Vanguard Pai Lung, LLC v. Moody, 2019 NCBC 38.

STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 18 CVS 13891
VANGUARD PAI LUNG, LLC; and PAI LUNG MACHINERY MILL CO. LTD., Plaintiffs, v. WILLIAM MOODY; NOREEN MOODY; MARY KATE MOODY; MICHAEL MOODY; NOVA TRADING USA, INC.; and NOVA WINGATE HOLDINGS, LLC, Defendants.	**ORDER AND OPINION ON PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIMS**
WILLIAM MOODY; NOVA TRADING USA, INC.; and NOVA WINGATE HOLDINGS, LLC, Counterclaim Plaintiffs, v. VANGUARD PAI LUNG, LLC; and PAI LUNG MACHINERY MILL CO. LTD., Counterclaim Defendants.	

1. This case arises out of disputes between the members and managers of Vanguard Pai Lung, LLC ("Vanguard"), a North Carolina limited liability company. Vanguard and its majority member, Pai Lung Machinery Mill Co. ("Pai Lung"), brought this suit against six defendants: William Moody, Vanguard's former President and Chief Executive Officer; Nova Trading USA, Inc. ("Nova Trading"), Vanguard's minority member and a company wholly owned by Moody; Nova Wingate Holdings, LLC, another company owned by Moody; and three of Moody's family

members. In short, Plaintiffs allege that Moody has been siphoning cash and assets from Vanguard to benefit himself and his family for the better part of a decade.

2. Defendants deny any wrongdoing and claim to be the real victims. Moody, Nova Trading, and Nova Wingate Holdings have asserted counterclaims premised on allegations that Pai Lung used its majority position to control Vanguard, force Moody out of the business, and frustrate the minority rights of Nova Trading. In addition to asserting sundry counterclaims for breach of contract and breach of fiduciary duty, Moody and Nova Trading ask the Court to dissolve Vanguard.

3. Vanguard and Pai Lung have moved to dismiss many but not all of the counterclaims under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. For the following reasons, the Court **DENIES** the motion.

Womble Bond Dickinson (US) LLP, by Matthew F. Tilley, Russ Ferguson, and Patrick G. Spaugh, and Perkins Coie LLP, by John P. Schnurer, Sean T. Prosser, John D. Esterhay, and Yun (Louise) Lu, for Plaintiffs/Counterclaim Defendants Vanguard Pai Lung, LLC and Pai Lung Machinery Mill Co. LTD.

Johnston, Allison & Hord, P.A., by Patrick E. Kelly, Michael J. Hoefling, and David V. Brennan, for Defendants/Counterclaim Plaintiffs William Moody, Nova Trading USA, Inc., and Nova Wingate Holdings, LLC.

Burns, Gray & Gray, by John T. Burns, for Defendants Noreen Moody, Mary Kate Moody, and Michael Moody.

Conrad, Judge.

I.
BACKGROUND

4. The Court does not make findings of fact on a Rule 12(b)(6) motion to dismiss. The following factual summary is drawn from relevant allegations in the amended answer and counterclaims and its exhibits. (ECF No. 59 ["Countercl."].)

5. Vanguard, a maker and seller of high-speed circular knitting machines, is the latest incarnation of a business once owned by Singer Co. and, more recently, by Monarch Knitting Machinery Corp. (*See* Countercl. ¶¶ 10–12, 22.) Formed in 2009, Vanguard had three initial members: Pai Lung (with a 51% interest), Nova Trading (with a 25% interest), and Leo Yates (with a 24% interest). (Countercl. ¶ 33.) Based in Taiwan, Pai Lung is one of the world's largest manufacturers of circular and flat weft knitting machines. (Countercl. ¶ 15.) Nova Trading, a North Carolina company, also manufactures knitting machines and is wholly owned by Moody. (Countercl. ¶¶ 2, 13.) Yates is one of Moody's longtime business partners and industry associates. (Countercl. ¶ 10.)

6. An Operating Agreement governs Vanguard's operations and the rights and obligations of its members. The company is managed by a board of managers, which must consist of at least three but no more than five managers. (Pls.'/Counter-Defs.' Mem. in Supp. Partial Mot. Dismiss Am. Countercl. Ex. A § 3.1(a), (c), ECF No. 63.1 ["Op. Agrmt."].) At least initially, Pai Lung had authority to appoint three of the five managers, and Nova Trading and Yates had authority to appoint one each. (Op. Agrmt. § 4.3(b)(i)–(iii).) Once elected, the managers may make "all decisions with respect to the management of the business and affairs" of Vanguard by a majority vote, except for some actions that require a supermajority vote of the members. (Op. Agrmt. § 3.1(a); *see also* Op. Agrmt. §§ 3.4, 4.4.) Members, on the other hand, are not permitted to "take part in the management or control of the business" in their capacity as members. (Op. Agrmt. § 4.2.)

7. To fill its allotted three board positions, Pai Lung appointed its president and chairman, James Wang, along with Wang's father and uncle. (Countercl. ¶¶ 17, 34, 35.) The other two board slots went to Moody (appointed by Nova Trading) and Yates (self-appointed). (*See* Countercl. ¶ 34.) The company's initial officers, as named in the Operating Agreement, included Moody as President and Chief Executive Officer and Yates as Secretary and Chief Operating Officer. (Op. Agrmt. § 3.2(a).) According to Moody, he also had a separate oral employment agreement in his role as an officer. (Countercl. ¶ 30.)

8. In 2011, Yates resigned, and Wang's father died. These events opened two vacancies on the board of managers. (Countercl. ¶¶ 37, 40.) Yates's position has never been filled, but Pai Lung filled its open seat with one of its agents. (Countercl. ¶¶ 41, 42.) When Yates resigned, he also sold his membership interest to Vanguard, leaving Pai Lung and Nova Trading as the two remaining members, with 67.1053% and 32.8947% interests, respectively. (Countercl. ¶ 38.)

9. That was the status quo until 2017 when Moody and Wang locked horns over company management. (Countercl. ¶¶ 45, 51.) To start, Pai Lung insisted on hiring Penny Peng, a Pai Lung employee and agent, as Vanguard's financial manager. (Countercl. ¶¶ 47, 48.) Moody thought the move was a fiasco. He objected to Peng's qualifications and her cumbrous practice of consulting Wang, halfway around the globe, before making a decision. (Countercl. ¶¶ 49, 50.) The situation only worsened when Wang began ignoring communications from Moody and others.

(*See* Countercl. ¶ 51.) Then, in November 2017, the board of managers—chaired by Wang—voted to remove Moody as President. (Countercl. ¶¶ 36, 52.)

10. At the same time, Peng began withholding commission payments from Nova Trading. (Countercl. ¶ 62.) These payments were part of an alleged agreement ("Commission Agreement") made among Pai Lung, Nova Trading, and Vanguard in January 2017. (Countercl. ¶¶ 55–58, 60–61.) In a nutshell, Vanguard would pay increased prices for parts and machines that it purchased from Pai Lung, and Nova Trading would in turn receive a commission of five percent on parts and ten percent on machines. (Countercl. ¶ 56.) In effect, the Commission Agreement served to offset the decrease in distributions to Nova Trading that would result from the increased prices being paid by Vanguard to Pai Lung. (Countercl. ¶ 60.)

11. Moody also claims that Vanguard refused to pay him a profit-sharing bonus for 2017. (Countercl. ¶ 71.) According to Moody, he agreed at the beginning of 2017 to assume additional responsibilities in exchange for a fifteen percent profit-sharing bonus, to be paid annually to Moody or Nova Trading ("Profit-Sharing Agreement"). (Countercl. ¶¶ 68, 69.) That payment was never made. (Countercl. ¶ 69.)

12. In mid-2018, a majority of the board of managers terminated Moody's employment as Chief Executive Officer. (Countercl. ¶ 52.) Two months later, Vanguard and Pai Lung filed this suit. They allege that Moody, as officer and manager of Vanguard, orchestrated a massive fraud on the company for the past ten years, siphoning money and assets for the benefit of himself and his family.

13. Moody and Nova Trading[1] respond that they are the victims of a scheme by Wang and Pai Lung to take complete control of Vanguard. (*See* Countercl. ¶ 53.) Today, Moody remains a Vanguard manager, and Nova Trading remains a member, but they allege that they have been effectively sidelined by Pai Lung and the Pai Lung-controlled board of managers. (*See* Countercl. ¶¶ 52–54.) In their amended answer and counterclaims, Moody and Nova Trading assert twelve counterclaims for, among other things, breaches of the Operating Agreement, the Commission Agreement, the Profit-Sharing Agreement, and Moody's oral employment agreement. They further assert that Pai Lung, as majority member, owed a fiduciary duty to Nova Trading, as minority member, and breached that duty. And they seek judicial dissolution of Vanguard.

14. In this motion, Pai Lung and Vanguard seek to dismiss eight of the twelve counterclaims. (Partial Mot. Dismiss Am. Countercl., ECF No. 62.) The motion has been fully briefed, and the Court held a hearing on April 17, 2019. (ECF No. 66.) The motion is ripe for decision.

II. ANALYSIS

15. A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of the" disputed pleading, here the amended counterclaims. *Concrete Serv. Corp. v. Inv'rs Grp., Inc.*, 79 N.C. App. 678, 681, 340 S.E.2d 755, 758 (1986). The motion should be granted only when: (1) the pleading "on its face reveals that no law supports" the

[1] The merits of this motion do not implicate the third counterclaimant, Nova Wingate Holdings, or any of the remaining defendants.

asserted claim; (2) the pleading "on its face reveals the absence of facts sufficient to make a good claim;" or (3) the pleading "discloses some fact that necessarily defeats" the claim. *Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 615, 821 S.E.2d 729, 736–37 (2018) (citation and quotation marks omitted).

16. In deciding a Rule 12(b)(6) motion, the Court must treat the well-pleaded allegations of the counterclaims as true and view the facts and permissible inferences "in the light most favorable to" the non-moving party. *Ford v. Peaches Entm't Corp.*, 83 N.C. App. 155, 156, 349 S.E.2d 82, 83 (1986). "[T]he court is not required to accept as true any conclusions of law or unwarranted deductions of fact." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 56, 554 S.E.2d 840, 844 (2001). The Court may consider documents that are the subject of the counterclaims and to which the counterclaims specifically refer without converting a Rule 12(b)(6) motion into a motion for summary judgment. *Weaver v. St. Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007) (quoting *Oberlin Capital*, 147 N.C. App. at 60, 554 S.E.2d at 847).

A. Contract Claims

17. Four disputed counterclaims relate to contracts that were allegedly breached around the time that Vanguard's board terminated Moody from his official positions. As alleged, Vanguard withheld commissions from Nova Trading under the Commission Agreement, refused to pay any bonus under the Profit-Sharing Agreement, and failed to pay Moody for accrued vacation time as required by his oral employment agreement. (Countercl. ¶¶ 126, 132, 143.) Moody and Nova Trading

also allege that Vanguard breached the implied covenant of good faith and fair dealing in each contract. (Countercl. ¶¶ 147, 148.) These four counterclaims are asserted against only Vanguard.

18. A theme of Vanguard's brief in support is that the allegations lack detail and are not supported by corroborating evidence. Vanguard describes the alleged contracts as "vaguely-articulated." (Pls.'/Counter-Defs.' Mem. in Supp. Partial Mot. Dismiss Am. Countercl. 7, ECF No. 63 ["Mem. in Supp."].) It contends that the allegations omit, among other things, who engaged in contract negotiations, when the negotiations happened, where the contracts were finalized, and why Vanguard would supposedly have been motivated to enter into them. (*See, e.g.*, Mem. in Supp. 8, 10, 11; *see also* Pls.'/Counter-Defs.' Reply in Supp. Partial Mot. Dismiss Am. Countercl. 4, 5, ECF No. 67 ["Reply Br."].) It also questions the veracity of several allegations—for example, that certain e-mails were sent or that commission payments were made for part of 2017—because Moody and Nova Trading haven't supplied evidence to back them up. (*See* Mem. in Supp. 8; Reply Br. 3, 5 n.2.)

19. Two initial observations are necessary. First, claims for breach of contract are "not subject to heightened pleading standards." *AYM Techs., LLC v. Rogers*, 2018 NCBC LEXIS 14, at *52 (N.C. Super. Ct. Feb. 9, 2018). Rather, they must meet the usual, liberal standard of Rule 8, which requires only a "short and plain statement of the claim" sufficient to put the court and parties on notice of the events giving rise to the claim. N.C. R. Civ. P. 8(a)(1). It is enough to plead the "(1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19,

26, 530 S.E.2d 838, 843 (2000). When these elements are alleged, "it is error to dismiss a breach of contract claim under Rule 12(b)(6)," and our appellate courts routinely reverse trial court orders that require anything more. *Woolard v. Davenport*, 166 N.C. App. 129, 134, 601 S.E.2d 319, 322 (2004); *see also, e.g.*, *Barbarino v. Cappucine, Inc.*, 2012 N.C. App. LEXIS 305, at *7 (N.C. Ct. App. Mar. 6, 2012) (unpublished) (reversing dismissal of claim for breach of contract); *Sanders v. State Pers. Comm'n*, 197 N.C. App. 314, 322, 677 S.E.2d 182, 188 (2009) (same); *Schlieper v. Johnson*, 195 N.C. App. 257, 266, 672 S.E.2d 548, 554 (2009) (same).

