

STATE OF NORTH CAROLINA
ORANGE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
22CVS001021-670

COMPASS TAX SERVICES LLC;
ASHOK LAMICHHANE; and AMAR
SHRESTHA,

Plaintiffs,

v.

RABINDRA KARKI,

Defendant.

**ORDER AND OPINION ON CROSS-
MOTIONS FOR SUMMARY
JUDGMENT**

1. **THIS MATTER** is before the Court on the 17 October 2023 filing of *Defendant's Motion for Summary Judgment* ("Defendant's Motion"), (ECF No. 41 ["Def.'s Mot."]), and *Plaintiffs' Motion for Partial Summary Judgment on the Counterclaims by Defendant Rabindra Karki* ("Plaintiffs' Motion"; together, the "Motions"), (ECF No. 45 ["Pls.' Mot."]).

2. Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure (the "Rule(s)"), Defendant Rabindra Karki ("Karki") seeks summary judgment in his favor on Plaintiffs' two remaining claims asserted against him, as well as affirmative summary judgment on his counterclaim for breach of contract. (Def.'s Mot. 1.) Plaintiffs seek summary judgment in their favor on Karki's counterclaims for fraud, breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices.¹ (Pls.' Mot. 1.)

¹ Plaintiffs initially sought summary judgment on Karki's counterclaim for civil conspiracy. (Pls.' Mot. 1.) However, Karki subsequently voluntarily dismissed that claim, mooted Plaintiffs' Motion in part as to this claim. (See ECF No. 51.)

3. For the reasons set forth herein, the Court **GRANTS** in part and **DENIES** in part the Motions.

Kennon Craver, PLLC, by Henry Sappenfield, for Plaintiffs Compass Tax Services, LLC, Ashok Lamichhane, and Amar Shrestha.

Morningstar Law Group, by Jeffrey L. Roether and Kenzie M. Rakes, for Defendant Rabindra Karki.

Robinson, Judge.

I. INTRODUCTION

4. This dispute arises out of Karki's sale of five Liberty Tax franchise locations to Plaintiffs. Plaintiffs contend that Karki failed to transfer the five Liberty Tax franchise locations pursuant to the operative sales agreement. Karki, however, contends that Plaintiffs failed to fulfill their payment obligations under the operative sale agreement. Karki also contends that Plaintiff Ashok Lamichhane made material misrepresentations regarding his intent when entering into the operative sale agreement and breached his fiduciary duty as majority owner and manager of Compass Tax Services, LLC.

II. FACTUAL BACKGROUND

5. The Court does not make findings of fact when ruling on a motion for summary judgment. "[T]o provide context for its ruling, the court may state either those facts that it believes are not in material dispute or those facts on which a material dispute forecloses summary adjudication." *Ehmann v. Medflow, Inc.*, 2017 NCBC LEXIS 88, at *6 (N.C. Super. Ct. Sept. 26, 2017); *see also Hyde Ins. Agency, Inc. v. Dixie Leasing Corp.*, 26 N.C. App. 138, 142 (1975) (encouraging the trial court

to articulate a summary of the relevant evidence of record to provide context for the claims and motion(s)).

A. The Parties

6. Plaintiff Compass Tax Services, LLC (“Compass Tax”) is a North Carolina limited liability company organized on 16 July 2021 for the purpose of purchasing and operating five Liberty Tax franchises. (Am. Compl. ¶¶ 5, 7, ECF No. 20 [“Am. Compl.”].)² The Liberty Tax franchises, including their respective business territories, are located at the following addresses: (1) 3825 S. Roxboro St. #136, Durham, North Carolina 27713 (Territory #027); (2) 247 Grady Height, Cary, North Carolina 27513 (Territory #003); (3) 4456 Fayetteville Road, Raleigh, North Carolina 27603 (Territory #029); (4) 501 Raleigh Road, Angier, North Carolina 27501 (Territory #0212); and (5) 3808 Guess Road, Durham, North Carolina 27705 (Territory #008), (together, the “Liberty Tax Franchises”). (Index Exs. Supp. Def.’s Mot. Ex. 9 at ¶ 5, ECF No. 42.9 [“Sept. Agt.”].)

7. Plaintiff Ashok Lamichhane (“Lamichhane”) is a resident of Orange County, North Carolina. (Am. Compl. ¶ 2.) Lamichhane is a member and manager of Compass Tax with a seventy-five percent (75%) membership interest in it. (Am. Compl. ¶¶ 5–6.)

² The Court recites, but does not rely upon, certain unverified allegations in the Amended Complaint to provide context for the material allegations on which the parties’ claims are based.

8. Plaintiff Amar Shrestha (“Shrestha”; with Compass Tax and Lamichhane, “Plaintiffs”) is a resident of Durham County, North Carolina, with a fifteen percent (15%) membership interest in Compass Tax. (Am. Compl. ¶¶ 3, 5–6.)

9. Defendant Karki is a resident of Wake County, North Carolina, with a ten percent (10%) membership interest in Compass Tax. (Am. Compl. ¶¶ 4–6.)

10. Lamichhane and Karki met through a mutual friend in the 1990s while living in Nepal. (Index Exs. Supp. Def.’s Mot. Ex. 1 at 36:9–22, ECF No. 42.1 [“Lamichhane Dep.”].) Lamichhane met Shrestha in Nepal around the same time. (Lamichhane Dep. 51:15–16.)

