STATE OF NORTH CAROLINA HAYWOOD COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 21 CVS 1224
MARY ANNETTE, LLC; JORGE CURE; DANA CURE; TWILIGHT DEVELOPMENTS, INC.; OZZIE 1, LLC; MICHAEL WASHBURN; and CHRISTINE SHEFFIELD, Plaintiffs, v. TERRI LYNN CRIDER; and MOUNTAIN GIRL VENTURES, LLC, Defendants.	**ORDER AND OPINION ON PLAINTIFFS' MOTION TO DISMISS DEFENDANTS' AMENDED COUNTERCLAIMS**

1. This case arises out of disputes concerning the creation, ownership, and management of Mary Annette, LLC. There are seven Plaintiffs, including Mary Annette itself, as well as Jorge Cure, Dana Cure, Michael Washburn, Christine Sheffield, Twilight Developments, Inc., and Ozzie 1, LLC. They have moved to dismiss the counterclaims asserted by Defendants Terri Lynn Crider and Mountain Girl Ventures, LLC ("Mountain Girl"). For the following reasons, the Court **GRANTS in part** and **DENIES in part** the motion.

McLean Law Firm, P.A., by Russell L. McLean III, for Plaintiffs Mary Annette, LLC, Jorge Cure, Dana Cure, Twilight Developments, Inc., Ozzie 1, LLC, Michael Washburn, and Christine Sheffield.

Smathers & Smathers, by Patrick U. Smathers, for Defendants Terri Lynn Crider and Mountain Girl Ventures, LLC.

Conrad, Judge.

I.
BACKGROUND

2. The Court does not make findings of fact on a motion to dismiss. The following background assumes that the allegations in the amended counterclaims are true.

3. Mary Annette was formed for the purpose of developing a piece of land in western North Carolina. The company's operating agreement names three members—Mountain Girl, Twilight Developments, and Ozzie 1—and states that each has a one-third interest. Crider wholly owns Mountain Girl; the Cures together own Twilight Developments; and Washburn and Sheffield together own Ozzie 1. (*See* Am. Countercls. ¶¶ 2, 3, ECF No. 55;[1] Op. Agrmt., ECF No. 31.)

4. This case has a complicated procedural history. It began as a lawsuit by Mary Annette against Crider, premised on allegations that Crider improperly held herself out as an officer and agent of the company and then refused to hand over company records and accounts. (*See generally* Compl., ECF No. 2.)

5. Later filings greatly expanded the scope of the case. Crider asserted counterclaims, added Mountain Girl as a supposed "Third Party Plaintiff," and added the Cures, Washburn, Sheffield, Twilight Developments, and Ozzie 1 as supposed "Third Party Defendants." Then, Mary Annette and the "Third Party Defendants" responded with another round of claims, which they referred to as "counterclaims," against Crider and Mountain Girl. (*See, e.g.*, ECF Nos. 4, 14.)

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[1] Defendants' pleading contains separately numbered sections for their "Answer" and their "Amended Counterclaims." The Court refers only to the latter section.

6. The case was eventually designated as a complex business case and assigned to the Business Court. Shortly after, the Court questioned the "confusing and unworkable" alignment of parties and claims, noting that, "among the procedural oddities, the original plaintiff is purportedly asserting 'counterclaims' against the original defendant." (Order on Predesignation Mots., ECF No. 47.) To simplify the pleadings and more accurately reflect the claimants' interests, the Court realigned the parties, identifying Mary Annette, the Cures, Sheffield, Washburn, Twilight Developments, and Ozzie 1 as "Plaintiffs" and Crider and Mountain Girl as "Defendants." Following realignment, the Court allowed the parties to replead their claims for clarity and consistency. (*See* Scheduling Order, ECF No. 50.)

7. Repleading is complete. Plaintiffs filed an amended complaint that includes eight causes of action. Defendants answered and asserted seven amended counterclaims. These counterclaims are the subject of the present dispute.

8. As alleged in the amended counterclaims, Crider has operated a vacation rental business on property that she co-owned with her brother. At some point, a dispute arose between the siblings, resulting in litigation. In summer 2020, Crider approached Jorge Cure—her friend and a licensed real estate agent—for help with buying her brother's one-third interest in the property and resolving their dispute. Although Jorge and his wife, Dana, agreed to help, Crider now believes that their offer was part of a scheme to defraud her. (*See* Am. Countercls. ¶ 4.)