20. Second, to dismiss a claim under Rule 12(b)(6) for lack of evidentiary support would be error. "Perhaps the most fundamental concept of motions practice under Rule 12 is that evidence outside the pleadings . . . cannot be considered in determining whether the complaint states a claim on which relief can be granted." *Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach*, 251 N.C. App. 771, 775, 796 S.E.2d 120, 123 (2017). "Neither party has any evidentiary burden at this stage," and the counterclaims' "factual allegations must be taken as true." *Neier v. State*, 151 N.C. App. 228, 233, 565 S.E.2d 229, 232 (2002).

21. Taken together, all of this means that stating a claim for breach of contract is a relatively low bar. As discussed below, the allegations of the amended counterclaims, though succinct, meet the minimal requirements of Rule 8 and binding appellate precedent.

1. Commission and Profit-Sharing Agreements

22. The parties dispute whether the Commission and Profit-Sharing Agreements must be in writing. Vanguard contends that they must because both are effectively amendments to the Operating Agreement. (*See* Mem. in Supp. 9 n.5; Reply Br. 2–4; Op. Agrmt. § 11.5.) Even if Vanguard were right about that (which the Court need not decide now), it would not be a reason to dismiss the counterclaims. Moody and Nova Trading expressly allege that both agreements were "contemporaneously memorialized." (Countercl. ¶ 73.) This is sufficient to allege a writing, assuming one was required, and must be accepted as true. *See, e.g.*, *Priest v. Coch*, 2013 NCBC LEXIS 6, at *18 (N.C. Super. Ct. Jan. 25, 2013) (taking allegation of written contract as true and denying motion to dismiss).

23. Vanguard also argues that Moody and Nova Trading failed to allege essential contract terms, particularly consideration. Not so. The Commission Agreement is a three-party contract related to Vanguard's purchase of machines and parts from Pai Lung, apparently for resale in North and Central America. (*See* Countercl. ¶¶ 55, 56; Op. Agrmt. § 4.9.) Each party received some benefit: Pai Lung received increased prices for its products; Nova Trading received a percentage commission for those sales; and Vanguard received the products sold by Pai Lung. (Countercl. ¶¶ 56, 57.) Perhaps this was a bad deal, as Vanguard suggests, "multiplying the disadvantage" to it by requiring it to pay increased prices and fees to both its members. (Mem. in Supp. 9.) But "the parties to a contract," not the Court, "are the judges of the adequacy of the consideration." *Hejl v. Hood, Hargett & Assocs.*,

Inc., 196 N.C. App. 299, 305, 674 S.E.2d 425, 429 (2009). Taken as true, the allegations plead the existence of consideration, which our courts define "as some benefit or advantage to the promisor or some loss or detriment to the promisee." *Deans v. Layton*, 89 N.C. App. 358, 368, 366 S.E.2d 560, 567 (1988).

24. Likewise, in the Profit-Sharing Agreement, Vanguard agreed to pay a bonus in return for Moody's assumption of additional responsibilities. (*See* Countercl. ¶ 68.) This allegation adequately pleads consideration and provides all the notice that Rule 8 requires. Moody and Nova Trading did not need to go further and "identify what these additional responsibilities were, or how employment responsibilities could even be added to someone who was already CEO and President," as Vanguard contends. (Reply Br. 6.)

25. As an additional argument, Vanguard asserts for the first time in its reply brief that the parties to the Profit-Sharing Agreement are not stated clearly enough. (*See* Reply Br. 5.) It is doubtful whether this argument is timely, but in any event, the Court disagrees. As alleged, the profit-sharing bonus was due to "Nova Trading and/or Moody." (Countercl. ¶¶ 68, 69.) Taking this allegation in a light most favorable to Moody and Nova Trading, Moody took on additional duties in return for a bonus that he directed to be paid to himself or to his wholly owned company. That leaves some ambiguity, but not one that is insoluble or so unclear that Vanguard lacks notice of the events giving rise to the claim.

26. The Court has considered Vanguard's other arguments as to the level of detail given by the allegations about these two agreements and finds them all

unpersuasive. "There is no rule which requires a plaintiff to set forth in his complaint the full contents of the contract which is the subject matter of his action or to incorporate the same in the complaint by reference to a copy thereof attached as an exhibit." *RGK, Inc. v. U.S. Fid. & Guar. Co.*, 292 N.C. 668, 675, 235 S.E.2d 234, 238 (1977) (citation and quotation marks omitted). The allegations give Vanguard "sufficient notice of the events or transactions which produced the claim." *Sutton v. Duke*, 277 N.C. 94, 104, 176 S.E.2d 161, 167 (1970).

27. Accordingly, the Court denies the motion to dismiss the counterclaims for breach of the Commission Agreement and the Profit-Sharing Agreement.

2. Moody's Employment Agreement

28. The third disputed contract is Moody's oral employment agreement. He alleges that Vanguard breached the employment agreement when it failed to pay him for accrued but unused vacation time. (Countercl. ¶¶ 140, 143.)

29. Vanguard argues that there is no allegation that Moody's "oral employment agreement expressly included a vacation policy, whether from an employee handbook or elsewhere, that became a binding contract." (Mem. in Supp. 12.) But there is. The amended counterclaims allege that "Vanguard maintains a standard vacation policy that applies to all Vanguard employees" and that this vacation policy "was incorporated into the employment agreement between Moody and Vanguard, which is a valid and enforceable contract." (Countercl. ¶¶ 136, 141.)

30. Next, Vanguard argues that "Moody was placed into the role of CEO and President through the Operating Agreement" and that, as a result, the terms of the

Operating Agreement supersede any alleged oral employment agreement. (*See* Mem. in Supp. 12; Reply Br. 7; Op. Agrmt. § 3.2(a)–(c).) It is entirely possible, however, that the Operating Agreement named the initial officers and that those officers also had separate employment agreements. There is no inherent conflict between the two. *See, e.g.*, *Roth v. Penguin Toilets, LLC*, 2011 NCBC LEXIS 46, at *12 (N.C. Super. Ct. Nov. 30, 2011) ("The Court's determination that the Employment Agreement contains the terms of Plaintiff's employment relationship with Defendant is not to say that a particular relationship can only be controlled by one document."); *see also Urquhart v. Trenkelbach*, 2017 NCBC LEXIS 12, at *3–4 (N.C. Super. Ct. Feb. 8, 2017) (noting that LLC members executed individual employment agreements in addition to the operating agreement); *Chemcraft Holdings Corp. v. Shayban*, 2006 NCBC LEXIS 15, at *3–5 (N.C. Super. Ct. Oct. 5, 2006) (same).

31. Taking all allegations as true, as the Court must, Moody and Nova Trading have sufficiently alleged the existence of an employment agreement containing a vacation policy and a breach of that agreement. The Court denies the motion to dismiss the counterclaim for breach of the employment agreement.

3. Implied Covenant of Good Faith and Fair Dealing

32. Moody and Nova Trading also adequately state a claim for breach of the implied covenant of good faith and fair dealing as to these three contracts. "In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." *Heron Bay Acquisition, LLC v. United Metal Finishing, Inc.*, 245 N.C.

App. 378, 385, 781 S.E.2d 889, 894 (2016) (citation and quotation marks omitted). Here, Moody and Nova Trading allege the existence of three valid contracts and that Vanguard breached the contracts as part of a scheme to push them out of the business. (*See, e.g.*, Countercl. ¶¶ 45, 51–54, 65, 71, 133, 144, 148, 149.) These allegations are sufficient to state a claim for breach of the implied covenant. *See, e.g.*, *Sparrow Sys. v. Private Diagnostic Clinic, PLLC*, 2014 NCBC LEXIS 70, at *47–48 (N.C. Super. Ct. Dec. 24, 2014); *Stec v. Fuzion Inv. Capital, LLC*, 2012 NCBC LEXIS 24, at *18–19 (N.C. Super. Ct. Apr. 30, 2012). The Court denies the motion to dismiss as to this counterclaim.

B. Fiduciary Claims

33. Nova Trading asserts claims for breach of fiduciary duty and constructive fraud against Pai Lung. Though these two causes of action are distinct, "an essential element of each claim is the existence of a fiduciary relationship." *Azure Dolphin, LLC v. Barton*, 2017 NCBC LEXIS 90, at *23 (N.C. Super. Ct. Oct. 2, 2017). To state a claim for breach of fiduciary duty, Nova Trading must plead the existence of a fiduciary duty, a breach of that duty, and injury proximately caused by the breach. *See Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 268 (2013). Constructive fraud requires Nova Trading to plead, in addition, that Pai Lung sought to benefit itself through the breach. *See White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 294, 603 S.E.2d 147, 155–56 (2004).

34. The basis for these claims is that Pai Lung, the majority member of Vanguard, breached a fiduciary duty that it owed to Nova Trading, the minority

member. (*See* Countercl. ¶¶ 162, 172.) Pai Lung argues that there is no fiduciary relationship between Vanguard's members and also that Nova Trading failed to meet the heightened pleading standard for constructive fraud. (*See* Mem. in Supp. 14, 17.)[2]

35. As a general rule, members of an LLC do not owe a fiduciary duty to one another, but in some circumstances, "a holder of a majority interest who exercises control over the LLC owes a fiduciary duty to minority interest members." *Fiske v. Kieffer*, 2016 NCBC LEXIS 22, at *9 (N.C. Super. Ct. Mar. 9, 2016); *see also Kaplan v. O.K. Techs., L.L.C.*, 196 N.C. App. 469, 473, 675 S.E.2d 133, 137 (2009). A majority interest does not necessarily equate to control. It all depends on what the LLC's members agree to in the operating agreement. Because "an LLC is primarily a creature of contract," the members are generally free to arrange their relationship however they wish. *Crouse v. Mineo*, 189 N.C. App. 232, 237, 658 S.E.2d 33, 36 (2008) (quoting Russell M. Robinson, II, *Robinson on North Carolina Corporate Law* § 34.01, at 34-2 to 34-3 (rev. 7th ed. 2006)). Among other things, they may depart from statutory default rules, require supermajority votes for some or all company matters, and impose or eliminate fiduciary duties for members and managers. *See, e.g.*, *Claudio v. Sellers*, 2019 N.C. App. LEXIS 288, at *4–5 (N.C. Ct. App. Mar. 26, 2019) (supermajority requirement); *Plasman v. Decca Furniture (USA), Inc.*, 2016 NCBC LEXIS 80, at *36 (N.C. Super. Ct. Oct. 21, 2016) (elimination of fiduciary duties);

[2] Pai Lung's opening brief includes the additional, conclusory assertion that, "even if Pai Lung owed [a fiduciary] duty, Nova Trading has not alleged sufficient facts demonstrating that Pai Lung breached that duty." (Mem. in Supp. 14.) This argument is unexplained and undeveloped, and the Court rejects it without further discussion.

Island Beyond, LLC v. Prime Capital Grp., LLC, 2013 NCBC LEXIS 48, at *15 (N.C. Super. Ct. Oct. 30, 2013) (statutory default rules).

36. This is one of the principal differences between LLC members and corporate shareholders. It has long been the rule that majority shareholders, by virtue of their majority status, hold control over the corporation and therefore owe a duty to protect the interests of minority shareholders, who "can act and contract in relation to the corporate property only through the former." *Gaines v. Long Mfg. Co.*, 234 N.C. 340, 344, 67 S.E.2d 350, 353 (1951) (citation and quotation marks omitted). Minority members of an LLC have a much stronger position because, through "the freedom of contract," they are able "to obtain minority protections not available to shareholders of [a] closely-held corporation." *Blythe v. Bell*, 2013 NCBC LEXIS 17, at *14 (N.C. Super. Ct. Apr. 8, 2013).

37. Nova Trading obtained a number of such protections as part of Vanguard's Operating Agreement. By way of example, members may not take part in the company's management in their capacity as members. (Op. Agrmt. § 4.2.) Nova Trading is guaranteed the right to elect one manager to the board of managers. (Op. Agrmt. § 4.3(b)(i).) And a supermajority vote of the members is needed to amend the Operating Agreement, sell the business, remove a member, or take similarly vital actions. (Op. Agrmt. § 4.4.) The question is whether, as a matter of law, these protections blocked Pai Lung from exercising control over the LLC.

38. The answer is no, at least at this early Rule 12 stage. Nova Trading alleges that Pai Lung is Vanguard's majority member with an interest edging just over 67%.

(Countercl. ¶ 38.) It further alleges that Pai Lung dominates the board of managers, which has broad authority to act on behalf of the company. (*See* Op. Agrmt. § 3.1(a)(i)–(x).) The Operating Agreement gives Pai Lung the right to appoint three of the five possible managers, thus ensuring a majority. (Op. Agrmt. § 4.3(b)(ii).) And Pai Lung has filled those seats with its agents, all of whom are "acting for or on its behalf." (Countercl. ¶¶ 43, 44.)