B. Beginning of the Parties’ Business Relationship

11. For approximately twenty years, Karki has “directly and indirectly owned tax-preparation businesses in central North Carolina that operate as Liberty Tax franchises[.]” (Index Exs. Supp. Def.’s Mot. Ex. 4 at ¶ 2, ECF No. 42.4 [“Karki Aff.”].)

12. In early 2021, Lamichhane and Karki began discussing the possibility of Lamichhane purchasing the Liberty Tax Franchises from Karki. (Lamichhane Dep. 39:3–21, 40:10–23.) Around that time, Lamichhane informed Shrestha of the same opportunity, and Shrestha notified Lamichhane that “he wanted to be part of the opportunity.” (Lamichhane Dep. 51:20–52:2.)

13. While their discussions continued regarding the contemplated purchase of the Liberty Tax Franchises, Karki provided by text message to Lamichhane the gross sales figures for the Liberty Tax Franchises between March and May 2021. (Lamichhane Dep. 45:5–9; *see* Index Exs. Supp. Def.’s Mot. Ex. 5, ECF No. 42.5)

(providing text messages between Karki and Lamichhane with gross figures.)
However, it was Lamichhane's understanding that the numbers provided by Karki represented the "net income" of the Liberty Tax Franchises, not the gross income. (Lamichhane Dep. 45:16–17.)

14. On 14 May 2021, Shrestha and Karki signed an agreement for the sale of the Liberty Tax Franchises (the "May Agreement"). (Index Exs. Supp. Def.'s Mot. Ex. 6, ECF No. 42.6 ["May Agt."]) Lamichhane was not a party to the May Agreement. (*See* May Agt.) The May Agreement reflected a purchase price of \$720,000.00 for the Liberty Tax Franchises. (May Agt. 2.)

15. Although Lamichhane did not sign the May Agreement, in July of 2021 he began advertising the Liberty Tax Franchises on Google and operating four of the five Liberty Tax Franchises by appointment only. (Lamichhane Dep. 43:2–17.)

C. The September Purchase Sale Agreement and Related Conduct

16. On 15 September 2021, the Operating Agreement for Compass Tax (the "Operating Agreement") was signed by Lamichhane, Shrestha, and Karki. (Index Exs. Supp. Def.'s Mot. Ex. 8, ECF No. 42.8 ["Op. Agt."].)

17. That same day, and after renegotiating the purchase price as previously contemplated in the May Agreement, (*see* Index Exs. Supp. Def.'s Mot. Ex. 2 at 23:22–24:1, ECF No. 42.2 ["Shrestha Dep."]; Index Add. Exs. Opp'n Pls.' Mot. Ex. 1 at 131:2–132:22, ECF No. 49.1), Lamichhane, Shrestha, and Karki signed the Purchase Sale Agreement (the "September Agreement"), which governs Plaintiffs' purchase of the Liberty Tax Franchises, (*see generally* Sept. Agt.).

18. After signing the September Agreement, Lamichhane had limited access to the Liberty Tax server as the general manager of Compass Tax, but he continued to request “financial reporting and the login credentials to access the financial reporting from the Liberty Tax portal[.]” (Compass Tax 30(b)(6) Dep. 95:21–96:1, 96:22–97:5, ECF No. 43.1.)³ Lamichhane did not receive full access to the financial information for the Liberty Tax Franchises until 9 December 2021. (Lamichhane Dep. 48:4–6, 151:7–10; Compass Tax 30(b)(6) Dep. 96:12–16, ECF No. 43.1) Upon gaining access to the Liberty Tax system and learning the financial status of the Liberty Tax Franchises, Lamichhane and Shrestha attempted to renegotiate the purchase price for the Liberty Tax Franchises but Karki declined to do so. (Shrestha Dep. 87:18–89:19.)

19. The September Agreement includes several provisions that are relevant to this litigation, as set forth in detail below.

1. Purchase Price Provision

20. In the September Agreement, Karki is identified as the seller with Lamichhane and Shrestha as the buyers. (Sept. Agt. 5.) However, the preamble of the September Agreement states that “Compass Tax Services LLC (as represented by Ashok Lamichhane[,], Amar Shrestha[,], and Rabindra Karki[]) agrees to purchase [the five Liberty Tax Franchises] from Rabindra Karki[.]” (Sept. Agt. ¶ 1.)

³ The Compass Tax 30(b)(6) Deposition was submitted in different filings on the record in this case. For clarity, the Court does not cite to each place where portions of the deposition appear in the record, but instead notes in each citation the specific ECF No. in which the portion cited may be found.

21. The September Agreement represents that Plaintiffs would pay Karki a purchase price of \$648,000.00 as follows:

- a) \$15,000 paid on 5/15/2021 as initial deposit payment when signed the Contract for the Purchased [sic] and Sales of a Business was signed.
- a) [sic] Out of purchase price \$179,400 shall be for operating and other the [sic] expenses and remaining shall be inventory, furniture and fixture and good will, of which \$79,400 shall be paid in cash on 8/24/2021 and \$100,000 will be paid in cash on 9/30/2021[.]
- b) Remaining balance shall be paid as promissory note in 5 installments beginning 5/15/2022[.]
- c) Compass Tax Services LLC shall pay interest of Bank prime loan plus 1 percent as of 5/10/2021 which is $3.25 + 1 = 4.25\%$ Annual compound[.]

