STATE OF NORTH CAROLINA STANLY COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23 CVS 363
JT RUSSELL AND SONS, INC., Plaintiff, v. ATLAS JAMES RUSSELL; THE TILLERY TRADITION, INC.; and MID-EASTERN ASPHALT, LLC, Defendants. ATLAS JAMES RUSSELL, individually and derivatively on behalf of JT RUSSELL AND SONS, INC., Counterclaim Plaintiff, v. JT RUSSELL AND SONS, INC.; ROBERT E. RUSSELL; RAYMOND RUSSELL; and TONY W. RUSSELL, Counterclaim Defendants.	**ORDER AND OPINION ON MOTIONS TO DISMISS PLAINTIFF'S CLAIMS**

1. JT Russell and Sons, Inc. ("JT Russell") is a family business. In this lawsuit, it alleges that Atlas James ("Jim") Russell, a onetime officer, unlawfully diverted its assets to benefit himself, his son, and two companies that he partly owns. Jim denies these allegations and has moved to dismiss some of the claims against him. His fellow defendants—The Tillery Tradition, Inc. and Mid-Eastern Asphalt, LLC—have likewise moved to dismiss certain claims. For the following reasons, the Court

GRANTS Mid-Eastern Asphalt's motion and **GRANTS in part** and **DENIES in part** Jim's and Tillery Tradition's motions.[1]

Troutman Pepper Hamilton Sanders LLP, by William C. Mayberry, Daniel Prichard, William J. Farley, and Jacquelyn Arnold, for Plaintiff JT Russell and Sons, Inc.

Ellis & Winters LLP, by Pamela S. Duffy and Tyler Jameson, for Defendant Atlas James Russell.

Fox Rothschild LLP, by Ashley Barton Chandler and Neale T. Johnson, for Defendants The Tillery Tradition, Inc. and Mid-Eastern Asphalt, LLC.

Bell, Davis & Pitt, P.A., by Edward B. Davis, for Counterclaim Defendants Robert E. Russell, Raymond Russell, and Tony W. Russell.

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 of the amended complaint are true.

3. JT Russell has been in the asphalt and road construction business for nearly sixty years. At issue here are JT Russell's allegations that Jim—an officer from 1998 to 2018 and still a minority shareholder today—abused his official position throughout his twenty-year tenure by channeling company money and resources toward his other personal and business interests. (*See* Am. Compl. ¶¶ 2, 3, 29, ECF No. 15.)

[1] Jim has also counterclaimed against JT Russell and some of its officers and directors. A separate opinion addresses the motions to dismiss his counterclaims.

4. One of these interests is Tillery Tradition, a country club and residential community in which Jim is an officer and shareholder. As alleged, Jim secretly funded Tillery Tradition's development and built much of its infrastructure using JT Russell's cash, equipment, and workers. Jim also named JT Russell as a guarantor on two loans taken by Tillery Tradition and advanced dividends to himself so that he could repay a third loan. At no point did Jim seek or get the approval of JT Russell's shareholders or directors for these activities. (*See* Am. Compl. ¶¶ 32, 36, 37, 40, 56–58, 60, 61, 68, 71, 72, 77.)

5. According to JT Russell, Jim and Tillery Tradition agreed after the fact to pay back all the cash used to fund the community's development. But they didn't follow through. At the end of 2019, after relieving Jim of his official duties, JT Russell wrote to Tillery Tradition to demand repayment of nearly $11 million in principal and interest. Tillery Tradition did not respond. (*See* Am. Compl. ¶¶ 45, 48, 50–54.)

6. Another of Jim's interests is Mid-Eastern Asphalt, which he formed in 2013. Mid-Eastern Asphalt is itself a member of another company called JTR Asphalt, LLC. Some allegations concerning these entities point to trademark infringement: that JTR Asphalt's name misleads customers into believing that it is affiliated with JT Russell when it is not. Other allegations point to a scheme involving sales of liquid asphalt to JT Russell by a company called SWT Group. How that scheme worked is unclear; the most that can be said is that Jim supposedly used the business relationship with SWT Group to divert profits to JTR Asphalt (and, thus, to

Mid-Eastern Asphalt and himself). (*See* Am. Compl. ¶¶ 83, 85, 98, 102, 104, 106, 107.)