39. This type of managerial control is one of the clearest attributes of a controlling member of an LLC, just as control over a board of directors is an attribute of a controlling corporate shareholder. *See, e.g.*, *Plasman*, 2016 NCBC LEXIS 80, at *17–18, 25 (concluding that plaintiff sufficiently alleged existence of fiduciary duty by 55% majority member with "ultimate decision-making authority"); *Kelly v. Blum*, 2010 Del. Ch. LEXIS 31, at *54 (Del. Ch. Feb. 24, 2010) (citing control over board of managers as factor favoring existence of fiduciary duties for majority member under Delaware law); *see also Corwin*, 371 N.C. at 616–17, 821 S.E.2d at 737–38 (noting that, under Delaware law, a controlling stockholder is one who exercises actual control over the board). By contrast, this Court has cited the absence of managerial control as a reason supporting dismissal of a claim for breach of fiduciary duty brought by one LLC member against another. *See Strategic Mgmt. Decisions v. Sales Performance Int'l*, 2017 NCBC LEXIS 69, at *13 (N.C. Super. Ct. Aug. 7, 2017) (granting motion to dismiss in part because 60% majority member had power to designate only one of two managers).

40. Pai Lung insists that no fiduciary duty arises simply because it exercised its rights, including the right to appoint a majority of the board, pursuant to the Operating Agreement. (*See* Reply Br. 8–9.) But the cases it cites for that proposition are inapposite. This Court has refused to impose a fiduciary duty on *minority* members that exercise their voting rights by joining together to outvote a third member. *See Fiske*, 2016 NCBC LEXIS 22, at *9–10; *HCW Ret. & Fin. Servs., LLC v. HCW Emp. Benefit Servs., LLC*, 2015 NCBC LEXIS 73, at *46–47 (N.C. Super. Ct. July 14, 2015); *Wortman v. Hutaff*, 2013 NCBC LEXIS 47, at *22–23 (N.C. Super. Ct. Oct. 29, 2013); *BOGNC, LLC v. Cornelius NC Self-Storage, LLC*, 2013 NCBC LEXIS 22, at *19 (N.C. Super. Ct. May 1, 2013).

41. These decisions underscore the obvious difference between backing a majority coalition and exercising majority control as of right. In the latter situation, it is the imbalance of power inherent in the relationship between majority and minority member that gives rise to a fiduciary duty. Thus, when the operating agreement confers controlling authority on the majority member, it owes a duty not to use its control to harm the minority, assuming no other provision disclaims such a duty. Here, Nova Trading has alleged that Pai Lung is not only the majority member but also that it exercises control through the board of managers, and the Operating Agreement does not address, much less disclaim, the duties that Pai Lung might owe other members. This is sufficient to survive a Rule 12 motion. *See Dunn Holdings I, Inc. v. Confluent Health LLC*, 2018 NCBC LEXIS 89, at *19 (N.C. Super. Ct. Aug. 24,

2018) (holding that plaintiff sufficiently alleged that 80% majority member was a controlling member).

42. To be clear, in permitting the claim to move forward, the Court does not hold that Pai Lung owed a fiduciary duty to Nova Trading. Pai Lung's control is considerable but not complete. Neither Pai Lung nor the board could dissolve the company, declare bankruptcy, or amend the Operating Agreement without Nova Trading's cooperation. (*See* Op. Agrmt. §§ 3.4, 4.4, 8.1, 8.3, 10.1.) These are serious limitations on Pai Lung's authority and meaningful protections for Nova Trading's minority interest, which could weigh against the existence of a fiduciary relationship in the context of a more developed evidentiary record.

43. At this stage, the facts stated in the amended counterclaims, along with the provisions of the Operating Agreement, suffice to allege the existence of a fiduciary relationship. The Court therefore denies the motion to dismiss as to the claim for breach of fiduciary duty.

44. Pai Lung also argues that the claim for constructive fraud should be dismissed because Nova Trading has not pleaded it with sufficient particularity. Our appellate courts have made clear that a claim of constructive fraud need not comply with the particularity requirements of Rule 9 as claims of actual fraud must. *See Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678–79 (1981). Rather, the amended counterclaims must allege "facts and circumstances '(1) which created the relation of trust and confidence, and (2) which led up to and surrounded the consummation of the transaction in which [the non-moving party] is alleged to have taken advantage

of his position of trust to the hurt of'" the movant. *Id.* at 85, 273 S.E.2d at 679 (quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950)) (alterations omitted).

45. Nova Trading has satisfied this standard. It has alleged a fiduciary duty based on Pai Lung's status as a controlling majority member of Vanguard. It has further alleged that Pai Lung schemed to gain exclusive control over Vanguard. (*See* Countercl. ¶¶ 45–53, 65, 71, 115, 167–69, 171–75.) The amended counterclaim goes beyond mere "cursory allegations" and demonstrates the "facts and circumstances" giving rise to the claim. *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 482, 593 S.E.2d 595, 599 (2004); *see also Global Textile All., Inc. v. TDI Worldwide, LLC*, 2018 NCBC LEXIS 159, at *23 (N.C. Super. Ct. Nov. 29, 2018).

46. The Court denies the motion to dismiss the claim for constructive fraud.

C. Judicial Dissolution

47. Nova Trading asserts two claims for judicial dissolution of Vanguard. By statute, a member of an LLC may seek judicial dissolution when "it is not practicable to conduct the LLC's business in conformance with the operating agreement" or when "liquidation of the LLC is necessary to protect the rights and interests of the member." N.C. Gen. Stat. § 57D-6-02(2). Nova Trading invokes the statutory remedy on both grounds. It also asserts, separately, that dissolution is appropriate based on the rule set forth in *Meiselman v. Meiselman*, which permits minority shareholders in closely held corporations to seek liquidation when their reasonable expectations have been frustrated. *See* 309 N.C. 279, 307 S.E.2d 551 (1983).

48. Vanguard and Pai Lung argue that the claims fail because Nova Trading has not alleged that it is impracticable to operate the business or that liquidation is necessary to protect Nova Trading's interests. They contend that the various management disagreements set out in the amended counterclaims show only that Nova Trading is "unhappy with the terms of the Operating Agreement." (Mem. in Supp. 18.)

49. The Court concludes that Nova Trading has adequately stated a claim under section 57D-6-02(2). As discussed, Nova Trading has alleged that Pai Lung breached its fiduciary duty as part of a scheme to take exclusive control of Vanguard. If true, these improprieties could support a claim that dissolution is necessary to protect Nova Trading's interests. *See, e.g.*, *Dunn Holdings I*, 2018 NCBC LEXIS 89, at *31–32. Accordingly, the Court denies the motion to dismiss the claim for judicial dissolution under section 57D-6-02(2).

50. Likewise, the Court denies the motion to dismiss the *Meiselman* claim. "[O]ur courts have not yet decided whether and to what extent the principles of *Meiselman* apply to actions" to dissolve an LLC. *Bennett v. Bennett*, 2019 NCBC LEXIS 19, at *35 (N.C. Super. Ct. Mar. 15, 2019); *see also Pure Body Studios Charlotte, LLC v. Crnalic*, 2017 NCBC LEXIS 98, at *13 (N.C. Super. Ct. Oct. 18, 2017); *Brady v. Van Vlaanderen*, 2017 NCBC LEXIS 61, at *31–32 (N.C. Super. Ct. July 19, 2017). Such questions should be addressed on a more fully developed record. Particularly given that the section 57D-6-02(2) claim is moving forward, it would be premature to dismiss the *Meiselman* claim.

51. Finally, it bears noting that it is not clear whether an LLC member may bring a freestanding *Meiselman* claim, as Nova Trading has here. There is a reasonable argument that the legislature intended section 57D-6-02(2) to be the exclusive avenue for LLC members to seek judicial dissolution, though the application of section 57D-6-02(2) may be informed by *Meiselman* principles. Neither side addressed this issue, however, so the Court leaves it for another day.

III.
CONCLUSION

52. For all these reasons, the Court **DENIES** Vanguard and Pai Lung's partial motion to dismiss.

SO ORDERED, this the 19th day of June, 2019.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases

Strategic Mgmt. Decisions, LLC v. Sales Performance Int'l, LLC, 2017 NCBC 68.

STATE OF NORTH CAROLINA

MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
17 CVS 3061

STRATEGIC MANAGEMENT DECISIONS, LLC,

Plaintiff,

v.

SALES PERFORMANCE INTERNATIONAL, LLC; KEITH M. EADES; DOUGLAS HANDY; AND ROBERT KEAR,

Defendants.

ORDER AND OPINION ON MOTION TO DISMISS

1. Plaintiff Strategic Management Decisions, LLC ("Plaintiff") is one of two members of Sales Talent Optimization, LLC ("STO"). Plaintiff contends that the other member, Defendant Sales Performance International, LLC ("Sales Performance"), wrongfully acquired the intellectual property of Plaintiff and STO, used the intellectual property to usurp STO's business opportunities, and competed against Plaintiff and STO in violation of contractual and fiduciary duties. Plaintiff further contends that three officers of Sales Performance—Keath Eades, Douglas Handy, and Robert Kear ("Individual Defendants")—are individually liable.

2. Defendants jointly moved to dismiss some, but not all, claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. They contend that this is a simple contract dispute between two corporations, with no basis for additional tort claims or individual liability.

3. Having considered the parties' filings and arguments, the Court **GRANTS in part** and **DENIES in part** the motion to dismiss.

Caudle & Spears, P.A. by Christopher P. Raab, and Martenson, Hasbrouck & Simon, LLP by Peter V. Hasbrouck and Christopher J. Perniciaro for Plaintiff.

Robinson, Bradshaw & Hinson, P.A. by Stephen M. Cox, Kevin R. Crandall, and Adam K. Doerr for Defendants.

Conrad, Judge.

I. BACKGROUND

4. The Court does not make findings of fact on a Rule 12(b)(6) motion to dismiss. The following factual summary is drawn from relevant allegations in the complaint and the attached exhibits.

5. Plaintiff "is an employee survey, assessment, and analytics company." (Compl. ¶ 8.) Defendant Sales Performance is a company "engaged in sales consulting." (Compl. ¶ 9.)

6. The two companies jointly formed STO on March 10, 2014 for the purpose of creating a "sales talent optimization technology platform." (Compl. ¶ 17.) According to the complaint, Plaintiff supplied the intellectual property needed to create the platform, and Sales Performance agreed to use its expertise to sell the platform for STO's benefit. (Compl. ¶ 17; *see also* Compl. ¶ 19.) Plaintiff and Sales Performance executed an Intellectual Property License and Services Agreement ("IP Agreement") "to govern the use and ownership of intellectual property" being contributed by each, as well as intellectual property that would be jointly created through STO. (Compl. ¶ 18, Ex. 2 ["IP Agreement"].)

7. STO's Operating Agreement governs the company's membership and management. (*See* Compl. Ex. 1 ["Operating Agreement"].) Sales Performance owns a 60 percent membership interest in STO, and Plaintiff owns the remaining 40 percent. (*See* Operating Agreement p.A-1; *see also* Compl. ¶¶ 15–16.) Each member has the power to designate one manager. (*See* Operating Agreement ¶ 5.3(a).) The two managers, who must be individuals, together "have full, exclusive and complete authority to manage the affairs of" STO, except for certain defined acts that require unanimous member approval (such as voluntary dissolution, amendment of the articles of organization, and conversion of the company into another form of business). (Operating Agreement ¶ 5.1; *see also* Operating Agreement ¶ 6.3.)

8. STO was "immediately successful"—so successful that Sales Performance sought to purchase Plaintiff's interest in December 2014. (Compl. ¶¶ 20–21.) Plaintiff obtained a valuation, but Sales Performance rejected it without explanation and without making a counteroffer. (*See* Compl. ¶¶ 21–22.)

9. Plaintiff now characterizes the episode as "pretextual" and alleges that Sales Performance has been competing against it and STO ever since. (Compl. ¶ 23.) The complaint alleges that Sales Performance used the intellectual property supplied by Plaintiff to "creat[e] a separate sales talent optimization technology platform" and then usurped business opportunities that should have gone to STO. (Compl. ¶¶ 23–25.) The net result, according to Plaintiff, is that Sales Performance "took" the interest that it refused to buy. (Compl. ¶ 23.)

10. Plaintiff filed its complaint on January 14, 2017. It asserts five causes of action: breach of the IP Agreement and breach of fiduciary duty as to Sales Performance; and conversion, unfair or deceptive trade practices, and unjust enrichment as to all Defendants. The complaint does not assert any derivative claims on behalf of STO. (*See* Pl.'s Resp. to Defs.' Mot. to Dismiss 2 n.1 ["Pl.'s Resp."].)

11. On April 26, 2017, Defendants jointly moved to dismiss all claims except breach of the IP Agreement. The motion is fully briefed, and the Court held a hearing on July 25, 2017. The motion is ripe for determination.

