STATE OF NORTH CAROLINA COUNTY OF CATAWBA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 09 CVS 830
BOBBY E. McKINNON, Plaintiff, v. CV INDUSTRIES, INC., Defendant.	**ORDER & OPINION**

{1} This matter is before the Court on Defendant CV Industries, Inc.'s Motion for Summary Judgment, filed March 1, 2010. For the reasons set forth below, the Court hereby GRANTS Defendant's Motion for Summary Judgment.

C. Gary Triggs, P.A. by C. Gary Triggs for Plaintiff.

Parker, Poe, Adams & Bernstein LLP by William L. Rikard, Jr. and James C. Lesnett, Jr. for Defendant.

Tennille, Judge.

I.

PROCEDURAL BACKGROUND

{2} Defendant CV Industries Inc. ("Defendant" or "CVI") filed a Notice of Designation in Catawba County on April 7, 2009. On April 13, 2009, this matter was designated a mandatory complex business case by Order of the Chief Justice of the North Carolina Supreme Court, pursuant to section 7A-45.4(b) of the North Carolina General Statutes, and subsequently assigned to the undersigned Chief Special Superior Court Judge for Complex Business Cases.

{3} On March 1, 2010, Defendant filed a Motion for Summary Judgment on all claims pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. Plaintiff Bobby E. McKinnon ("Plaintiff" or "McKinnon") filed his Response in Opposition to

Defendant's Motion on April 9, 2010.[1] On April 19, 2010, Defendant filed its Reply Brief and the Court heard oral arguments.

II.
FACTUAL BACKGROUND
A.
THE PARTIES

{4} McKinnon is a resident of Catawba County, North Carolina. From 1978 until 1995, he served as president and chief executive officer of Valdese Weavers, a profitable subsidiary of CVI. (McKinnon Aff. ¶¶ 4, 7.) In 1995, McKinnon accepted an employment position at CVI. (McKinnon Aff. ¶ 4.) He served as CVI's president and chief executive officer from 1995 until 2000, while retaining the chief executive officer position at Valdese Weavers. (McKinnon Aff. ¶¶ 4, 14.)

{5} CVI is a corporation organized under the laws of North Carolina with its principal place of business and registered agent in Catawba County. This Hickory-based corporation is the parent company of a number of subsidiaries, including Century Furniture, LLC ("Century Furniture") and Valdese Weavers, LLC ("Valdese Weavers"). Century Furniture manufactures high-end residential furniture; Valdese Weavers manufactures mid to high-end jacquard fabric. (Garrison, Jr. Aff. ¶ 3.)

B.
THE SEVERANCE AGREEMENT

{6} After almost twenty-two years of continuous employment at CVI or one of its subsidiaries, McKinnon voluntarily terminated his employment at CVI to accept an employment position at Joan Fabrics Corporation and its affiliate Mastercraft Fabrics, LLC (collectively, "Mastercraft").[2] (B. McKinnon Aff. ¶ 21; Def.'s Br. Supp. Mot. Summ. J. Ex. 2 ¶ 4.) Mastercraft is a large textile company that manufactures

[1] The Court allowed Plaintiff to file a response brief even though Plaintiff's counsel missed his April 5, 2010 filing deadline. When Plaintiff filed his response brief, it contained paragraphs from a brief in another case on issues unrelated to the issues in this case. The Court granted Plaintiff's motion to amend his brief to remove the paragraphs Plaintiff's counsel had mistakenly included.

[2] For purposes of this opinion, references to McKinnon's tenure at Mastercraft will include his time as president and chief executive officer of Doblin, a division of Mastercraft, and his assumption of management responsibility at EBM Fabrics and Circa 1801, affiliates of Joan Fabrics. (*See* Def.'s Br. Supp. Mot. Summ. J. Ex. 5.)

upholstery fabric and, at the time, was a direct competitor of Valdese Weavers. (Compl. ¶ 6; B. McKinnon Dep. 24:2–9; Buxton Aff. ¶ 4.)

{7} On May 25, 2000, the parties executed a Severance Agreement and Release ("Severance Agreement") to minimize any "disruption to CVI and its subsidiaries" and to reflect "favorably upon McKinnon's career and reputation" within the textile industry. (Def.'s Br. Supp. Mot. Summ. J. Ex. 2 ¶ 5.) The Severance Agreement modified McKinnon's eligibility for benefits under certain employment agreements and incentive plans with CVI and its subsidiaries. (Pl.'s Br. Opp'n at 3.)