7. In addition to advancing his personal interests, Jim allegedly dished out favors to his son, Nathan. Among other things, Jim let Nathan run a competing business (NJR Group, Inc.) while employed by JT Russell, engaged NJR Group as a subcontractor for JT Russell, and gave NJR Group jobs that JT Russell had bid for and won. (*See* Am. Compl. ¶¶ 125, 126, 128–30.)

8. Based on these allegations, JT Russell sued Jim, Tillery Tradition, and Mid-Eastern Asphalt. The amended complaint includes claims for breach of fiduciary duty and constructive fraud (against Jim only); account stated (against Tillery Tradition only); conversion, unjust enrichment, and breach of contract (against Jim and Tillery Tradition); and unfair or deceptive trade practices under N.C.G.S. § 75-1.1 (against Jim, Tillery Tradition, and Mid-Eastern Asphalt). There is also a remedial claim for constructive trust.

9. Jim, Tillery Tradition, and Mid-Eastern Asphalt have each moved to dismiss some of these claims under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. (*See* ECF Nos. 20, 21, 24.) The motions have been fully briefed, and the Court held a hearing on 17 January 2024. The motions are ripe for decision.

II.
ANALYSIS

10. A motion to dismiss for failure to state a claim "tests the legal sufficiency of the 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 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. 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).

A. Section 75-1.1

11. Section 75-1.1 states that "unfair or deceptive acts or practices in or affecting commerce" are "unlawful." Our Supreme Court has held that this language is broad enough "to regulate a business's regular interactions with other market participants" but not so broad as to capture conduct "solely related to the internal operations of" a business. *White v. Thompson*, 364 N.C. 47, 51–52 (2010). Thus, "any unfair or deceptive conduct contained solely within a single business is" not in or affecting commerce and "not covered by" the statute. *Id.* at 53; *see also Nobel v. Foxmoor Grp.*, 380 N.C. 116, 121–22 (2022).

12. JT Russell's claim is rooted in Jim's alleged advancement of his own interests at its expense: funneling cash and services to Tillery Tradition, siphoning profits through Mid-Eastern Asphalt, and diverting corporate opportunities to his son's business. Jim, Tillery Tradition, and Mid-Eastern Asphalt argue that these misuses of corporate resources, if true, are matters internal to JT Russell and, thus, not in or affecting commerce within the meaning of section 75-1.1. JT Russell

responds that its allegations go beyond its internal operations because they involve transactions with outside entities that occurred in the broader marketplace.

13. This is a well-worn area of law. The docket brims with section 75-1.1 claims alleging that a rogue owner or officer abused his official position to further personal interests. Uniformly, our appellate courts and this Court have held that an insider's misappropriation of corporate resources and usurpation of corporate opportunities are internal matters that are not in or affecting commerce, even when the insider diverts those resources and opportunities to his own separate business entity or to a family member. Various rationales support these decisions, the most powerful of which is that any unfairness arising from this kind of insider misconduct occurs *within* the company rather than in regular interactions with other market participants. *See White*, 364 N.C. at 54 (concluding that partner's diversion of corporate opportunities to his competing business involved "conduct within the ACE partnership").[2]

