STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
	SUPERIOR COURT DIVISION
COUNTY OF DURHAM	08-CVS-003884
MARK W. OAKESON Plaintiff, v. TBM CONSULTING GROUP, INC., ANAND SHARMA, GARY HOURSELT, WILLIAM SCHWARTZ, & DAN SULLIVAN, Defendants.	DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS

Pending before the Honorable Court is Defendants TBM Consulting Group, Inc., Anand Sharma, Gary Hourselt, William Schwartz, and Dan Sullivan's Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. For the following reasons, the Defendants' Motion should be ALLOWED and the Plaintiff's Second through Sixth Causes of Action DISMISSED WITH PREJUDICE.

I. STATEMENT OF THE CASE

This contract and tort lawsuit revolves around Plaintiff Mark Oakeson's voluntary discontinuation of his professional relationship with Defendant TBM Consulting Group, Inc. (hereinafter, "TBM"). During his fourteen-year tenure with TBM, Mr. Oakeson was an employee, shareholder, officer, and director of the company. In fact, Mr. Oakeson was a founding member of the company. In July 2005, Mr. Oakeson resigned from the company, relinquished his employment and contractual rights, and sold his shares back to TBM in exchange for an array of financial and non-monetary benefits, including buyout payments totaling more than $3,500,000. Now, on the eve of the expiration of the statute of limitations and as that buyout payment stream nears its end, Mr. Oakeson, for the first time, contends that he was "forced" and "pressured" to resign and redeem his shares.

Nowhere does Mr. Oakeson mention or explain his dozen or more decisions to accept and cash TBM's buyout payments.

The Defendants emphatically deny wrongdoing and respectfully contend that this lawsuit is without any legal or factual merit. Defendants seek dismissal of the Second through Sixth Causes of Action:

1. **Plaintiff's Second Cause of Action, captioned "Breach of Implied Covenant of Good Faith and Fair Dealing," should be dismissed with prejudice because the Plaintiff has failed to set forth separate, distinct, and identifiable acts and injuries from the overarching breach of contract claim;**

2. **Plaintiff's Third Cause of Action, captioned "Breach of Fiduciary Duty," should be dismissed with prejudice because:**

    a. **to the extent the Plaintiff seeks to include Defendant TBM Consulting Group, Inc. in the Third Cause of Action, under North Carolina law, a corporation does not owe itself a fiduciary duty, nor does a corporation owe a fiduciary duty to its shareholders;**

    b. **the Plaintiff has failed to include any allegations or suggestions that any act or omission by any Defendant harmed or impaired the corporation-Defendant's interests or that the corporation-Defendant suffered any harm at all;**

    c. **the Plaintiff has failed to set forth any allegations of a particular act or omission by the majority shareholders that, as a matter of law, constitute a violation or breach of any fiduciary obligation owed to a minority shareholder, as such. While the Plaintiff may feel that his purely personal interests were impaired by the Defendants' acts to protect the corporation's interests, he has failed to set forth any facts that the Defendants' acts or omissions violated his interests as a shareholder;**

3. **Plaintiff's Fourth Cause of Action, captioned "Civil Conspiracy," should be dismissed with prejudice because North Carolina does not recognize such a claim;**

4. **Plaintiff's Fifth Cause of Action, captioned "Punitive Damages," should be dismissed with prejudice because the Plaintiff has failed to set forth any facts or allegations that give rise to a claim for punitive damages; and**

5. **Plaintiff's Sixth Cause of Action, captioned "Unfair and Deceptive Trade Practices," should be dismissed with prejudice because North Carolina does**

not permit such a claim in the context of employment and shareholder disputes.

Mr. Oakeson filed the instant Complaint with the Durham County Superior Court on July 3, 2008. On July 31, 2008, Defendants transferred the case to Business Court. Defendants' deadline with which to respond to Plaintiff's complaint is September 3, 2008. This motion is therefore timely and ripe for consideration.

II. ARGUMENT.

The Plaintiff's Second, Third, Fourth, Fifth, and Sixth Causes of Action should be dismissed with prejudice. The Plaintiff's first cause of action raises a claim for breach of contract. The remaining causes of action reflect the Plaintiff's attempt to avail himself of tort-based measures of damages by merely clothing the same facts and allegations as torts. North Carolina does not allow such attempts, however, and the only cause of action that should proceed past the pleading stage is that initial claim for breach of contract.

A. The Plaintiff's Claim for "Breach of the Implied Covenant of Good Faith and Fair Dealing" is legally flawed and must fail.

The Plaintiff seeks to interpose a claim for intentional or tortious breach of contract, in the form of his Second Cause of Action, which is captioned "Breach of Implied Covenant of Good Faith and Fair Dealing." To begin with, it is unclear whether North Carolina actually recognizes such an independent theory of relief in any form or ideation. Although North Carolina's courts have recognized the principle that every contract contains an implied covenant of good faith and fair dealing, outside of the insurance coverage context, our courts have never recognized an independent tort of "bad faith breach of contract," "intentional breach of contract," or "tortious breach of contract." *Eli Research, Inc. v. United Communications Group*, 312 F.Supp.2d 748, 756

(M.D.N.C. 2004) (stating, under North Carolina law, that the Plaintiffs' bad faith breach of contract claim "does not appear to state a recognized cause of action independent of a claim for breach of contract."). Instead, in order to pursue any tort claims that emanate out of contractual dealings, including the implied covenant of good faith and fair dealing, the plaintiff must allege "separate," "distinct," and "identifiable" conduct and damages that give rise to extra-contractual liability. Here, the Plaintiff has failed to do so, and the claim must fail.

In fact, as this Honorable Court has ruled, "North Carolina courts must remain vigilant against a party's unsupported attempt to engraft tort liability on what is at bottom a breach of contract action." *Club Car, Inc. v. Dow Chemical Company*, 2007 NCBC 10 (May 3, 2007)[1]; *see also Media Network, Inc. v. Mullen Advertising, Inc.*, 2007 NCBC 1 (Jan 19, 2007). To be sure, where a party negligently or *even intentionally* fails to perform the terms of a contract, a tort action generally will not lie against the breaching party. *N.C. State Ports Authority v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 82 (1978).

Likewise, in the absence of personal injury or property damage, to state a tort claim when the underlying nucleus of operative facts revolve around contractual dealings, the plaintiff must allege facts and damages that are separate, distinct, and identifiable from the contract facts, claims and damages. This prohibition is at the heart of the "economic loss rule." To be sure, North Carolina law requires the dismissal of tort claims that are not both "identifiable" and "distinct" from a "primary breach of contract claim." *See Broussard v. Meineke Discount Muffler Shops, Inc.,* 155 F.3d 331,346 (4th Cir 1998); *Strum v. Exxon Co.,* 15 F.3d 327 (4th Cir. 1994); *See also Media Network, Inc. v. Mullen Advertising, Inc.,* 2007 NCBC 1 (Jan 19, 2007), *Garlock v. Hilliard*, 2000 WL

[1] All unpublished opinions are attached hereto.

33914616, 2000 NCBC 11 (N.C. Super. Aug 22, 2000). North Carolina litigants are not permitted "to manufacture a tort dispute out of what is, at bottom, a simple breach of contract claim." Such attempts are "inconsistent with both North Carolina law and sound commercial practice." *Strum*, 15 F.3d at 329.

Mr. Oakeson's breach of the implied duty of good faith and fair dealing claim is merely an unrecognized, legally bankrupt duplication of his contract claim. Consequently, Plaintiff's second cause of action should be dismissed with prejudice.

B. <u>The Alleged Impairment of Plaintiff's Personal Interests Does Not Constitute a Breach of Fiduciary Duty</u>.

Mr. Oakeson's Third Cause of Action, sounding in breach of fiduciary duty, cannot survive this preliminary motion. As an initial matter, the Complaint suggests that Defendant TBM, in addition to its majority shareholders, is subject to liability under this cause of action. As a matter of law, TBM cannot breach a fiduciary duty to itself.

Next, because the Complaint fails to include any fact or allegation that the majority shareholders harmed or impaired the corporation's interests, the claim should be dismissed with prejudice. The gravamen of a director or majority shareholder's breach of fiduciary duty is the placing of one's personal interests over the corporation's interests, thereby impairing the minority shareholder's interests in the corporate "property." The mere fact that a minority shareholder suffers some individual injury does not give rise to a breach of fiduciary duty claim.

The Plaintiff contends that the Defendants forced the "Plaintiff to resign or to vote him out as a Board Member, Shareholder and employee of TBM." However, Mr. Oakeson makes no allegation that the conduct of Defendants harmed the corporation or acted in a manner that was not in the corporation's best interests. Likewise, the Plaintiff

fails to allege that the complained of acts or omissions were unfair to the corporation or even unwise.

In discharging his or her duties to a minority shareholder, "a majority shareholder has a fiduciary duty not to misuse his power by promoting his *personal interests* at the *expense of corporate interests*." *Farndale Co., LLC v. Gibellini*, 176 N.C.App. 60, 67 (2006) (internal citations omitted) (italics added).

While the Defendants readily concede that Mr. Oakeson's personal interests were at stake when he resigned from his job in exchange for payments that will exceed $3,500,000.00, nowhere does Mr. Oakeson allege that the majority shareholders failed to exercise sound business judgment. Nowhere does Mr. Oakeson allege that the majority shareholders acted at the expense of the corporation's interests. Because he was overpaid and underproductive, perhaps Mr. Oakeson recognizes that his separation actually served and promoted the corporation's interests. In any event, the loss of a job or title or a directorship is insufficient to constitute a breach of fiduciary duty.

The law imposes a fiduciary duty upon majority stockholders because they have a "community of interest with the minority holders in the same property," while having complete control over the corporation. *Gaines v. Long Mfg. Co*, 234 N.C. 340, 345 (1951). Thus, the purpose of the fiduciary obligation is to preserve and increase that property rather than advance the personal pecuniary interests of the minority shareholder. Accordingly, Mr. Oakeson's claim for breach of fiduciary duty should be dismissed with prejudice.

C. North Carolina Does Not Recognize a Claim for Civil Conspiracy.

In his Fourth Cause of Action, the Plaintiff purports to assert a claim for "Civil Conspiracy." There are few authorities that are as well-settled as North Carolina's rejection of civil conspiracy as an independent cause of action. *See, Toomer v. Garrett*, 155 N.C. App. 462, 483 (2002). As our Court of Appeals noted, "there is not a separate civil action for conspiracy in North Carolina." *Dove v. Harvey*, 168 N.C. App. 687, 690 (2005). To close the issue, the North Carolina Supreme Court has elaborated on this very point: "Attention is called to certain relevant general principles. Accurately speaking, there is no such thing as a claim for civil conspiracy." *Reid v. Holden*, 242 N.C. 408, 414 (1955). As a result, Mr. Oakeson's claim for civil conspiracy should be dismissed with prejudice.

D. The Complaint Contains No Factual Allegations That Give Rise to a Claim for Punitive Damages.

The Plaintiff interposes a claim for punitive damages as his Fifth Cause of Action. However, as noted above, Plaintiff's claims arise out of contract, as opposed to tort. North Carolina General Statute § 1D-15(d) provides, "Punitive damages shall not be awarded against a person solely for breach of contract." Further, the Complaint fails to set forth any aggravating factors that permit an award of punitive damages. "The purpose of punitive damages is to punish wrongdoers for misconduct of an *aggravated, extreme, outrageous, or malicious character*." *Rhyne v. K-Mart Corporation*, 149 N.C. App. 672, 687 (2002)(italics added).

The Complaint is bereft of even the suggestion of the types of extreme or outrageous misbehavior that would warrant punishment, deterrence, or the imposition of

the unusual sanction of punitive relief. Consequently, the Plaintiff's claim for punitive damages should be dismissed with prejudice.

E. <u>North Carolina has Expressly Rejected Chapter 75 Claims Under Similar Circumstances</u>.

In his Sixth (and final) Cause of Action, the Plaintiff asserts a claim for Unfair and Deceptive Trade Practices pursuant to North Carolina General Statute § 75-1.1, *et seq.*

The North Carolina Unfair and Deceptive Trade Practices Act, known as "Chapter 75," declares it unlawful for a person or entity to engage in "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." Chapter 75 was enacted to provide a "private cause of action for consumers." *Durling v. King*, 146 N.C.App. 483, 488 (2001). Indeed, "although commerce is defined broadly under G.S. § 75-1.1(b) as 'all business activities, however denominated,' the fundamental purpose of G.S. § 75-1.1 is to protect the consuming public." Id. (internal citations omitted).

With respect to the instant dispute, Mr. Oakeson was not a member of the "consuming public." Rather, at all operative times relevant to the Complaint, the Plaintiff was an officer, director, employee and shareholder of Defendant TBM. As our courts have held on numerous occasions, the statute is not meant to apply to internal employment disputes and has only been applied where the employee has scammed the employer. *See, Dalton v. Camp*, 353 N.C. 647 (2001); *Buie v. Daniel International*, 56 N.C.App. 445 (1982); and *Sara Lee Corp. v. Carter*, 351 N.C. 27 (1999).

Likewise, shareholder disputes are beyond the scope of Chapter 75. *Skinner v. E.F. Hutton & Co*., 314 N.C. 267 (1985). The *Skinner* court reasoned that extending the

UDTPA to securities transactions would create overlapping supervision, enforcement, and liability in a field that is already strictly regulated by state and federal statutes and agencies. *Id.*; *see also HAJMM Company v. House of Raeford Farms, Inc.*, 328 N.C. 578, 594 (1991).

The Plaintiff's allegations all surround his separation from the company and attendant voluntary relinquishment of his job, his titles, and his shares. The subject matter of this action does not fall within the protections of Chapter 75.

III. CONCLUSION

The Second through Sixth Causes of Action are mere recitations of basic contract theories impermissibly cloaked in tort. For the foregoing reasons, the Defendants' Motion should be ALLOWED, and the Plaintiff's Second, Third, Fourth, Fifth, and Sixth claims for relief should be dismissed with prejudice.

This, the 3rd day of September, 2008.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Memorandum of Law 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.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 3rd day of September, the foregoing Memorandum of Law was served on all known counsel of record via email, the North Carolina Business Court's electronic filing system, and first class mail as follows:

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

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

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

May 3, 2007.