II.
ANALYSIS

12. A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of the complaint." *Concrete Serv. Corp. v. Investors Grp., Inc.*, 79 N.C. App. 678, 681, 340 S.E.2d 755, 758 (1986). "Dismissal of a complaint under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint on its face reveals the absence of fact sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim." *Jackson v. Bumgardner*, 318 N.C. 172, 175, 347 S.E.2d 743, 745 (1986).

13. In deciding a Rule 12(b)(6) motion, the Court must treat the well-pleaded allegations of the complaint as true and view the facts and permissible inferences "in the light most favorable to" the non-moving party. *Ford v. Peaches Entm't Corp.*, 83 N.C. App. 155, 156, 349 S.E.2d 82, 83 (1986); *see also Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). "[T]he court is not required to accept as true any

conclusions of law or unwarranted deductions of fact." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 56, 554 S.E.2d 840, 844 (2001). In addition, the Court "may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers," without converting a Rule 12(b)(6) motion into a motion for summary judgment. *Weaver v. St. Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007) (quoting *Oberlin Capital*, 147 N.C. App. at 60, 554 S.E.2d at 847).

A. Conversion

14. Conversion is "defined as 'an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.'" *Peed v. Burleson's, Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956) (citation omitted). "The essence of conversion is not the acquisition of property by the wrongdoer, but a wrongful deprivation of it to the owner." *Bartlett Milling Co. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 86, 665 S.E.2d 478, 488 (2008).

15. Plaintiff's conversion claim has evolved over time. The complaint broadly alleges that Defendants converted Plaintiff's "intellectual property, including but not limited to [Plaintiff's] assessment and analytics technology." (Compl. ¶ 35.) In its briefing, Plaintiff pares back the allegation, stating that the claim "is not for patent, trademark, or copyright conversion" but is instead "correctly categorized as conversion of 'proprietary information.'" (Pl.'s Resp. 5.) At the hearing, Plaintiff further clarified that the property at issue is primarily software.

16. The nature of the allegedly converted property is important because North Carolina does not recognize a claim for conversion of intangible interests. *See, e.g.*, *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 414, 537 S.E.2d 248, 264 (2000) (citing "business opportunities and expectancy interests" as "intangible interests"); *HCW Ret. & Fin. Servs., LLC v. HCW Emp. Benefit Servs., LLC*, 2015 NCBC LEXIS 73, at *57–58 (N.C. Super. Ct. July 14, 2015) (dismissing conversion claim as to trademark rights). On the other hand, a conversion claim may cover proprietary information in certain circumstances. *See Se. Shelter Corp. v. BTU, Inc.*, 154 N.C. App. 321, 331, 572 S.E.2d 200, 207 (2002).

17. For purposes of this motion, the Court liberally construes the complaint to allege the conversion of "electronically stored proprietary information," as Plaintiff's brief states. (Pl.'s Resp. 5.) Although the intellectual property identified in the IP Agreement includes patents, copyrights, and trademarks, it also includes other technology and products, which apparently comprise the relevant software. (*See* IP Agreement pp.15–16; *see also* Pl.'s Resp. 5 (referring to certain "technology platforms," "assessments," and "employee surveys").) The Court further assumes, without deciding, that this property could be the subject of a conversion claim.

18. Even so, Plaintiff has failed to allege that it was deprived of this information. The complaint states only that the information was "copied, reproduced, and disseminated to various third parties without [Plaintiff's] authorization or consent." (Compl. ¶ 29.) Plaintiff's sur-reply similarly states that its "allegations encompass misappropriation of a physical copy" of electronically stored information.

(Pl.'s Surreply 1.) As this Court has recently held, "making a copy of electronically-stored information which does not deprive the plaintiff of possession or use of information, does not support a claim for conversion." *RCJJ, LLC v. RCWIL Enters., LLC*, 2016 NCBC LEXIS 46, at *53 (N.C. Super. Ct. June 20, 2016); *see also Addison Whitney, LLC v. Cashion*, 2017 NCBC LEXIS 51, at *17 (N.C. Super. Ct. June 9, 2017); *RoundPoint Mortg. Co. v. Florez*, 2016 NCBC LEXIS 18, at *55 (N.C. Super. Ct. Feb. 18, 2016); *Horner Int'l Co. v. McKoy*, 2014 NCBC LEXIS 68, at *8 (N.C. Super. Ct. Dec. 18, 2014).

19. The Court therefore grants the motion to dismiss as to the claim for conversion. The Court need not address Defendants' alternative arguments, including their argument that the claim is preempted by the federal Copyright Act.

B. Unfair or Deceptive Trade Practices

20. Plaintiff's claim under N.C. Gen. Stat. § 75-1.1 is also the subject of some ambiguity. The complaint restates all preceding paragraphs without identifying the acts that are alleged to be unfair or deceptive trade practices. (*See* Compl. ¶¶ 48–51.) At the hearing, Plaintiff's counsel clarified that the claim is limited to Defendants' alleged taking of Plaintiff's technology and that it does not concern the alleged taking of STO's technology or usurpation of its business opportunities.

21. The clarification considerably narrows the issue. The alleged unfair trade practices are essentially identical to the alleged conversion and breach of the IP Agreement: that Sales Performance "copied, reproduced, and disseminated" Plaintiff's intellectual property and proprietary information. (Compl. ¶ 28.) Having

already dismissed the conversion claim, the Court further agrees with Defendants that "a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1." *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992).

22. Appellate precedent routinely holds that a section 75-1.1 violation "is unlikely to occur during the course of contractual performance," and "these types of claims are best resolved by simply determining whether the parties properly fulfilled their contractual duties." *Heron Bay Acquisition, LLC v. United Metal Finishing, Inc.*, 781 S.E.2d 889, 893 (N.C. Ct. App. 2016) (quoting *Mitchell v. Linville*, 148 N.C. App. 71, 75, 557 S.E.2d 620, 623–24 (2001)). Plaintiff has not alleged the type of "substantial aggravating circumstances," such as fraud, necessary to transform a breach of contract into a section 75-1.1 claim. *Branch Banking & Trust*, 107 N.C. App. at 62, 418 S.E.2d at 700. At most, Plaintiff's allegation that Sales Performance "purposefully" copied and disseminated its intellectual property would constitute an intentional breach of the IP Agreement, which is insufficient to state a claim for unfair or deceptive trade practices. (Compl. ¶ 29.)

23. Accordingly, the Court grants the motion to dismiss as to the claim for unfair or deceptive trade practices.

C. Breach of Fiduciary Duty

24. Plaintiff alleges that Sales Performance, as the majority member of STO, breached a fiduciary duty owed to Plaintiff, as the minority member. (*See* Compl. ¶ 41; *see also* Compl. ¶ 42.) Sales Performance contends that there is no fiduciary

relationship between STO's members and that, in any event, the parties waived and disclaimed any fiduciary duties in the Operating Agreement. (*See* Mem. of Law in Supp. of Defs.' Mot. to Dismiss Claims Under Rule 12(b)(6) 8, 11 ["Defs.' Br."].)

25. The law does not favor claims by one LLC member against another for breach of fiduciary duty. As the North Carolina Court of Appeals has explained, the North Carolina Limited Liability Company Act "does not create fiduciary duties among members." *Kaplan v. O.K. Techs., L.L.C.*, 196 N.C. App. 469, 473, 675 S.E.2d 133, 137 (2009). Rather, members of an LLC "are like shareholders in a corporation in that members do not owe a fiduciary duty to each other or to the company." *Id.*

26. Plaintiff relies on an exception to this general rule. Citing *Kaplan*, a few recent cases have stated that "a holder of a majority interest who exercises control over the LLC owes a fiduciary duty to minority interest members." *Fiske v. Kieffer*, 2016 NCBC LEXIS 22, at *9 (N.C. Super. Ct. Mar. 9, 2016); *see also Zagaroli v. Neill*, 2016 NCBC LEXIS 106, at *18 (N.C. Super. Ct. Dec. 29, 2016); *SCA-Blue Ridge, LLC v. WakeMed*, 2016 NCBC LEXIS 2, at *20 (N.C. Super. Ct. Jan. 4, 2016); *Island Beyond, LLC v. Prime Capital Grp., LLC*, 2013 NCBC LEXIS 48, at *14–15 (N.C. Super. Ct. Oct. 30, 2013).

27. The scope of this exception, borrowed from precedents governing corporations, remains unsettled. This Court has cautioned against a broad application because of the fundamental differences between LLCs and corporations. *See HCW Ret. & Fin. Servs.*, 2015 NCBC LEXIS 73, at *47 n.102; *see also Blythe v. Bell*, 2013 NCBC LEXIS 17, at *13–14 (N.C. Super. Ct. Apr. 8, 2013). Unlike a

corporation, "[a]n LLC is primarily a creature of contract." *Crouse v. Mineo*, 189 N.C. App. 232, 237, 658 S.E.2d 33, 36 (2008) (quoting Russell M. Robinson, II, *Robinson on North Carolina Corporate Law* § 34.01, at 34-2 to 34-3 (rev. 7th ed. 2016)). The rights and duties of LLC members are ordinarily governed by the company's operating agreement, not by general principles of fiduciary relationships. *See* N.C. Gen. Stat. § 57D-2-30 ("The operating agreement governs the internal affairs of an LLC and the rights, duties, and obligations of . . . the interest owners . . . in relation to each other"). Especially where the members have bargained for comprehensive terms to govern their relationship, the imprudent imposition of fiduciary duties could "undermine the contractual nature of an Operating Agreement." *HCW Ret. & Fin. Servs.*, 2015 NCBC LEXIS 73, at *47 n.102.

28. With these principles in mind, the Court concludes that Plaintiff has not adequately alleged the existence of a fiduciary relationship. Plaintiff first contends that Sales Performance's "mere possession of a majority interest in STO created a fiduciary relationship with [Plaintiff] as a minority interest holder." (Pl.'s Br. 11.) That is simply wrong. Even in the context of corporate shareholders, "the element of *control* is what gives rise to a fiduciary duty between the controlling shareholder and the minority." *Emergys Corp. v. Consert, Inc.*, 2012 NCBC LEXIS 19, at *21 (N.C. Super. Ct. Apr. 5, 2012) (emphasis added); *see also Gaines v. Long Mfg. Co.*, 234 N.C. 340, 344–45, 67 S.E.2d 350, 353 (1951) (stating "the fact of control . . . creates the fiduciary obligation on the part of the majority stockholders"); *Freese v. Smith*, 110

N.C. App. 28, 37, 428 S.E.2d 841, 847 (1993) ("In North Carolina, it is well established that a controlling shareholder owes a fiduciary duty to minority shareholders.").

29. Plaintiff insists that a majority interest "creates a presumption of a control that cannot be overcome by only considering the pleadings." (Pl.'s Br. 11.) That may be true for corporations. *See Corwin v. British Am. Tobacco PLC*, 796 S.E.2d 324, 332 (N.C. Ct. App. 2016) ("[A] majority shareholder is presumed to be a controlling shareholder." (internal quotation omitted)), *review allowed* 799 S.E.2d 616 (N.C. 2017). Plaintiff has neither cited authority extending the rule to LLCs nor explained why it would be sensible to do so. There is little reason to believe that control presumptively goes hand in hand with a majority interest in an LLC. "Parties to an LLC Operating Agreement can alter statutory default rules," *Island Beyond*, 2013 NCBC LEXIS 48, at *15, and minority members of an LLC have "the freedom of contract . . . to obtain minority protections not available to shareholders of [a] closely-held corporation," *Blythe*, 2013 NCBC LEXIS 17, at *14.

30. The STO Operating Agreement is a case in point. It conclusively rebuts any presumption of majority control, to the extent one exists. Although Sales Performance owns 60 percent of STO, it has no meaningful ability to use that interest to exercise control over the company. Plaintiff and Sales Performance are not "agents of" STO and do "not have any authority to manage or control the business and affairs of the Company or to sign for or act on behalf of the Company." (Operating Agreement § 6.1.) The Operating Agreement instead vests "full, exclusive and complete authority to manage the affairs of the Company" in two managers. (Operating

Agreement § 5.1.) Plaintiff and Sales Performance each have "the power to designate" one manager, and any action of the managers must be unanimous. (Operating Agreement §§ 5.3(a), 5.4, 5.5, 5.8.) Likewise, the Operating Agreement prohibits amendment of the articles of organization, conversion of STO into another form of business, voluntary dissolution or liquidation, and numerous other actions in the absence of "the approval of Members holding one hundred percent" of the membership interest units. (Operating Agreement § 6.3.)

31. Plaintiff has been able to identify only one action that the Operating Agreement authorizes Sales Performance to take without Plaintiff's cooperation or approval: determining the amount to pay the managers for their services. (Operating Agreement § 5.6; *see also* Operating Agreement § 6.2.) It may well be that Sales Performance is obliged to exercise this power fairly and in good faith. The complaint does not allege that it has been abused, and in any event, it is insufficient standing alone to turn Sales Performance's majority interest into a controlling interest for other purposes.