(Sept. Agt. ¶ 2.)

22. In accordance with terms of the September Agreement, the following payments were made to Karki: (1) the initial deposit of \$15,000.00 on 15 May 2021; (2) a sum of \$79,400.00 on 24 August 2021; and (3) a sum of \$100,000.00 on 30 September 2021. (Lamichhane Dep. 108:21–109:11; *see* Sept. Agt. ¶ 2.)

23. Payment of the first of five installment payments was thereafter due on 15 May 2022; however, no installment payments were made to Karki. (Lamichhane Dep. 109:12–16; *see* Sept. Agt. ¶ 2.b.)

2. Management Fee Provisions

24. The Operating Agreement states that “[a]ny manager rendering services to the Company is entitled to compensation proportionate with the value of those services.” (Op. Agt. ¶ 5.1.)

25. However, the September Agreement contains a provision that provides that:

Lamichhane will be managing member of this entity and he shall be paid \$500 for each franchise territory a month as Management fee for maintaining the day-to-day business for first year and \$1000 for each franchise territory a month as Management fee for managing the day-to-day business for second year and \$1500 for each franchise territory a month as Management fee for managing the day-to-day business for after 2nd year.

(Sept. Agt. ¶ 19.)

26. Lamichhane began operating the Liberty Tax Franchises in July 2021.

(Lamichhane Dep. 42:25–43:17.)

27. Karki understood that Lamichhane’s compensation would be “for managing the day-to-day business’ in the amount of \$500.00 per month per territory for the first year, \$1,000 per month per territory for the second year, and \$1,500 per month per territory in subsequent years.” (Index Add. Exs. Opp’n Pls.’ Mot. Ex. 3 at ¶ 3, ECF No. 49.3 [“Second Karki Aff.”].) Karki’s understanding was that the “management fee would be paid only during the tax season.” (Second Karki Aff. ¶ 3.) Lamichhane had a similar understanding of the management fee structure. (See Lamichhane Dep. 117:9–118:9.)

28. Thereafter, on 21 March 2022, Lamichhane wrote himself a check for \$20,000.00 purportedly for his combined January and February 2022 management fee. (See Index Exs. Opp’n Pls.’ Mot. Ex. 8, ECF No. 49.8.) On 23 March 2022, Lamichhane wrote himself a check from Compass Tax in the amount of \$35,000.00, representing payment of the management fee for 16 July 2021 through 31 December 2021, (see Index Exs. Opp’n Pls.’ Mot. Ex. 7, ECF No. 49.7), followed by more checks written to “cash,” (see Index Exs. Opp’n Pls.’ Mot. Exs. 9–10, ECF Nos. 49.9–10). The

evidence demonstrates that Lamichhane used one check written to “cash”, in the amount of \$1,900.00, to pay a contractor for work done on his home. (Compass Tax 30(b)(6) Dep. 183:1–14, ECF No. 49.2.)

29. Karki did not “authorize any increase in [Lamichhane’s] management fee from Compass Tax,” and testified that he did not learn of Lamichhane’s increased management fee until it was “reflected in Compass Tax[’s] financial records provided” to him by Lamichhane. (Second Karki Aff. ¶ 4.)

3. Obligation to Facilitate the Transfer of Franchise Rights to Plaintiffs

30. The September Agreement provides that the “Buyers and Sellers agree to execute all documents necessary to conclude this transaction, including, where applicable, assignments of leases, contract, licenses, operating agreements or other such documents necessary to fulfill the parties’ intent.” (Sept. Agt. ¶ 7.)

31. In August 2021, prior to signing the September Agreement, Karki requested a transfer of the franchise rights for the Liberty Tax Franchises to Compass Tax through Liberty Tax’s online portal. (Karki Aff. ¶ 5.) It was Lamichhane’s understanding that it was in Karki’s control whether the territories were transferred. (Lamichhane Dep. 240:24–241:6.) To facilitate the transfer of the Liberty Tax Franchises, Lamichhane testified on behalf of Compass Tax that Karki signed and completed all documents presented to him. (Compass Tax 30(b)(6) Dep. 51:23–52:14, ECF No. 42.3; *see* Index Exs. Supp. Def.’s Mot. Ex. 10 at 8, ECF No. 42.10.)

32. Plaintiffs contend that, due to Karki’s failure to transfer the Liberty Tax Franchises, “Compass Tax [] was never able to effectively operate the [b]usiness

because it lacked the necessary information and was never given full authority and control.” (Am. Compl. ¶ 30.) However, Karki contends that as a result of Plaintiffs’ conduct, he has “suffered significant financial losses and sustained other personal losses[.]” (Answer Am. Compl. & Am. Countercl. ¶ 102, ECF No. 26 [“Countercl.”].)

33. As a result of the above-described facts and circumstances, Lamichhane tendered the remaining business assets back to Karki, (Compass Tax 30(b)(6) Dep. 178:8–11, ECF No. 43.3), and litigation ensued.

III. PROCEDURAL BACKGROUND

34. The Court sets forth herein only those portions of the procedural history relevant to its determination of the Motions.