9. According to Crider, Jorge proposed developing part of the property at issue into a Planned Unit Development comprising cabins and RV lots. Once developed,

these units would be marketed and sold to individual buyers. To accomplish this, Jorge and one or more other investors—eventually including Dana, Washburn, and Sheffield—would jointly contribute $650,000 to buy the interest of Crider's brother and another $200,000 toward development costs. Crider would retain individual ownership of several tracts of the property for her vacation rental business. Either individually or through an entity, she would also retain a two-thirds interest in the portion of the property being developed, and the profits from sales of the cabins and lots would be split with two-thirds going to Crider and the other one-third to Jorge and his fellow investors. Crider agreed to these terms. (*See* Am. Countercls. ¶¶ 5, 7.)

10. Over the fall and winter of 2020, the parties sought local governmental approval to create the Planned Unit Development. They also formed Mary Annette with Mountain Girl, Twilight Developments, and Ozzie 1 as its only members. (*See* Am. Countercls. ¶¶ 2, 3, 8.)

11. Although there are few details concerning Crider's brother, it appears that he agreed to sell his interest. At the closing for that sale, Crider learned that the Cures, Washburn, and Sheffield did not have the $850,000 in capital that they had pledged. Instead, they intended to borrow the money by mortgaging Crider's property. Crider objected that she had never agreed to mortgage her own property to secure the funds promised by her business partners. Plaintiffs urged her to proceed, assuring her that all would be well and that there was no other way to buy her

brother's interest and end the family litigation. Crider acquiesced. (*See* Am. Countercls. ¶ 9.)

12. After the closing, Crider reviewed Mary Annette's operating agreement and concluded that it did not reflect the parties' earlier oral agreement. Crider believes that she—or, rather, Mountain Girl in her place—was entitled to a two-thirds interest. But the operating agreement gave equal one-third interests to Mountain Girl, Twilight Developments, and Ozzie 1. When Crider confronted the others about it, they took steps to exclude her from the business. (*See* Am. Countercls. ¶¶ 10, 11.)

13. Crider and Mountain Girl assert seven counterclaims: (1) intentional misrepresentation and fraud; (2) breach of fiduciary duty; (3) breach of contract; (4) reformation and declaratory judgment; (5) unfair or deceptive trade practices under N.C.G.S. § 75-1.1; (6) quiet title and declaratory judgment; and (7) conversion. Plaintiffs have moved to dismiss the amended counterclaims. The Court held a hearing on 27 January 2023, at which all parties were represented by counsel. The motion is ripe for decision.

II.
LEGAL STANDARD

14. A motion to dismiss for failure to state a claim "tests the legal sufficiency of the [counterclaim] complaint." *Isenhour v. Hutto*, 350 N.C. 601, 604 (1999) (citation and quotation marks omitted). Dismissal is proper when "(1) the complaint on its face reveals that no law supports the . . . 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 . . . claim." *Corwin v. Brit. Am. Tobacco PLC*,

371 N.C. 605, 615 (2018) (citation and quotation marks omitted). In deciding the motion, the Court must treat all well-pleaded allegations as true and view the facts and permissible inferences in the light most favorable to the nonmoving party. *See, e.g.*, *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332 (2019). The Court may also consider documents, such as contracts, that are the subject of the counterclaims. *See, e.g.*, *McDonald v. Bank of N.Y. Mellon Tr. Co.*, 259 N.C. App. 582, 586 (2018).

III.
ANALYSIS

15. Some preliminary observations are needed. First, the allegations in the amended counterclaims are often confusing. References to the parties are especially confusing. There are references to "Plaintiff" and "Defendant" in the singular without identifying which Plaintiff or Defendant is intended. Likewise, there are many references to "Third Party Plaintiffs" and "Third Party Defendants" even though no third-party claims exist following the realignment of the parties.

16. Second, it appears that every Defendant asserts every counterclaim against every Plaintiff. This has put some counterclaims in an awkward, potentially nonsensical posture. The contract-based counterclaims, for example, are asserted by or against every litigant, including those who are not parties to the disputed contracts.