32. In view of the comprehensive terms of the Operating Agreement, Plaintiff has failed to allege the control necessary to demonstrate a fiduciary relationship between STO's members. Plaintiff successfully bargained for numerous protections for its minority interest. Imposing an additional fiduciary duty on Sales Performance (the majority interest owner), outside of its contractual duties, would be inconsistent with the parties' bargain and with this State's policy of "giv[ing] the maximum effect to the principle of freedom of contract and the enforceability of operating

agreements." N.C. Gen. Stat. § 57D-10-01(c); *see also Related Westpac LLC v. JER Snowmass LLC*, C.A. No. 5001-VCS, 2010 Del. Ch. LEXIS 158, at *30–31 (Del. Ct. Ch. July 23, 2010) (applying Delaware law and holding that "[w]hen a fiduciary duty claim is plainly inconsistent with the contractual bargain struck by parties to an LLC . . ., the fiduciary duty claim must fall").

33. The Court has considered and finds unpersuasive Plaintiff's other arguments, including its contention that STO's status as a joint venture gives rise to an independent fiduciary relationship. Plaintiff and Sales Performance chose to organize their joint enterprise as an LLC, and it is therefore subject to the laws governing LLCs. Moreover, the complaint does not allege a fiduciary relationship on this basis. *See Se. Shelter Corp.*, 154 N.C. App. at 327, 572 S.E.2d at 204–05 (discussing "essential elements of a joint venture").

34. The Court therefore grants the motion to dismiss the claim for breach of fiduciary duty. Having concluded that no fiduciary relationship has been alleged, the Court need not address Defendants' alternative argument that the Operating Agreement disclaimed any fiduciary duties.

D. Unjust Enrichment

35. Plaintiff's unjust enrichment claim is based on the allegation that it "provided a benefit to the Defendants in the form of access to its intellectual property." (Compl. ¶ 53.) Defendants seek to dismiss the claim solely on the ground that unjust enrichment is not an appropriate remedy where the parties have an express contract (here, the IP Agreement). (Defs.' Br. 16–17.)

36. The Court concludes that Plaintiff may plead its unjust enrichment claim in the alternative. It is unclear whether the claim for breach of the IP Agreement (which is between Plaintiff and Sales Performance only) perfectly aligns with the claim for unjust enrichment (which is against all Defendants), and the limited briefing on the issue does not provide a reasoned basis for dismissing the claim as to Sales Performance but not as to the Individual Defendants. Defendants may eventually succeed in demonstrating that the IP Agreement bars any recovery for unjust enrichment, but the better course is not to dismiss the unjust enrichment claim at this stage despite the claim for breach of contract. The Court therefore denies the motion to dismiss the claim for unjust enrichment. *See, e.g.*, *Krawiec v. Manly*, 2016 NCBC LEXIS 7, at *31 (N.C. Super. Ct. Jan. 22, 2016) (denying motion to dismiss unjust enrichment claim).

III.
CONCLUSION

37. For these reasons, the Court **GRANTS** the motion to dismiss the claims for conversion, unfair or deceptive trade practices, and breach of fiduciary duty. Plaintiff has not previously amended its complaint or attempted to cure any defects in its pleading, and these claims are therefore **DISMISSED** without prejudice. *See First Fed. Bank v. Aldridge*, 230 N.C. App. 187, 191, 749 S.E.2d 289, 292 (2013) ("The decision to dismiss an action with or without prejudice is in the discretion of the trial court."). The Court **DENIES** the motion as to the claim for unjust enrichment.

This the 7th day of August, 2017.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases

Bennett v. Bennett, 2019 NCBC 18.

STATE OF NORTH CAROLINA FORSYTH COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 18 CVS 48
BERT L. BENNETT III and TERRY BENNETT ALLEN, Plaintiffs, v. GRAHAM F. BENNETT; ANN BENNETT-PHILLIPS; JAMES H. BENNETT; and LOUISE BENNETT, Defendants, and BENNETT LINVILLE FARM, LLC; JOHN J. BENNETT; and JEANNE R. BENNETT, Nominal Defendants.	**ORDER AND OPINION ON MOTION TO DISMISS SECOND AMENDED COMPLAINT**

1. This case arises out of a dispute between siblings, all of whom are members or former members of Bennett Linville Farm, LLC ("Bennett Farm"). Formed as an estate-planning vehicle, Bennett Farm's initial members included most of the Bennett family—both parents and six of their children. The family's intent, according to Plaintiffs, was for each of Bennett Farm's members to have an equal say in its affairs.

2. Instead, Plaintiffs contend, they have been denied a voice on nearly every company decision in recent years. In this action, they allege that three of the Bennett siblings—Graham Bennett, Ann Bennett-Phillips, and Jim Bennett—conspired to

seize managerial authority without the other members' knowledge or approval. The three then fraudulently amended Bennett Farm's operating agreement to consolidate their control and, having done so, began taking actions on the company's behalf without member approval. Plaintiffs now claim that Graham, Ann, and Jim breached a fiduciary duty owed to the other members, seek declarations that their actions were unauthorized and invalid, and request a decree judicially dissolving Bennett Farm.

3. In response, Graham, Ann, and Jim seek to dismiss this action in its entirety. They contend that Plaintiffs lack standing to bring many of the asserted claims as direct claims, rather than as derivative claims on behalf of Bennett Farm. They also contend that Plaintiffs fail to state any claim upon which relief can be granted. For the reasons stated below, the Court **GRANTS in part** and **DENIES in part** the motion.

Fitzgerald Litigation, by Andrew L. Fitzgerald, Lee Denton, and D. Stuart Punger, for Plaintiffs.

Bell, Davis & Pitt, P.A., by Allison B. Parker and Kevin G. Williams, for Defendants Graham F. Bennett, Ann Bennett-Phillips, James H. Bennett, and Bennett Linville Farm, LLC.

Roberson Haworth & Reese, PLLC, by Andrew D. Irby, for Defendant Louise Bennett.

No counsel appeared for Nominal Defendants John J. Bennett and Jeanne R. Bennett.

Conrad, Judge.

I.
BACKGROUND[1]

4. The history of this case begins nearly 40 years ago with Bert Bennett, Jr., his wife Lillian Bennett, and their eight children: Bert III, Graham, Joy, John, Louise, Terry, Ann, and Jim. (Second Am. Compl. ¶ 12, ECF No. 25 ["Compl."].) In the early 1980s, the Bennett parents began giving real estate to their children. (Compl. ¶ 14.) Over the course of several years, each of the Bennett children received a one-eighth undivided interest in several parcels in Avery County—a tract that eventually grew to hundreds of acres. (Compl. ¶¶ 14, 15.)

5. Such was the status quo until 2001, when Joy gave up her interest in the property, transferring it to her seven siblings. (Compl. ¶ 16.) Around the same time, John and his wife, Jeanne, requested that they be given a portion of the property to own separate and apart from the others. (Compl. ¶ 17.) The Bennett parents agreed, and the other Bennett children deeded their interests in a 35-acre tract to John and Jeanne. (Compl. ¶ 19.) Although somewhat unclear, it appears that John in return gave up his interest in the rest of the Avery County property. (*See* Compl. ¶ 20.)

6. The second amended complaint says little about how the Bennett family managed the jointly held property at first. The Bennett parents, though having given the property to their children, seem to have exercised continued decision-making authority for a time. (*See* Compl. ¶¶ 18, 24.) That changed in 2007 with the creation of Bennett Farm, a limited liability company formed to facilitate the parents' estate

[1] This summary is drawn from relevant allegations in the second amended complaint and the attached exhibits. It is intended only to provide context for the Court's decision and does not constitute findings of fact.

planning. (*See* Compl. ¶ 24.) The founding members of Bennett Farm were the Bennett parents (each with a 23% interest), along with Bert III, Graham, Louise, Terry, Ann, and Jim (each with a 9% interest). (Compl. ¶ 24; *see also* Ex. 2 at Schedule I ["Op. Agr."].) All of the members transferred their ownership interests in the Avery County property to Bennett Farm. (Compl. ¶ 28.)

7. According to Bert III and Terry (the plaintiffs here), the family intended Bennett Farm to be a member-managed LLC. (Compl. ¶ 24.) They allege, though, that Graham and Ann designated Bennett Farm as a manager-managed LLC—without the knowledge of the other members—in certain Articles of Incorporation.[2] (Compl. ¶ 25.) The company's Operating Agreement was then executed in February 2007. (Compl. ¶ 26.) It also states that Bennett Farm "shall be managed by the Managers," a term defined as "those individuals set forth in Schedule II" or individuals "who are elected to act as Managers." (Op. Agr. §§ 2.1, 12.1(p).) As executed, though, the Operating Agreement included no Schedule II, and no election of managers ever took place. (*See* Compl. ¶¶ 26, 27.) Bert III and Terry allege that a document labeled as Schedule II, which lists Graham and Ann as managers, was added later without the approval of Bennett Farm's members. (Compl. ¶ 26.)

8. In 2010, Graham and Ann, joined by Jim, amended the Operating Agreement, again without the others' knowledge, to include new terms designed to consolidate their control. (*See* Compl. ¶ 30.) Among other changes, the Amended Operating Agreement designates Jim as a third manager, authorizes the managers

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[2] It is unclear why Articles of Incorporation were adopted for Bennett Farm, which is a limited liability company and not a corporation.

to make capital calls without member consent, loosens the restrictions on a member's right to transfer his or her interest, and permits Bennett Farm to redeem any member's interest upon the consent of members owning at least 75% of the company. (*See* Compl. Ex. 4 §§ 7.2, 9.2, 9.6 ["Am. Op. Agr."].) Bert III and Terry signed the Amended Operating Agreement but allege that they were never provided a copy of the document apart from the signature page, that the terms were never disclosed, and that Graham falsely represented that their signatures were needed for administrative purposes. (Compl. ¶ 31.) They saw the new terms for the first time more than five years later. (*See* Compl. ¶ 33.)

9. In 2012, Lillian Bennett died. (Compl. ¶ 34.) She passed her interest in Bennett Farm to Bert III, Graham, Louise, Terry, Ann, and Jim—the six children with membership interests in the company. (Compl. ¶ 34.) Bert Bennett, Jr., though still living, did the same a few months later. (Compl. ¶ 35.) Thus, as of June 2012, Bennett Farm had six remaining members, all with equal interests. (Compl. ¶ 36.)

10. Not long after, Graham, Ann, and Jim asked John and Jeanne to give Bennett Farm a right of first refusal on their separate 35-acre tract. (Compl. ¶ 37.) John and Jeanne agreed. (Compl. ¶ 38.) When John later learned that the right of first refusal would interfere with his plan to incorporate his property into an adjacent subdivision, he requested that Bennett Farm terminate the then-unexercised right. (Compl. ¶ 40.) This prompted a heated family disagreement. Bert III, Terry, and Louise had received no notice of the right of first refusal in the first place and favored granting John's request to terminate it. (Compl. ¶¶ 39, 46.) Graham, Ann, and Jim

disagreed and, claiming managerial authority, decided to exercise and enforce the right of first refusal even in the absence of majority approval of the members. (Compl. ¶¶ 46–48.) John and Jeanne responded by suing Bennett Farm. (Compl. ¶ 50.)

11. The litigation deepened the family divide. The siblings disputed who should pay for Bennett Farm's litigation expenses. (*See* Compl. ¶¶ 61, 78, 90(f).) Bert III's refusal to pay his share of the expenses prompted a backlash by Graham, Ann, and Jim, resulting in his exclusion from the Bennett Farm property. (*See* Compl. ¶¶ 78, 79.)

12. There were also discussions about how to pay for John and Jeanne's land if Bennett Farm succeeded in exercising the right of first refusal. Bert III and Terry now allege that the others used the issue as leverage to force Terry out of the company. In an e-mail to Graham and Ann, Jim expressed his "wish" to "find a way to get Terry to sell out of the entire property now." (Compl. ¶ 52.) Ann agreed and observed that Terry likely would not or could not pay her pro rata share of any cost to buy John and Jeanne's land. (*See* Compl. ¶ 52.) Graham later informed Terry that she would have to make such a contribution—an amount over $100,000—or consider selling her interest in Bennett Farm to the other members. (Compl. ¶ 54.) To satisfy any capital call to buy out John and Jeanne, Terry would have needed access to funds in a trust that had been created by her mother's will. (Compl. ¶ 51.) Ann, one of the two trustees, refused to assure Terry that she would have access to the trust funds. (Compl. ¶ 57.) Unable to afford a capital call, Terry negotiated a sale of her

membership interest in February 2016 to the other five remaining members of Bennett Farm. (Compl. ¶ 58.)

13. As the litigation with John lingered, Bert III commenced this action in January 2018 against Graham, Ann, Jim, and Louise, along with Bennett Farm as a nominal defendant. (ECF No. 4.) His original complaint sought a declaration that Graham, Ann, and Jim are not managers of Bennett Farm and that many of their actions on the company's behalf were invalid. In addition, he brought claims for breach of fiduciary duty, civil conspiracy, constructive fraud, and judicial dissolution of Bennett Farm. The complaint was later amended to add Terry as a plaintiff. (ECF No. 5.) Terry joined in Bert III's original claims and added new allegations that Ann breached her fiduciary duty in her role as trustee for Terry.