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[2] *See also, e.g.*, *Conservation Station, Inc. v. Bolesky*, 2023 NCBC LEXIS 164, at *29 (N.C. Super. Ct. Dec. 12, 2023) ("Bolesky's formation of CTS and usurpation of CSI's corporate opportunities was not in or affecting commerce for purposes of" section 75-1.1.); *Langley v. Autocraft, Inc.*, 2023 NCBC LEXIS 95, at *22 (N.C. Super. Ct. Aug. 7, 2023) ("[T]he fact that Langley formed LBM and used that entity to usurp some of Autocraft's opportunities does not transform the misconduct into an unfair or deceptive trade practice that affected commerce."); *Poluka v. Willette*, 2021 NCBC LEXIS 105, at *17–21 (N.C. Super. Ct. Dec. 2, 2021) ("The mere presence of BR Ventures as a potential beneficiary of Willette's alleged wrongful conduct does not alter the fundamental character of this internal dispute."); *Botanisol Holdings II, LLC v. Propheter*, 2021 NCBC LEXIS 94, at *26–28 (N.C. Super. Ct. Oct. 18, 2021) ("The fact that another entity or entities benefitted . . . does not make the dispute one 'in and affecting commerce.' "); *Kane v. Moore*, 2018 NCBC LEXIS 184, at *13–14 (N.C. Super. Ct. Dec. 4, 2018) ("North Carolina courts have consistently held that allegations that a corporate manager breached fiduciary duties by diverting opportunities from a corporation to [himself], or to other third-party businesses the manager controlled, does not amount to unfair conduct 'in or affecting commerce.' "); *LLG-NRMH, LLC v. N. Riverfront Marina & Hotel, LLLP*, 2018 NCBC LEXIS 105, at *11 (N.C. Super. Ct. Oct. 9,

14. Add this case to the pile. Over and over, the amended complaint accuses Jim of "sabotage," "theft," "pillaging," "loot[ing]," and "personally profiting" from the abuse of his official position within JT Russell. (Am. Compl. ¶¶ 1, 14, 15, 17, 18, 19.) It is neither here nor there that Jim may have routed the fruits of his theft to or through separate entities (Tillery Tradition, Mid-Eastern Asphalt) and family members (Nathan, NJR Group). The unfairness of his conduct, if any, is wholly internal to JT Russell. *See White*, 364 N.C. at 53–54 (holding that section 75-1.1 did not apply to partner's diversion of opportunities to his separate business and away from the partnership); *Alexander v. Alexander*, 250 N.C. App. 511, 517 (2016) (holding that insider's payments made "for the benefit of himself and his family members are more properly classified as the misappropriation of corporate funds within a single entity rather than commercial transactions between separate market participants").

15. The cases cited by JT Russell are inapposite for that reason. There, unlike here, the claims involved "buyer-seller relations in a business setting," *Sara Lee Corp. v. Carter*, 351 N.C. 27, 32–33 (1999), and "misrepresentations to [third-party] clients," *Wilkie v. Stanley*, 2011 NCBC LEXIS 11, at *10 (N.C. Super. Ct. Apr. 20, 2011). The

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2018) ("That Schoninger advanced the interests of his own entities at the expense of the Harnett Entities does not change the fundamental character of the dispute." (citation and quotation marks omitted)); *Potts v. KEL, LLC*, 2018 NCBC LEXIS 24, at *15 (N.C. Super. Ct. Mar. 27, 2018) ("Rives may have carried out his . . . misappropriation of Steel Tube's assets by channeling money and equipment to Elite Tube and diverting a corporate opportunity to KEL. But the unfairness of these actions, if any, inheres in the relationship between Potts and Rives *as co-owners* of Steel Tube."); *JS Real Est. Invs. LLC v. Gee Real Est., LLC*, 2017 NCBC LEXIS 104, at *21 (N.C. Super. Ct. Nov. 9, 2017) ("The fact that Defendants channeled management fees to Gvest Capital, an outside entity, does not change the fundamental character of the dispute."); *Bandy v. Gibson*, 2017 NCBC LEXIS 66, at *21 (N.C. Super. Ct. July 26, 2017) ("Any indirect dealings that Margaret or Perfect Fit had with other market participants was incidental to the alleged unfair conduct that took place solely within Perfect Fit.").

unfairness, in those circumstances, was not internal. It "occurred in the broader marketplace." *Powell v. Dunn*, 2014 NCBC LEXIS 3, at *10 (N.C. Super. Ct. Jan. 28, 2014).

16. JT Russell also argues in passing that JTR Asphalt has used the letters "JTR" to trade on its name and mislead customers, all of which is conduct in or affecting commerce. Without doubt, trademark infringement may serve as a predicate for a section 75-1.1 claim. *See Ray Lackey Enters., Inc. v. Vill. Inn Lakeside, Inc.*, 2016 NCBC LEXIS 9, at *37 (N.C. Super. Ct. Jan. 29, 2016). But JT Russell has not pleaded the elements of trademark infringement. Nor has it alleged a basis for attributing trademark infringement by JTR Asphalt, a nonparty, to Jim.