17. Third, the briefs are full of skeletal and undeveloped arguments. Among other things, although Plaintiffs style their motion as one for dismissal of all counterclaims, they have not advanced any arguments directed to the counterclaims

for conversion and to quiet title. The Court therefore denies the request to dismiss those counterclaims without further analysis.

18. As for the remaining issues, the Court has done its best to construe the counterclaims liberally without rewriting them, to read each side's arguments fairly, and to confine its analysis to arguments actually raised and timely asserted.

A. Breach of Contract

19. The Court begins with the counterclaim for breach of contract. In their opening brief, Plaintiffs argue that Crider is not a party to Mary Annette's operating agreement and therefore cannot sue for breach; that the Cures, Sheffield, and Washburn are also not parties to the operating agreement and therefore cannot be sued for breach; and that the allegations, if true, do not show a breach of the operating agreement by any other party. But these arguments misconstrue the counterclaim, which does not concern the operating agreement. Rather, the counterclaim concerns an alleged oral agreement relating to capital funding and development of the disputed property. (*See* Am. Countercl. ¶¶ 5, 20.) Plaintiffs' arguments, which focus entirely on the operating agreement, do not address that oral agreement and therefore provide no basis to dismiss the claim for its breach.

20. For the first time in their reply brief, Plaintiffs argue that the operating agreement's merger clause extinguished any preexisting oral contract. That argument is untimely, and the Court declines to consider it. *See* BCR 7.7 ("[T]he Court may decline to consider issues or arguments raised by the moving party for the first time in a reply brief."). Plaintiffs are free to renew the argument at summary judgment.

21. Considering only those arguments that were timely raised, the Court denies the motion to dismiss the counterclaim for breach of contract.

B. Breach of Fiduciary Duty

22. Next is the counterclaim for breach of fiduciary duty. "For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Dalton v. Camp*, 353 N.C. 647, 651 (2001). Plaintiffs argue that this claim should be dismissed because the allegations supporting the existence of a fiduciary relationship are inadequate and because the claim is barred by the economic loss rule.

23. The key allegation, and the premise of this claim, is that "Plaintiff and Third Party Defendants, as members, managers, and officers, owe a duty of fidelity and loyalty to Defendant and Mountain Girl . . . ." (Am. Countercls. ¶ 18.) On its face, this sentence is confusing and imprecise. For starters, there are no "Third Party Defendants." Presumably, the phrase "Plaintiff and Third Party Defendants" was meant to say "Plaintiffs." In addition, the allegation says that these parties are "members, managers, and officers" but does not say of what. Presumably, the answer is Mary Annette, though that would mean that Mary Annette is alleged to be a member, manager, or officer of itself. Thus, however awkward, the allegation appears to state that Plaintiffs are members, managers, and officers of Mary Annette and, in those roles, owe fiduciary duties to Mountain Girl as the other member and to Crider as Mountain Girl's principal.

24. Even with the most charitable reading, this allegation is inadequate to show that a fiduciary relationship exists. Generally, members of an LLC don't owe fiduciary duties to each other or to the company, and managers and officers owe

fiduciary duties to the company but not to the members. *See, e.g.*, *Kaplan v. O.K. Techs., L.L.C.*, 196 N.C. App. 469, 473–74 (2009). There is no allegation or argument that the parties modified these general rules in the operating agreement. *See Bourgeois v. Lapelusa*, 2022 NCBC LEXIS 111, at *14 (N.C. Super. Ct. Sept. 23, 2022) (observing that the operating agreement may depart from default rules and establish member-to-member fiduciary duties).