14. A motion to dismiss the amended complaint was filed but became moot when Bert III and Terry were granted leave to amend for a second time. (ECF No. 24.) The second amended complaint adds John and Jeanne as nominal defendants. It also adds new claims for breach of contract and breach of the implied covenant of good faith and fair dealing, both relating to Louise's sale of her membership interest in April 2018. (*See* Compl. ¶ 68.) Louise, apparently fed up with family litigiousness, invited offers to purchase her membership interest from all her siblings but ultimately sold it to Graham, Ann, and Jim. (*See* Compl. ¶¶ 63–69.) The transaction gave Graham, Ann, and Jim a combined 80% of Bennett Farm and left Bert III with the remaining 20% interest. (Compl. ¶ 68.) Bert III and Terry allege that the transfer

failed to comply with the terms of the Operating Agreement, or the Amended Operating Agreement if it controls. (*See* Compl. ¶¶ 103–09.)

15. Graham, Ann, and Jim moved to dismiss the second amended complaint in its entirety on July 10, 2018. (ECF No. 32.) The motion has been fully briefed, and the Court held a hearing on August 16, 2018. The motion is ripe for resolution.[3]

II.
ANALYSIS

16. Bert III and Terry allege that three of their siblings—Graham, Ann, and Jim—"have undertaken a crusade" to gain control of Bennett Farm and its property to the exclusion of the other Bennett children. (Pl.'s Br. Opp'n. Mot. Dismiss 6–7, ECF No. 38 ["Opp'n"].) According to Bert III and Terry, all or nearly all of the actions taken by Graham, Ann, and Jim on behalf of Bennett Farm were unauthorized and in violation of fiduciary and contractual duties owed to the other members. Bert III and Terry have brought each of their eight claims for relief as direct claims and not as derivative claims on behalf of Bennett Farm.

17. Graham, Ann, and Jim seek to dismiss the second amended complaint in its entirety. They press a mix of jurisdictional and merits-related arguments. Among other things, Graham, Ann, and Jim contend that they owed no fiduciary duties to Bert III and Terry as either co-members or managers of Bennett Farm and that the

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[3] Louise filed her own motion to dismiss on July 26, 2018. (ECF No. 36.) In response, Bert III and Terry voluntarily dismissed any demand for monetary relief against Louise, though maintaining that she must remain a party because their claims could affect the transfer of her membership interest in Bennett Farm. (ECF No. 40.) Louise withdrew her motion on August 10, 2018. (ECF No. 41.)

requested declaratory judgments are largely improper efforts to nullify contracts, including the Amended Operating Agreement.

A. Legal Standard

18. "Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy." *Intersal, Inc. v. Hamilton*, 2017 NCBC LEXIS 97, at *16 (N.C. Super. Ct. Oct. 12, 2017). Matters outside the pleadings may be considered by the Court. *See State v. Seneca-Cayuga Tobacco Co.*, 197 N.C. App. 176, 177, 676 S.E.2d 579, 583 (2009). If the Court does not consider matters outside the pleadings, "the court must accept plaintiff's allegations as true and construe them in the light most favorable to the plaintiff." *DiCesare v. Charlotte-Mecklenburg Hosp. Auth.*, 2017 NCBC LEXIS 33, at *18 (N.C. Super. Ct. Apr. 11, 2017).

19. A motion to dismiss under North Carolina Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of the complaint." *Concrete Serv. Corp. v. Inv'rs Grp., Inc.*, 79 N.C. App. 678, 681, 340 S.E.2d 755, 758 (1986). Dismissal pursuant to Rule 12(b)(6) is appropriate when "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Corwin v. British Am. Tobacco PLC*, 821 S.E.2d 729, 736–37 (N.C. 2018) (citation and quotation marks omitted).

20. In deciding a Rule 12(b)(6) motion, the Court must treat the well-pleaded allegations of the complaint as true and view the facts and permissible inferences "in the light most favorable to" the nonmoving party. *Ford v. Peaches Entm't Corp.*, 83

N.C. App. 155, 156, 349 S.E.2d 82, 83 (1986). "[T]he court is not required to accept as true any conclusions of law or unwarranted deductions of fact." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 56, 554 S.E.2d 840, 844 (2001). The Court "may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers" without converting a Rule 12(b)(6) motion into a motion for summary judgment. *Weaver v. St. Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007) (quoting *Oberlin Capital*, 147 N.C. App. at 60, 554 S.E.2d at 847).[4]

B. Fiduciary Claims

21. The Court begins with the claims based on fiduciary relationships. The second amended complaint includes two distinct claims for breach of fiduciary duty: one related to actions taken by Graham, Ann, and Jim on behalf of Bennett Farm; and the other against Ann in her role as trustee for Terry. There is also a single claim for constructive fraud that is premised on the same facts underlying the two fiduciary-duty claims. The Court considers each in turn.

1. Breach of Fiduciary Duty Based on Actions by Graham, Ann, and Jim on Behalf of Bennett Farm

22. As alleged in the second amended complaint, Graham, Ann, and Jim breached their fiduciary duties owed to Bert III and Terry by seizing control of Bennett Farm without the authorization of its members and then taking a series of

[4] Bert III and Terry object to any consideration of the exhibits to the motion to dismiss and other extrinsic matter introduced in the briefing. (*See* Opp'n 28–29.) These materials are not pertinent to the disputed issues, and the Court therefore has not considered them.

actions designed to consolidate their control. (*See* Compl. ¶¶ 84–96.) Graham, Ann, and Jim contend that Bert III and Terry lack standing to pursue a direct claim for breach of fiduciary duty and that the complaint does not adequately allege the existence of a fiduciary relationship between the parties. (*See* Def.'s Br. in Supp. Mot. Dismiss 7–10 ["Br. in Supp."].)

23. "Standing generally refers to a party's right to have a court decide the merits of a dispute." *DiCesare*, 2017 NCBC LEXIS 33, at *19. It is "a necessary prerequisite to a court's proper exercise of subject matter jurisdiction," *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002), and, therefore, "a threshold issue that must be addressed and found to exist, before the merits of the case are judicially resolved," *Byron v. SYNCO Props.*, 813 S.E.2d 455, 458 (N.C. Ct. App. 2018) (citation and quotation marks omitted).

24. Here, Graham, Ann, and Jim argue that Bert III and Terry lack standing to assert a direct claim for breach of fiduciary duty, relying on the general rule "that shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock." *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 658, 488 S.E.2d 215, 219 (1997). The exception to this rule is that a shareholder may maintain an individual action, "even if the corporation also has a cause of action arising from the same wrong, if the shareholder can show that the wrongdoer owed him a special duty or that the injury suffered by the shareholder is separate and distinct from the injury sustained by the other shareholders or the corporation itself." *Id.* at 659, 488

S.E.2d at 219. These rules apply "equally to LLCs" and their members because the members are, for this purpose, functionally equivalent to corporate shareholders. *Levin v. Jacobson*, 2015 NCBC LEXIS 111, at *15 n.4 (N.C. Super. Ct. Dec. 7, 2015).[5]

25. The alleged breaches of fiduciary duty here are extensive and overlapping. They include allegations that Graham, Ann, and Jim improperly acquired and then exercised managerial authority over Bennett Farm—for example, hiring counsel to amend the Operating Agreement (which they then tricked their siblings into signing), negotiating and exercising the right of first refusal as to John and Jeanne's land, and declaring and making capital calls. (*See* Compl. ¶¶ 88, 90, 92, 93.) The second amended complaint further alleges that Graham, Ann, and Jim improperly induced Terry into selling her membership interest and purchased Louise's membership interest in violation of the Operating Agreement. (*See* Compl. ¶¶ 90, 94.)

26. In each case, assuming the alleged facts to be true, the injuries incurred by Bert III and Terry are "separate and distinct" from those of Bennett Farm as required under the *Barger* framework. *Barger*, 346 N.C. at 659, 488 S.E.2d at 219. At root, Bert III and Terry allege that Graham, Ann, and Jim seized managerial control without authorization and took actions on behalf of Bennett Farm against the wishes

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[5] The *Barger* framework seems to be a poor fit here, yet both sides apply it, apparently on the theory that the claim is based on alleged wrongs committed "against [Bennett Farm] and alleged injuries suffered by [Bennett Farm]." (Br. in Supp. 6; *see also* Opp'n 15–18.) There is no claim, though, that Graham, Ann, and Jim breached a fiduciary duty owed to Bennett Farm. And many of the alleged wrongs were clearly directed toward Bennett Farm's members, not Bennett Farm, which would suggest the claim is, at least in part, a direct claim on its face. Nevertheless, application of the *Barger* framework would lead to the same result, and the Court elects to do so. *See Atkinson v. Lackey*, 2015 NCBC LEXIS 21, at *14 n.3 (N.C. Super. Ct. Feb. 27, 2015) (applying *Barger* even though "claims arguably could be seen as direct claims on their face and fall outside the *Barger* analysis altogether").

of the majority of its members. If so, the effect was to deprive dissenting members of their voting rights. This would include at least the right to elect managers, (*see* Op. Agr. § 12.1(p)), and the residual right to vote on business affairs in the absence of validly appointed managers, *see* N.C. Gen. Stat. § 57D-3-20(d) ("All members will be managers for any period during which the LLC would otherwise not have any managers or other company officials."). As this Court recently held, the right to vote on company matters is a right possessed by the individual member, and the infringement of that right is an individual injury properly the subject of a direct claim. *See 759 Ventures, LLC v. GCP Apt. Investors, LLC*, 2018 NCBC LEXIS 82, at *10 (N.C. Super. Ct. Aug. 13, 2018); *see also La Mack v. Obeid*, 2015 NCBC LEXIS 24, at *12–14 (N.C. Super. Ct. Mar. 5, 2015) (applying Delaware law).

27. So too for the other allegations. The loss of Terry's membership interest, if she was wrongfully induced into selling, is an injury unique to Terry. Similarly, the allegedly improper purchase of Louise's membership interest by Graham, Ann, and Jim diluted the interest of Bert III relative to theirs—effectively increasing the interest of the three managerial members at the expense of the remaining minority member. *Cf. Corwin*, 821 S.E.2d at 735–36 (holding that shareholder had standing to bring direct claim for voting power dilution in corporate context).

28. Graham, Ann, and Jim argue, perhaps correctly, that they became managers through legitimate means and therefore properly exercised managerial authority. (*See* Br. in Supp. 3, 19.) They also argue that Terry was not coerced into selling her interest and that the purchase of Louise's interest complied with the

requirements of the Amended Operating Agreement. (*See* Br. in Supp. 21.) But the allegations of the second amended complaint say otherwise, and "[j]urisdiction of the court over the subject matter is not defeated by the possibility that the allegations of the complaint may fail to state a cause of action upon which the plaintiff may recover." *Wilkie v. Stanley*, 2011 NCBC LEXIS 11, at *7 (N.C. Super. Ct. Apr. 20, 2011) (quoting *Dale v. Lattimore*, 12 N.C. App. 348, 352, 183 S.E.2d 417, 420 (1971)). For purposes of standing, Bert III and Terry have alleged a concrete, individual injury, sufficient "to justify the invocation of the judiciary's remedial powers." *Id.* at *8 (citation and quotation marks omitted).

29. On the merits, however, the claim falls short. An "essential element" of a claim for breach of fiduciary duty "is the existence of a fiduciary relationship." *Azure Dolphin, LLC v. Barton*, 2017 NCBC LEXIS 90, at *23 (N.C. Super. Ct. Oct. 2, 2017) (citing *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001)). As a general rule, members of an LLC "do not owe a fiduciary duty to each other or to the company." *Kaplan v. O.K. Techs., L.L.C.*, 196 N.C. App. 469, 473, 675 S.E.2d 133, 137 (2009). Rather, "[t]he rights and duties of LLC members are ordinarily governed by the company's operating agreement, not by general principles of fiduciary relationships." *Strategic Mgmt. Decisions, LLC v. Sales Performance Int'l, LLC*, 2017 NCBC LEXIS 69, at *10–11 (N.C. Super. Ct. Aug. 7, 2017); *see also* N.C. Gen. Stat. § 57D-2-30(a).

30. Bert III and Terry offer no persuasive reason to depart from these usual rules. Although Bert III and Terry dispute the validity of the Amended Operating

Agreement, they do not contest the validity of the original Operating Agreement. (*See, e.g.*, Compl. ¶¶ 26, 82.) That agreement thoroughly addresses the duties, powers, and potential liability of members. (*See* Op. Agr. §§ 4.2, 5.6, 6.3, 11.1.) Several provisions expressly disclaim fiduciary or fiduciary-like duties on the part of members or managers. (*See* Op. Agr. §§ 6.2, 11.1.) No provision is alleged to support the existence of a fiduciary relationship between Bennett Farm's members.

31. Rather, Bert III and Terry allege a fiduciary relationship based on other factors, unrelated to the Operating Agreement or the organizational structure of Bennett Farm. They point to their sibling relationship and the allegedly greater business experience and financial resources of Graham, Ann, and Jim. (Compl. ¶¶ 86, 87.) It is debatable whether these factors, even if taken as true, could override the Operating Agreement. "Especially when the members have bargained for comprehensive terms to govern their relationship, the imprudent imposition of fiduciary duties could undermine the contractual nature of an operating agreement." *Strategic Mgmt. Decisions*, 2017 NCBC LEXIS 69, at *11.