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

ORDER

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

I.

PROCEDURAL BACKGROUND

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

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

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

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

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

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

II.

THE FACTS

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

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

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

{11} The claims in this case arise from Club Car's 2003 introduction of a line of premium golf cars known as the "Precedent" line. (Compl.¶ 3.) The Precedent line includes a distinctive, uniform dark gray underbody fashioned from compression-molded plastic through a process developed in Germany. (Compl.¶¶ 5, 8.) The underbody is designed so as not to require painting, and its molded components are intended to resist long-term exposure to the elements

without fading or becoming discolored. (Compl.¶¶ 5-6.)

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

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

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

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

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

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

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

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

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

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

III.

CONCLUSIONS OF LAW

A.

STANDARD OF REVIEW

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

***3** {23} When ruling on a Rule 12(b)(6) motion, the

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

B.

ANALYSIS

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

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

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

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

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

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

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

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

4. Moreover, where a breach of contract " 'smack[s] of tort because of the fraud and deceit involved,' " North Carolina law will allow a party to pursue punitive damages based on the fraudulent act. *See Zubaidi v. Earl L. Pickett Enters., Inc.*, 164 N.C.App. 107, 115, 595 S.E.2d 190, 194 (2004) (quoting *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 136, 225 S.E.2d 797, 808-09 (1976)).

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

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

6. But, North Carolina courts must remain vigilant against a party's unsupported attempt to engraft tort liability on what is at bottom a breach of contract action. *See Broussard v. Meineke Disc. Muffler*

Shops, Inc., 155 F.3d 331, 346 (4th Cir.1998). *Hospira,* slip op. at 8-9.

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

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

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

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

{31} The Court defers dismissal of the claims here, however, because it is unclear whether Club Car has a contractual remedy. Dow Chemical has yet to answer the allegations of the Complaint, and its brief in support of its motion to dismiss is cryptic as to the scope of the express warranties alleged by Club Car. (*See* Def.'s Brief in Supp. of Mot. to Dismiss Pl.'s Second and Third Claims for Relief 7 (stating that "whether the bargains Club Car struck in connection with the manufacture and sale of the compression molded parts provide a contractual remedy against Dow [Chemical] is a question for another day").)

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

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

{34} Moreover, that Club Car has also pleaded contractual relief for breach of express warranties is of no legal moment, at least not at this stage. Subject

to the requirements of Rule 11, our rules of civil procedure allow a pleader to "state as many separate claims or defenses as he has regardless of consistency[.]"N.C.G.S. § 1A-1, Rule 8(e)(2); *see Hendrix v. Hendrix,* 67 N.C.App. 354, 357, 313 S.E.2d 25, 27 (1984) (Phillips, J., concurring) ("The main reason for permitting inconsistent claims to be alleged is so that litigants can investigate and assess them before having to decide-or before the court decides for them-which inconsistent claim is supportable and which is not.").

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

CONCLUSION

{36} The Court DENIES the Motion.

This the 3rd day of May, 2007.

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

END OF DOCUMENT

CMedia Network, Inc. v. Mullen Advertising, Inc.
N.C.Super.,2007.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of North Carolina,
Mecklenburg County,
Business Court.
MEDIA NETWORK, INC. d/b/a Gateway Media,
Plaintiff,
v.
MULLEN ADVERTISING, INC.; Transit ADS Incorporated d/b/a Carteles; Carl Haynes, individually and d/b/a High Plains Business Consulting a/k/a High Plains Business a/k/a High Plains; and High Plains Business Consulting a/k/a High Plains Business a/k/a High Plains, Defendants.
Media Network, Inc. d/b/a Gateway Media, Plaintiff,
v.
Long Haymes Carr, Inc. d/b/a Mullen/LHC and Carney Media, Inc., Defendants.
No. 05 CVS 7255, 05 CVS 15428.

Jan. 19, 2007.

Nexsen Pruet Adams Kleemeier, P.L.L.C. by J. Alexander S. Barrett and Stuart C. Gauffreau for Plaintiff Media Network, Inc. d/b/a/ Gateway Media.
Kilpatrick Stockton L.L.P. by George L. Little, Jr., W. Mark Conger and Elliot A. Fus for Defendants Mullen Advertising, Inc. and Long Haymes Carr. Inc. d/b/a Mullen/LHC.

ORDER

DIAZ, Judge.
***1** {1} The Court heard this matter on 16 May and 8 August 2006 on the following Motions:

(a) Plaintiff's Motion for Summary Judgment against Defendant Mullen [FN1] for Breach of Contract and Unfair or Deceptive Trade Practices;

FN1. When the parties use the name "Mullen" in their motion papers, they are referring collectively to Defendants Long Haymes Carr, Inc. and Mullen Advertising, Inc. In this Order, the Court refers to these two defendants collectively as the "Mullen Defendants."

(b) Mullen's Motion for Summary Judgment;

(c) Mullen's Motion for Partial Summary Judgment and Other Relief Regarding Damages for "Diminution in Business Value;"

(d) Plaintiff's Motion for Leave to Submit Additional Materials in Opposition to Defendants' Motions for Partial Summary Judgment and Other Relief Regarding Damages for "Diminution in Business Value;" and

(e) Plaintiff's Motion for Summary Judgment Regarding Proposed but Unasserted Defense.

{2} For the reasons set forth below, and after considering the Court file, the written Motions and exhibits, and counsels' memoranda and oral arguments, the Court concludes that the proper party Defendant in these actions is Defendant Long Haymes Carr, Inc. d/b/a/ Mullen/LHC and will dismiss, *with prejudice,* Plaintiff's claims in 05 CVS 7255.

{3} With respect to Plaintiff's claims in 05 CVS 15428, the Court:

(a) DENIES Plaintiff's Motion for Summary Judgment as to its claim for breach of contract;

(b) GRANTS Mullen's Motion for Summary Judgment as to Plaintiff's claim for breach of contract;

(c) DENIES the parties' cross-motions for summary judgment as to Plaintiff's claim under the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA");

(d) GRANTS Mullen's Motion for Partial Summary Judgment and Other Relief Regarding Damages for

"Diminution in Business Value" and also GRANTS Mullen's separate motion to exclude any expert testimony as to this issue;

(e) DENIES Plaintiff's Motion for Leave to Submit Additional Materials in Opposition to Defendants' Motion for Partial Summary Judgment and Other Relief Regarding Damages for "Diminution in Business Value;" and

(f) DENIES Plaintiff's Motion for Summary Judgment Regarding Proposed but Unasserted Defense.

I.

PROCEDURAL BACKGROUND

{4} Plaintiff Media Network, Inc. d/b/a Gateway Media ("Gateway") filed the Complaint in 05 CVS 7255 on 15 April 2005 and the Complaint in 05 CVS 15428 on 23 August 2005.[FN2]

> FN2. Among the many disputes between the parties in these cases is a disagreement as to the proper Mullen entity that should be before the Court, which, in turn, resulted in Gateway filing two Complaints asserting essentially the same claims. Hereinafter, the Court will identify the pleadings as "Compl. 7255" and "Compl. 15428." If the pleadings are referred to collectively, the Court will identify them as "Compls."

{5} Defendant Mullen Advertising, Inc. ("Mullen Advertising") answered the Complaint in 05 CVS 7255 on 13 June 2005. Mullen Advertising served an Amended Answer on 15 June 2005.

{6} Defendant Long Haymes Carr, Inc. d/b/a/ Mullen LHC answered the Complaint in 05 CVS 15428 on 31 October 2005.

{7} The cases were transferred to the North Carolina Business Court and assigned to me as complex business matters by order of the Chief Justice of the North Carolina Supreme Court dated 3 February 2006.

{8} The Complaints originally asserted claims against the Mullen Defendants for: (a) breach of contract, (b) misappropriation of trade secrets, (c) injunctive relief, (d) fraud, (e) negligent misrepresentation, (f) tortious interference with contract, (g) trespass to chattels, (h) unfair and deceptive trade practices, and (i) negligent supervision. (Compl. 7255 ¶¶ 41-121; Compl. 15428 ¶¶ 42-101.)

***2** {9} Subsequently, the parties stipulated to the entry of certain injunctive relief that resolved all claims except for those alleging breach of contract and unfair and deceptive trade practices. (Consent Order and Inj. ¶¶ 1, 3, June 28, 2006.)

{10} On 16 February 2006, Mullen Advertising filed a motion and supporting brief seeking partial summary judgment and other relief regarding damages for "diminution in business value." On 7 April 2006, Gateway filed its brief in opposition. On 18 April 2006, the Mullen Defendants filed a reply brief as to this motion.

{11} On 31 May 2006, Gateway filed a motion and supporting brief seeking summary judgment on its claims for breach of contract and unfair and deceptive trade practices, and a separate motion and supporting brief seeking summary judgment as to a "proposed but unasserted defense." That same day, the Mullen Defendants filed a cross-motion and supporting brief seeking summary judgment as to all claims.

{12} On 23 June 2006, all parties filed opposition briefs to the motions for summary judgment. The parties then filed reply briefs on 14 July 2006.

{13} Finally, on 18 August 2006, Gateway filed a Motion for Leave to Submit Additional Materials in Opposition to the Mullen Defendants' pending Motion for Partial Summary Judgment and Other Relief Regarding Damages for "Diminution in Business Value." The Mullen Defendants filed a brief in opposition on 11 September 2006, and Gateway filed its reply on 21 September 2006.[FN3]

> FN3. Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court emphasizes that "[t]he Court favors concise briefs."BCR 15.8. The briefing on the pending motions

> has been anything but concise, as the parties have deluged the Court with 13 briefs, totaling 245 pages, and seven binders of deposition testimony and supporting exhibits. Several witnesses also felt compelled to file multiple affidavits in addition to their deposition testimony; one witness, Brad Heard, filed three affidavits. The Court accepts some blame for this avalanche of paper because it allowed the parties to slice up the summary judgment pie by filing motions on discrete sub-issues. Unfortunately, the Court's reward for its largesse has been briefing (and oral argument) that, while helpful, has given true meaning to the law of diminishing marginal returns and delayed entry of the Court's ruling. I take this opportunity to gently remind the bar that less is almost always best when it comes to the practice of law, and motions practice is no exception.

{14} The Court heard the parties' oral arguments on the various motions on 16 May and 8 August 2006.

II.

THE FACTS

A.

THE PARTIES

{15} Gateway is a Delaware corporation authorized to do business in North Carolina. (Compls.¶ 1.)

{16} Mullen Advertising is a Massachusetts corporation authorized to do business in North Carolina. (Compl. 7255 ¶ 2.)

{17} Long Haymes Carr, Inc. is a North Carolina corporation, with its principal place of business in Winston Salem, North Carolina. (Compl. 15428 ¶ 2; Paul Slack Aff. ¶ 3.)

{18} Mullen Advertising and Long Haymes Carr, Inc. are subsidiaries of The Interpublic Group ("IPG"), a New York corporation. (Slack Aff. ¶ 2.)

{19} Since on or about 2001, Long Haymes Carr, Inc. has done business in North Carolina under the assumed name of Mullen/LHC. (Slack Aff. ¶ 5.) In or around 2004, Long Haymes Carr, Inc., filed documents in North Carolina to transact business as "Mullen." (Slack.Aff.¶ 6.) The Court hereinafter refers to Defendant Long Haymes Carr, Inc. as "Mullen/LHC."

{20} Carl Haynes ("Haynes") is a citizen and resident of North Carolina. (Compl. 7255 ¶ 5.) Gateway alleges that, during all times relevant to these actions, Haynes was doing business as High Plains Business Consulting a/k/a High Plains Business a/k/a High Plains.[FN4](Compl. 7255 ¶ 5). At all times relevant to this action, Haynes also worked for Mullen/LHC as a Senior Vice President. (Haynes Aff. ¶ 2, June 12, 2006.)

> FN4. Gateway also named High Plains Business Consulting as a separate defendant in 05 CVS 7255.

***3** {21} Haynes and Defendants Transit Ads Incorporated d/b/a Carteles, High Plains Business Consulting, and Carney Media, Inc., have all been dismissed from these actions.

B.

THE CLAIMS

{22} In addressing the competing motions for summary judgment, the Court has accepted the non-moving party's version of the facts, where supported in the record.

{23} In these cases, Gateway alleges that one or both of the Mullen Defendants breached a "non-cancelable" contract in which Gateway was to provide services to the Mullen Defendants in connection with an advertising program for R.J. Reynolds Tobacco Company ("RJRT"). The Mullen Defendants assert that the contract was cancelable on 60-days written notice and that a 2 February 2005 letter from the Defendants to Gateway properly provided for termination effective 4 April 2005.

{24} The alleged contract between the parties centers around a cigarette advertising program funded by RJRT in which "one-sheets" (described as poster-

sized print advertisements) are designed and manufactured by an advertising agency for placement on a rotating basis in or outside convenience stores throughout the United States (hereinafter the "One-Sheet Program"). (Compl. 7255 ¶ 6-7; Compl. 15428 ¶ 7-8; Dep. Ex. 193; Williard Dep. 13:15-19.)

{25} Defendants admit that RJRT hired Mullen/LHC to develop and manage the One-Sheet Program. (Defs.' Br. in Supp. of Mot. for Summ. J. 27, May 31, 2006; Williard Dep. 21:16-22:10; Dep. Ex. 41.) They deny that Mullen Advertising is liable for the claims at issue.

{26} According to Gateway's president, however, there were many occasions where those with whom he dealt with at Mullen/LHC (including, apparently, the switchboard operator) indicated that they worked for "Mullen Advertising" or "Mullen Advertising, Inc." (Brad Heard Aff. ¶¶ 45-46, June 19, 2006.)

{27} Mullen/LHC has managed the One-Sheet Program for over 12 years. (Sterling Dep. 18:16-24; Williard Dep. 17:5-11.) In its role as manager, Mullen/LHC selected the "one-sheet" vendors, who then "posted" the advertising materials in specified geographic locations. (Dep.Ex. 29.)

{28} As a Senior Vice-President for Mullen/LHC, Haynes's duties included the administration of the One-Sheet Program. (Haynes Aff. ¶ 2, May 26, 2006; Slack Dep. 65:14-22.)

{29} From approximately 1999 through 2002, non-party Gateway Outdoor Advertising, Inc. served as a vendor for the One-Sheet Program. (Brad Heard Aff. ¶ 4, May 30, 2006; Craig Heard Dep. 44:17-45:16.)

{30}In 2002, Gateway was spun-off from Gateway Outdoor Advertising, Inc. and took over as one of four vendors for the One-Sheet Program. (Craig Heard Aff. ¶¶ 1, 4-5, Apr. 5, 2006; Brad Heard Dep. 22:11-14.) At the request of its lender, Gateway Outdoor Advertising, Inc. formed this separate entity to facilitate loans for the funding of capital investments in the One-Sheet Program. (Craig Heard. Aff. 1 ¶ 5.) [FN5]

FN5. The other vendors were Defendants Carteles and Carney, and non-party Interstate Outdoor Advertising, L.P. (Dep.Exs.193-94.)

***4** {31} From 2002 through its termination by Mullen/LHC in 2005, Gateway's primary (if not exclusive) source of revenue was as a vendor for the One-Sheet Program. (Compl. 7255 ¶ 22; Compl. 15428 ¶ 23; Whitt Aff. Ex. A; Brad Heard Aff. ¶ 14, Apr. 5, 2006; Craig Heard Dep. 153:22-154:5.) [FN6]

FN6. The one-sheet vendors were discouraged, if not expressly prohibited, from soliciting anti-tobacco or other competitive business. (Sterling Dep. 178:10-182:7, 199:14-200:1.)

{32} As a condition of obtaining the vendor contract for the One-Sheet Program, and allegedly unbeknownst to Mullen/LHC and RJRT, Haynes solicited and received over $750,000.00 in "consulting fees" from Gateway and its predecessor Gateway Outdoor Advertising, Inc. (Compl. 7255 ¶¶ 10-13; Compl. 15428 ¶¶ 11-14.) [FN7]

FN7. Mullen/LHC characterizes the payments as commercial bribes, while Gateway insists that the payments were legitimate fees for actual consulting services rendered by Haynes. While it appears that Mullen/LHC's characterization may be more accurate, the Court declines to resolve this issue here. I include the background facts merely because they provide the context for Mullen/LHC's subsequent actions. And to be fair to Haynes, the record in this case is replete with instances of other Mullen/LHC employees falling over themselves to scoop up "freebies" from one-sheet vendors and others soliciting Mullen/LHC's advertising business, some of which violate the spirit, if not the letter, of Mullen/LHC's policy regarding acceptance of such items. For example, Mullen/LHC employees routinely solicited or accepted tickets to various high-profile professional sporting and entertainment events, including, in the case of one Mullen/LHC senior executive, $4,000.00 in tickets to the 2004 American League baseball playoffs and World Series, and airfare, accommodations, meals, and venue tickets for the 2004 Summer Olympic

Games in Athens, Greece. (Dep. Exs. 5-8; Trosan Dep. 101:4-22, 133:12-22, 136:10-137:14, 182:19-186:20.)

{33} For its services as manager of the One-Sheet Program, Mullen/LHC received a per-sheet monthly fee of $85.00. (Compl. 7255 ¶ 17; Compl. 15428 ¶ 18.) Mullen/LHC paid Gateway 85% of the fee (or $72.25 per sheet) for its work in implementing the program. (Compl. 7255 ¶¶ 16-17; Compl. 15428 ¶¶ 17-18.)

{34} Gateway implemented the One-Sheet Program upon receipt of so-called "insertion orders." (Sterling Aff. Exs. A, B.) The insertion orders are form documents that provided Gateway with specific details regarding implementation of the One-Sheet Program in monthly intervals over the course of the contract year, including the convenience store locations to be served, the number of "one-sheet" advertisements to be posted, the "issue" months for the particular postings, and the total fee that Gateway would be paid for that order. (Sterling Aff. Exs. A, B.)

{35} The "terms and conditions" portion of the insertion orders also provided that (a) Mullen/LHC could "cancel this contract, with no obligation of payment or penalty ... upon written notice to the [vendor] at least sixty (60) days, including Sundays and holidays, in advance of any scheduled posting date;" and (b) the "contract contains the entire understanding between the parties and cannot be changed or terminated orally."(Sterling Aff. Ex. A.)

{36}In 2002 and 2003, the parties performed the One-Sheet Program under contracts that allowed Mullen/LHC to cancel any uncompleted one-sheet postings pursuant to the 60-day notice provision. (Compl. 7255 ¶ 17; Compl. 15428 ¶ 18.)

{37}In 2004, however, Mullen/LHC and RJRT negotiated a reduced gross monthly fee of $74.00 per sheet, which, in turn, resulted in a $62.90 per sheet fee to the vendors. (Compl. 7255 ¶ 18; Compl. 15428 ¶ 19.) To induce the vendors to accept the reduced rate, Mullen/LHC (with RJRT's consent) agreed that the vendor contracts for 2004 would be guaranteed for one year. (Compl. 7255 ¶ 18; Compl. 15428 ¶ 19.) Accordingly, without striking the form language regarding termination in the "terms and condition" portion of the insertion orders, the parties added the following to the front page of the insertion orders for 2004:

CONTRACTS ARE NON-CANCELABLE PER AGREEMENT WITH RJRT TO RECEIVE REDUCED SPACE RATE OF $74 GROSS PER UNIT PER MONTH, FOR TRADITIONAL ONE-SHEETS ... CONTRACTS WILL RUN THE TERM INDICATED.

***5** (Sterling Aff. Ex. A.) [FN8]

FN8. The "terms and conditions" portion of the insertion orders resolved the inconsistency in the contract language by noting that "[w]hen there is any inconsistency between these standard conditions and a provision on the face hereof, the latter shall govern."(Sterling Aff. Ex. A.)

{38} The parties performed the One-Sheet Program without incident in 2004. (Brad Heard Aff. ¶ 14, May 30, 2006.)

{39} On or about 5 October 2004, Haynes wrote to Gateway and the other vendors to announce a further reduction in the per-sheet fee for 2005 (hereinafter the "Haynes Memorandum"). Specifically, Haynes told the vendors:

As we move forward toward issuance of RJRT one-sheet contracts for 2005 we will be reducing the unit rate to $71 gross.

....

The $71 is predicated upon continuous contracts (non-cancelable) and significant volume to make the acceptance of our contracts worth your while.

....

As always, acceptance of the new pricing is your decision. If you choose not to do so please let me know so we can plan accordingly.

(Compls.Ex. 3.) The Haynes Memorandum also explained that "our contracts specify the market in

which we are placing one-sheets."(Compls.Ex. 3.)

{40} In response, Gateway's president, Brad Heard, wrote Haynes via e-mail that, "We are certainly on board at the new rate. We appreciate the business you have given us and look forward to 2005."(Brad Heard Aff. ¶ 18, May 30, 2006; Dep. Ex. 178.)

{41} Sometime in November 2004, Mullen/LHC sent Gateway the insertion orders for 2005, which denoted the new $71.00 per-sheet gross fee. (Brad Heard Aff. ¶¶ 22-23, May 30, 2006; Brad Heard Aff. ¶¶ 38, 44, June 19, 2006.) Unlike the 2004 insertion orders, however, the 2005 orders did not state expressly that they were non-cancelable. (Brad Heard Aff. ¶¶ 22-23, May 30, 2006; Brad Heard Aff. ¶ ¶ 38, 44, June 19, 2006.) Rather, the documents contained the form language used in earlier contract years allowing Mullen/LHC to cancel on 60-days notice. (Brad Heard Aff. ¶¶ 22-23, May 30, 2006; Brad Heard Aff. ¶¶ 38, 44, June 19, 2006.)

{42} When Brad Heard received the 2005 insertion orders in early November 2004, he noticed the omission and called Haynes, who assured him that this was an inadvertent error and that the reduced rate was based on a guaranteed one-year term. (Brad Heard Aff. ¶ 38, June 19, 2006; Brad Heard Dep. 156:9-158:6, 160:5-17.)

{43} In a series of e-mails in or around early February 2005, Haynes insisted that he had previously confirmed the guaranteed term with his superior Carol Sterling. (Haynes Aff. Exs. A-B, June 12, 2006.) Mullen/LHC disputes this claim, insisting that Haynes had no authority to make such a commitment because Mullen/LHC had not yet received approval from its client RJRT. (Sterling Aff. ¶ ¶ 8-9; Slack Dep. 257:12-15; Troutman Dep. 207:7-25, 218:20-219:6.) Haynes has since retracted his earlier e-mails, stating that although he "expected that the vendors' 2005 contracts would be 'non-cancelable' ... [Gateway knew that he] did not have authority to provide contracts until all terms had been approved by [RJRT]." (Haynes Aff. ¶ 7, May 26, 2006.)

***6** {44} Regardless, on 8 December 2004, JoAn Williard, who served as Media Director for RJRT, notified Sterling of RJRT's preliminary approval of one-year guaranteed contracts for the 2005 One-Sheet Program. (Dep.Ex. 21.) A few days later, Williard received final approval for this commitment, which she then communicated to Sterling by telephone. (Williard Dep. 337:13-25.) Sterling claims to have no recollection of this conversation, however, and there is no evidence that Gateway was told of RJRT's action.

{45} Instead, following Heard's conversation with Haynes in early November 2004, Heard signed one or more of the 2005 insertion orders (containing the 60-day cancellation term), and Gateway subsequently began performing in late December 2004 by, among other things, borrowing funds to implement the 2005 One-Sheet Program, purchasing equipment and other necessary supplies, leasing space from convenience store operators, and convening operational meetings with its management, employees, and subcontractors. (Compl. 7255 ¶ 25; Compl. 15428 ¶ 26; Brad Heard Aff. ¶¶ 51-55, June 19, 2006; Brad Heard Dep. 160:18-22.) [FN9]

> FN9. Sometime in early November 2004, Haynes and Sterling discussed the vendors' concerns over the lack of express language in the insertion orders guaranteeing a one-year term. (Sterling Dep. 51:25-64:25.) Sterling, however, did not tell Gateway that Mullen/LHC had not approved non-cancelable contracts for 2005 before Gateway began performing. (Sterling Dep. 67:2-8.)

{46} In March 2004, IPG retained an outside accounting firm to investigate the "consulting fees" paid by Gateway to Haynes. (Slack Dep. 27:18-28:12, 59:6-13; Battson Dep. 16:15-20.) The nearly year-long investigation confirmed that the payments had been made, and Mullen/LHC concluded that they violated the company's internal ethics rules. (Battson Dep. 20:18-24; Dep. Exs. 118, 340.) [FN10]As a result, Mullen/LHC suspended Haynes in December 2004, and then fired him in January 2005. (Haynes Aff. ¶ 2, May 26, 2006; Haynes Aff. ¶ 2, June 12, 2006; Ambrosio Aff. ¶¶ 3-4.)

> FN10. According to Gateway, Mullen/LHC knew of the allegedly illegal payments as early as March 2004 and certainly no later than August 2004, when it discovered documents on Haynes's computer

referencing the payments. (Battson Dep. 16:15-20, 61:7-62:17, 73:8-10, 88:6-15.) Gateway also alleges that, despite this knowledge, Mullen/LHC allowed Haynes to continue negotiating contracts with the vendors for 2005. (*See* Compl; 7255 ¶ 35.)

{47} On 2 February 2005, Mullen/LHC, at RJRT's insistence, terminated Gateway as a one-sheet vendor pursuant to the 60-day termination provision in the 2005 insertion orders. (Compls. Ex. 4; Slack Dep. 236:10-20; Williard Dep. 85:23-86:22, 88:21-25.) Mullen/LHC's notice referred specifically to the investigation regarding the payments made to Haynes as a basis for the termination. (Compls.Ex. 4.)

{48} Following its termination, Gateway was unable to obtain any other business to mitigate its damages. (Brad Heard Aff. ¶ 20, Apr. 5, 2006; Brad Heard Dep. 206:13-19.) The reason, according to Brad Heard, is that the advertising industry has two major buying cycles: (a) during the Fall for the upcoming year; and (b) in the first quarter of each year for Spring or Summer promotions. (Brad Heard Aff. ¶ 16, Apr. 5, 2006.) According to Heard, because Mullen/LHC, knowing that the one-sheet business was Gateway's sole source of revenue, terminated Gateway in February 2005, Gateway "missed out on both major buying cycles for 2005 and had significantly reduced ability to find replacement business for 2005."(Brad Heard Aff. ¶¶ 19, 20, Apr. 5, 2006.) As a result, the company shut down its operation and folded its assets and obligations into Gateway Outdoor Advertising, Inc. (Brad Heard Aff. ¶ 22, Apr. 5, 2006.) [FN11]

FN11. In its 2 February 2005 termination notice, Mullen/LHC also raised some performance issues regarding Gateway's one-sheet postings. (Compls.Ex. 4.) Ultimately, however, Gateway was paid in full for its work up to and including the date of its termination. (Troutman Dep. 233:14-25; Dep. Ex. 101.)

***7** {49} Gateway seeks to recover more than $3 million in profits allegedly lost in 2005 following its termination as a one-sheet vendor, as well as $14.472 million in damages arising from the alleged diminution in Gateway's business value. (Whitt Aff. Ex. A ¶ 64.)

{50} According to Gateway's damages expert, T. Randolph Whitt ("Whitt"), the approximately $14.5 million in "diminution in business value" damages is derived by " 'estimating what the value of Gateway's business would have been at the end of 2005 had the Mullen/RJRT business continued *...or a level of business similar to the Mullen RJRT business,* compared to the actual estimated value of the business at the end of 2005 without the Mullen/RJRT business." ' (Whitt Aff. ¶ 8 (quoting Whitt Aff. Ex. A ¶ 40) (emphasis in original).)

{51} More specifically, Whitt arrived at this figure by projecting Gateway's expected net cash flows for the years 2006-2010 and then discounting these amounts to present value using a 22% discount rate. (Whitt Aff. Ex. A ¶¶ 46-49.)