17. For all these reasons, the Court concludes that JT Russell has not alleged that Jim, Tillery Tradition, or Mid-Eastern Asphalt committed any unfair or deceptive acts in or affecting commerce within the meaning of section 75-1.1. The Court therefore dismisses this claim.

B. Breach of Contract & Account Stated

18. JT Russell's claims for breach of contract and account stated are based on allegations that Jim and Tillery Tradition promised, expressly or implicitly, to repay millions of dollars in undocumented transfers. Jim seeks to dismiss the claim for breach of contract; Tillery Tradition seeks to dismiss the claim for account stated.

19. **Breach of Contract Against Jim.** The elements of a claim for breach of contract are the existence of a valid contract and a breach of that contract's terms. *See Poor v. Hill*, 138 N.C. App. 19, 26 (2000). "Our system of notice pleading means

the bar to plead a valid contract is low." *Lannan v. Bd. of Governors of the Univ. of N.C.*, 285 N.C. App. 574, 596 (2022) (citation and quotation marks omitted); *see also Vanguard Pai Lung, LLC v. Moody*, 2019 NCBC LEXIS 39, at *11 (N.C. Super. Ct. June 19, 2019) ("[S]tating a claim for breach of contract is a relatively low bar.").

20. JT Russell's allegations, though succinct, are sufficient. Viewed in the light most favorable to JT Russell, the allegations show that Jim offered to pay back all the money that he had transferred to Tillery Tradition without board approval, that the amount of repayment would be $9 million, that JT Russell accepted that offer, and that the parties formed a valid contract. The allegations also show that Jim then breached this contract by failing to pay what he had promised. Having thus alleged the existence of a contract and a breach of its terms, JT Russell has stated a claim for relief. (*See* Am. Compl. ¶¶ 45, 302–05.)

21. The main argument in Jim's opening brief rests on a misreading of the claim. He points to allegations that he guaranteed Tillery Tradition's debt to JT Russell in a series of written agreements between 2012 and 2017, (*see* Am. Compl. ¶¶ 46, 47), and goes on to argue that these guaranties cannot support a claim for breach of contract because they expired and are no longer enforceable. Jim's argument misses the mark because JT Russell bases its claim on a promise to repay the transfers that is distinct from the written guaranties. (*See* Am. Compl. ¶¶ 45, 302.)

22. Separately, Jim argues that any oral agreement to repay Tillery Tradition's debt would be barred by the statute of frauds. It is true that a "promise to answer the debt, default or miscarriage of another person" is unenforceable unless

memorialized in writing and signed by the promisor. N.C.G.S. § 22-1. Construed liberally, though, the amended complaint alleges that Jim promised to pay his own debts attributable to breaches of the fiduciary duties that he owed to JT Russell. Section 22-1 "is inapposite regarding the payment of one's own debts." *Cooper v. Cameron*, 2015 N.C. App. LEXIS 337, at *13 (N.C. Ct. App. May 5, 2015) (unpublished).

23. Jim's reply brief argues that the amended complaint lacks particularized allegations about when the contract was formed, whether the contract had other material terms, and what consideration JT Russell promised in return. In its discretion, the Court declines to consider arguments "raised by the moving party for the first time in a reply brief." BCR 7.7.

24. For these reasons, the Court denies Jim's motion to dismiss as to JT Russell's claim for breach of contract.

25. **Account Stated Against Tillery Tradition.** "An account stated is by nature a new contract to pay the amount due based on the acceptance of or failure to object to an account rendered." *Carroll v. McNeill Indus., Inc.*, 296 N.C. 205, 209 (1978). To plead its claim, JT Russell must allege that it calculated "the balance due," that it submitted a statement of account to Tillery Tradition, that Tillery Tradition acknowledged "the correctness of that statement," and that Tillery Tradition made a promise, express or implied, "to pay the balance due." *Id.*

26. Tillery Tradition begins by arguing that a statement of account usually takes the form of an invoice or periodic billing statements. JT Russell's

correspondence, according to Tillery Tradition, was neither. It contends that JT Russell sent a demand for repayment and an invitation to negotiate, not a true statement of account.