{8} In consideration of these modifications, McKinnon agreed to a standstill agreement which prohibited him from soliciting or employing any CVI employee, designer, salesman, or independent contractor while employed by Mastercraft or any other competitor. (Def.'s Br. Supp. Mot. Summ. J. Ex. 2 ¶ 6.) He also agreed not to acquire any patents or manufacturing rights to the fire-resistant patents or processes owned by Frank J. Land or Land Fabric Company and not to solicit or employ any of their employees, designers, salesmen, or independent contractors. (Def.'s Br. Supp. Mot. Summ. J. Ex. 2 ¶ 6.)

{9} From the time of execution until present, CVI made all payments required under Plans B, C, and D of the Severance Agreement.[3] (Reese Aff. ¶ 2.) Plaintiff's claims arise from the sums allegedly due under Plan A, the shadow equity plan.

{10} Plan A, as modified, set forth a two-part test for determining at what point McKinnon would qualify for Plan A benefits. First, McKinnon would need to stop competing with CVI or any of its subsidiaries. (Pl.'s Br. Opp'n at 3.)

> Benefits due McKinnon or his designated beneficiaries or his estate under Plan A . . . will be suspended until such time as McKinnon leaves the employment of Mastercraft, is not employed by any other competitor of and is not engaged in competition with CVI or any of its subsidiaries.

(Def.'s Br. Supp. Mot. Summ. J. Ex. 2 ¶ 8.)

{11} Second, the price of CVI's ESOP stock on December 31 of the calendar year preceding the date McKinnon ceases competition would need to be the equivalent of

[3] In total, CVI paid McKinnon $2,530,670 under Plans B, C, and D. (Reese Aff. ¶ 2.)

or exceed its December 31, 1999 ESOP stock price. (Pl.'s Br. Opp'n at 3–4.) Specifically, the Severance Agreement provided that:

> The value of McKinnon's units under Plan A will be determined as of December 31 of the calendar year immediately preceding the time he becomes eligible to receive benefits under Plan A. However, if the value of such units used to calculate McKinnon's benefits at the time he becomes eligible to receive such benefits is below the value calculated by Houlihan Lokey Howard & Zukin for the value of CVI ESOP stock as of December 31, 1999, all benefits due McKinnon, his beneficiaries, and his estate under Plan A will be forfeited.

(Def.'s Br. Supp. Mot. Summ. J. Ex. 2 ¶ 8.) CVI's year-end stock price remained below its December 31, 1999 stock price until December 31, 2007. (Reese Aff. ¶ 3.) Therefore, if McKinnon stopped competing with CVI and its subsidiaries prior to December 31, 2007, he forfeited his Plan A benefits.

{12} CVI reported Plan A benefits as a liability on its financial statements up until March 30, 2002, at which point it determined that Plan A liability no longer existed.[4] (Reese Aff. ¶ 4.) McKinnon had resigned from Mastercraft and was now working exclusively for Basofil Fibers, LLC ("Basofil Fibers"),[5] whose business is described below in part II.C.

{13} McKinnon notified CVI that he was no longer in continuous competition and that he expected to receive Plan A benefits in 2008, at which point the 2007 year-end value of CVI ESOP stock exceeded the December 31, 1999 stock price.

C.

BASOFIL FIBERS AND ALESSANDRA YARN

{14} When McKinnon resigned from Mastercraft in November 2001, he became an owner and employee of Basofil Fibers.[6] (Def.'s Br. Supp. Mot. Summ. J. Ex. 6.)

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[4] At this time, CVI knew that McKinnon was employed with Basofil Fibers and was no longer in competition with CVI or any of its subsidiaries. (Reese Aff. ¶ 4.)

[5] McKinnon-Land, LLC, McKinnon-Land-Moran, LLC, and Basofil Technologies, LLC merged into Basofil Fibers, LLC on June 28, 2007. (Def.'s Br. Supp. Mot. Summ. J. Ex. 11.) The Court will refer to each of these entities, collectively, as "Basofil Fibers".