35. Plaintiffs initiated this action on 19 August 2022 with the filing of their Verified Complaint. (See ECF No. 3.)

36. On 16 February 2023, Plaintiffs filed their Amended Complaint as of right, asserting eleven claims for relief against Karki. (See *generally* Am. Compl.) Plaintiffs thereafter voluntarily dismissed nine of those eleven claims without prejudice. (See ECF No. 31.) Plaintiffs’ two remaining claims are for (1) breach of contract (“Count One”), (Am. Compl. ¶¶ 43–47); and (2) breach of the duty of good faith and fair dealing (“Count Two”), (Am. Compl. ¶¶ 48–55).

37. On 20 March 2023, Karki filed his Answer to Amended Complaint and Amended Counterclaim, asserting six counterclaims against Plaintiffs. (See *generally* Countercl.) Karki thereafter voluntarily dismissed his fifth cause of action for civil conspiracy without prejudice. (See ECF No. 51.) Karki’s five remaining

claims are (1) breach of contract (“Counterclaim One”), (Countercl. ¶¶ 103–06); (2) fraud (“Counterclaim Two”), (Countercl. ¶¶ 107–14); (3) breach of fiduciary duty (“Counterclaim Three”), (Countercl. ¶¶ 115–20); (4) constructive fraud (“Counterclaim Four”), (Countercl. ¶¶ 121–26); and (5) violations of the North Carolina Unfair and Deceptive Trade Practices Act (“UDTPA”), N.C.G.S. § 75-1.1 *et seq.*, (“Counterclaim Five”), (Countercl. ¶¶ 131–37).

38. The Motions were filed on 17 October 2023. (*See* ECF Nos. 41, 45.) Following full briefing, the Court held a hearing on the Motions on 24 January 2024 (the “Hearing”), at which all parties were present and represented through counsel. (*See* ECF No. 56.)

39. The Motions are ripe for resolution.

IV. LEGAL STANDARD

40. Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C.G.S. § 1A-1, Rule 56(c). “A ‘genuine issue’ is one that can be maintained by substantial evidence.” *Dobson v. Harris*, 352 N.C. 77, 83 (2000) (citation omitted). “‘Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion’ and means ‘more than a scintilla or a permissible inference.’” *Head v. Gould Killian CPA Grp., P.A.*, 371 N.C. 2, 8 (2018) (quoting *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 335 (2015)).

41. The moving party bears the burden of showing that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Hensley v. Nat'l Freight Transp., Inc.*, 193 N.C. App. 561, 563 (2008). The movant may make the required showing by proving that “an essential element of the opposing party’s claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of her claim.” *Dobson*, 352 N.C. at 83 (citations omitted).

42. “Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial.” *Gaunt v. Pittaway*, 139 N.C. App. 778, 784–85 (2000) (citation omitted). The Court must view the evidence in the light most favorable to the nonmovant. *Dobson*, 352 N.C. at 83 (citation omitted). However, the nonmovant

may not rest upon the mere allegations or denials of [their] pleading, but [their] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If [the nonmovant] does not so respond, summary judgment, if appropriate, shall be entered against [the nonmovant].

N.C.G.S. § 1A-1, Rule 56(e).

V. ANALYSIS

43. The Court begins its analysis with Plaintiffs’ Motion and concludes with Defendant’s Motion.

A. Plaintiffs' Motion

44. Plaintiffs seek summary judgment on Karki's Counterclaims Two, Three, Four, and Five. The Court addresses each counterclaim in turn.

1. Karki's Counterclaim Two: Fraud

45. Plaintiffs seek summary judgment on Karki's fraud claim, arguing that Karki failed to proffer sufficient evidence of Plaintiffs' alleged intent to deceive to support his claim. (Pls.' Memo. Supp. Pls.' Mot. 8, ECF No. 46 ["Br. Supp. Pls.' Mot."].) In Plaintiffs' view, the evidence does not show that they made a promise to pay Karki for the Liberty Tax Franchises without the intent to keep that promise. (Br. Supp. Pls.' Mot. 8.) Plaintiffs contend that the evidence actually demonstrates that they "intended to take full possession and operated the franchises" at "great personal burden and expense to themselves." (Br. Supp. Pls.' Mot. 8.)

46. In North Carolina, the "essential elements of actual fraud are well established: '(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.'" *Forbis v. Neal*, 361 N.C. 519, 526–27 (2007) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138 (1974)). "Whether each of the elements of actual fraud and reasonable reliance are met are ordinarily questions for the jury 'unless the facts are so clear that they support only one conclusion.'" *Head*, 371 N.C. at 9 (quoting *Forbis*, 361 N.C. at 527).

47. An unfulfilled promise typically cannot serve as the basis for a fraud claim. *Pierce v. Am. Fid. Fire Ins. Co.*, 240 N.C. 567, 571 (1954). However, "a promissory

misrepresentation may constitute actual fraud if the misrepresentation is made with intent to deceive and with no intent to comply with the stated promise or representation.” *Braun v. Glade Valley Sch., Inc.*, 77 N.C. App. 83, 87 (1985) (citation omitted). In each case, the “misrepresentation of the state of the promisor’s mind” is itself a misrepresentation of an existing fact, giving rise to a fraud claim. *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 452 (1981); accord *McKinnon v. CV Indus.*, 213 N.C. App. 328, 338 (2011). Accordingly, a fraud claim may be based upon promissory representations, but Karki must also allege facts “from which a court and jury may reasonably infer that [Plaintiffs] did not intend to carry out such representations when they were made.” *Whitley v. O’Neal*, 5 N.C. App. 136, 139 (1969).

48. Direct evidence of intent is not required. “Juries often have little access to direct evidence of a person’s intent and therefore may infer intent from the totality of the properly admitted evidence.” *Hudgins v. Wagoner*, 204 N.C. App. 480, 491 (2010). Circumstantial evidence of intent may include, among other things, a motive to deceive, close proximity between the promise and the breach, efforts to conceal nonperformance from the promisee, and a broader pattern of deceit. *See, e.g., Calloway v. Wyatt*, 246 N.C. 129, 133–34 (1957); *Jones v. Harrelson & Smith Contractors, LLC*, 194 N.C. App. 203, 214–15 (2008), *aff’d per curiam*, 363 N.C. 371 (2009); *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 481 (2004); *Meekins v. Box*, 152 N.C. App. 379, 386–89 (2002); *Carver v. Roberts*, 78 N.C. App. 511, 513–14 (1985).

49. Karki alleges that when Plaintiffs entered into the September Agreement and the Operating Agreement, Plaintiffs fraudulently concealed that they: (i) “did not intend to honor their payment obligations” under the September Agreement; (ii) “did not inten[d] to take transfer of the franchise rights and obligations for the Franchises or their respective leases and other operational obligations; (iii) did not intend to abide by Liberty Tax’s policies and regulations; and (iv) intended to use the Franchises and their associated assets and resources” for their own benefit to the detriment of Karki. (Countercl. ¶ 108.)

50. In Plaintiffs’ view, there is insufficient evidence to support Karki’s contention that Plaintiffs did not intend to pay for the Liberty Tax Franchises, or that they “did not intend to take full possession of them.” (Br. Supp. Pls.’ Mot. 8.) Plaintiffs direct the Court to both Lamichhane’s and Shrestha’s testimony detailing how Plaintiffs began operating the Liberty Tax Franchises, (Br. Supp. Pls.’ Mot. 8 (citing Lamichhane Dep. 161–164; Shrestha Dep. 8, 18, 116)), which Plaintiffs contend shows that there is “no evidence that Lamichhane and Shrestha had the intent to deceive at the time they made their putative representations[,]” (Br. Supp. Pls.’ Mot. 9).

51. In response, Karki offers evidence that (1) Plaintiffs did little to no due diligence into the financial status of the Liberty Tax Franchises before signing the September Agreement, (Def.’s Br. Opp’n Pls.’ Mot. 8, ECF No. 52 [“Br. Opp. Pls.’ Mot.”]), and (2) Lamichhane repeatedly tried to renegotiate the purchase price for the Liberty Tax Franchises, despite what he previously agreed to in the September

Agreement, after Lamichhane received additional financial information about the Liberty Tax Franchises, (Br. Opp. Pls.’ Mot. 9). Karki also argues that he has offered evidence that Lamichhane “took control of the business assets” of the Liberty Tax Franchises and “proceeded to earn revenue from those assets,” (Br. Opp. Pls.’ Mot. 9) (citing Lamichhane Dep. 96–97), all while Lamichhane “paid himself a higher management fee from Compass Tax than authorized in the September Agreement,” (Br. Opp. Pls.’ Mot. 10) (citing Compass Tax 30(b)(6) Dep. 30–37, ECF No. 42.3).

52. The Court finds the evidence offered by Karki sufficient to raise a genuine issue of material fact as to whether Lamichhane and Shrestha acted with fraudulent intent, which is a question for the jury here. *See Latta v. Rainey*, 202 N.C. App. 587, 600 (2010) (citation omitted) (“Whether the defendant acts with the requisite scienter for fraud is generally a question of fact for the jury.”); *Sports Quest, Inc. v. Dale Earnhardt, Inc.*, 2004 NCBC LEXIS 10, at **12–13 (N.C. Super. Ct. Mar. 12, 2004) (denying summary judgment as to fraud claim because the “motivations behind [defendant’s] action [were] unclear”).

53. Therefore, the Court **DENIES** Plaintiffs’ Motion as to Karki’s Counterclaim Two for fraud.

2. Karki’s Counterclaims Three and Four: Breach of Fiduciary Duty and Constructive Fraud

54. Plaintiffs request summary judgment on Karki’s Counterclaims Three and Four, arguing that Karki has not provided sufficient evidence of a breach of any fiduciary duty owed to him. (Br. Supp. Pls.’ Mot. 9–12.)

55. “For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties.” *King v. Bryant*, 369 N.C. 451, 464 (2017) (quoting *Dalton v. Camp*, 353 N.C. 647, 651 (2001)). A claim for constructive fraud likewise requires a plaintiff to allege facts establishing a confidential or fiduciary relationship. *Gen. Fid. Ins. Co. v. WFT, Inc.*, 269 N.C. App. 181, 185 (2020) (“Constructive fraud ‘arises where a confidential or fiduciary relationship exists, which has led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.’” (quoting *Forbis*, 361 N.C. at 528)).

56. Karki contends that Lamichhane owed him a fiduciary duty as the “majority member and Chief Executive Member of Compass Tax.” (Countercl. ¶ 116.) Plaintiffs do not challenge Karki’s contention,⁴ but instead argue that Karki has not provided sufficient evidence of a breach of the alleged duty. (Br. Supp. Pls.’ Mot. 10–12.) Therefore, the Court turns to whether Karki has presented sufficient evidence to create a genuine issue of material fact as to Lamichhane’s alleged breach.

57. Karki alleges that Lamichhane breached his fiduciary duty by: (i) “failing to honor his payment obligations” under the September Agreement, (ii) “failing to take transfer of the franchise rights and obligations for the Franchises or their respective leases and other operational obligations, (iii) failing to abide by Liberty Tax’s policies and regulations, and (iv) using the Franchises and their associated

⁴ Plaintiffs explicitly note that their argument “assum[es] Lamichhane owed Karki a fiduciary duty[.]” (Br. Supp. Pls.’ Mot. 10.) Since Plaintiffs assume Lamichhane owed a duty to Karki, the Court, at this stage, will not address the first element further.

assets and resources” for his own benefit and to the detriment of Karki. (Countercl. ¶ 118.)

58. Plaintiffs argue that failing to make payments under the September Agreement is the basis for a breach of contract claim, but that this conduct “does not automatically translate to a separate breach of fiduciary duty.” (Br. Supp. Pls.’ Mot. 10.) Further, Plaintiffs contend that they could not “fail[]to take transfer” of the Liberty Tax Franchises pursuant to the September Agreement because no transfer was initiated. (Br. Supp. Pls.’ Mot. 10.) Plaintiffs further contend that there is insufficient evidence that “Lamichhane did not comply with ‘Liberty Tax’s policies and regulations[,]” as Karki was unable to identify any Liberty Tax policies that Lamichhane failed to comply with. (Br. Supp. Pls.’ Mot. 11.)

59. Here, Karki’s alleged injury and the damages he seeks to recover for his breach of fiduciary duty and constructive fraud claims, do not arise out of the purported fiduciary relationship between Karki and Lamichhane. Instead, the wrongful conduct at issue arises as a result of the contractual obligations created by the September Agreement. *See, e.g., Haigh v. Superior Ins. Mgmt. Grp., Inc.*, 2017 NCBC LEXIS 100, at *19 (N.C. Super. Ct. Oct. 24, 2017) (dismissing breach of fiduciary duty claim where alleged wrongdoing was “a result of the parties’ *contractual* relationship, not as a result of a *fiduciary* relationship” and would be “better resolved through contract principles, rather than general principles of fiduciary relationships”).

60. However, Karki's contention that Lamichhane breached his fiduciary duty by "using the Franchises and their associated assets and resources" for his "own benefit and to the exclusion and detriment of Karki," is supported by sufficient evidence to survive summary judgment. (Countercl. ¶ 118.)

61. Karki argues that Lamichhane used Compass Tax's "funds to pay for personal expenses as credit to his outstanding 'management fees.'" (Br. Opp. Pls.' Mot. 12.) Further, there is clear evidence here that Lamichhane wrote checks to himself under the guise of paying himself a "management fee." (See ECF Nos. 49.7–.10 (providing the checks at issue).) Plaintiffs have not offered sufficient evidence to show that these management fees were "proportionate with the value of those services" performed by Lamichhane, as contemplated in the Operating Agreement, (see Op. Agt. ¶ 5.1).

62. Plaintiffs have not met their burden at this stage, as a genuine issue of material fact remains as to whether Lamichhane breached a fiduciary duty owed to Karki by paying himself a management fee, and whether the amounts paid were disproportionate to the value of the services Lamichhane performed for Compass Tax.

63. The Court therefore **DENIES** in part Plaintiffs' Motion as to Counterclaim Three for breach of fiduciary duty and Counterclaim Four for constructive fraud, to the extent those counterclaims concern Lamichhane's use of "the Franchises and their associated assets and resources for [his] own benefit and to the exclusion and detriment of Karki." (Countercl. ¶ 118). Except as expressly denied, Plaintiffs'

Motion is otherwise **GRANTED** in part as to Counterclaims Three and Four, and those claims are therefore **DISMISSED**.

3. Karki's Counterclaim Five: Violations of the UDTPA

64. Plaintiffs seek dismissal of Counterclaim Five based on their contention that Karki's UDTPA claim is "effectively a repackaging of the breach of contract and fraud claims." (Br. Supp. Pls.' Mot. 14.) As this is the sole argument raised by Plaintiffs regarding Counterclaim Five, the Court limits its analysis accordingly.⁵

65. In order to establish a UDTPA claim, Karki must prove that Plaintiffs committed (1) an unfair or deceptive act or practice, (2) in or affecting commerce, (3) which proximately caused injury to him. *Walker v. Fleetwood Homes of N.C., Inc.*, 362 N.C. 63, 71–72 (2007).

66. Karki's UDTPA claim relies on the same facts and conduct underlying his counterclaims for fraud, breach of fiduciary duty, and constructive fraud. (Countercl. ¶ 132.) The Court has herein determined that those claims survive summary judgment, at least in part. (*See supra* ¶¶ 53, 63.) Therefore, those counterclaims, and the conduct alleged in support thereof, may serve as a basis for Karki's Counterclaim Five. *See Silverdeer, LLC v. Berton*, 2013 NCBC LEXIS 21, at *28–29 (N.C. Super. Ct. Apr. 24, 2013) (holding that the UDTPA claim derivative of fraud and other claims "rises and falls" with those claims); *Conservation Station, Inc.*

⁵ The Court notes that Plaintiffs only focus on the first element presented below, (*infra* ¶ 65), regarding whether the conduct alleged by Karki, and the evidence presented in support of his UDTPA claim, is sufficient to establish an unfair or deceptive act or practice, (*see* Br. Supp. Pls.' Mot. 14). Plaintiffs do not raise any argument concerning whether Karki has presented sufficient evidence to show that the alleged conduct satisfies the second required element that the unfair or deceptive act or practice is "in or affecting commerce."

v. Bolesky, 2023 NCBC LEXIS 164, at **29 (N.C. Super. Ct. Dec. 12, 2023) (“Claims for breach of fiduciary duty and constructive fraud may in appropriate circumstances support a claim for violations of the UDTPA.”).

67. Therefore, the Court hereby **DENIES** in part Plaintiffs’ Motion as to Counterclaim Five for violations of the UDTPA. However, to the limited extent this claim relies on Counterclaims Three and Four for Lamichhane’s alleged failure (i) to honor payment obligations under the September Agreement, (ii) to take transfer of the franchise rights and obligations for the Liberty Tax Franchises, and (iii) to abide by Liberty Tax’s policies and regulations, Plaintiffs’ Motion is **GRANTED** in part and Counterclaim Five is **DISMISSED** to that extent.

B. Defendant’s Motion

68. Karki seeks affirmative summary judgment on his own Counterclaim One for breach of contract, as well as summary judgment on Plaintiffs’ Counts One for breach of contract and Count Two for breach of duty of good faith and fair dealing. (See Def.’s Mot.)

69. Affirmative summary judgment on a party’s own claims for relief is infrequently granted and requires the moving party to carry a greater burden. *Brooks v. Mount Airy Rainbow Farms Ctr., Inc.*, 48 N.C. App. 726, 728 (1980). The moving party “must show that there are no genuine issues of fact, that there are no gaps in his proof, that no inferences inconsistent with his recovery arise from the evidence, and that there is no standard that must be applied to the facts by the jury.” *Parks Chevrolet, Inc. v. Watkins*, 74 N.C. App. 719, 721 (1985). Therefore, it is “rarely . . .

proper to enter summary judgment in favor of the party having the burden of proof.” *Blackwell v. Massey*, 69 N.C. App. 240, 243 (1984); see *Banc of Am. Merch. Servs., LLC v. Arby’s Rest. Grp., Inc.*, 2021 NCBC LEXIS 61, at *10–11 (N.C. Super. Ct. June 30, 2021).

1. Counterclaim One and Count One: Breach of Contract

70. Karki seeks summary judgment on the parties’ respective breach of contract claims, arguing that the “undisputed material facts show the existence of a valid contract and non-performance by Plaintiffs of a material aspect of that contract.” (Def.’s Br. Supp. Def.’s Mot. 14, ECF No. 47 [“Br. Supp. Def.’s Mot.”].)

71. “As a general rule, if either party to a bilateral contract commits a material breach of the contract, the non-breaching party is excused from the obligation to perform further.” *McClure Lumber Co. v. Helmsman Constr., Inc.*, 160 N.C. App. 190, 198 (2003) (citation omitted). A “[b]reach of contract occurs when a party fails to perform a contractual duty which has become absolute . . . [W]hen performance of a duty under contract is presently due any nonperformance constitutes a breach.” *Millis Constr. Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 510 (1987) (citations omitted). A breach is considered material if it “substantially defeats the purpose of the agreement or goes to the very heart of the agreement, or can be characterized as a substantial failure to perform.” *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 220 (2015) (quoting *Long v. Long*, 160 N.C. App. 664, 668 (2003)). The materiality of a breach of contract is “ordinarily a question for a jury.”

Id. at 221 (quoting *Charlotte Motor Speedway, Inc. v. Tindall Corp.*, 195 N.C. App. 296, 302 (2009)).

72. Further, “[i]f the contract ‘contains some condition precedent to defendant’s liability,’ the plaintiff must also allege that the condition has been met.” *Upchurch v. Sapp*, 2020 NCBC LEXIS 118, at *5 (N.C. Super. Ct. Oct. 8, 2020) (quoting *Beachboard v. S. Ry. Co.*, 16 N.C. App. 671, 681 (1972) (citation omitted)). “A condition precedent is a fact or event that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty.” *Kumar v. Patel*, 2024 NCBC LEXIS 36, at **19–20 (N.C. Super. Ct. Feb. 28, 2024) (quoting *Mosely v. WAM, Inc.*, 167 N.C. App. 594, 600 (2004) (citation omitted)). “The use of language such as ‘when,’ ‘after,’ and ‘as soon as’ clearly indicates that a promise will not be performed except upon the happening of a stated event, *i.e.*, a condition precedent.” *Craftique, Inc. v. Stevens & Co.*, 321 N.C. 564, 567 (1988).

i. Karki’s Counterclaim One

73. Karki’s Counterclaim One focuses on the September Agreement and Plaintiffs’ alleged failure to pay the amount due thereunder on 15 May 2022. (Countercl. ¶¶ 72, 105; Br. Supp. Def.’s Mot. 14.)