32. In any event, the allegations are facially insufficient to plead the existence of a fiduciary relationship. "Only when one party figuratively holds all the cards—all the financial power or technical information, for example—have North Carolina courts found that the special circumstance of a fiduciary relationship has arisen." *Highland Paving Co. v. First Bank*, 227 N.C. App. 36, 42, 742 S.E.2d 287, 292 (2013) (citation and quotation marks omitted). Here, no individual sibling held all the cards. Each member affirmatively represented that he or she possessed "such expertise,

knowledge, and sophistication in financial and business matters generally, and in the type of transactions in which [Bennett Farm] proposes to engage in particular," to be able to evaluate the merits and risks of membership in the company. (Op. Agr. § 11.2.)

33. Furthermore, the other allegations in the second amended complaint refute the existence of a relationship of confidence or trust. Bert III and Terry deny ever having given managerial authority to their siblings. (*See* Compl. ¶¶ 26, 27, 82(b).) In addition, they repeatedly voted against the actions taken by Graham, Ann, and Jim that form the basis of this lawsuit. (*See* Compl. ¶¶ 46, 47, 48.) They also refused to satisfy capital calls. (*See* Compl. ¶ 78.) Simply put, even taking the allegations of the second amended complaint as true, this is not the rare familial relationship that gives rise to a fiduciary relationship. *See White v. Hyde*, 2016 NCBC LEXIS 74, at *21 (N.C. Super. Ct. Oct. 4, 2016) (rejecting fiduciary relationship between sibling co-owners of LLC).

34. In their briefing, Bert III and Terry make two additional, and much narrower, arguments.[6] First, they contend that Graham, Ann, and Jim collectively own more than 50% of Bennett Farm and therefore owe a fiduciary duty as controlling members. (*See* Opp'n 16.) This duty, if it existed, would have applied only after Terry sold her membership interest in February 2016. (*See* Comp. ¶¶ 57, 58.)

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[6] The second amended complaint also makes reference to a family ledger, which apparently records distributions from the Bennett parents to their children. (*See* Compl. ¶ 72.) The Bennett parents delegated responsibility for maintaining the ledger to Graham at some point. (*See* Compl. ¶ 74.) Bert III and Terry suggest this is another factor supporting the existence of a fiduciary duty but give no reasoned explanation for why that would be so, and the Court cannot discern one. No claim appears to arise out of mismanagement of the ledger.

35. Some recent cases have stated that "a holder of a majority interest who exercises control over the LLC owes a fiduciary duty to minority interest members." *Fiske v. Kieffer*, 2016 NCBC LEXIS 22, at *9 (N.C. Super. Ct. Mar. 9, 2016). "The scope of this exception, borrowed from precedents governing corporations, remains unsettled," and "[t]his Court has cautioned against a broad application because of the fundamental differences between LLCs and corporations." *Strategic Mgmt. Decisions*, 2017 NCBC LEXIS 68, at *11. In the corporate context, for example, courts have held that a controlling shareholder may include "a group of shareholders with an aggregated majority interest acting in concert." *Brewster v. Powell Bail Bonding, Inc.*, 2018 NCBC LEXIS 76, at *10 (N.C. Super. Ct. July 26, 2018). But this Court has routinely refused to extend these precedents to LLCs because minority members have much greater ability to negotiate for protections in the operating agreement. *See, e.g.*, *HCW Ret. & Fin. Servs., LLC v. HCW Employee Benefit Servs., LLC*, 2018 NCBC LEXIS 73, at *47 n.102 (N.C. Super. Ct. July 14, 2015); *Fiske*, 2016 NCBC LEXIS 22, at *10; *Blythe v. Bell*, 2013 NCBC 18, at *13–14 (N.C. Super. Ct. Apr. 8, 2013).

36. The Court adheres to these decisions, which Bert III and Terry do not address or distinguish. As alleged, Bennett Farm does not have and has never had a single majority member. (*See* Compl. ¶¶ 24, 36, 68.) The allegation that Graham, Ann, and Jim collectively own a majority interest does not give rise to a fiduciary duty to minority members.

37. Second, Terry argues that Graham, Ann, and Jim owed her a fiduciary duty of disclosure when purchasing her interest. (Compl. ¶¶ 51–58, 88.) The briefing does little to explain this position, which apparently would apply only to Terry and only to the purchase of her interest. Terry cites no law supporting the proposition that an LLC member owes a fiduciary duty when negotiating a contract to purchase another's interest. Rather, Terry relies on another precedent from the law governing corporations related to a director's purchase of shares from a shareholder. *See Lazenby v. Godwin*, 40 N.C. App. 487, 492, 253 S.E.2d 489, 491 (1979). To the extent Terry intends to suggest that a manager of an LLC (akin to a corporate director) owes a similar duty to a member (akin to a shareholder), the claim is contradicted by her denial that Graham, Ann, and Jim are, in fact, the managers of Bennett Farm.

38. At bottom, the members of Bennett Farm decided to organize their relationship through an LLC. Their rights and duties, as members, are and should be governed by the Operating Agreement, not general principles of fiduciary relationships. Bert III and Terry have not pleaded facts sufficient to show the existence of such a relationship between them, on the one hand, and Graham, Ann, and Jim, on the other.[7]

39. Accordingly, the Court grants the motion to dismiss the claim for breach of fiduciary duty as to the actions of Graham, Ann, and Jim on behalf of Bennett Farm. The Court need not and does not address alternative arguments made in support of the motion.

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[7] This excludes Ann's role as trustee for Terry, which is the subject of a separate claim and addressed below.

2. Breach of Fiduciary Duty Based on Ann's Actions as Trustee

40. The second claim for breach of fiduciary duty relates to Ann's role as trustee for Terry. There is no dispute that Ann, as trustee, owes a fiduciary duty to Terry, as beneficiary of the trust. *See Wachovia Bank & Tr. Co. v. Johnston*, 269 N.C. 701, 711, 153 S.E.2d 449, 457 (1967) (observing "that one of the most fundamental duties of the trustee throughout the trust relationship is to maintain complete loyalty to the interests of" the beneficiary).

41. Ann argues that the claim should be dismissed for two other reasons. She argues, first, that Terry failed to join all necessary parties because Ann's co-trustee was not named as a party. (*See* Br. in Supp. 22–23.) She also argues that the second amended complaint fails to allege a breach of her duty or any injury resulting from it. (*See* Br. in Supp. 23.) Neither argument is persuasive.

42. Whether a trustee is a necessary party depends on the nature of the asserted claims. *See, e.g.*, *Wash. Mut. Bank v. Hargrove*, 2007 N.C. App. LEXIS 12, at *7 (2007) (unpublished) (concluding that trustee was not a necessary party); *Tart v. Byrne*, 243 N.C. 409, 411, 90 S.E.2d 692, 694 (1956) (concluding that trustee was a necessary party as to some but not all claims). Ann points to the general rule that all trustees (and all beneficiaries) are necessary parties "in suits, respecting the trust property, brought either by or against the trustees." *Dunn v. Cook*, 204 N.C. App. 332, 337, 693 S.E.2d 752, 756 (2010) (citation and quotation marks omitted). It is a rule that stems from the broader requirement that "all parties claiming an interest in contested assets must be a party to a suit affecting those assets." *Window World of St. Louis,*

Inc. v. Window World, Inc., 2015 NCBC LEXIS 79, at *24 (N.C. Super. Ct. Aug. 10, 2015).

43. Neither the rule nor its underlying rationale applies here. As alleged, Terry's claim does not create a dispute over the property in her trust. It is instead a claim for money damages against Ann based on Ann's actions as trustee. *See In re Jacobs*, 91 N.C. App. 138, 145, 370 S.E.2d 860, 865 (1988) ("General common law principles hold that a trustee's breach of trust subjects him to personal liability."). This claim can be decided without affecting the trust property or infringing the property rights possessed by the trustees or beneficiary. It was therefore not necessary to name Ann's co-trustee as a party.

44. Terry's allegations are also sufficient to state a claim for relief. Taken as true, the second amended complaint shows that Ann joined with Graham and Jim in an effort "to get Terry to sell out of the entire property now." (Compl. ¶ 52.) Ann proposed telling Terry that she would need to "pony up" a sum of money, apparently to permit Bennett Farm to buy John and Jeanne's property, in the hopes that Terry would instead sell her membership interest. (Compl. ¶ 52.) Graham did just that by presenting Terry with the prospect of contributing her share in a capital call or taking a sizeable loan. (Compl. ¶ 56.) Ann then refused to make trust assets available to Terry to meet a capital call, prompting Terry to sell her membership interest as planned. (Compl. ¶ 57.) Construed liberally, these allegations are sufficient to allege that Ann did not act in Terry's interests but instead used her status as trustee as leverage in Bennett Farm's internal feud, all to Terry's detriment.

45. Accordingly, the Court denies the motion to dismiss Terry's claim for breach of fiduciary duty against Ann in her role as trustee.

<u>3. Constructive Fraud</u>

46. The claim for constructive fraud is premised on the same facts that underlie the two fiduciary-duty claims. (*See* Compl. ¶¶ 115–19.) The dismissal of the first claim for breach of fiduciary duty—the Bennett Farm-centered claim—also requires dismissal of the claim for constructive fraud to the extent it is based on the same facts. Bert III and Terry have standing to bring the claim individually, for the reasons explained above. But they have not sufficiently alleged the existence of a fiduciary relationship, which is a necessary element for constructive fraud just as it is for breach of fiduciary duty. *See White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 293, 603 S.E.2d 147, 155 (2004); *see also Brown v. Secor*, 2017 NCBC LEXIS 65, at *18 (N.C. Super. Ct. July 28, 2017).

47. Terry's claim against Ann in her role as trustee, on the other hand, may proceed. As noted, Ann does not challenge the existence of a fiduciary relationship. (*See* Br. in Supp. 23.) Constructive fraud also requires a showing that the defendant took advantage of the fiduciary relationship "to benefit himself" or herself. *White*, 166 N.C. App. at 294, 603 S.E.2d at 156. Although Graham, Ann, and Jim's brief argues that this element is absent as it relates to their actions on behalf of Bennett Farm, they do not make the same argument about Ann's alleged actions as trustee. (*See* Br. in Supp. 17–18.) Accordingly, the Court finds no persuasive basis to dismiss Terry's claim against Ann for constructive fraud.

48. The Court therefore grants the motion to dismiss the claim for constructive fraud against Graham and Jim but denies the motion as to the claim against Ann to the extent it is based on her role as Terry's trustee.

C. Contract Claims

49. Bert III and Terry allege that the transfer of Louise's interest in Bennett Farm to Graham, Ann, and Jim was improper under sections 9.1 and 9.2 of the Operating Agreement or, alternatively, the same sections of the Amended Operating Agreement. (*See* Compl. ¶ 104.) They assert claims for breach of contract and breach of the implied covenant of good faith and fair dealing. The parties' briefs treat the two claims as one, and the Court therefore does as well.

50. To state a claim for breach of contract, a party must allege that there is a valid contract and that a term of the contract was breached. *See Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). In every contract, including LLC operating agreements, there is an implied covenant "that neither party will do anything which injures the right of the other to receive the benefits of the agreement." *Pro-Tech Energy Solutions, LLC v. Cooper*, 2015 NCBC LEXIS 76, at *21 (N.C. Super. Ct. July 30, 2015) (quoting *Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985)).

51. According to Graham, Ann, and Jim, the Amended Operating Agreement is a valid contract, but the second amended complaint does not adequately allege that it was breached. They contend that section 9.2, by its terms, permitted Louise to sell

her membership interest to some of her siblings without first offering it to all. (*See* Br. in Supp. 21.)

52. As Bert III and Terry correctly note, though, section 9.2 of the Amended Operating Agreement permits transfers by one sibling to another "for estate and gift tax planning purposes." (Am. Op. Agr. § 9.2.) Transfers to family members for other purposes (or to non-family members for any reason) are permitted only if a number of conditions are satisfied, including first offering the interest to Bennett Farm. (*See* Am. Op. Agr. § 9.2(a)–(d).) The second amended complaint alleges that Louise admitted to selling "her interest primarily to get away from family disharmony and avoid paying legal fees," not to plan for any estate or gift tax considerations. (Compl. ¶ 69.) At the Rule 12 stage, this allegation is sufficient to plead that the transfer was improper and, therefore, a breach of section 9.2.

53. The original Operating Agreement is structured differently. It has no provision permitting transfers to siblings for estate or gift tax purposes. For any proposed transfer, a member must offer his or her interest first to Bennett Farm. (*See* Op. Agr. § 9.2(a)–(d).) Thus, in the event the original Operating Agreement remains operative, as Bert III and Terry contend, the allegations relating to Louise's transfer of her membership would also state a claim for its breach.

54. The Court therefore denies the motion to dismiss the claims for breach of contract and the implied covenant of good faith and fair dealing.