[6] McKinnon's November 26, 2001 Agreement with Mastercraft provides that he resigned as an officer and director of Mastercraft on February 12, 2001 and terminated his employment at Mastercraft on November 26, 2001. (Def.'s Br. Supp. Mot. Summ. J. Ex. 6.) However, other evidence in the record suggests that his tenure with Mastercraft continued until November 2002. (*See, e.g.*, Compl. Ex. D;

Basofil Fibers manufactured and sold a fiber with fire-resistant properties. (Def.'s Br. Supp. Mot. Summ. J. at 6 & Ex. 1 ¶ 4.) Although the Basofil fiber was spun into yarn that was then woven into fabric, Basofil Fibers did not actually spin the yarn or manufacture the fabric. It sold Basofil fiber to yarn manufacturers.

{15} Basofil fiber is a key component in the manufacture of Alessandra Yarn. (Def.'s Br. Supp. Mot. Summ. J. at 6.) Alessandra Yarn is used in the manufacture of fire-resistant mattress ticking and barrier cloth. (Def.'s Br. Supp. Mot. Summ. J. Ex. 12 ¶ 4.) Basofil Fibers also licensed the Alessandra Yarn flame-resistant technology to other companies for manufacture. (B. McKinnon Dep. 268:10–14.)

{16} Historically, Valdese Weavers had funded the research and development of the Alessandra Yarn technology. (Def.'s Br. Supp. Mot. Summ. J. Ex. 1 ¶ 4–5.) It had been interested in the technology for use in its manufacture of upholstery fabric and mattress ticking. Therefore, when McKinnon terminated his employment with CVI in 2000, CVI negotiated to include a provision in his Severance Agreement that prevented him from being involved with any of Frank J. Land's fire-resistant patents or processes, including the Alessandra Yarn business:

> McKinnon agrees to the same standstill agreement with regard to the solicitation or employment of any employee, salesman, designer, or independent contractor of the entity owning or controlling the fire retardant patents or processes owned by Frank J. Land or Land Fabric Company. McKinnon agrees not to acquire the patents representing any inventions by Land, any company owned or controlled by Land, or rights to manufacture any products covered by such patents.

(Def.'s Br. Supp. Mot. Summ. J. Ex. 2 ¶ 6.)

{17} In the fall of 2001, Valdese Weavers discontinued their funding in this area. (Def.'s Br. Supp. Mot. Summ. J. Ex. 9.) After CVI abandoned its involvement with Frank J. Land and his fire-resistant patents, McKinnon requested that CVI release him from the standstill agreement that restricted his involvement with Alessandra Yarn. (B. McKinnon Dep. 168:3–169:2.) Once he received express permission from

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Compl. Ex. E; B. McKinnon Aff. ¶ 41.) Because CVI's stock price was below the $9.90 threshold on December 31, 2000 and December 31, 2001, the Court concludes that any dispute as to the exact date of termination is not material.

CVI to engage in fire-resistant fabric activity, he resigned from Mastercraft and formed Basofil Fibers.[7] (Def.'s Br. Supp. Mot. Summ. J. Ex. 9.)

{18} During his tenure at Basofil Fibers, McKinnon was required to work exclusively for Basofil Fibers. Specifically, under the terms of the Basofil Fibers Operating Agreement, he was subject to the following covenant not to compete:

> While a Member of the Company and for a period of twenty-four (24) months after a Buy-Out (herein defined), Member or Disposed Member (herein defined) shall not be an equity owner (excepting investments in publicly held companies) or manager or key employee (herein defined) or consultant or have material financial interest in (excepting public companies) any sole proprietorship, partnership, corporation, firm, association, or other entity or enterprise in the manufacturing of or licensing of technology for fire resistant ("FR") yarns, FR core spun or FR woven or FR knit fabrics (the "Product") competitive with that of the Company.

(Def.'s Br. Supp. Mot. Summ. J. Ex. 19 ¶ 12.2.) All members of Basofil Fibers were subject to this covenant, including Joe Feege, who also served as the executive vice-president of sales at Valdese Weavers. (Def.'s Br. Supp. Mot. Summ. J. Ex. 1 ¶ 8.)

{19} McKinnon worked for Basofil Fibers until he retired in November 2006. (Def.'s Br. Supp. Mot. Summ. J. Ex. 14.)