27. This is a question for discovery. The relevant correspondence is not attached to the amended complaint (the operative pleading), and the facts concerning JT Russell's transfers of funds to Tillery Tradition are disputed and undeveloped. Furthermore, Tillery Tradition has not cited any binding authority that limits a claim for account stated to the regular exchange of goods and services documented by invoices or periodic billing statements. The purpose of the claim is to enforce "a promise to pay a pre-existing debt," whether that debt arises from a sale of goods, a loan grant, or some other type of transaction. *Id.* at 210 (quoting 6 Corbin on Contracts § 1307, at 244 (1962)). And the statement of account that the claim requires is simply a statement by the creditor calculating the amount of debt owed by the debtor. Construed in the light most favorable to JT Russell, that is exactly what the amended complaint alleges: that Jim made a series of undocumented transfers of funds from JT Russell to Tillery Tradition and that JT Russell later "calculated the balance due" and "submitted" a "statement of the indebtedness" to Tillery Tradition. (Am. Comp. ¶¶ 51, 307, 308.)

28. Next, Tillery Tradition argues that the claim is barred by the three-year statute of limitations that applies to claims for account stated. *See* N.C.G.S. § 1-52(1). "A statute of limitation . . . may be the basis of a 12(b)(6) dismissal if on its face the complaint reveals the claim is barred." *Forsyth Mem'l Hosp., Inc. v. Armstrong World*

Indus., Inc., 336 N.C. 438, 442 (1994). Tillery Tradition contends that the claim is untimely because JT Russell submitted the statement of account in December 2019 but filed this suit in May 2023, more than three years later.

29. This, too, is a question for discovery. JT Russell alleges that Tillery Tradition implicitly agreed to the correctness of the statement of account when it failed to object within a reasonable time, (Am. Compl. ¶ 310). *See Mast v. Lane*, 228 N.C. App. 294, 297 (2013) (noting that "agreement may be implied by failure of the party to be charged to object within a reasonable time after the other party has calculated the balance and submitted a statement of the account" (cleaned up)). "Consequently, an account stated cause of action did not accrue, if at all, until the expiration of a reasonable amount of time during which [Tillery Tradition] could have objected to the statement at issue." *Channel Grp., LLC v. Cooper*, 2010 N.C. App. LEXIS 312, at *12 (N.C. Ct. App. Feb. 16, 2010) (unpublished). What constitutes a reasonable time is a question of fact that cannot be resolved from the face of the amended complaint.

30. Accordingly, the Court denies the motion to dismiss the claim for account stated.

C. Constructive Trust

31. In its opposition brief, JT Russell states that it does not object to dismissal of its constructive trust claim so long as it may still pursue the imposition of a constructive trust as a remedy. *See Haddock v. Volunteers of Am.*, 2021 NCBC LEXIS 8, at *19 (N.C. Super. Ct. Jan. 22, 2021) ("A constructive trust is not a standalone

claim for relief or cause of action. Rather, it is a remedy which may or may not be available depending on the underlying causes of action." (cleaned up)). The Court therefore dismisses the remedial claim for constructive trust without prejudice to JT Russell's right to seek a constructive trust as a remedy at a later stage.

III.
CONCLUSION

32. For these reasons, the Court **GRANTS** Mid-Eastern Asphalt's motion to dismiss and **GRANTS in part** and **DENIES in part** Jim's and Tillery Tradition's motions to dismiss as follows:

a. The Court **DISMISSES** JT Russell's section 75-1.1 claim against Jim, Tillery Tradition, and Mid-Eastern Asphalt with prejudice.

b. The Court **DISMISSES** JT Russell's claim for constructive trust without prejudice to its right to pursue a constructive trust as a remedy.

c. The Court **DENIES** the motions to dismiss JT Russell's claims for breach of contract and account stated.

SO ORDERED, this the 28th day of February, 2024.

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