25. In their opposition brief, Defendants point to the rule that an LLC's controlling member may, in some circumstances, owe fiduciary duties to minority members. *See Kaplan*, 196 N.C. App. at 473. But they cite nothing in their pleading to support that argument. Indeed, it appears that the Cures, Sheffield, and Washburn are not members at all. And, of course, Mary Annette cannot be a member of itself. Nor do any allegations tend to show that Twilight Developments and Ozzie 1 are controlling members. Rather, the amended counterclaims allege the reverse: that "Defendant"—presumably, Mountain Girl—"is the principal controlling member," not Plaintiffs. (Am. Countercls. ¶ 12.) Furthermore, even if the interests of Twilight Developments and Ozzie 1 add up to a majority, North Carolina courts have consistently refused, absent special circumstances not alleged here, to impose a fiduciary duty on minority members that join together to outvote another member. *See, e.g.*, *Duffy v. Schussler*, 2022 N.C. App. LEXIS 912, at *27–28 (N.C. Ct. App. Dec. 20, 2022); *see also Vanguard Pai Lung, LLC v. Moody*, 2019 NCBC LEXIS 39, at *20 (N.C. Super. Ct. Jun. 19, 2019) (collecting cases).

26. Defendants have not adequately alleged a fiduciary relationship. Accordingly, the Court dismisses the counterclaim for breach of fiduciary duty.

C. Intentional Misrepresentation and Fraud

27. Fraud has five "essential elements": (1) a false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) that did in fact deceive, and (5) that resulted in damage to the injured party. *Rowan Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 17 (1992). The injured party's reliance on the misrepresentation or concealment "must be reasonable." *Forbis v. Neal*, 361 N.C. 519, 527 (2007).

28. A fraud claim must be pleaded with particularity. *See* N.C. R. Civ. P. 9(b). Generally, to satisfy the particularity requirement, the claimant needs to plead the following: the time, place, and content of the fraudulent representation; the identity of the person making the representation; and what was obtained as a result of the fraudulent act or representation. *See, e.g.*, *State ex rel. Stein v. Kinston Charter Acad.,* 379 N.C. 560, 585 (2021).

29. Plaintiffs' arguments are scattershot. They contend, for example, that Defendants failed to plead the time and place of false statements by Jorge Cure. But it is not clear which statements are at issue because Plaintiffs do not cite any specific allegation to support their argument. *See* BCR 7.5 ("When a motion or brief refers to any supporting material, the motion or brief must include a pinpoint citation to the relevant page of the supporting material whenever possible."). At a minimum, it is alleged that Jorge falsely represented in summer 2020 that he and others would invest $850,000 in the disputed property and that he never intended to carry out that

promise. (*See* Am. Countercls. ¶¶ 4, 14.) Plaintiffs' undeveloped argument is insufficient to show that these allegations lack particularity.

30. Plaintiffs' second argument is unpersuasive for essentially the same reason. They contend that Defendants failed to allege any misrepresentations by Washburn, Sheffield, Twilight Developments, and Ozzie 1 that could support a claim for fraud.[2] But again, Plaintiffs make only conclusory arguments and do not cite any specific allegation to support their position, leaving the Court to guess at the issue. The Court will not dismiss a claim based on arguments that haven't been made or developed.

31. A third argument is that the fraud claim is barred by the economic loss rule because it relates to contractual obligations imposed by Mary Annette's operating agreement. This is a misunderstanding of the fraud allegations, which relate at least partly to representations made before Mary Annette was formed. In any event, binding appellate precedent holds that "while claims for negligence are barred by the economic loss rule where a valid contract exists between the litigants, claims for fraud are not so barred." *Bradley Woodcraft, Inc. v. Bodden*, 251 N.C. App. 27, 34 (2016). Thus, the economic loss rule does not bar the counterclaim for fraud.

32. A fourth and final argument regarding the fraud claim is that Crider lacks standing because the alleged injury—the failure to capitalize Mary Annette—is an injury to the company rather than to her personally. Again, this is a misunderstanding of the allegations. As alleged, Crider transferred her interest in

[2] Although Plaintiffs say nothing about Mary Annette, it is also ostensibly a target of the fraud claim.

the disputed property to Mary Annette in reliance on Plaintiffs' representations. That is an injury to Crider personally and one that she can sue to redress.

33. For these reasons, the Court denies the motion to dismiss the counterclaim for fraud.

34. One other issue regarding the fraud counterclaim arises from the briefing. In their opposition brief, Defendants contend that their allegations support a claim for constructive fraud in addition to actual fraud. No claim for constructive fraud appears in the amended counterclaims, however, and the allegations do not give notice of such a claim. And in any event, constructive fraud requires a relationship of trust or a fiduciary relationship, which Defendants have not adequately alleged. *See White v. Consol. Plan., Inc.*, 166 N.C. App. 283, 294 (2004). Accordingly, the Court concludes that Defendants have not pleaded a claim for constructive fraud either expressly or implicitly.