III.
LEGAL STANDARD

{20} Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. R. Civ. P. 56(c). "An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citation omitted). "It is not the purpose of the rule to resolve disputed material issues of fact but rather

[7] The language of the release and McKinnon's deposition testimony show that CVI was aware of McKinnon's plan to resign from Mastercraft and to begin working with Basofil Fibers. (Def.'s Br. Supp. Mot. Summ. J. Ex. 9; B. McKinnon Dep. 168:3–169:2.)

to determine if such issues exist." N.C. R. Civ. P. 56 cmt.

{21} The burden of showing a lack of triable issues of fact falls upon the moving party. *See, e.g.*, *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). Once this burden has been met, the nonmoving party must "produce a forecast of evidence demonstrating that [it] will be able to make out at least a prima facie case at trial." *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). This Court recognizes that it must exercise caution in granting a motion for summary judgment. *See N.C. Nat'l Bank v. Gillespie*, 291 N.C. 303, 310, 230 S.E.2d 375, 379 (1976).

IV.

ANALYSIS

A.

BREACH OF CONTRACT AND SPECIFIC PERFORMANCE

{22} Plaintiff's first and second claims for relief seek compensatory damages and specific performance for breach of contract. Specifically, McKinnon contends that CVI failed to honor its commitment under Plan A of the Severance Agreement. CVI, on the other hand, maintains that McKinnon never became eligible for Plan A benefits because CVI's stock price on December 31, 1999 exceeded its stock price on December 31 of the calendar year immediately preceding the date McKinnon ceased competing. The Court agrees with CVI and finds that CVI is entitled to judgment as a matter of law on both claims for relief.

{23} McKinnon's claims for breach of contract and specific performance rest on the mistaken assumption that he was in fact entitled to Plan A benefits under the terms of the Severance Agreement. To survive summary judgment on either claim, McKinnon needed to show that CVI's stock price on December 31 of the calendar year prior to the date he ceased competition was the equivalent or exceeded CVI's December 31, 1999 stock price of $9.90 per unit. Because CVI's year-end stock price remained below the $9.90 threshold until December 31, 2007, overcoming summary judgment would require a forecast of evidence showing that McKinnon engaged in

continuous competition with CVI and its subsidiaries from June 16, 2000 until January 1, 2008. However, the Court concludes, based on the record before it, that McKinnon stopped competing with CVI and its subsidiaries before January 1, 2008.

{24} Neither side disputes that McKinnon's employment with Mastercraft, a direct competitor of Valdese Weavers, prevented him from receiving benefits under Plan A. And although Plaintiff maintains that he continued to compete after he left Mastercraft, the Court finds his forecast of evidence insufficient to create material issues of fact in that regard.

{25} When McKinnon resigned from Mastercraft in November 2001,[8] he began working for Basofil Fibers. (Def.'s Br. Supp. Mot. Summ. J. Ex. 10.) At the time, he was subject to a covenant not to compete. His November 26, 2001 Agreement with Mastercraft prohibited him for a period of one year from "having any business connection or business or employment relationship with any entity or person . . . engaged in the research, development, production, sale or distribution of a product or service which competes with or is substantially similar" to any of Mastercraft's products or services. (Def.'s Br. Supp. Mot. Summ. J. Ex. 6.) In the agreement, Mastercraft expressly recognized that this restriction did not prevent McKinnon from engaging in the development of technology for fire-resistant fiber and yarns. (Def.'s Br. Supp. Mot. Summ. J. Ex. 6.) This distinction supports the Court's conclusion that Basofil Fibers did not compete with Mastercraft or competitors of Mastercraft, like CVI.

{26} Basofil Fibers manufactures and sells a manmade fiber that is spun into specialized yarns.[9] It did not spin yarn; it did not manufacture fabric; and it did not manufacture furniture. With the exception of McKinnon's self-serving conclusory allegations (*see, e.g.*, B. McKinnon Aff. ¶¶ 10, 44–46), the evidence that Basofil

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[8] Plaintiff contends that he terminated his employment with Mastercraft on November 28, 2002. (Pl.'s Br. Opp'n Ex. 10.) CVI's stock price on December 31, 2001 was below the $9.90 threshold. Therefore, even if the Court were to accept Plaintiff's contention, CVI would nonetheless be entitled to summary judgment. Thus, any dispute as to the exact date of termination is not material. *See also supra* ¶ 14 n.6.

[9] Basofil Fibers also licenses the fire-resistant Alessandra Yarn technology. *See supra* Part II.C.

Fibers did not compete with CVI or its subsidiaries is entirely unrefuted. (*See* Def.'s Reply Br. Ex. 22.)

{27} While working for Basofil Fibers, McKinnon was prohibited from working for any competitors.[10] He freely admits that Basofil Fibers's exclusivity provision would not have prevented him from going back to work for CVI. (B. McKinnon Dep. 369:13–15; *see also* Ewendt Dep. 15:17–17.3.) Thus, McKinnon's own testimony supports the Court's finding that Basofil Fibers did not sell or manufacture any products that competed with CVI. In addition, the president of Basofil Fibers testified that Basofil Fibers does not compete with CVI or any of its subsidiaries. (Ewendt Dep. 16:21–17:3.)

{28} CVI did not object when the executive vice-president of sales at Valdese Weavers, Joe Feege, invested more than $840,000 in Basofil Fibers for one simple reason—Basofil Fibers did not manufacture any competing products. (Garrison, Jr. Aff. ¶ 8.) As a member of Basofil Fibers, Feege also was subject to a covenant not to compete. However, the covenant did not prohibit him from working with Valdese Weavers. (Ewendt Dep. 18:21–24.) Although Valdese Weavers may have been a potential customer of Basofil Fibers, it was not a competitor.[11] Plaintiff's forecast of evidence fails to set forth *specific facts* suggesting otherwise.

{29} McKinnon contends that he engaged in other continuous competition with CVI and its subsidiaries from 2000 until 2008 despite the exclusivity provision in his Basofil Fibers contract. (Pl.'s Br. Opp'n at 15.) However, his general allegations of continuous competition are not enough to overcome Defendant's initial showing. (*See, e.g.*, Downing Aff. ¶ 13; R. McKinnon Aff. ¶ 13; B. McKinnon Aff. ¶ 45.) Rule 56(e) of the North Carolina Rules of Civil Procedure requires specificity:

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[10] The Operating Agreement of Basofil Fibers prohibited McKinnon and other members of the Company from being an owner, manager, key employee, or consultant for any company engaged "in the manufacturing of or licensing of technology for fire-resistant ("FR") yarns, FR core spun or FR woven or FR knit fabrics." (Def.'s Br. Supp. Mot. Summ. J. Ex. 19 ¶ 12.2; *see also supra* ¶ 18.)

[11] The record establishes that Basofil Fibers and CVI (and its subsidiaries) occupy different positions on the supply chain. For example, Basofil Fibers would sell fiber to yarn manufacturers who would then sell their yarn to fabric manufacturers, like Valdese Weavers. (*See* Garrison, Jr. Aff. ¶ 6.)

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth *specific facts* showing that there is a genuine issue for trial.

N.C. R. Civ. P. 56(e) (2009) (emphasis added). None of the evidence set forth in Plaintiff's Response and Brief in Opposition to Defendant's Motion, including the chart attached as Exhibit 9 or the outline of competition attached as Exhibit 10, specifically identifies competitive activities that McKinnon engaged in during the relevant times. (*See* Def.'s Br. Supp. Mot. Summ. J. at 5–10.)

{30} Our courts have consistently found overly broad restrictions on competition to be unenforceable. *See, e.g.*, *Hartman v. W.H. Odell & Assocs., Inc.*, 117 N.C. App. 307, 317, 450 S.E.2d 912, 920 (1994) (voiding a non-compete provision when it prevented an employee from having any association with any business that provides actuarial services rather than preventing the employee from competing for actuarial business). In effect, Plaintiff seeks a broad interpretation of competition which is counter to that historical judicial approach. He would interpret working for a fiber company as competing against a fabric manufacturer. Were this Court being called upon to enforce a restrictive covenant involving a fabric manufacturer, it would be hard pressed to find employment in a fiber company as competition.

{31} McKinnon never received or reported any compensation or any form of remuneration from any of CVI's competitors during his tenure at Basofil Fibers. In addition, he never received W-2 or 1099 forms from any competitor; he never reported any income from a competitor on his tax returns; he never entered into a contract or written or oral agreement with a competitor; and he never maintained an office or regular place of business at a competitor's office or place of business.

{32} Although McKinnon may have provided free advice to friends whose business competed with CVI,[12] that advice did not keep his Plan A rights alive. Those rights ended during his period of exclusive employment with Basofil Fibers.

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[12] McKinnon claims that Richard Downing, a friend of twenty-five plus years who worked for Metropolis Fabrics, LLC (a competitor of Valdese Weavers), engaged him as a consultant. (*See*

{33} For all of these reasons, the Court identifies McKinnon's employment with Basofil Fibers as the point in time that he was no longer engaged in competition with CVI or any of its subsidiaries. The Court grants summary judgment against Plaintiff on his first and second claims for relief.

B.

FRAUD AND MISREPRESENTATION

{34} Plaintiff's third claim for relief seeks punitive damages for fraud. To establish a claim for fraud, a plaintiff must show: "(1) a false representation or concealment of material fact, (2) reasonably calculated to deceive, (3) made with the intent to deceive, (4) that does in fact deceive, and (5) results in damage to plaintiff." *Perkins v. HealthMarkets, Inc.*, 2007 NCBC 25 ¶ 52 (N.C. Super. Ct. July 30, 2007), http://www.ncbusinesscourt.net/opinions/2007%20NCBC%2025.pdf.

{35} Intent to deceive is an essential element of fraud. *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568, 374 S.E.2d 385, 392 (1988). McKinnon relies on circumstantial evidence to overcome summary judgment on this essential element. Specifically, he draws the Court's attention to the following:

> (1) promises and inducements that were never paid; (2) removing the reserve for payment in 2002 without advising Plaintiff; (3) unilaterally determining that "Plan A" was no longer valid in 2002 yet waiting six years to tell Plaintiff and then only after he sought the payment he contended he was entitled to; (4) filing an obviously false counterclaim against Plaintiff which was only dismissed when a letter authorizing the conduct complained of was produced by Plaintiff.

(Pl.'s Br. Opp'n at 19.)

{36} Plaintiff's forecast of evidence, at best, shows an unfulfilled promise. However, "mere unfulfilled promises will not support a claim for fraud." *See Perkins*, 2007 NCBC 25 ¶ 53. A plaintiff must show that the defendant made "a promise with no intention of carrying it out." *Id.*; *see also Hoyle v. Bagby*, 253 N.C. 778, 781, 117 S.E.2d 760, 761 (1961) (explaining that the fraudulent intent

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Downing Aff. ¶¶ 5, 7–8.) Yet McKinnon admits that there was no contract and that he did not charge Downing a fee for his consulting services. (B. McKinnon Dep. 324:16–325:16.) When asked whether he received compensation for his services, McKinnon identifies golf tournament tickets and "know[ing] that you've helped a friend" as his compensation. (B. McKinnon Dep. 325:5–25.)

"must have existed in the defendant's mind at the time he made the promise which induced the plaintiff to do the work").

{37} The factual record is devoid of any evidence indicating that CVI did not intend to honor the Plan A provisions at the time it entered into the Severance Agreement. All of the circumstances Plaintiff offers in support of his fraud claim occurred *after* the parties executed the Severance Agreement. Moreover, CVI paid McKinnon $2,530,670 under other provisions of the Severance Agreement. (Reese Aff. ¶ 2.) Under North Carolina law, partial performance of a contract is evidence of a party's intent to fulfill the contract at the time it was made. *See Davis v. Davis*, 236 N.C. 208, 211, 72 S.E.2d 414, 415–16 (1952); *Mesimer v. Stancil*, 52 N.C. App. 361, 363–64, 278 S.E.2d 530, 532 (1981). As noted above in part II.B, CVI carried a liability on its books for Plan A benefits until McKinnon became an owner and employee of Basofil Fibers.

{38} CVI also voluntarily released McKinnon from other contractual restrictions. Its concession to a release that allowed McKinnon to work for Basofil Fibers and to invest in Alessandra Yarn is further evidence that it had no intent to defraud when it entered into the Severance Agreement. For all of these reasons, CVI is entitled to judgment as a matter of law in its favor on Plaintiff's third claim for relief.

C.