D. Conspiracy

55. There is no "separate civil action for civil conspiracy in North Carolina." *Dove v. Harvey*, 168 N.C. App. 687, 690, 608 S.E.2d 798, 800 (2005). Rather, "[t]he action is for damages caused by acts committed pursuant to a formed conspiracy, rather than by the conspiracy itself." *Reid v. Holden*, 242 N.C. 408, 414–15, 88 S.E.2d 125, 130 (1955). Thus, a claim for civil conspiracy requires "(1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to the plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme." *Lendingtree, LLC v. Intercontinental Capital Grp.*, 2017 NCBC LEXIS 54, at *14–15 (N.C. Super. Ct. June 23, 2017) (quoting *Piraino Bros., LLC v. Atl. Fin. Grp., Inc.*, 211 N.C. App. 343, 350, 712 S.E.2d 328, 333 (2011)).

56. Bert III and Terry base their conspiracy claim on the wrongful acts underlying the claims for breach of fiduciary duty and breach of contract. The second amended complaint alleges, for example, that Graham, Ann, and Terry conspired to take control of Bennett Farm, to exercise that control without the other members' consent, to deprive Terry of access to her trust funds, and to acquire Louise's membership interest for themselves. (*See* Compl. ¶¶ 111(d), 111(g), 112.)

57. Graham, Ann, and Jim argue that the conspiracy claim must be dismissed if the underlying claims are dismissed. (*See* Br. in Supp. 18–19.) As to the Bennett Farm-centered claim for breach of fiduciary duty, the Court agrees. Having dismissed that underlying claim, the Court also dismisses the conspiracy claim to the extent

based on the same acts. *See Azure Dolphin*, 2017 NCBC LEXIS 90, at *28–29 (dismissing conspiracy claim). The allegations specific to Ann's actions in her role as trustee and to the purchase of Louise's membership interest, however, are sufficient to plead an unlawful act for purposes of the conspiracy claim.[8] *See Brewster*, 2018 NCBC LEXIS 76, at *15 (denying motion to dismiss conspiracy claim when underlying claim survived).

58. Graham, Ann, and Jim also argue that "Plaintiffs have not alleged any facts to establish the existence of an agreement" between them to perform any unlawful acts. (Br. in Supp. 19.) This short, undeveloped argument is unconvincing. The second amended complaint identifies several communications between Graham, Ann, and Jim that tend to support the existence of such an agreement. (*See, e.g.*, Compl. ¶¶ 52, 55.)

59. The Court therefore denies the motion to dismiss the claim for conspiracy to the extent that claim is based on Ann's alleged breach of fiduciary duty in her role as trustee and on Defendants' alleged breach of contract and the implied covenant of good faith and fair dealing.

E. Declaratory Judgment

60. The declaratory-judgment claim is better viewed as nine requests for distinct, but often overlapping, declarations: (1) that the Amended Operating Agreement is invalid; (2) that Bennett Farm has no validly elected managers; (3) that

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[8] There is an open question in North Carolina as to whether a breach of contract may support a claim for conspiracy. Some courts in other jurisdictions have held that it may not. *See, e.g.*, *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 522 (1994). Bert III and Terry have not raised this issue, however, and the Court therefore does not address it.

Graham, Ann, and Jim have no managerial authority over Bennett Farm; (4) that capital calls require member consent; (5) that Bennett Farm's acquisition of the right of first refusal on John's property was not validly authorized; (6) that Bennett Farm also had no authority to exercise or enforce the right of first refusal; (7) that the purchase of Terry's membership interest was improper or fraudulent; (8) that Bert may access Bennett Farm's property; and (9) that Bert, Graham, Ann, Jim, and Louise held an equal membership interest in Bennett Farm as of April 13, 2018. (*See* Compl. ¶¶ 82, 83.) Most, if not all, of the requested declarations turn on the authority of Graham, Ann, and Jim to act as managers of Bennett Farm.[9] The effect, if Bert III and Terry are successful, would be to unravel years of activity by Bennett Farm, including changes to its assets and ownership structure.

61. Our appellate courts have stressed that "[a] motion to dismiss for failure to state a claim is seldom appropriate 'in actions for declaratory judgments, and will not be allowed simply because the plaintiff may not be able to prevail.'" *Morris v. Plyler Paper Stock Co.*, 89 N.C. App. 555, 557, 366 S.E.2d 556, 558 (1988) (quoting *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 439, 206 S.E.2d 178, 182 (1974)). Rather, a motion to dismiss a declaratory-judgment claim is appropriate only "'"when the complaint does not allege an actual, genuine existing controversy,'" which

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[9] Graham, Ann, and Jim contend that Bert III and Terry lack standing to seek these declarations for the same reasons asserted as to the claim for breach of fiduciary duty. As noted, the Court concludes that Bert III and Terry have sufficiently alleged a concrete, individual injury. It is also unclear how the *Barger* framework, with its focus on diminution of stock value, applies in the context of declaratory relief.

prevents a court from entering a "purely advisory opinion." *Legalzoom.com, Inc. v. N.C. State Bar*, 2012 NCBC LEXIS 49, at *9 (N.C. Super. Ct. Aug. 27, 2012).

62. Graham, Ann, and Jim argue that nearly all of the requested declarations are improper efforts to nullify contracts—Bennett Farm's Operating Agreement, the right of first refusal, and other contracts transferring membership interests. (*See* Br. in Supp. 19–20.) They point to cases stating that the Declaratory Judgment Act "is not a vehicle for the nullification of [written] instruments." *Farthing v. Farthing*, 235 N.C. 634, 635, 70 S.E.2d 664, 665 (1952). The North Carolina Court of Appeals, however, has rejected this argument. *Farthing* held only that "the validity of a will is a probate matter" and cannot be held void through a declaratory-judgment action. *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 630, 518 S.E.2d 205, 208 (1999). "The validity of a contract, however, is a different matter," and this Court "certainly may determine the validity and enforceability of a contract under the Declaratory Judgment Act." *Id.*; *see also, e.g.*, *Allen v. Ferrera*, 141 N.C. App. 284, 292, 540 S.E.2d 761, 767 (2000) (following *Bueltel*); *Tumlin v. Tuggle Duggins P.A.*, 2018 NCBC LEXIS 217, at *40 (N.C. Super. Ct. Dec. 18, 2018) (same); *Haigh v. Superior Ins. Mgmt. Grp.,* 2017 NCBC LEXIS 100, at *20–21 (N.C. Super. Ct. Oct. 24, 2017) (same).

63. The other arguments go toward the merits of the requested declarations. In their opening brief, Graham, Ann, and Jim contend that Bert III has not alleged that he ever possessed the right to access Bennett Farm's property and that, in any event, it was reasonable for them to deny access to the property for members who fail to satisfy capital calls. (*See* Br. in Supp. 20–21.) In their reply brief, Graham, Ann, and

Jim argue more comprehensively that, as a matter of law, they are Bennett Farm's managers and that Bert III and Terry are bound by the Amended Operating Agreement. (*See* Reply Br. Supp. Mot. Dismiss 1–3, ECF No. 39.)

64. The question, though, is not whether Bert III and Terry will prevail on their claim. It is only whether they have identified an actual, genuine controversy. *See Johnson's Landing Homeowners Ass'n, Inc. v. Hotwire Communs., LLC*, 2018 NCBC LEXIS 113, at *11 (N.C. Super. Ct. Oct. 29, 2018); *see also Gvest Real Estate, LLC v. JS Real Estate Invs., LLC*, 2017 NCBC LEXIS 32, at *10 (N.C. Super. Ct. Apr. 6, 2017) (declining to address "arguments more appropriately made in the context of a motion for judgment on the pleadings under Rule 12(c) or a motion for summary judgment under Rule 56"). The parties' views about which members are entitled to exercise managerial authority over Bennett Farm are irreconcilable, giving rise to a definite, concrete controversy. As a result, "[t]he parties are entitled to a declaration of their rights and liabilities and the action should be disposed of only by a judgment declaring them." *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 288, 134 S.E.2d 654, 657 (1964).

65. The Court therefore denies the motion to dismiss the declaratory-judgment claim.

F. Judicial Dissolution

66. In their final claim, Bert III and Terry seek a decree judicially dissolving Bennett Farm. By statute, a member of an LLC may seek dissolution if "(i) it is not practicable to conduct the LLC's business in conformance with the operating

agreement and [governing statutes] or (ii) liquidation of the LLC is necessary to protect the rights and interests of the member." N.C. Gen. Stat. § 57D-6-02(2). Bert III and Terry invoke both grounds. (*See* Compl. ¶ 121.)

67. Graham, Ann, and Jim begin by arguing that Terry lacks standing to seek dissolution because she is no longer a member of Bennett Farm. (*See* Br. in Supp. 22.) The Court agrees. Although Terry hopes to invalidate or revoke the transfer of her membership through this action, she is currently not a member of Bennett Farm. (*See* Compl. ¶ 2.) Section 57D-6-02(2) does not authorize courts to dissolve limited liability companies in proceedings brought by former members. As a result, Terry lacks standing to seek judicial dissolution. *See Slaughter v. Winner Enters. of Carolina Beach, LLC*, 2019 NCBC LEXIS 1, at *25–26 (N.C. Super. Ct. Jan. 7, 2019) (granting motion to dismiss); *Finkel v. Palm Park, Inc.*, 2018 NCBC LEXIS 112, at *9 (N.C. Super. Ct. Oct. 24, 2018) (same); *Azure Dolphin*, 2017 NCBC LEXIS 90, at *17 (same).

68. There is no dispute, however, that Bert III is a member of Bennett Farm and has standing. Graham, Ann, and Jim contend that his claim fails because he has not alleged that it is impracticable to operate Bennett Farm or that liquidation is necessary to protect his interests. The management disagreements identified in the complaint, they contend, are insufficient to warrant dissolution. (*See* Br. in Supp. 22.)

69. Bert III responds that his siblings have exercised illegitimate authority over Bennett Farm for nearly a decade. He believes that, if his claims are successful, it

would be impossible to unwind all of their actions during that time, leaving dissolution as the only meaningful path forward. (*See* Opp'n 25.) Bert III also looks to dissolution case law in the corporate context, which permits minority shareholders in closely held corporations to seek liquidation when their reasonable expectations have been frustrated. *See Meiselman v. Meiselman*, 309 N.C. 279, 299, S.E.2d 551, 563 (1983).

70. After careful consideration, the Court concludes that it would be premature to dismiss Bert III's claim for judicial dissolution. The second amended complaint alleges that virtually every action taken by Bennett Farm since its inception is tainted by his siblings' usurpation of managerial authority. If Bert III is able to support those allegations after discovery and establish his claims to the satisfaction of a jury, it would raise thorny questions about Bennett Farm's ability to bring itself into compliance with its governing operating agreement, as well as whether nearly a decade of unlawful management has left liquidation as the only way to protect Bert III's rights. In addition, our courts have not yet decided whether and to what extent the principles of *Meiselman* apply to actions under section 57D-6-02(2). *See Brady v. Van Vlaanderen*, 2017 NCBC LEXIS 61, at *31–32 (N.C. Super. Ct. July 19, 2017). As this Court has observed, it is prudent to address such questions on a more fully developed record. *See Pure Body Studios Charlotte, LLC v. Crnalic*, 2017 NCBC LEXIS 98, at *13 (N.C. Super. Ct. Oct. 18, 2017).

71. Accordingly, the Court concludes that Terry lacks standing to seek judicial dissolution and grants the motion to dismiss her claim. The Court denies the motion to dismiss Bert III's claim for dissolution.

III.
CONCLUSION

72. For the reasons discussed above, the Court **ORDERS** as follows:

a. The motion to dismiss the claim for breach of fiduciary duty based on the actions of Graham, Ann, and Jim on behalf of Bennett Farm is **GRANTED**. The claim is **DISMISSED with prejudice**.

b. The motion to dismiss the claim for breach of fiduciary duty against Ann in her role as trustee is **DENIED**.

c. The motion to dismiss the claim for constructive fraud is **DENIED** to the extent based on Ann's actions in her role as trustee and **GRANTED** to the extent based on the actions of Graham, Ann, and Jim on behalf of Bennett Farm.

d. The motion to dismiss the claims for breach of contract and breach of good faith and fair dealing is **DENIED**.

e. The motion to dismiss the claim for civil conspiracy is **DENIED** to the extent based on Ann's actions in her role as trustee and on the claims for breach of contract and the implied covenant of good faith and fair dealing. It is **GRANTED** to the extent based on the actions of Graham, Ann, and Jim on behalf of Bennett Farm.

f. The motion to dismiss the claim for declaratory judgment is **DENIED**.

g. The motion to dismiss Terry's claim for judicial dissolution is **GRANTED**, and the claim is **DISMISSED without prejudice**. The motion to dismiss Bert III's claim for judicial dissolution is **DENIED**.

73. The Court further **ORDERS** the parties to file their case management report and a proposed case management order within fourteen days of the date of this Order and Opinion. *See* Business Court Rule 9.2.

SO ORDERED, this the 15th day of March, 2019.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases