services, Inc.,* 145 F.3d 543 (2nd Cir. 1998) (affirming summary judgment dismissing claims based on document that specifically referred to additional agreements required for resolution of all material terms); *Feldman v. Alleghany Int'l Inc.,* 850 F.2d 1217 (7th Cir. 1998) (affirming directed verdict dismissing claims based on letter of intent that disclaimed binding effect); *Rennick v. O.P.T.I.O.N. Care, Inc.,* 77 F.3d 309 (9th Cir. 1996) (same); *Phoenix Mut. Life Ins. Co. v Shady Grove Plaza Ltd. P'ship,* 734 F.Supp. 1181, 1185-1192 (D. Md. 1990) (summary judgment dismissing claims for breach of contract, equitable estoppel, breach of duty of good faith, breach of fiduciary duty, misrepresentation and negligence where, as here, those claims were based on LOI expressly disclaiming binding effect), aff'd *per curiam* 937 F.2d 603 (4th Cir. 1991) (unpublished); *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d. 69 (2nd Cir. 1989)

(affirming summary judgment dismissing claims based on letter of intent that anticipated further contract documents); *Quality Croutons, Inc. v. George Weston Bakeries, Inc.* No. 05 CV 4928, 2008 U.S. Dist. LEXIS 10426, (N.D. Ill. Feb. 12, 2008) (unpublished) (summary judgment dismissing claims based on LOI disclaiming binding effect); *Beazer Homes Corp. v VMIF/Anden Southbridge Venture,* LPI, 235 F. Supp. 2d 485 (E.D. Va. 2002) (motion to dismiss claims based on LOI that disclaimed contractual effect); *Misigman v. USI Northeast, Inc.*, 131 F. Supp. 2d 495 (S.D.N.Y. 2001) (summary judgment dismissing claims for breach of contract and fraud based on LOI); *Gorodensky v. Mitsubishi Pulp Sales (MC) Inc.,* 92 F. Supp. 2d 249 (S.D.N.Y. 2000) (summary judgment dismissing claims based on LOI notwithstanding absence of express disclaimer); *Paramount Brokers, Inc. v. Digital River, Inc.*, 126 F. Supp. 2d 939 (D. Md. 2000) (granting summary judgment dismissing claims based on LOI with disclaimer of contractual effect no as strongly as the LOI language here). Significantly, for present purposes, these cases, like this Court's decision in *Durham Coca-Cola,* all resolved the issue as a matter of law, most on summary judgment motions.

As these cases recognize, the intent expressed in the Letter of Intent is the most important factor in assessing claims like those at issue here. *See, e.g., Arcadian Phosphate, Inc. v. Arcadian Corp*., 884 F2d at 72 ("[T]he language of the agreement is the most important"); *Gorodensky v. Mitsubishi Pulp Sales (MC) Inc.*, 92 F. Supp.2d at 255 (same), It is difficult to imagine a disclaimer of contractual effect more unequivocal (and less ambiguous) than the LOI's statement that it "does not create any binding, contractual rights . . . and shall serve only as an expression of intention . . ." But if JDH were somehow to find ambiguity in this clear disclaimer, that ambiguity must be construed against JDH because it drafted the language. *Reichhold Chemicals, Inc. v. Goel,* 146 N.C. App. 137, 153, 555 S.E.2d 281, 291 (N.C. App.

2001) (ambiguities in contract to be strictly construed against drafting party); *Fed. Land Bank of Columbia v. Lieben,* 89 N.C. App. 395, 399, 366 S.E.2d 592, 595 (N.C. App. 1988) (same). *See also, Phoenix Mut. Life Ins. Co. v. Shady Grove Plaza Ltd. P'ship,* 734 F. Supp. at 1188:

> Generally, a document is to be construed against the one drafting it, . . . and in this case plaintiff drafted the letter of intent which included the non-binding language. Plaintiff cannot use either the letter of intent or later negotiations to avoid the express provision relieving either party of any binding legal obligation until a formal partnership agreement was signed.

If JDH wanted the outcome for which it now argues, it could and should have written the Letter of Intent differently. See *Arcadian,* 884 F.2d at 72-73 ("[A] party that wishes to be bound can very easily protect itself by refusing to accept language that shows an intent not to be bound" (emphasis in original)).

What is more, the explicit disclaimer of contractual effect in the LOI is reinforced because the LOI left numerous terms open, to be covered by the definitive agreement anticipated by the LOI. See p. 5 above. In *Boyce,* the North Carolina Supreme Court held that the presence of such open terms renders a purported agreement

> Nugatory and void for indefiniteness. "The reason for this rule is that there could be no way by which the court could determine what sort of contract the negotiations would result in . . . [citations omitted]"

Boyce, 285 N.C. at 734. Similarly, this Court recognized in *Durham Coca-Cola* that the existence of such open terms weighs heavily against claims such as those asserted by JDH here. 2003 N.C.B.C. LEXIS at 31-32. This Court also recognized that a letter of intent which is only a few pages long necessarily has left open terms – and thus is non-binding – where, as here, the proposed (but unsigned) definitive agreement exceeds forty pages. [Id. at 29] The courts in other jurisdictions have agreed. The controlling rationale was stated by the Second Circuit:

> As Judge Leval noted in *Tribune,* "there is a strong presumption against finding binding obligation in agreements which include open terms, call for future approvals and expressly anticipate future preparation and execution of contract documents."

Arcadian Phosphates, Inc. v. Arcadian Corp., 884 F.2d at 73, quoting with approval, *Teachers Ins. & Annuity Assoc. v. Tribune Co.,* 670 F. Supp. 491, 499 (S.D.N.Y. 1987). *See also, Phoenix Mut. Life Ins. Co. v. Shady Grove Plaza Ltd. P'ship,* 734 F. Supp. at 1187 (noting significance of open terms and the fact that, as here, the parties proposed additional terms after execution of the LOI); *Adjustrite Systems, Inc. v. Gab Bus. Services, Inc.,* 145 F.3d at 546 & 550 (dismissing claims like those of JDH where, as here, letter of intent did not cover all material terms).

As the cases cited above also reflect, JDH's claims are further undermined because this is the type of complex commercial deal that is usually covered by a comprehensive written agreement. JDH and Ms. Flowers were discussing a complicated potential relationship providing for the conveyance of real estate worth millions of dollars, the expenditure of millions of dollars in developing a shopping center on that real estate over a period of years, leasing and managing the resulting shopping center, and allocating between the parties various rights, responsibilities, duties expenses and profits from all the foregoing. *See, e.g., Phoenix Mut. Life Ins. Co. v. Shady Grove Plaza Ltd. Partnership,* 734 F. Supp. at 1187-88:

> As the court noted in *Kona Hawaiian Associates v. Pacific Group*, 680 F. Supp. 1438, 1454 (D. Haw. 1988), business entities ordinarily do not enter into multimillion dollar transactions in the absence of a comprehensive writing. *See also Millman v. Wetterau, Inc.* Civ. No. H-88-1331, Slip Op. at 14, 1989 W.L. 206582 (D. Md. June 6, 1989) (complex transactions do not normally become binding merely as a result of extended oral discussions). The large amounts involved and the complexity of this transaction highlight the practical business need to have the party's legal obligations recorded in formal documents. *Reprosystem, B.B. v. SCM Corp.,* 727 F.2d 257, 262-62 (2nd Cir. 1984). As the *Teacher's* court noted, there is a strong presumption against finding a binding agreement when the parties expressly

> contemplated the future preparation of and the execution of a formal contract document.

See also Missigman v. USI Northeast, Inc., 131 F. Supp. 2d at 511 ("because of the size of the proposed transaction, and the complexity of the asset purchase agreement . . ., this was clearly a contract of the type that usually would be committed not only to a writing, but also to a formal contract complete with all standards provisions usually found in sophisticated, formal contracts."). Here, the fact that this was the type of contract normally covered by more comprehensive formal agreements is illustrated by (i) the LOI's express provision for the preparation and execution of more comprehensive documents and (ii) the fact that the proposed final agreement consumed 42 pages (not counting exhibits) to spell out rights and obligations of the parties that the LOI covered in only 4 pages. *See Durham Coca-Cola, supra,* at 34.

Indeed, this was a transaction that was required by statute to be in writing. The alleged joint venture agreement would have entailed the conveyance of Ms. Flowers' real property to the joint venture and N. C. Gen. Stat. § 22-2 requires contracts for the conveyance of real property to be in a writing signed by the party against whom enforcement is sought. *See Ludwig v. Walter,* 75 N.C. App. 584, 331 S.E.2d 177 (1985) ("[L]and owned individually by one who enters into a partnership cannot become a partnership asset absent some written agreement sufficient to satisfy the statute of frauds."); *Dobbs v. Vornado, Inc.*, 576 F. Supp. 1072 (E.D.N.Y. 1983) (court holds that statute of frauds is applicable to situations in which at the time of the creation of the joint venture the land is already owned by one of the parties so that a conveyance is necessary to effect the transfer); *See also 168th and Dodge LP v. Rave Reviews Cinema, LLC*, 501 F.3d at 15-20; *Rennick v. O.P.T.I.O.N. Care, Inc.,* 77 F.3d at 313-315, 317; *Greene v. Interstate United Mgmt. Services Corp.,* 748 F2d at 832. As shown herein, JDH's evidence would not establish

the existence of a binding contract even if the statute of frauds did not apply. *A fortiori,* JDH has not satisfied N. C. Gen. Stat. § 22-2.

Contrary to JDH's apparent contention, it cannot circumvent the fatal flaws in its case because the parties took some steps toward development of the property while negotiating the proposed joint venture agreement. While JDH exaggerates what it did, its contentions would not change the outcome of the case even if accepted. The courts have rejected the contention that "partial performance" can convert an explicitly non-binding letter of intent into a binding contract. *See, e.g., Adjustrite Systems, Inc. v. GAB Bus. Services, Inc.,* 145 F.3d at 550-51:

> The one factor that arguably supports a contrary conclusion – partial performance – is not sufficient to raise a genuine issue for trial, for not reasonable fact finder could conclude, on this record and in the face of the objective documentary evidence, that the parties agree on all material elements of the transaction, and tend to be fully bound when they signed the agreement, and considered the formal sales agreement and employment contracts to be unnecessary formalities.

See also U.S.I. Northeast, Inc., 131 F. Supp. 2d 495, 510 & 511-12 (S.D.N.Y. 2001) (holding that substantial partial performance by plaintiff was not sufficient to create a binding contract in the face of explicit disclaimer of contractual effect in written agreement).

It is especially inappropriate for JDH to contend that its work on the project overrides the express disclaimer of contractual effect in the LOI because much of that work was done before even JDH contends that there was a contract. The Rule 30(b)(6) designee for JDH claims that one of JDH's most valuable contributions to the project consisted of the JDH-prepared site plans and associated communications that shared with Ms. Flowers JDH's expertise that a large grocery store (rather than the boutique grocery store she had contemplated) was necessary for the success of the proposed project. The record is undisputed, however, that JDH transmitted this information to Ms. Flowers very early in the discussions, at a time when even JDH admits that it

was merely exploring the possibility of an agreement [Hill Dep. (Vol. II) 241-242, 263-264, 344-345, 350] Similarly, according to JDH's expert, the most time consuming portion of the package that JDH sent to prospective grocery store tenants was the housing survey. [Haggart Dep. 164-165.] The record reflects, however, that most of that survey was done in February of 2006, well in advance of the execution of the LOI [Ex. 88 p.(JDH-723)].

JDH plainly cannot rely on this pre-LOI work as evidence that partial performance had converted the LOI into a binding contract without contradicting the sworn testimony of its own Rule 30(b)(6) designee that the preparation of the site plans and related sharing of expertise was solely for the purpose of exploring whether JDH and Ms. Flowers could agree on a common approach and for performance under any contract. JDH cannot avoid summary judgment by assertions that contradict its own sworn testimony. *Wachovia Mortg. Co. v. Autry-Barker-Spurrier Real Estate, Inc.,* 39 N.C. App. 1, 249 S.E.2d 727 (1978), aff'd, 297 N.C. 696, 256 S.E.2d 688 (1979). In addition, the JDH-drafted disclaimer of contractual effect in the LOI makes no sense if JDH believed that the parties' conduct and communications prior to the LOI had already created a contract.

Most of JDH's post-LOI activities on the project (work on the budget that was to be an exhibit to the final agreement, communications with Paul Smith about the engineering design and "entitlements", and transmission of solicitation packages to grocery store tenants) took place in the period from April to mid-July 2006 when JDH had not yet even circulated the first draft of the proposed operating agreement, so that no progress had been made in resolving the terms left open by the LOI.

For these reasons, JDH's conduct before and after execution of the LOI reflects only that JDH was prepared to assume the risk that its time and effort negotiating and doing preliminary

work would not be rewarded if the parties were not able to reach a final agreement. *See, e.g., Phoenix Mut. Life Ins., Co. v. Shady Grove Plaza Ltd. P'ship,* 743 F. Supp. at 1191:

> A sophisticated investor which had engaged in many negotiations of the sort involved in this case, plaintiff knew from the outset that, if no final agreement was ever reached by the parties, lost time and effort would result. Parties seeking to conclude a business deal like this one obviously assume risks of this sort. [*citations omitted.*]

Significantly, if JDH was not willing to assume the risk that its work would not be profitable if no final agreement was ever reached, it could have protected itself in either or both of two ways. First, it could have included a provision making the LOI binding and/or providing for compensation to JDH in the event that negotiations were unsuccessful. Second, JDH could have complied with its own representations that the definitive agreement would be drafted within a week so that the final agreement could be executed within a month after the LOI, thus reducing the need for work on the project before determination as to whether final agreement could be reached. By delaying almost four months in circulating the draft definitive agreement, JDH exposed itself to the risk that activity in the interim would not be fruitful.

In sum, JDH, of its own volition, expressly provided that the LOI did not create any binding contractual rights and that the parties would execute formal LLC documents at a later time. The LOI contained open terms, and it related to the type of transaction that parties would normally cover by a comprehensive agreement (not a four-page LOI) – and indeed is required by the statute of frauds to be put in writing. Under these circumstances, JDH's attempt to rely on ambiguous conduct – much of which pre-dated the LOI disclaiming that a contract had been created – is insufficient as a matter of law.

B. JDH's Purported Misrepresentation Claims are Without Merit as a Matter of Law on the Undisputed Facts.

JDH's purported claims for negligent misrepresentation, fraud and unfair trade practice claims [Third, Fourth, and Fifth Claims for Relief] are without merit as a matter of law. Reduced to essentials, those claims are all based on the allegations that Ms. Flowers represented that she would comply with her obligations under the alleged (but nonexistent) contract. [Comp. ¶¶ 41, 48 & 57.] This is nothing but the breach contract claim in different clothing; and the new clothes cannot change the inherent defect in JDH's position. While JDH has not produced any evidence of any such representation by Ms. Flowers other than the act of engaging in contract negotiations, JDH's purported claims would be without merit even if it had presented evidence of such representations. The circumstance envisaged by the alleged representation (*i.e.* the formation of a contract) never occurred for reasons set forth above, and Ms. Flowers never breached any contractual obligations because no contract was ever formed. A dispute about whether a contract was created does not convert a breach of contract claim into a fraud, misrepresentation or unfair trade practice claim.

In any event, North Carolina courts have recognized that a misrepresentation or fraud claim cannot be based on a breach of contract unless the plaintiff carries the burden of proving that the defendant never intended to comply with the contract. *Williams v. Williams*, 220 N.C. 806, at 810, 18 S.E.2d 364, at 366 (1942) (judgment of involuntary non-suit because mere unfulfilled promises cannot be the basis for an action of fraud unless promissor had no intention of carrying out the promise at the time it was made and proof of non-performance is not sufficient to establish the necessary fraudulent intent.), *See also, Braun v. Glade Valley School, Inc.*, 77 N.C. App. 83, 334 S.E.2d 404 (1985); *Britt v. Britt*, 320 N.C. 573, 359 S.E.2d 467 (1987) (rev'd on other grounds). Ms. Flowers has offered evidence that it was her intention to

comply with any contract with JDH if the parties' negotiations resulted in such a contract [Flowers Aff. ¶6], and JDH has presented no evidence to the contrary.

In *Paramount Brokers, Inc. v. Digital River, Inc., supra*, Judge Harvey rejected a similar attempt to convert a dispute about the contractual effect of a letter of intent into a fraud claim:

> [T]his Court concludes that plaintiff's claim of fraud must also fail. The allegedly fraudulent statements were made in the course of contract negotiations between two business entities. The statements of defendant's representatives relied upon by plaintiff did no more than indicate a desire on the part of defendant that negotiations would be fruitful. The statements at issue were made during the parties' negotiations. They were not fraudulent because they related to the future course of the business relationship between the parties. Representations as to what will be performed or will take place in the future are regarded as predictions and hence are not fraudulent. [citation omitted] Proof that defendant's expectations were never realized does not amount to clear and convincing evidence of knowingly fraudulent misrepresentations.
>
> Moreover, plaintiff has not proved by clear and convincing evidence that it had a right to rely on defendant's statements regarding defendant's desire to solidify a business relationship with plaintiff. The negotiations between the parties were rife with comments concerning the tentative nature of the parties' relationship and the fact that there would be no binding contract absent the parties' ability to reach agreement on pricing and commissions.

126 F. Supp. 2d at 950-951. Similarly, in this case, the parties' communications were rife with communications by Ms. Flowers and/or JDH that certain conditions needed to be satisfied before a binding agreement was reached, that the LOI did not constitute a binding contract, that Ms. Flowers architectural preferences were a critical element in the deal to her, that no partnership agreement had yet been reached and the like.

Because JDH has not been able to produce any testimony supporting its allegation of misrepresentation, the court must enter summary judgment dismissing the claims based on that allegation.

C. JDH's Purported *Quantum Meruit* Claim is Without Merit as a Matter of Law on the Undisputed Facts.

JDH's purported *quantum meruit* claim fairs no better than its breach of contract and fraud claims. The fatal flaw in that claim is illustrated by Judge Harvey's decision in *Paramount Brokers, Inc. v. Digital River, Inc.*, 126 F. Supp. 2d at 951. In that case, Judge Harvey granted summary judgment based on a holding that the letter of intent between the parties did not constitute a binding contract [Id. at 947, 951]. The plaintiff then sought recovery for its partial performance while the unsuccessful negotiations were proceeding under Maryland's *quantum meruit* law, which is substantially similar to North Carolina law. Judge Harvey rejected the *quantum meruit* claim for reasons directly applicable here:

> [A] plaintiff may recover under the theory of *quantum meruit* only if it had reasonable expectation of being paid. [*citation omitted*]. A broker may recover under a theory of *quantum meruit* if his efforts have been contributed under circumstances from which an expectation of payment may be inferred. [*citation omitted*]
>
> On the record here, this court concludes that plaintiff's *quantum meruit* claim must fail. It cannot be inferred on this record that plaintiff had a reasonable expectation of being paid for services rendered during the period of time when the parties were attempting to negotiate a finalized broker agreement. As a broker which had engaged in prior negotiations of the sort involved in this case, plaintiff knew from the outset that if no final agreement was ever reached by the parties, lost time and effort would result. [*citation omitted*] Parties seeking to conclude a business deal like this one obviously assume risk of this sort.

As set forth above, JDH, like the plaintiff in *Paramount Brokers,* assumed the risk that lost time and effort would result if it was unable to reach agreement with Ms. Flowers or if the project did not move forward for other reasons. Similarly, as set forth above, JDH's contention that it had a reasonable expectation of compensation is especially without merit since most of its work was

performed when JDH itself understood that there was no contract in place and before JDH even circulated the proposed operating agreement.

Finally, even if JDH had a valid *quantum meruit* claim, that claim would be limited to the value of its work to Ms. Flowers. No recognized measure of damages for *quantum meruit* would permit JDH to recover (as it seeks) an amount equivalent to the projected profit that it would have made on the project if (i) a final agreement had been reached and (ii) JDH had incurred the economic/financial risk and the burden and expense of the responsibilities that it would have had to guarantee financing, complete design and construction, fully lease the premises and manage the premises after construction (none of which JDH did). What is more, it is doubtful that JDH could prove *quantum meruit* damages under the correct remedy. The project has not yet gone forward, and it is not certain, when, if ever, it will do so. No tenant solicited by JDH has signed a lease for space in the proposed project and it is not clear whether any will do so. Accordingly, it is not reasonable that the purported work by JDH will ever be accepted or appropriated by Ms. Flowers and actually result in any value to her. *Thormer v. Lexington Mail Order Co.,* 241 N. C. 249, 252-53, 85 S.E.2d 140, 143-44 (1954) (Recovery on theory of *quantum meruit* is limited to reasonable value of the services rendered by plaintiff and accepted by defendant); *Stout v. Smith,* 4 N.C. App. 81, 84-85, 165 S.E.2d 789, 792 (1969) (error to permit plaintiff to recover reasonable value of their services without limiting such recovery to the reasonable value of the services accepted and appropriate by defendant).

II. The Undisputed Facts Establish That the Corporate Defendants Were Not Parties to the Negotiations at Issue.

JDH's recent motion to amend its Complaint (filed while this motion was being drafted) suggests that it no longer intends to pursue claims against DWF Development, Inc., Flowers Plantation Foundation, Inc, f/k/a Flowers Plantation, Inc. That is an appropriate course because

the record is clear that JDH would have no basis for pursuing claims against those entities even if, contrary to fact, its claims against Ms. Flowers had merit. JDH's dealings were solely with Ms. Flowers, who is the owner of the property at issue and who was to be the signatory of the proposed limited liability company operating agreement. [Ex.37] JDH's Rule 30(b)(6) designee admitted that JDH had never even heard of the two corporate defendants until counsel came up with the names in preparing this lawsuit. Accordingly, the claims against the two corporate entities are without merit as a matter of law on the undisputed facts and should be dismissed.

CONCLUSION

For the reasons set forth above and for additional reasons to be shown at the hearing on this matter, the purported claims of JDH are without merit as a matter of law on the undisputed facts. Accordingly, Defendants' Motion for Summary Judgment should be granted, and JDH's claims should be dismissed with prejudice.

Undersigned counsel certifies that this brief conforms to Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court as modified by the *Order Expanding Word Limitation* signed April 17, 2008.

This the 22nd day of April, 2008.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing ***Brief in Support of Motion For Summary Judgment*** was duly served this day on all parties by substituted Electronic Service pursuant to Rule 6 of the General Rules of Practice and Procedures for the North Carolina Business Court and the Case Management Order entered in this action and by forwarding a copy thereof enclosed in a postage paid envelope deposited in the United States mail, addressed as follows:

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