UNFAIR AND DECEPTIVE TRADE PRACTICES

{39} Plaintiff's fourth claim for relief seeks treble damages, costs, and attorney fees under North Carolina's Unfair and Deceptive Trade Practice Act, section 75-1.1 of the North Carolina General Statutes (the "UDTPA"). To establish a violation of the UDTPA, a plaintiff must show: "(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Sunbelt Rentals, Inc. v. Head & Engquist Equip., LLC*, 2003 NCBC 4 ¶ 261 (N.C. Super. Ct. May 2, 2003), http://www.ncbusinesscourt.net/opinions/2003%20NCBC%204.htm (citations omitted).

{40} Although the commerce element encompasses a broad range of business activity, the UDTPA does not cover "all wrongs in a business setting." *HAJMM Co.*

v. House of Raeford Farms, Inc., 328 N.C. 578, 593, 403 S.E.2d 483, 492 (1991). As our Supreme Court recently explained, the UDTPA was designed to "regulate two types of interactions in the business setting: (1) interactions between businesses, and (2) interactions between businesses and consumers." *White v. Thompson*, No. 226A09, 2010 N.C. LEXIS 349, at *12 (Apr. 15, 2010). Unfair or deceptive conduct solely related to the internal operations of a single business falls outside the scope of the UDTPA. *Id.* at *13–14.

{41} As this Court previously observed, "[m]ost disputes between employers and employees are internal to the business organization and simply do not have an effect on commerce in the way required by section 75-1.1." *Schlieper v. Johnson*, 2007 NCBC 29 ¶ 46 (N.C. Super. Ct. Aug. 31, 2007), http://www.ncbusinesscourt.net/opinions/Schlieper%20v.%20Johnson%20Order%20on%20Motion%20to%20Dismiss%20Website.pdf, *aff'd in part and rev'd in part on other grounds*, 2009 N.C. App. LEXIS 124 (Feb. 3, 2009). To satisfy the commerce element in such a context, "the claimant must make a showing of business related conduct that is unlawful or of deceptive acts that affect commerce beyond the employment relationship." *Gress v. Rowboat Co.*, 190 N.C. App. 773, 776, 661 S.E.2d 278, 282 (2008) (citation omitted).

{42} This Court's analysis of the commerce element in *Schlieper* is instructive in determining the applicability of the UDTPA to the present case. In *Schlieper*, the plaintiff brought a UDTPA claim against a former employer for compensation due under various employment documents. *Schlieper*, 2007 NCBC 29 ¶ 49. The Court highlighted the fact that the former employer was a reinsurance business and that bonus amounts paid to employees "were not part of the 'day-to-day activities' [the company] regularly engaged in and for which it was organized." *Id.* Ultimately, the Court determined that the employer's conduct fell outside the channels of commerce; it was an internal matter that warranted dismissal. *Id.* ¶¶ 51–54.

{43} This case involves a UDTPA claim brought against a former employer for shadow equity plan benefits under the terms of a severance agreement. Similar to *Schlieper*, the payment (or lack thereof) of these employment benefits would not be a practice that impacts commerce or the marketplace, nor would it be part of the

day-to-day activities for which CVI was organized. Therefore, this Court concludes that CVI's conduct falls outside the purview of the UDTPA.

{44} McKinnon contends that a finding of fraud would allow him to recover under the UDTPA. (Pl.'s Br. Opp'n at 21.) He also contends that he was restrained from engaging in other business ventures at which he could have earned substantial income. (Pl.'s Br. Opp'n at 20–21; *see also* B. McKinnon Aff. ¶¶ 25–26.) However, because the Court grants summary judgment on the commerce element, it need not address the question of unfairness or deception. *See HAJMM Co.*, 328 N.C. at 592, 403 S.E.2d at 492.

V.
CONCLUSION

{45} Based on the foregoing, it is hereby ORDERED, ADJUDGED, and DECREED:

1) Defendant's Motion for Summary Judgment is GRANTED as to Plaintiff's claim for Breach of Contract;
2) Defendant's Motion for Summary Judgment is GRANTED as to Plaintiff's claim for Specific Performance;
3) Defendant's Motion for Summary Judgment is GRANTED as to Plaintiff's claim for Fraud and Misrepresentation; and
4) Defendant's Motion for Summary Judgment is GRANTED as to Plaintiff's claim for Unfair and Deceptive Trade Practice violations.

IT IS SO ORDERED, this the 3rd day of June, 2010.

/s/ Ben F. Tennille
The Honorable Ben F. Tennille
Chief Special Superior Court Judge
for Complex Business Cases