D. Reformation

35. "Reformation is a well-established equitable remedy used to reframe written instruments where, through mutual mistake or the unilateral mistake of one party induced by the fraud of the other, the written instrument fails to embody the parties' actual, original agreement." *Metropolitan Prop. & Cas. Ins. Co. v. Dillard*, 126 N.C. App. 795, 798 (1997) (citations and quotations omitted). Crider and Mountain Girl allege that, "due to fraud and mistake," Mary Annette's operating agreement misstates the members' ownership interests. They seek to reform the operating agreement so that Mountain Girl has "a two-thirds ownership interest" and Ozzie 1

and Twilight Developments share the remaining "one-third interest." (Am. Countercls. ¶ 22.)[3]

36. Plaintiffs challenge this counterclaim solely on the ground that Crider is not a party to the operating agreement and therefore may not seek to reform it. They are correct, and the Court therefore dismisses Crider's claim for reformation. *See Shipton v. Barfield*, 23 N.C. App. 58, 61 (1974) ("It is established that only the original parties to a written instrument, or persons claiming under them in privity, have standing to maintain an action for reformation.").

37. But Plaintiffs raise no arguments as to why Mountain Girl's claim should be dismissed. Accordingly, the Court denies the motion to dismiss Mountain Girl's claim.

E. Section 75-1.1

38. The section 75-1.1 counterclaim piggybacks on the other counterclaims. All that is alleged is that "the foregoing constitutes unfair and deceptive trade practices." (Am. Countercls. ¶ 24.) Plaintiffs argue that the alleged conduct is not in or affecting commerce, as required by section 75-1.1. *See* N.C.G.S § 75-1.1 (declaring "unlawful" all "unfair or deceptive acts or practices in or affecting commerce"). Defendants respond that their allegations are sufficient but cite nothing in the amended counterclaims to support that argument.

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[3] Crider and Mountain Girl style their claim as one for reformation and declaratory judgment. The purpose of a declaratory judgment is to provide "declaratory relief." *Brandis v. Trs. of Davidson Coll.*, 227 N.C. 329, 331–32 (1947). Yet Crider and Mountain Girl ask the Court to enter a declaratory judgment that *reforms* the operating agreement. (*See* Am. Countercls. ¶¶ 21, 22.) This request exceeds the scope of declaratory relief. Thus, the Court construes the claim as a request for reformation alone.

39. The Court agrees with Plaintiffs. At bottom, this lawsuit is confined to a single business entity—Mary Annette. All the alleged misconduct concerns either the capitalization of Mary Annette during its formation or matters of internal governance afterward. Our Supreme Court has held that "extraordinary events done for the purpose of raising capital" and matters internal to a single market participant are not in or affecting commerce and are therefore not covered by section 75-1.1. *E.g., Nobel v. Foxmoor Grp.*, 380 N.C. 116, 120–22 (2022) (affirming dismissal of claim based on misconduct related to capital contribution); *see also White v. Thompson*, 364 N.C. 47, 53 (2010) (affirming dismissal of claim based on conduct "solely related to the internal operations" of business).

40. Accordingly, the Court grants the motion to dismiss the counterclaim for violations of section 75-1.1.

IV.
CONCLUSION

41. For the foregoing reasons, the Court **GRANTS** in part and **DENIES** in part Plaintiffs' motion to dismiss as follows:

a. The Court **DENIES** the motion to dismiss the counterclaims for breach of contract, fraud, conversion, and to quiet title.

b. The Court **GRANTS** the motion to dismiss the counterclaims for breach of fiduciary duty and for violations of section 75-1.1. These counterclaims are **DISMISSED** with prejudice.

c. The Court **GRANTS** the motion to dismiss Crider's counterclaim for reformation but **DENIES** the motion to dismiss Mountain Girl's counterclaim for reformation.

SO ORDERED, this the 23rd day of February, 2023.

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