{52} Mullen/LHC, however, was not obligated to provide any one-sheet business to Gateway beyond 2005. (Brad Heard Dep. 225:14-20; Guldner Dep. 191:19-25.)

III.

CONCLUSIONS OF LAW

A.

SUMMARY JUDGMENT STANDARD

{53} Summary judgment should be granted 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 a judgment as a matter of law."N.C.G.S. § 1A-1, Rule 56(c) (2006).

{54} The moving party bears the burden of showing a lack of triable issues of fact. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). Once the moving party meets this burden, the nonmoving party must "produce a forecast of evidence demonstrating that the [nonmoving party] 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).

{55} When considering a motion for summary judgment, a trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. *Singleton v. Stewart,* 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972).“An issue is material if the facts alleged would constitute or would irrevocably establish any material element of a claim or defense.”*Anderson v. Canipe,* 69 N.C.App. 534, 536, 317 S.E.2d 44, 46 (1984).“An issue is genuine if it may be maintained by substantial evidence.”*Id.*

{56} In deciding the motion, “ ‘all inferences of fact ... must be drawn against the movant and in favor of the party opposing the motion.” ’ *Caldwell v. Deese,* 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (quoting 6 James Wm. Moore, et al., Moore's Federal Practice § 56.15[3] (2d ed.1971)).

***8** {57} Finally, summary judgment is a drastic remedy that should be granted cautiously. Where the slightest doubt exists as to the merits of the motion, it should be denied. *First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co.,* 282 N.C. 44, 51, 191 S.E.2d 683, 688 (1972); *Volkman v. DP Assocs.,* 48 N.C.App. 155, 157, 268 S.E.2d 265, 267 (1980).

B.

PROPER PARTY DEFENDANT

{58} Mullen Advertising argues first that the separate complaint filed against it in 05 CVS 7255, which duplicates the claims filed against Mullen/LHC in 05 CVS 15428, should be dismissed because Mullen Advertising was not the corporate entity that dealt with Gateway. (Defs.' Br. in Supp. of Mot. for Summ. J. 27-29, May 31, 2006.) I agree.

{59} Gateway sued Mullen Advertising on 15 April 2005. Approximately four months later, it filed the same claims against Mullen/LHC. Gateway asserts that it may seek relief against both Mullen Defendants based on evidence that several of the Defendants' representatives involved in the decision to terminate Gateway as a one-sheet vendor claimed to be working for “Mullen Advertising” and another representative expressed a belief that Mullen/LHC and Mullen Advertising were the same company. (Pl.'s Br. in Resp. to Def. Mullen's Mot. for Summ. J. 33; Brad Heard Aff. ¶¶ 45-46, June 19, 2006.)

{60} To be blunt, these are the thinnest of factual reeds on which to rest support for effectively doubling the Court's file and increasing the litigation burden for all parties. In the first place, whatever confusion Gateway may have had about the relationship of the Mullen Defendants should have been laid to rest when it reviewed the North Carolina Secretary of State filings and other records showing clearly that Mullen/LHC and Mullen Advertising are separate companies. (*See* Slack Aff. Exs. A-F.)

{61} Moreover, in its briefs and arguments to this Court, Gateway has never wavered from its insistence that a contract was formed in October 2004 between its president Brad Heard and Mullen/LHC's former senior vice-president Carl Haynes. Gateway, however, presents *no* evidence to dispute the fact that Haynes worked only for Mullen/LHC and, although Mullen/LHC disputes Haynes's authority with respect to the alleged contract, (*see* Mullen's Resp. to Pl.'s Mot. for Summ. J. for Breach of Contract and Unfair and Deceptive Trade Practices 13, June 23, 2006), it does not disavow responsibility for the actions taken by the individuals that Gateway blames for wrongfully terminating the alleged contract.

{62} Consequently, whatever Haynes (or any other individual) did with respect to the alleged contract, and whatever liability arises from those acts, is the responsibility of Mullen/LHC alone. I find absolutely *no* merit to Gateway's attempt to prosecute two separate actions here.

{63} Accordingly, the Court GRANTS Defendant Mullen Advertising's Motion for Summary Judgment and dismisses, *with prejudice,* the claims in 05 CVS 7255.

C.

BREACH OF CONTRACT

***9** {64} Both parties argue that they are entitled to summary judgment as to Gateway's breach of contract claim. Because the specific evidence that Gateway relies on to buttress its claim is deficient as a matter of law, the Court will GRANT

Mullen/LHC's motion and dismiss this claim.

1.

APPLICABLE LAW

{65} The elements of a valid contract are offer, acceptance, consideration, and mutuality of assent to the contract's essential terms. *Cap Care Group, Inc. v. McDonald,* 149 N.C.App. 817, 822, 561 S.E.2d 578, 582 (2002) ("An enforceable agreement requires an offer, acceptance and consideration."); *Snyder v. Freeman,* 300 N.C. 204, 218, 266 S.E.2d 593, 602 (1980) ("The essence of any contract is the mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds.")."It is a well-settled principle of contract law that a valid contract exists only where there has been a meeting of the minds as to all essential terms of the agreement."*Northington v. Michelotti,* 121 N.C.App. 180, 184, 464 S.E.2d 711, 714 (1995) (citing *O'Grady v. First Union Nat'l Bank of N.C.,* 296 N.C. 212, 221, 250 S.E.2d 587, 594 (1978)); *see Boyce v. McMahan,* 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974).

{66} An agreement to make a contract, or as the cases sometimes phrase it, "an agreement to agree," does not constitute a binding obligation. *Gregory v. Perdue, Inc.,* 47 N.C.App. 655, 657, 267 S.E.2d 584, 586 (1980). For a contract to bind two parties, they must assent to the same thing in the same sense, and their minds must meet at least with respect to *all* material terms. Thus, a contract that leaves material terms open for future negotiations is invalid.*Id.;Boyce,* 285 N.C. at 734, 208 S.E.2d at 695. Put another way, "[i]f any portion of the proposed terms is not settled, there is no agreement."*Goeckel v. Stokely,* 236 N.C. 604, 607, 73 S.E.2d 618, 620 (1952).

{67} On the other hand, "the law ... does not favor the destruction of contracts on account of uncertainty, and 'the courts will, if possible, so construe the contract as to carry into effect the reasonable intent of the parties, if it can be ascertained." ' *Welsh v. N. Telecom, Inc.,* 85 N.C.App. 281, 290, 354 S.E.2d 746, 751 (1987) (quoting *Fisher v. John L. Roper Lumber Co.,* 183 N.C. 486, 490, 111 S.E. 857, 860 (1922)). Wherever possible, "courts should attempt to determine the intent of the parties from the language used, construed with reference to the circumstances surrounding the making of the contract." *Id.* (citing *Chew v. Leonard,* 228 N.C. 181, 44 S.E.2d 869 (1947)).

2.

ANALYSIS

a.

LEGAL SUFFICIENCY OF THE ALLEGED CONTRACT

{68} I conclude that I may determine the sufficiency of the disputed contract as a matter of law and that, contrary to Gateway's claim, the October 2004 exchange of correspondence between Carl Haynes and Brad Heard did not create a contract.

***10** {69} In its Complaints, Gateway asserts that the Haynes Memorandum committing Mullen/LHC to a $71.00 per-sheet non-cancelable price for insertion orders commencing in 2005, and the 7 October 2004 e-mail response by Brad Heard, Gateway's president, accepting these terms created a binding contract with nothing more to be negotiated by the parties. (Compl. 7255 ¶¶ 20-22; Compl. 15428 ¶¶ 21-23.) I disagree.

{70} For the purposes of analyzing the sufficiency of Gateway's breach of contract claim, the Court assumes (as Gateway alleges) that Haynes was authorized to commit Mullen/LHC to the terms in the Haynes Memorandum and that Gateway accepted those terms. Even so, however, these writings fall far short of a contract.

{71} On its face, the Haynes Memorandum refers to the parties moving "toward issuance of RJRT one-sheet contracts for 2005" before indicating that any such contracts will be predicated on a reduced $71.00 per-sheet rate and a guaranteed one-year term. (Compls.Ex. 3.)

{72} The Haynes Memorandum also makes clear, however, that any such contracts would "specify the market in which we are placing one-sheets."(Compls.Ex. 3.) Thus, while Haynes certainly presented the $71.00 rate in conjunction with an offer of a non-cancelable contract, and Gateway accepted

those terms, the parties negotiated nothing else.

{73} In North Carolina, "a contract, or offer to contract, leaving material portions open for future agreement is nugatory and void for indefiniteness [and, therefore,] 'a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations." ' *Boyce,* 285 N.C. at 733, 734, 208 S.E.2d 692, S.E.2d at 695 (quoting *Croom v. Goldsboro Lumber Co.,* 182 N.C. 217, 220, 108 S.E. 735, 737 (1921)).

{74} A party may not enforce a purported contract that omits the "nature and extent of the service to be performed, the place where, and the person to whom it is to be rendered, and the compensation to be paid,"*Croom,* 182 N.C. at 220, 108 S.E. at 737, or that fails to specify the quantity to be furnished.*Elks v. N.C. State Ins. Co.,* 159 N.C. 619, 626, 75 S.E. 808, 811 (1912); *see also Williamson v. Miller,* 231 N.C. 722, 58 S.E.2d 743 (1950) (dismissing complaint where the alleged contract for the sale of merchandise failed to provide for the sale and delivery of any specified quantity of the goods).

{75} The alleged contract in this case required Gateway to post one-sheet cigarette advertisements in or outside convenience stores throughout the United States. (Dep.Ex. 29.) Following their exchange of correspondence in early October 2004, the parties had reached agreement on only some of the material terms of the purported contract, that is, on a "unit" or "per-sheet" price, conditioned on a guaranteed one-year term. Even with that commitment in hand, however, Gateway could not perform in October 2004, because it had not yet reached agreement with Mullen/LHC as to, among other things, the number of one-sheets to be posted, the "issue months" for the postings, and their geographic locations.

***11** {76} Without agreement on these materials terms, the parties' purported commitment on 7 October 2004 to a fixed unit price and a guaranteed term was meaningless because " 'there would be no way by which the court could determine what sort of a contract the [future] negotiations would result in; [and] no rule by which the court could ascertain what damages, if any, might follow a refusal to enter into such future contract on the arrival of the time specified." ' *Boyce,* 285 N.C. at 734, 208 S.E.2d at 695 (quoting *Croom,* 182 N.C. at 220, 108 S.E. at 737).

{77} Mullen/LHC presented these additional material terms in the subsequent insertion orders that Gateway's president received in November 2004. Because the parties had not yet committed to a contract, however, Mullen/LHC was free to retract its earlier offer of a guaranteed one-year term, which it did by tendering its form insertion order containing the 60-day cancellation provision. Gateway's president clearly understood the significance of this omission when he called Haynes to inquire about it.

{78} For reasons I discuss later, the ensuing conversation between Heard and Haynes-wherein Haynes allegedly assured Gateway's president that this omission was inadvertent and that the parties agreement in fact included a guaranteed one-year term-provides a sufficient basis for Gateway to proceed on its claim alleging unfair and deceptive trade practices.

{79} As to Gateway's breach of contract claim, however, there simply was no contract between the parties following Gateway's receipt of the Haynes Memorandum and its 7 October 2004 e-mail response because the offer was too indefinite to bind the parties.

b.

RATIFICATION AND USE OF PAROL EVIDENCE

{80} Gateway also asserts that there is a genuine issue of material fact as to whether Mullen/LHC ultimately ratified a one-sheet contract for 2005 that included a one-year guaranteed term. (Pl.'s Reply Br. In Supp. of Mot. for Summ. J. Against Def. Mullen for Breach of Contract and Unfair or Deceptive Trade Practices 13-15, June 23, 2006.) The Court disagrees.

{81} Gateway's first contention is that RJRT's approval of non-cancelable contracts in or around December 2004 served as a ratification of the disputed contract by Mullen/LHC. (Pl.'s Reply Br. In Supp. of Mot. for Summ. J. Against Def. Mullen for Breach of Contract and Unfair or Deceptive Trade Practices 15, June 23, 2006.) This argument,

however, confuses both the undisputed facts regarding the relationship of the parties to this transaction and the law of ratification.

{82} Ratification occurs when:

[A] person with no authority whatsoever (or in excess of the limited authority given her) makes a contract as an agent for another or purports to do so. Upon discovery of the facts, the principal may ratify the contract, in which event it will be given the same effect as if the agent or purported agent had actually been authorized by the principal to make the contract prior to the making thereof.

***12** *Blanchard v. MBNA Am. Bank, N.A.*, 2005 U.S. Dist. LEXIS 18450, at *15, 2005 WL 1921000 (W.D.N.C. Aug. 9, 2005) (citing *Patterson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 266 N.C. 489, 146 S.E.2d 390 (1966)). On the other hand, " 'ratification is not possible unless the person making the contract, in doing so, purported to act as the agent of the person ... claimed to be the principal." ' *Inv. Props. of Asheville, Inc. v. Allen*, 283 N.C. 277, 288, 196 S.E.2d 262, 269 (1973) (quoting *Patterson*, 266 N.C. at 492-93, 146 S.E.2d at 393) (internal citation omitted) (ellipses in original).

{83} In this case, there is no dispute that Mullen/LHC was acting as agent for its disclosed principal, RJRT, and not the other way around.[FN12] Gateway's argument on ratification thus amounts to the legal equivalent of attempting to force a square peg into a round hole. In short, the fact that RJRT, as principal, may have approved a non-cancelable contract with Gateway for 2005 does not establish a ratification of that same contract by Mullen, as agent. None of the cases that Gateway relies on extend the law of ratification so far, and this Court sees no good reason to twist an otherwise coherent legal concept beyond all recognition.

> FN12. Mullen/LHC has not moved to dismiss the breach of contract claim on this basis. *See Baker v. Rushing*, 104 N.C.App. 240, 248, 409 S.E.2d 108, 112 (1991) (stating that "[a]n authorized agent who enters into a contract on behalf of a disclosed principal generally is not personally liable to third parties since the contract is with the principal.").

{84} Gateway next argues that the following "undisputed" facts establish Mullen/LHC's ratification of a non-cancelable contract purportedly executed by Haynes:

(1) Mullen negotiated with the one-sheet vendors, including Gateway, for a lower, non-cancelable rate of $71.00 for 2005; (2) Mullen issued insertion orders for 2005 to Gateway and the other vendors in early November 2004 at the $71.00 rate; (3) Immediately thereafter, Carl Haynes informed his supervisor at Mullen, Carol Sterling, that he (on behalf of Mullen) had promised the vendors that their contracts would be non-cancelable if they accepted the $71.00 rate, and Mullen never re-issued insertion orders for 2005 at a higher rate; (4) Gateway and the other vendors performed in 2005 at the lower $71.00 rate and were paid by Mullen at the lower $71.00 rate; (5) On January 21, 2005, Mullen informed a prospective replacement vendor that 'the space rate for non-cancelable orders is $71 gross per unit per month'... and (6) Mullen received bonus and incentive compensation from RJRT in 2005 as a result of reducing the rate from $74.00 to the non-cancelable rate of $71.00.

(Pl.'s Br. in Resp. to Def. Mullen's Mot. for Summ. J. 14-16, June 23, 2006.) The Court again disagrees.

{85} The first undisputed fact merely recounts the parties' negotiations in October 2004, which the Court has already determined did not result in a contract. Ratification presumes the existence of a contract (albeit an unauthorized one), and Gateway's assertion that preliminary negotiations can amount to ratification improperly places the ratification cart before the contract horse.

{86} The second and fourth undisputed facts say nothing about ratification and, in fact, ignore the plain language of the insertion orders allowing Mullen/LHC to cancel any uncompleted work on 60-days notice.

***13** {87} The fifth undisputed fact attempts to use Mullen/LHC's separate negotiations with other one-sheet vendors as a basis for ratification of Gateway's alleged contract. The sixth undisputed fact attempts to fashion a similar connection arising from Mullen's

compensation arrangement with its principal RJRT. While I agree with Gateway that a jury " 'may find ratification from any course of conduct on the part of the principal which reasonably tends to show an intention on his part to ratify the agent's unauthorized acts [,]"*Phillips v. Rest. Mgmt. of Carolina, L.P.*, 146 N.C.App. 203, 210, 552 S.E.2d 686, 691 (2001) (quoting *Brown v. Burlington Indus., Inc.*, 93 N.C.App. 431, 437, 378 S.E.2d 232, 236 (1989)), I find as a matter of law that Mullen/LHC's alleged conduct involving *other* contracts and parties does not reasonably allow for such a conclusion here.

{88} Finally, the third "undisputed" fact amounts to a claim that a jury should be allowed to consider parol evidence of the parties' true agreement regarding the 2005 One-Sheet Program.

{89} Generally, "[t]he parol evidence rule excludes prior or contemporaneous oral agreements which are inconsistent with a written contract if the written contract contains the complete agreement of the parties."*Tar River Cable TV, Inc. v. Standard Theatre Supply Co.*, 62 N.C.App. 61, 64-65, 302 S.E.2d 458, 460 (1983). The parol evidence rule, however, does not bar the admission of such evidence "to prove that a written contract was procured by fraud because 'the allegations of fraud challenge the validity of the contract itself, not the accuracy of its terms[.]" ' *Godfrey v. Res-Care, Inc.*, 165 N.C.App. 68, 598 S.E.2d 396, 403 (2004) (quoting *Fox v. S. Appliances, Inc.*, 264 N.C. 267, 270, 141 S.E.2d 522, 525 (1965)) (alteration in original).

{90} In response to Gateway's contention, Mullen/LHC asserts that the written insertion orders bar any claim that the agreement was non-cancelable for one year because they provide expressly for cancellation on 60-days notice and contain an integration or "merger" clause affirming that the documents are a complete statement of the contract terms. (Mullen's Resp. to Pl.'s Mot. for Summ. J. for Breach of Contract and Unfair or Deceptive Trade Practices 7-10, June 23, 2006.)

{91}"North Carolina recognizes that merger clauses are valid contractual provisions and the courts consistently uphold their use."*Mech. Sys. & Servs., Inc. v. Carolina Air Solutions, L.L.C.*, 2003 NCBC 9, at ¶ 25 (N.C.Super.Dec. 3, 2003) (citing *Zinn v. Walker*, 87 N.C.App. 325, 333, 361 S.E.2d 314, 318 (1987)).

{92} The primary purpose of a merger clause is "to effectuate the policies of the Parol Evidence Rule; i.e., barring the admission of prior and contemporaneous negotiations on terms inconsistent with the terms of the writing."*Zinn*, 87 N.C.App. at 333, 361 S.E.2d at 318.

{93} As Gateway notes, however, "[w]here giving effect to the merger clause would frustrate and distort the parties' true intentions and understanding regarding the contract, the clause will not be enforced."*Id.* For this exception to apply, however, "the parties' conduct [must indicate] their intentions to include collateral agreements or writings despite the existence of the merger clause and the parol evidence [must not be] *markedly different,* if at all, from the written contract...."*Id.* at 334, 361 S.E.2d at 319 (emphasis added).

***14** {94} The *Zinn* holding does not aid Gateway here. Taking the evidence in the light most favorable to Gateway, Haynes's promise of a guaranteed one-year term is completely at odds with the express terms of the written insertion orders allowing Mullen/LHC to cancel any uncompleted one-sheet postings on 60-days notice. Accordingly, the parol evidence rule bars Gateway's attempt to vary the terms of the paper writing.

{95} Finally, as the Court more fully explains in its discussion of Gateway's UDTPA claim, Gateway's complaint smacks of fraud in the inducement, which is a recognized exception to the parol evidence rule. However, " 'an action for fraud inducing the execution of a contract is not on the contract but in tort...." ' *Parker v. Bennett*, 32 N.C.App. 46, 50, 231 S.E.2d 10, 13, (1977) (internal citation omitted). Alternatively, fraud in the inducement can be asserted to rescind a contract or as a defense to a breach of contract claim, in which case the contract would be rendered void. *Fox*, 264 N.C. at 270, 141 S.E.2d at 525;*see also Godfrey*, 165 N.C.App. at 78, 598 S.E.2d at 403.

{96} In this case, Gateway has dismissed its fraud claim against Mullen and Haynes, leaving only its UDTPA claim, and Gateway clearly does not seek avoidance of the written insertion orders, but rather wants to admit evidence of oral statements, consistent

with its view of the "true" agreement. Because, however, this evidence would substitute a new and different agreement from the one memorialized by the parties in writing, it is barred by the parol evidence rule. *See* Neal v. Marrone, 239 N.C. 73, 78, 79 S.E.2d 239, 242 (1953).

{97} Accordingly, for the reasons set forth above, the Court GRANTS Mullen/LHC's motion for summary judgment as to Gateway's breach of contract claim.

D.

UNFAIR AND DECEPTIVE TRADE PRACTICES

{98} Both parties have moved for summary judgment as to Gateway's UDTPA claim. Because I conclude that there are genuine issues of material fact as to this claim, the Court will DENY the cross-motions.

1.

APPLICABLE LAW

{99} The elements of a UDTPA claim are "(1) defendant[ ] committed an unfair or deceptive act or practice, (2) in or affecting commerce and (3) plaintiff was injured as a result."*Phelps-Dickson Builders, L.L.C. v. Amerimann Partners,* 172 N.C.App. 427, 439, 617 S.E.2d 664, 671 (2005).

{100}"A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious[.]"*Marshall v. Miller,* 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981).

{101} As for the element of deception, "a plaintiff need not show fraud, bad faith, or actual deception. Instead, it is sufficient if a plaintiff shows that a defendant's acts possessed the tendency or capacity to mislead or created the likelihood of deception."*RD & J Props. v. Lauralea-Dilton Enters., LLC,* 165 N.C.App. 737, 748, 600 S.E.2d 492, 501-02 (2004)."In a business context, this question is determined based on the likely effect on 'the average businessperson.' " *Id.,* 600 S.E.2d at 502 (quoting *Bolton Corp. v. T.A. Loving Co.,* 94 N.C.App. 392, 412, 380 S.E.2d 796, 808 (1989)).

***15** {102} Although it is a question of fact whether the defendant performed the alleged acts, it is a question of law whether those facts constitute an unfair or deceptive trade practice. *First Atl. Mgmt., Corp. v. Dunlea Realty, Co.,* 131 N.C.App. 242, 252-53, 507 S.E.2d 56, 63 (1998).

{103}"It is well established[, however,] that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action [under the statute]."*Computer Decisions, Inc. v. Rouse Office Mgmt. of N.C., Inc.,* 124 N.C.App. 383, 390, 477 S.E.2d 262, 266 (1996). To sustain a cause of action, a plaintiff is required to allege and prove that "substantial aggravating circumstances" attended the breach. *Id.*

{104} Finally, when a UDTPA claim is based on alleged misrepresentations, the plaintiff must show that the misrepresentations complained of proximately caused it actual injury. *See Mosley & Mosley Builders, Inc. v. Landin Ltd.,* 97 N.C.App. 511, 517, 389 S.E.2d 576, 579 (1990); *Bartolomeo v. S.B. Thomas, Inc.,* 889 F.2d 530, 535 (4th Cir.1989). As to this issue, however, "whether plaintiffs' damages were the proximate result of defendants' actions is almost always a question of fact for the jury ."*Edwards v. West,* 128 N.C.App. 570, 575, 495 S.E.2d 920, 924 (1998).

2.

ANALYSIS

{105} Gateway catalogues a virtual "potpourri" of alleged misconduct by Mullen/LHC that it argues is sufficient to support its UDTPA claim. (*see* Br. in Supp. of Pl.'s Mot. for Summ. J. Against Def. Mullen for Breach of Contract and Unfair and Deceptive Trade Practices 25-27; Pl.'s Br. in Resp. to Def. Mullen's Mot. for Summ. J. 28-29.) For purposes of resolving the competing motions, however, the Court focuses on only one of these claims.

{106} According to Plaintiff's evidence, in or around 7 October 2004, Haynes promised Gateway's President that the 2005 one-sheet contract would be guaranteed for one year at a reduced rate of $71.00 per-sheet. (Compls.Ex. 3.) Haynes then later repeated that promise and commitment when Heard called to discuss its omission from the 2005 insertion orders,

(Brad Heard Aff. ¶ 38, June 19, 2006; Brad Heard Dep. 156:9-158:6, 160:5-17), and although Gateway apparently did not know it at the time, Mullen/LHC's principal later gave Mullen/LHC authority to execute a guaranteed contract, (Williard Dep. 337:13-25.) Finally, neither Haynes nor his superior made any effort to disavow Haynes's promise of a guaranteed one-year term. (Sterling Dep. 51:25-64:25, 67:2-8.)

{107} Mullen/LHC's evidence is that Haynes never made an unqualified commitment of a guaranteed term and that, in any event, Haynes knew he was not authorized to make such an offer when he did because RJRT had not given its approval. (Sterling Aff. ¶¶ 8-9; Slack. Dep. 257:12-15; Troutman Dep. 207:7-25, 218:20-219:6.)

{108} Gateway responds that Haynes either had such authority or falsely represented his bona fides when he committed Mullen/LHC to the one-year term and that Mullen/LHC did nothing to correct this misrepresentation. (Pl.'s Br. in Resp. to Def. Mullen's Mot. for Summ. J. 11-15, June 23, 2006.)

***16** {109} This factual dispute is both material and genuine. It is genuine because there is substantial evidence on either side of the issue. It is material because if, as Mullen/LHC asserts, Haynes lacked authority to commit to a guaranteed one-year term, and if, as Gateway insists, Haynes made the promise anyway, then Gateway's claim smacks of fraud in the inducement.

{110}"The essential elements of fraud [or, in this case, fraud in the inducement] are: '(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." ' *Rowan County Bd. of Educ. v. U.S. Gypsum Co.,* 332 N.C. 1, 17, 418 S.E.2d 648, 658 (1992) (quoting *Terry v. Terry,* 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981)).

{111} Although Gateway need not prove fraud to make out its UDTPA claim, *Edwards,* 128 N.C.App. at 574, 495 S.E.2d at 924, proof of fraud would necessarily constitute a UDTPA violation. *Bhatti v. Buckland,* 328 N.C. 240, 243, 400 S.E.2d 440, 442 (1991).

{112} Construing the disputed facts in the light most favorable to Gateway, Haynes's alleged conduct (and Mullen/LHC's ensuing silence) [FN13] may well have been fraudulent and was certainly unethical. At a minimum, it had the capacity or tendency to deceive, and Gateway's evidence is that-in reliance on Hayne's promises-Gateway was deceived into undertaking a host of commitments that it would not otherwise have made and also failed to pursue other business. (Pl.'s Br. in Resp. to Def. Mullen's Mot. for Summ. J. 28-29, June 23, 2006.)

> FN13. The court is aware that silence generally is not actionable as fraud unless there is a duty to speak, which in turn, arises from a relationship of trust, confidence, inequality of condition and knowledge, or other attendant circumstances. *Setzer v. Old Republic Life Ins. Co.,* 257 N.C. 396, 399, 126 S.E.2d 135, 137 (1962). Regardless, the critical question is whether Mullen/LHC's acts, taken as a whole, had a capacity or tendency to deceiver; Gateway need not prove all of the elements of common law fraud. *See generally Pierce v. Am. Defender Life Ins. Co.,* 316 N.C. 461, 470, 343 S.E.2d 174, 180 (1986).

{113} Mullen/LHC's retort that these facts allege at best a mere breach of contract misses the point. I agree with the views expressed in *Broussard v. Meineke Discount Muffler Shops, Inc.* that trial courts should keep "open-ended tort damages from distorting contractual relations" and must be vigilant against a party's attempt " 'to manufacture a tort dispute out of what is, at bottom, a simple breach of contract claim[,]" ' a practice that is " 'inconsistent both with North Carolina law and sound commercial practice." ' 155 F.3d 331, 346 (4th Cir.1998) (quoting *Strum v. Exxon Co.,* 15 F.3d 327, 329 (4th Cir.1994)).

{114} Nevertheless, in summoning *Broussard* for support, Mullen/LHC incorrectly focuses on its purported right to cancel the One-Sheet Program once the parties began performing in 2005. The factual crux of Gateway's UDTPA claim, however, centers on (a) Haynes's alleged misrepresentations during the parties' contract negotiations, when he induced Gateway to commit to the 2005 One-Sheet Program by reassuring Gateway's president that it was guaranteed a one-year term, all the while

knowing that he had no authority to make such a commitment; and (b) Mullen/LHC's failure to set the record straight.[FN14]These facts are sufficient to withstand Mullen/LHC's motion for summary judgment as to the UDTPA claim but, because they are disputed, Gateway also is not entitled to summary judgment. *See* *Phelps-Dickson Builders,* 172 N.C.App. at 439, 617 S.E.2d at 671 (reversing summary judgment for defendant on UDTPA claim where defendant's agent made oral misrepresentations that were inconsistent with the parties' written contract); *Process Components, Inc. v. Baltimore Aircoil Co., Inc.,* 89 N.C.App. 649, 654, 366 S.E.2d 907, 911 (1988) (holding that defendant-manufacturer's acts were sufficiently deceptive when defendant promised plaintiff an exclusive distributorship while defendant was still bound to an agreement with another distributor).

> FN14. Additionally, even if, as Mullen/LHC insists, the insertion orders purport to be the entire contract between the parties, Gateway would nevertheless be able to introduce parol evidence of Haynes's additional promise where such statements are offered to prove a UDTPA claim. *See* *Torrance v. AS & L Motors, Ltd.,* 119 N.C.App. 552, 554-55, 459 S.E.2d 67, 68 (1995).

***17** {115} Mullen/LHC's insistence that it did not authorize Haynes to act does not bar Gateway's claim. In the first place, there is a genuine factual dispute as to Haynes's apparent authority, an issue that the Court may not resolve on summary judgment.

{116} Apparent authority is defined as "that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses."*Zimmerman v. Hogg & Allen,* 286 N.C. 24, 31, 209 S.E.2d 795, 799 (1974). Moreover, an employer is liable for an agent's fraud when committed within the scope of an agent's apparent authority, "even though the principal did not know or authorize the commission of the fraudulent acts."*Norburn v. Mackie,* 262 N.C. 16, 23, 136 S.E.2d 279, 284-85 (1964).

{117}"[T]he determination of a principal's liability in any particular case must be determined by what authority the third person in the exercise of reasonable care was justified in believing that the principal had, under the circumstances conferred upon his agent."*Zimmerman,* 286 N.C. at 31, 209 S.E.2d at 799.

{118} This statement of the law answers Mullen/LHC's argument that Gateway could not reasonably have relied on Haynes's alleged misrepresentations in the face of written insertion orders stating expressly that its performance could be cancelled on 60-days notice. Whether a person exercised reasonable care is generally an issue of fact to be resolved by a jury. *Cf.* *Moore v. Crumpton,* 306 N.C. 618, 624, 295 S.E.2d 436, 440 (1982) (stating that "[e]ven where there is no dispute as to the essential facts, where reasonable people could differ with respect to whether a party acted with reasonable care, it ordinarily remains the province of the jury to apply the reasonable person standard.").

{119} Understandably, Mullen/LHC would like me to conclude that Gateway's reliance here was unreasonable as a matter of law. But, as our Supreme Court has noted:

> The law does not require a prudent man to deal with everyone as a rascal and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to a contract; [instead] there must be a reliance on the integrity of man or else trade and commerce could not prosper.... Just where reliance ceases to be reasonable and becomes such negligence and inattention that it will, as a matter of law, bar recovery ... is frequently very difficult to determine.... In close cases, however, we think that a [party to an action] ... should not be permitted to say in effect, 'You ought not to have trusted me. If you had not been so gullible, ignorant, or negligent, I could not have deceived you.'Courts should be very loath to deny an actually defrauded plaintiff relief on this ground.
>
> *Johnson v. Owens,* 263 N.C. 754, 758, 140 S.E.2d 311, 314 (1965) (internal citations and quotations omitted).

***18** {120} There is conflicting evidence as to Haynes's apparent authority to commit Mullen/LHC to a one-year guaranteed term for the 2005 One-Sheet Program, and consequently, there is a genuine issue

of material fact as to whether Gateway acted reasonably in relying on Haynes's alleged statements that Mullen/LHC had committed to such a guarantee. *See First Union Nat'l. Bank v. Brown,* 166 N.C.App. 519, 527-28, 603 S.E.2d 808 (2004) (stating that "the law of apparent authority usually depends upon the unique facts of each case.... [And where] the evidence is conflicting or susceptible to different reasonable inferences, the nature and extent of an agent's authority is a question of fact to be determined by the trier of fact.").[FN15]

> FN15. The Court acknowledges those cases barring UDTPA claims involving misrepresentations concerning the terms of a contract. *See, e.g., Spartan Leasing Inc. of N.C., v. Pollard,* 101 N.C.App. 450, 400 S.E.2d 476 (1991). I also recognize that persons executing written contracts have a duty to read them and ordinarily are charged with knowledge of their contents. *Id.* at 456, 400 S.E.2d at 479. In this case, however, I have found that a contract did not exist in October 2004, as contended by the Plaintiff. Moreover, the evidence, taken in the light most favorable to Gateway, is that its president inquired as to the omission in the insertion orders regarding the guaranteed one-year term and was assured by Mullen/LHC's agent that it was an administrative error. Given that Gateway did not have a direct contractual relationship with RJRT, the ultimate beneficiary of its services, but instead relied on Mullen/LHC to advise it as to the scope of its performance of the One-Sheet Program, it is for a jury to decide whether Gateway acted reasonably.

{121} Accordingly, the Court DENIES the parties' cross-motions for summary judgment as to Gateway's UDTPA claim.

E.

DAMAGES FOR DIMINUTION IN BUSINESS VALUE

{122} Mullen/LHC has also moved for summary judgment as to the proper measure of damages, arguing that Gateway has improperly attempted to expand the scope of damages to include recovery of almost $14.5 million arising from the alleged diminution in value of Gateway's business.

{123} Gateway responds that such damages are recoverable under the facts of this case and has moved to supplement the record with testimony given by Mullen/LHC's expert in other cases to prove the point.

{124} I conclude that damages for diminution in Gateway's business value are not recoverable in this case and, therefore, will GRANT Mullen/LHC's motion and DENY Gateway's motion to supplement the record.

{125} As noted earlier, Gateway's UDTPA claim is essentially a claim alleging fraud in the inducement. According to our Supreme Court, "[t]he measure of damages for fraud in the inducement of a contract is the difference between the value of what was received and the value of what was promised, and is potentially trebled by N.C.G.S. § 75-16."*River Burch Assocs. v. City of Raleigh,* 326 N.C. 100, 130, 388 S.E.2d 538, 556 (1990) (internal citation omitted).

{126} In this case, that measure of damages is the difference between Gateway's expected profit had it been allowed to perform for the full year and the amount Gateway was actually paid before being terminated in February 2005, with any such award potentially trebled. *See Horne v. Cloninger,* 256 N.C. 102, 104, 123 S.E.2d 112, 113 (1961) ("The jury, having established the fraud, should have awarded as damages the difference between the actual value and the value if the [property] had been as represented.").

{127} The Court declines Gateway's invitation to expand the scope of damages beyond the rule announced in *Horne.*Gateway relies on *Pleasant Valley Promenade v. Lechmere, Inc.,* 120 N.C.App. 650, 464 S.E.2d 47 (1995) as authority for pursuing "diminution in business value" damages. That decision, however, does not support such a result here.

***19** {128} In *Pleasant Valley Promenade,* the plaintiff limited partnership operated a shopping center that included a department store chain, defendant Lechmere, Inc., ("Lechmere"), as its anchor store tenant. Although Lechmere owned the

property upon which it operated its business, it was bound by a restrictive covenant with the shopping center developer to operate its store for seven years. Lechmere, however, closed the store after only two years of operation and thereafter leased the space to a discount pharmacy chain.*Id.* at 654-55, 464 S.E.2d at 52-53.

{129} Plaintiff in that case alleged claims for breach of contract, fraud, and unfair and deceptive trade practices. The trial court granted a partial directed verdict on plaintiff's fraud and UDTPA claims and set aside the jury's verdict of $8 million on the breach of contract claim. *Id.* at 655, 464 S.E.2d at 53.

{130} The resulting cross-appeals raised a host of issues, including the proper scope of damages for the breach of contract claim. The precise question before the Court of Appeals was "whether diminished market value is recoverable in a breach of contract action arising out of an anchor store's breach of covenants with the shopping center in which it resides."*Id.* at 666, 464 S.E.2d at 59.

{131} As to that question, our Court of Appeals expressed the general rule that " 'for a breach of contract the injured party is entitled as compensation therefor to be placed, insofar as this can be done by money, in the same position he would have occupied if the contract had been performed." ' *Id.* at 665, 464 S.E.2d at 59 (quoting *First Union Nat'l Bank of N.C. v. Naylor*, 102 N.C.App. 719, 725, 404 S.E.2d 161, 164 (1991)).

{132} To that end, the Court agreed with the views of other courts that diminished market value may be an appropriate measure of contractual damages measure where the harm suffered will not otherwise be fully compensated. *Id.* at 667,464 S.E.2d 47, 464 S.E.2d at 60 (citing *United Roasters, Inc., v. Colgate-Pamolive Co.*, 649 F.2d 985 (4th Cir.1981)).

{133} But the specific holding in *Pleasant Valley Promenade* was very narrow, i.e., that "diminution in market value may be applied to redress breach of contract occurring between an anchor store and the shopping center in which it resides[.]"*Id.* at 671, 464 S.E.2d at 62. According to the Court of Appeals, recovery of diminution in business value damages is particularly appropriate in such a context because of the cooperative enterprise that is a shopping center, "with each store's success dependent on the continued operation of the other stores ...." and the critical role of the anchor store in the financial success of the entire shopping center. *Id.* (quoting *Dover Shopping Ctr., Inc. v. Cushman's Sons, Inc.*, 63 N.J.Super. 384, 164 A.2d 785, 790 (N.J.Super.Ct.App.Div.1960)). As the Court of Appeals explained:

The function of the anchor is to provide certainty of income stream, an identity and stability for the center which, in turn, draws customers, attracts other tenants and increases overall sales. Further, without an anchor store long-term financing is virtually impossible to obtain. Therefore, the anchor's loss has been described as worse than a flood, fire or tornado, because usually there is insurance to cover natural disasters.

***20** *Id.* at 670,464 S.E.2d 47, 464 S.E.2d at 61 (internal citations and quotations omitted).

{134} The case before me does not mirror the unique harm caused by a defendant who executes a seven-year covenant to operate its business as the anchor tenant for a shopping center, and then abandons the center less than two years later. Rather, the facts here involve a corporate entity spun off from its predecessor, whose sole *raison d'être* was to manage a single line of business pursuant to annual contracts that, taken in the light most favorable to Gateway, guaranteed a revenue stream for only one year.

{135} I acknowledge that unfair and deceptive trade practices and unfair competition claims are neither wholly tortious nor wholly contractual in nature and the measure of damages is broader than common law actions. *Bernard v. Cent. Carolina Truck Sales, Inc.*, 68 N.C.App. 228, 230, 232, 314 S.E.2d 582, 584-85 (1984). Nevertheless, a diminution in business value theory of damages has no place here. As the Eleventh Circuit held on facts remarkably similar to those before me, where a plaintiff business elects to serve one client and is "a creature of the contract" with that client, the business has value only to the extent that the client chooses to renew the contract. *Mark Seitman & Assocs., Inc., v. R.J. Reynolds Tobacco Co.*, 837 F.2d 1527, 1532 n. 7 (11th Cir.1988).

{136} The Court has already determined that Gateway's claim for breach of contract fails, and that the damage to Gateway, if any, arises, not from any

alleged contractual breach, but as a result of the alleged actions of Mullen/LHC's agent in fraudulently inducing Gateway to perform.

{137} Except by virtue of the statutory trebling of damages that arises from these facts, however, Gateway's actual damages are the same whether the case proceeds as a contract action or as a UDTPA claim. That is, Gateway is entitled to recover the difference between the value of what was received (i.e., the profits earned and paid before Gateway's termination) and the value of what was promised (i.e., the profits Gateway would have earned for the full year).

{138} Gateway concedes that Mullen/LHC was not obligated to retain it as a one-sheet vendor beyond 2005. (Brad Heard Dep. 225:14-20; Guldner Dep. 191:19-25.) Moreover, Gateway came to life following a business decision by its predecessor, Gateway Outdoor Advertising, Inc., at the request of its lender, to fragment its revenue stream to facilitate access to capital. (Craig Heard Aff. ¶¶ 1, 4-5, Apr. 5, 2006.) To then claim that a three-year-old company with revenues tied almost exclusively to a single client suffered almost $14.5 million in diminution in business value damages, in addition to over $3 million in lost profits, following a decision to terminate an alleged one-year contract is, I conclude, unbounded speculation.

{139} Moreover, although couched as a figure purporting to assess Gateway's diminished business value, Gateway's damages calculation is nothing more than an estimate of its lost profits for the years ending 2006-2010, discounted to their present value. North Carolina courts, however, "have long held that damages for lost profits will not be awarded based upon hypothetical or speculative forecasts of losses."*Iron Steamer, Ltd. v. Trinity Rest., Inc.*, 110 N.C.App. 843, 847, 431 S.E.2d 767, 770 (1993).

***21** {140} In this case, Gateway's calculation of diminished business value damages is based on two assumptions. The first, that Mullen/LHC would renew the one-sheet contract for 2006 and beyond, is unfounded given the facts, and the second, that Gateway would have been able to solicit a comparable level of business with more notice of its eventual termination, is speculative given that Gateway had no established history of profits from clients other than Mullen/LHC. *See generally* *Old Well Water Inc., v. Collegiate Distrib. Inc.*, 2002 N.C.App. LEXIS 1939, at *12, 2002 WL 1315395 (N.C. Ct.App. June 18, 2002) (affirming dismissal of a claim for lost profits where plaintiff was a new business with no history of established profits and the evidence of projected profits was speculative).

{141} And while it is true that North Carolina has no *per se* rule that precludes an award of damages for lost profits where a business has no recent record of profitability, such businesses, like established businesses, must prove lost profits with reasonable certainty. *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 546, 356 S.E.2d 578, 585 (1987). Put another way, the plaintiff must show "that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty."*Id.* at 547-48, 356 S.E.2d at 586.

{142} In this case, Gateway had no expectation of serving as a one-sheet vendor beyond 2005, and Gateway has presented no evidence to show that a company created for the sole purpose of managing a single line of business could, in fact, diversify its operations so as to generate future revenues equivalent to those lost by the termination of its relationship with its only client.

{143} Accordingly, because Gateway's estimate regarding "diminution in business value" damages is based on assumptions that are either unfounded or purely speculative, the Court GRANTS Mullen/LHC's motion for summary judgment as to this issue and will exclude any evidence of "diminution in business value" damages.

{144} Also before the Court is Gateway's motion for further supplementation as to the damages issue. Gateway seeks to submit the deposition testimony of Mullen/LHC's expert, given in other cases, wherein he purportedly agreed that "diminution in business value" damages are an appropriate measure of damages.

{145} In light of my ruling above, this issue is moot. Regardless, in determining the proper measure of damages, the Court cares not what an expert thinks, but only what North Carolina law provides. Accordingly, the Court DENIES Gateway's motion to

supplement.

F.

UNASSERTED DEFENSE

{146} Finally, Gateway moves for judgment as a matter of law to prevent Mullen/LHC from defending against Gateway's breach of contract and unfair and deceptive trade practices claims on the basis of the allegedly unlawful "consulting" payments made by Gateway to Haynes.

***22** {147} Gateway argues, among other things, that Mullen/LHC has waived the matter by failing to plead it as an affirmative defense or, alternatively, by entering into the 2005 contract with Gateway with full knowledge of the allegedly improper payments. (Br. in Supp. of Pl.'s Mot. for Summ. J. Regarding Proposed but Unasserted Defense of Def. Mullen 10-11, May 31, 2006.)

{148} Mullen/LHC responds that Gateway's payments to Haynes were in fact "kickbacks" that provided independent grounds to terminate the one-year contract (if one existed) regardless of whether the payments were pled as an affirmative defense. (Mullen's Resp. to Mot. for Summ. J. Regarding "Unasserted Defense" 6, June 23, 2006.)

{149} The Court DENIES Gateway's motion. In the first place, whether the alleged kickbacks provided sufficient grounds to terminate the contract is moot, as I have dismissed Gateway's breach of contract claim.

{150} Second, it is unclear whether the alleged kickbacks would be an affirmative defense to Haynes's alleged misrepresentation that the 2005 insertion orders were guaranteed for a full year, given the disputed facts as to the nature of the payments and the relative knowledge of the parties. Regardless, because Mullen/LHC has not asserted the kickbacks as an affirmative defense to any claim, I decline to address it on summary judgment but do not foreclose further consideration of the issue at trial.

CONCLUSION

{151} Based upon the foregoing, the Court:

(a) GRANTS Mullen Advertising's motion to dismiss all claims in 05 CVS 7255;

(b) DENIES Gateway's Motion for Summary Judgment as to its claim for breach of contract;

(c) GRANTS Mullen/LHC's Motion for Summary Judgment as to Gateway's claim for breach of contract;

(d) DENIES the parties' cross-motions for summary judgment as to Gateway's claim alleging Unfair and Deceptive Trade Practices;

(e) GRANTS Mullen/LHC's Motion for Partial Summary Judgment and Other Relief Regarding Damages for "Diminution in Business Value" and also GRANTS Mullen/LHC's separate motion to exclude any expert testimony as to this issue;

(f) DENIES Gateway's Motion for Leave to Submit Additional Materials in Opposition to Defendants' Motion for Partial Summary Judgment and Other Relief Regarding Damages for "Diminution in Business Value;" and,

(g) DENIES Gateway's Motion for Summary Judgment Regarding Proposed but Unasserted Defense.

N.C.Super.,2007.
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Not Reported in S.E.2d, 2007 WL 2570175 (N.C.Super.), 2007 NCBC 1

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HGarlock v. Hilliard
N.C.Super.,2000.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of North Carolina, Mecklenburg County,
Business Court.
Tammy L. GARLOCK, Judith L. Jacobs and Ralph W. Johnson, individually and on behalf of Southeastern Gas & Power, Inc., a North Carolina corporation, Plaintiffs,
v.
Aubrey L. HILLIARD, Southeastern Gas & Power, Inc., and Seg & P, LLC, a North Carolina limited liability company, Defendants.
No. 00-CVS-1018.

Aug. 22, 2000.

{1} This matter comes before the Court on cross motions seeking dismissal pursuant to 12(b)(6) of the North Carolina Rules of Civil Procedure.[FN1] At issue are the prerequisites to filing a shareholder derivative action, the application of the unfair trade practices statute in the context of both the employment relationship and the formation of corporations, and the requirements for pleading fraud with particularity. For the reasons stated below the Court holds that: 1) Plaintiffs lack standing to assert derivatives claims and such claims are dismissed; 2) Plaintiffs' UDTP claim and civil conspiracy claims are inapplicable to Plaintiffs' dealings with Defendant Hilliard and are also dismissed; 3) Defendants' claims for fraud are pled with sufficient particularity to survive a motion to dismiss; however, 4) Defendants' negligence claims are an impermissible attempt to convert a contract claim into a tort action and are dismissed.

FN1. The Court notes Defendant Hilliard's claim that Plaintiffs' motion to dismiss is untimely. While technically true, N.C. R. Civ. P. 12(g) and 12(h)(2) provides that failure to state a claim upon which relief can be granted may be raised on a motion for judgment on the pleadings or at the trial on the merits. Consequently Plaintiffs could raise their failure to state a claim defense through a motion for judgment on the pleadings, and the court will treat Plaintiffs' motion as such.

The Bishop Law Firm by J. Daniel Bishop, A. Todd Capitano and D. Christopher Osborn, for Plaintiffs.
Rayburn, Moon & Smith, P.A. by James B. Gatehouse and C. Richard Rayburn, Jr., for Defendants Southeastern Gas & Power, Inc. and SEG & P, LLC.
Moore & Van Allen, P.L.L.C. by Karin M. McGinnis and Scott Tyler, for Defendant Aubrey L. Hilliard.

ORDER AND OPINION

BEN F. TENNILLE, Special Superior Court Judge for Complex Business Cases.

Factual Background

***1** {2} Aubrey L Hilliard ("Hilliard"), Tammy L. Garlock ("Garlock"), Judith L. Jacobs ("Jacobs") and Ralph W. Johnson ("Johnson") are all the shareholders of Southeastern Gas & Power, Inc. ("Southeastern"). Hilliard owns sixty-one percent of the outstanding stock, and the other three shareholders own thirty-nine percent. Hilliard is the sole director of Southeastern. SEG & P, LLC is owned entirely by Hilliard

{3} Southeastern is in the business of marketing and distributing gas. Prior to the formation of Southeastern, Plaintiffs and Hilliard worked together at a company engaged in a similar business. In late 1997 all parties left their employment to form Southeastern and all of them became employed by Southeastern. Hilliard handled sales, Johnson finances, and Garlock and Jacobs operations. Hilliard was issued a majority ownership interest because he had the customer contacts. All the parties agree that an oral agreement was entered into covering the manner in which all the shareholders would be compensated by Southeastern. It is also undisputed that the original agreement was amended to reallocate Southeastern's profits.

{4} Prior to the formation of Southeastern, Hilliard disclosed to Plaintiffs that he entered into a plea bargain in connection with a federal income tax based prosecution. Plaintiffs contend that Hilliard failed to disclose certain key facts in connection with that plea bargain, the omission of which gives rise, in part, to their claim for fraudulent inducement.

{5} Hilliard's plea bargain resulted in his spending over eight months in prison. Plaintiffs claim that during that period the oral agreement covering compensation was amended to reallocate more income to them based upon the unexpected length of Hilliard's incarceration and the increased amount of work required during his absence. Although the correct implementation of that reallocation agreement is disputed, the pleadings of both Plaintiffs and Hilliard agree on the essential terms of the original contract as well as the subsequent oral agreement. (Pls.' Compl. at 2, 4, 5; Def. Hilliard Mot. Dismiss, Answer, Countercl. at 6, 8, 9.)

{6} Following his release from prison, Hilliard asserted his majority control. As a result all three plaintiffs were either fired or quit their employment with Southeastern. Hilliard also formed a separate company, SEP & G, LLC ("SEG & P"). Plaintiffs assert that it was formed to divert business from Southeastern and as such represented usurpation of corporate opportunity, waste of corporate assets and conflict of interest on the part of Hilliard. Hilliard contends that SEG & P was never activated and has not functioned in any way to compete with Southeastern.

{7} Plaintiffs contend that after Hilliard returned from prison he did not properly allocate Southeastern's profits and that Southeastern owes them additional compensation under the amended reallocation agreement.

***2** {8} After their employment terminated, Plaintiffs filed this action. At its core, this is an action for dissolution of the corporation under N.C.G.S. § 55-14-30(2)(ii). In addition, Plaintiffs seek to recover compensation allegedly due them under the oral compensation agreement, as well as for fraud. Defendants contend that Plaintiffs conspired to improperly allocate the corporation's profits while Hilliard was in prison.

{9} Pertinent to Southeastern's motion to dismiss are Plaintiffs' third (usurpation of corporate opportunity), fourth (misappropriation/waste of corporate assets), fifth (director self interest), tenth (unfair and deceptive trade practices) and eleventh (civil conspiracy) claims for relief. Plaintiffs also seek to amend the complaint to add a twelfth claim for relief (breach of fiduciary duty). To the extent that each of those claims for relief is cast as a shareholder derivative claim, Southeastern seeks dismissal for Plaintiffs' failure to make proper and timely demand and Plaintiffs' inability to fairly and accurately represent the interests of the corporation due to their own conflicts of interest.

{10} Defendant Hilliard has moved to dismiss the eighth (state securities fraud), tenth (Unfair and Deceptive Trade Practices Act ("UDTPA")) and eleventh (civil conspiracy) claims for relief for failure to state claims pursuant to Rule 12(b)(6). Defendant Hilliard alleges that (1) state securities fraud is barred by the statute of limitations; (2) the UDTPA is not applicable to Plaintiffs as employees or as holders or purchasers of securities; and (3) the "intracorporate conspiracy doctrine" prevents finding civil conspiracy between a corporation (SEG & P) and its agent (Hilliard).

{11} Plaintiffs took a voluntary dismissal of the eighth claim for relief. Plaintiffs filed their motion to dismiss Defendant Hilliard's first (misrepresentation), second (fraud), third (conversion), fourth (breach of duty) and fifth (negligence) claims for relief. Plaintiffs allege that Hilliard's first four claims for relief are based on fraud which Hilliard failed to plead with particularity pursuant to N.C. R. Civ. P. 9(b). Plaintiffs move to dismiss Hilliard's negligence claim based on Hilliard's absence of standing or privity.

{12} Plaintiff seeks dismissal of Southeastern's second (fraud), third (negligence), fourth (negligent misrepresentation) and sixth (accounting/constructive trust) claims for relief. Plaintiff alleges all above-named claims for relief sound in fraud and are not pled with particularity as required by N.C. R. Civ. P. 9(b). Alternatively, Plaintiffs claim the "economic loss rule" bars Southeastern's negligence claim.

II.

Motion to Dismiss Plaintiff's Claims

{13} When ruling on a motion to dismiss under Rule 12(b)(6), the court must determine "whether, as a matter of law, the allegations of the complaint ... are sufficient to state a claim upon which relief may be granted."*Harris v. NCNB,* 85 N.C.App. 669, 670, 355 S.E.2d 838, 840 (1987). In ruling on a motion to dismiss, the court must treat the allegations in the complaint as true. *See* *Hyde v. Abbott Lab., Inc.,* 123 N.C.App. 572, 473 S.E.2d 680, 682 (1996). The court must construe the complaint liberally and must not dismiss the complaint unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *See id.*When considering a motion under Rule 12(b)(6), the court is not required to accept as true any conclusions of law or unwarranted deductions of fact in the complaint. *Sutter v. Duke,* 277 N.C. 94, 176 S.E.2d 161 (1970). When the complaint fails to allege the substantive elements of some legally cognizable claim, or where it alleges facts which defeat any claim, the complaint should be dismissed under Rule 12(b)(6).*See* *Hudson Cole Dev. Corp. v. Beemer,* 132 N.C.App. 341, 511 S.E.2d 309 (1999). When applying this standard, it must be kept in mind that when fraud is alleged, the circumstances constituting fraud must be pled with particularity. N.C. R. Civ. P. 9(b).*See also* *Terry v. Terry,* 302 N.C. 77, 273 S.E.2d 674 (1981).

A.

Plaintiffs' Derivative Claims

***3** {14} Central to Plaintiffs' derivative claim on behalf of Southeastern is the application of N.C.G.S. § 55-7-42 which provides:

No shareholder may commence a derivative proceeding until:

1. A written demand has been made upon the corporation to take suitable action; and

2. 90 days have expired from the date the demand was made unless, prior to the expiration of the 90 days, the shareholder was notified that the corporation rejected the demand, or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.

In applying the demand requirement, this Court has previously held:

In determining whether the demand requirement has been met the Court must compare the derivative claims asserted in a complaint against the specific demands a plaintiff has made prior to filing suit. The demand must be made with sufficient clarity and particularity to permit the corporation, through independent directors or an outside advisory committee, to assess its rights and obligations and determine what action is in the best interest of the company.

Greene v. Shoemaker, 1998 NCBC 4 at 18 (No. 97 CVS 2118, Wilkes County Super. Ct. September 24, 1998) (Tennille, J.).

{15} In this case, the only written pre-complaint demand was contained in a letter dated October 11, 1999 from Plaintiffs' counsel to C. Wells Hall, III, who at the time represented both Hilliard and Southeastern. (*See* Compl., Ex. A.) That letter made no specific demand and did not request that the Board of Directors take any action or bring any lawsuit. That letter simply questioned the rationale for the formation of SEP & G, LLP by Hilliard. Mr. Hall previously wrote Mr. Bishop and stated that SEP & G, LLP would not be "activated." Mr. Bishop's letter made no mention of a derivative action nor did it demand that Southeastern pursue any of the claims against Hilliard currently asserted as derivative claims. That letter did not contain a demand of sufficient clarity and particularity to permit the corporation's Board of Directors to assess its rights and obligations.

{16} It was not until the same day the complaint was filed that a formal demand letter was sent requesting that the company "take appropriate action to obtain all relief sought derivatively on behalf of Southeastern in the complaint."(*See* Compl., Ex. C .) A written demand sent simultaneously with the filing of a complaint does not meet the demand requirements of the statute, nor may a complaint serve as the written demand. The statute clearly provides that a written demand is a prerequisite to filing suit:

To hold that the filing of a complaint, which was itself subject to dismissal for failure to meet the demand requirement, can satisfy the demand requirement would defeat the purpose of the statute. The statutory scheme was designed to give the Board of Directors the opportunity and obligation to review the claims before the corporation was required to incur the fees and expenses associated with litigation.

***4** *Greene v. Shoemaker,* 1998 NCBC 4 at 20 (No. 97 CVS 2118, Wilkes County Super. Ct. September 24, 1998) (Tennille, J.).

{17} Plaintiffs seek to distinguish this case from *Greene* on the basis that Hilliard was the sole director and majority shareholder. Those facts do not distinguish this case from *Greene* .Similarly, in *Greene,* the defendants controlled the Board of Directors. The Court made it clear in *Greene* that the futility exception had been eliminated from the statute and that the proper procedure was to make demand and, if the facts warranted, move the Court to shorten the period of time within which the corporation had to act. *Id.* at 19-22.The statutory scheme is designed to place the initial burden on the Board of Directors to act and to place the courts in the position of reviewing the actions of the Board under the business judgment rule.

{18} Plaintiffs argue that they sent a written demand with the complaint attached, that ninety days have now passed without Board action, and therefore the complaint should not be dismissed. To give effect to such an argument would defeat the purpose of the statutory scheme which insures the Board has a chance to fulfill its duties before the corporation incurs legal expenses or the litigation escalates into counterclaims and cross claims as it has in this case. By personally selecting themselves as representatives of the company, they have deprived the company of the opportunity to select independent persons to make the objective business decisions required under the circumstances. The statutory scheme permits the directors to act on the claims or select an independent party to act for them if they have a conflict. Here both Plaintiffs and Hilliard have conflicting interests. An independent advisory committee could have been appointed to decide what claims the company should pursue and against which parties. That was the result in *Greene* and could have been the result in this case if demand had been made properly.

{19} For the reasons set forth above the Court finds that the third (usurpation of corporate opportunity), fourth (misappropriation/waste of corporate assets), fifth (director self interest), tenth (unfair and deceptive trade practices) and eleventh (civil conspiracy) claims for relief are dismissed for failure to make proper demand as required by the statute. Since the civil conspiracy claim is a derivative claim and therefore dismissed, it is not necessary for the Court to determine the questions raised about intracorporate conspiracy.

{20} Plaintiffs also moved to amend to add a twelfth claim for relief for breach of fiduciary duty, also a derivative claim. Plaintiffs failed to make proper demand upon the corporation to take action on that claim, and therefore the twelfth claim for relief would be subject to dismissal. The twelfth claim for relief would also be moot based upon the representation of Defendants' counsel that SEP & G, LLC never became an active corporation. Accordingly, the motion to amend to add the twelfth claim for relief is denied based upon futility.

B.

Plaintiffs' UDTPA Claim

***5** {21} Plaintiffs' tenth claim for relief for UDTPA is unclear. Paragraph 109 of Plaintiffs' complaint states that “Hilliard's conduct as alleged constitutes violation of N.C.G.S. § 75-1.1, by which plaintiffs have been damaged individually, and by which Southeastern has been damaged, in amounts exceeding $10,000.”“Hilliard's conduct” is said to refer to all the preceding allegations in the complaint.

{22} To the extent the tenth claim for relief is a derivative claim seeking damages for Southeastern it is subject to dismissal for the reasons stated above.

{23} In order to state a claim for unfair and deceptive trade practices, plaintiff must allege facts supporting a finding that (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. *See Pleasant Valley Promenade v. Lechmere, Inc.,* 120

N.C.App. 650, 464 S.E.2d 47 (1995).

{24} Central to Plaintiffs' nonderivative UDTPA claim against Hilliard is determining what actions between Plaintiffs and Hilliard are *not* protected by the UDTPA. The action must be "in or affecting commerce." *Id.* The North Carolina courts have consistently held that the provisions of the UDTPA do not apply to securities transactions. *See* *Oberlin Capital, L.P. v. Slavin,* 2000 NCBC 6 at 34-36 (No. 99 CVS 03447, Wake County Super. Ct. April 28, 2000) (Tennille, J.) and the cases cited therein. Further, in *HAJMM Co. v. House of Raeford Farms,* 328 N.C. 578, 403 S.E.2d 483 (1991), the Supreme Court held that where the purpose of a transaction was not part of an entity's business activities but to raise capital or organize the business, the UDTPA did not apply. The decision by Plaintiffs and Hilliard to form Southeastern constituted a securities transaction and an activity to raise capital and organize the business and was not part of Southeastern's daily business activities. Accordingly, there is no purchase and sale transaction to which Chapter 75 would apply. *See also* *Sara Lee Corp. v. Carter,* 351 N.C. 27, 31-33, 519 S.E.2d 308, 311-12 (1999). Therefore, to the extent that this claim is an individual claim based upon the alleged misrepresentations by Hilliard in connection with the formation or organization of Southeastern it fails to state a claim upon which relief may be granted.

C.

Plaintiffs' Civil Conspiracy Claim Against Hilliard

{25} Plaintiffs allege that Hilliard and SEG & P conspired to harm Southeastern and Plaintiffs. Plaintiffs further seek to amend their complaint to allege that "Hilliard acted in his individual capacity, seeking to serve his personal, corrupt financial interest to unlawfully deprive plaintiffs of the value of their interest in Southeastern."The amendment is sought to overcome the limitations of the intracorporate immunity doctrine.

{26} The Fourth Circuit recognized the doctrine of intracorporate immunity in *Buschi v. Kirven,* 775 F.2d 1240, 1252 (4th Cir.1985). The doctrine holds that, since at least two persons must be present to form a conspiracy, a corporation cannot conspire with itself, just as an individual cannot conspire with himself. *Id.* Alleging that a corporation is conspiring with its agents, officers or employees is accusing a corporation of conspiring with itself.*Id.* The grant of immunity is not destroyed by suing the agent in his individual capacity. *Id.* Therefore, the unamended complaint for civil conspiracy is dismissed for failure to state a claim for which relief can be granted.

***6** {27} An exception to the doctrine of intracorporate immunity exists if the agent of the corporation has an "independent personal stake in achieving the corporation's illegal objective."*Buschi v. Kirven,* 775 F.2d at 1252,*citing* *Greenville Publishing Co., v. Daley Reflector, Inc.,* 496 F.2d 391, 399 (4th Cir.1974). Plaintiff's proposed amendment does not save the civil conspiracy claim. The court in *Selman v. American Sports Underwriters, Inc.,* 697 F. Supp 225, 238 (E.D.Va.1988) stated it well:

[T]his "independent personal stake" exception must not be interpreted in too broad a manner or it will consume the entire intracorporate immunity doctrine. Certainly, under the most permissive interpretation of its language, an employee or agent of a corporation would always meet the exception since he would surely have an independent personal stake in the health and profitability of the corporation. Such an interpretation is overbroad. Instead, this court will follow the Fourth Circuit's implicit suggestion that the exception was meant to apply to facts such as those of *Greenville Publishing,* 496 F.2d at 400.Here, the conspirator gained a direct personal benefit from the conspiracy, a benefit wholly separable from the more general and indirect corporate benefit always present under the circumstances surrounding virtually any alleged corporate conspiracy.

{28} The facts at bar indicate that the only benefit accruing to Hilliard are the benefits directly associated with the profitability of SEG & P. This type of personal stake is insufficient to plead civil conspiracy. Therefore, Plaintiffs' motion to amend complaint as to its eleventh claim for relief is denied.

II.

Motion to Dismiss Defendants' Claims

{29} Rule 9(b) of the North Carolina Rules of Civil Procedure requires that "[i]n all averments of fraud or

mistake, the circumstances constituting fraud or mistake shall be stated with particularity."The Supreme Court states it as follows:

[I]n pleading actual fraud the 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. A constructive fraud claim requires even less particularity because it is based on a confidential relationship rather than specific misrepresentation. The very nature of constructive fraud defies specific and concise allegations and the particularity requirement may be met by alleging 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 [plaintiff] is alleged to have taken advantage of his position of trust to the hurt of [defendant]."

Terry v. Terry, 302 N.C. 77, 85, 273 S.E.2d 674, 679 (1981) (quoting *Rhodes v. Jones,* 232 N.C. 547, 548-49, 61 S.E.2d 725, 725)).

A.

Southeastern's and Hilliard's Fraud Claims

***7** {30} In the instant case both Southeastern and Hilliard allege that Plaintiff Johnson (1) *at all times* from the formation of Southeastern until December 1999 calculated compensation and allocation of earnings; (2) did so as a part of *his activities at Southeastern;* and (3) *overstated* revenues, *decreased* expenses allocable to plaintiffs and failed to allocate some expenses. These allegations are adequate to state the time, place and content of the fraudulent representation as to Johnson. Therefore, Plaintiffs' motion to dismiss the fraud-related claims against Johnson is denied.

{31} As to the fraud counterclaims against Garlock and Jacobs, Southeastern has alleged that Garlock and Jacobs owed fiduciary duties to Southeastern as officers and employees of the corporation and that in their position as officers Garlock and Jacobs "accepted this increased compensation with full knowledge of the fraudulent ... records."(Southeastern's Answer at 20.) Further, Southeastern alleges that it was harmed financially as a result of the fraudulent accounting. These allegations by Southeastern satisfy the requirements for pleading constructive fraud because 1) as officers of Southeastern, Plaintiffs owed fiduciary duties to the corporation and were in a position of trust and confidence with the corporation and 2) it was this position of trust and confidence that provided the opportunity for fraud against the corporation. Consequently, Plaintiffs' motion to dismiss fraud-related claims of Southeastern is denied.

{32} As to the fraud counterclaims against Garlock and Jacobs asserted by Hilliard, Hilliard alleges that his imprisonment forced him into a position of trust and confidence with Plaintiffs; Plaintiffs had complete control of the company, the financial statements and Hilliard's compensation during his period of imprisonment. Hilliard alleges the trust and confidence he instilled in Plaintiffs provided them with the opportunity to commit fraud against him. These allegations are sufficient to survive a motion to dismiss for failure to state a claim for fraud. Thereby, Plaintiffs' motion to dismiss Hilliard's fraud-related claims is denied.

B.

Negligence Claims of Southeastern and Hilliard

{33} Both Southeastern and Hilliard have asserted negligence claims against Johnson and seek damages based upon his allegedly faulty calculations of the division of profits under the oral agreement. To assert an independent tort action in a breach of contract action, the tortious conduct must have some other aggravating element outside the breach of contractual duties. *See* *Broussard v. Meineke Discount Muffler Shops, Inc.,* 155 F.3d 331 (4th Cir.1998); *Strum v. Exxon Co.,* 15 F.3d 327(4th Cir.1994). Defendants' allegations of general miscalculations fail to meet this standard. Therefore, Defendants' negligence claims are dismissed for failure to state a claim for which relief may be granted.

***8** {34} It should be noted that if there were miscalculations, Southeastern has a claim under contract for any overpayment to Johnson, Jacobs and Garlock. If Hilliard was shortchanged, he has a claim in contract against the corporation which owed him the money in the first instance. Since Hilliard

controls the corporation, he can obviously pay himself what is due and has no damages. If the miscalculations were the result of a conspiracy among Johnson, Jacobs and Garlock to intentionally defraud Hilliard and Southeastern, both Defendants have fraud claims to cover those causes of action. Upon breach of contract, the proper cause of action lies in contract, not in tort for negligent performance of the contract. Accordingly, the Court grants leave to Southeastern to file an amended response containing any breach of contract claims it believes it has and leave to Hilliard to file any breach of contract he has against the corporation. Each should be filed within thirty days of the entry of this order.

{35} This case, in which the parties organized a corporation and entered into an agreement dividing profits among the parties, involves only three real areas of dispute. First, have the profits been distributed in accordance with the terms of the agreement? Second, has the conduct of any party in connection with the organization or operation of the company risen to the level of fraud? Third, should the corporation now be dissolved pursuant to N .C.G.S. § 55-14-30(2)(ii)? Counsel are encouraged to focus on the core issues in this case rather than create a multitude of causes of action covering the same basic issues.

III

Conclusion

{36} For the reasons stated above, Plaintiffs lack standing to assert derivative claims and such claims are dismissed. Likewise Plaintiffs' UDTP claim and civil conspiracy claims are inapplicable to Plaintiffs' dealings with Defendant Hilliard and are also dismissed.

{37} Defendants' claims for fraud are pled with sufficient particularity to survive a motion to dismiss. However, Defendants' negligence claims are an impermissible attempt to convert a contract claim into a tort action and are dismissed.

{38} Therefore, it is hereby ORDERED, ADJUDGED and DECREED that:

1. Plaintiffs' third (usurpation of corporate opportunity), fourth (misappropriation/waste of corporate assets), fifth (director self interest), tenth (unfair and deceptive trade practices) and eleventh (civil conspiracy) claims for relief are dismissed.

2. Plaintiffs' move to amend complaint to add a twelfth claim for relief (breach of fiduciary duty) is denied.

3. Defendant Hilliard's fifth (negligence) claim for relief is dismissed.

4. Defendant Southeastern's third (negligence) and fourth (negligent misrepresentation) claims for relief are dismissed.

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