74. Based on the record before the Court, it is undisputed that the September Agreement provided an unambiguous payment term, which required Plaintiffs, as the buyers, to pay Karki the first of five installment payments on 15 May 2022. (Sept. Agt. ¶ 2.b.) It is also undisputed that the first installment payment was not made to Karki on 15 May 2022, and no such payment has been made since. (*See Lamichhane*

Dep. 109:12–16.) As a result, the Court concludes that Plaintiffs breached the September Agreement by failing to pay Karki the first installment payment in accordance with the terms of that agreement.

75. While Plaintiffs acknowledge their own non-payment, they contend that Karki has “provided no independent documentation of his completion of his duties to attempt to transfer the ownership of the franchises,” and that, as a result, Karki breached the September Agreement first, which Plaintiffs contend excused their own non-performance. (Pls.’ Memo. Opp’n Def.’s Mot. 6–8, ECF No. 53 [“Br. Opp. Def.’s Mot.”].)

76. While the September Agreement requires Karki, as the seller, to “execute all documents necessary to conclude this transaction, including, where applicable, assignments of leases, contract, licenses, operating agreements or other such documents necessary to fulfill the parties’ intent,” there is no deadline for completion of this obligation, and Plaintiffs have offered no evidence to support a contention that Karki had a deadline to perform this obligation. As such, Karki’s performance was not a condition precedent to Plaintiffs’ performance on 15 May 2022, and thus Plaintiffs’ payment obligation was not excused by Karki’s alleged failure to comply with his transfer obligations.

77. Therefore, the Court **GRANTS** in part Defendant’s Motion as to Counterclaim One for breach of contract, to the extent the Motion seeks to establish that one or more Plaintiffs failed to pay Karki the 15 May 2022 installment payment.

78. While summary judgment is appropriate as to Karki's Counterclaim One related to the issue of breach, a genuine issue of material fact remains as to *whose* obligation it was to pay Karki on 15 May 2022. While the September Agreement expressly lists Lamichhane and Shrestha as the "Buyers," (Sept. Agt. 5), the preamble of the September Agreement explicitly states that Compass Tax is the purchaser, (Sept. Agt. ¶ 1). Additionally, Karki has inconsistently identified who he contends was obligated to remit payment on 15 May 2022. (*Compare* Br. Supp. Def.'s Mot. 4 ("Compass Tax agreed to pay Karki[.]"), *with* Countercl. 13, 29 ("Buyers breached the . . . September Agreement . . . by failing to make payments when due," with the term "Buyers" defined therein as Compass Tax, Lamichhane, and Shrestha).) When asked about this issue at the Hearing, the parties were unable to provide any guidance or clarification.

79. Therefore, the Court determines that a genuine issue of material fact remains as to Counterclaim One regarding which Plaintiff, or Plaintiffs, were obligated to remit payment to Karki on 15 May 2022. *See KNC Techs., LLC v. Tutton*, 2021 NCBC LEXIS 38, at *40 (N.C. Super. Ct. Apr. 8, 2021) (citing *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 265 N.C. 520, 525 (2012)) ("An ambiguity exists when the effect of provisions is uncertain or capable of several reasonable interpretations."); *see also Robertson v. Hartman*, 90 N.C. App. 250, 252–53 (1988) ("[I]f the terms employed [in the contract] are subject to more than one reasonable meaning, the interpretation of the contract is a jury question.").

80. Therefore, the Court **DENIES** in part Defendant's Motion as it relates to which Plaintiff(s) bear the liability associated with Counterclaim One for breach of the September Agreement.

ii. Plaintiffs' Count One

81. Plaintiffs likewise allege, through their own Count One, that Karki breached the September Agreement by failing to facilitate the transfer of the Liberty Tax Franchises.⁶ (Am. Compl. ¶¶ 27–30.)

82. As the Court has discussed above, one or more Plaintiffs breached the September Agreement by failing to remit payment to Karki on 15 May 2022. The Court has also noted that Karki's obligation to transfer the Liberty Tax Franchises to Plaintiffs was not a condition precedent, and that as a result, Karki's alleged failure to facilitate the transfer of the Liberty Tax Franchises did not relieve Plaintiffs of their obligation to pay Karki on 15 May 2022. Thus, Plaintiffs breach of the September Agreement on 15 May 2022 relieved Karki of any pending obligations to facilitate the transfer of the Liberty Tax Franchises.

⁶ In the Amended Complaint, Plaintiffs allege multiple breaches of the September Agreement by Karki. (See Am. Compl. ¶¶ 31–42.) However, as Karki correctly points out, (Def.'s Reply Br. Supp. Def.'s Mot. 1 n.1, ECF No. 55 ["Reply"]), Plaintiffs do not respond to Karki's argument regarding those other alleged breaches, instead focusing only on Karki's alleged failure to facilitate the transfer of the Liberty Tax Franchises, (see Br. Opp. Def.'s Mot. 6–9). Plaintiffs had the burden "to rebut these arguments by identifying the evidence that supports [their] claim and articulating how that evidence creates a genuine issue of material fact for trial." *Brewster v. Powell Bail Bonding, Inc.*, 2020 NCBC LEXIS 27, at *9 (N.C. Super. Ct. Mar. 11, 2020). Plaintiffs did not carry that burden. Therefore, the Court concludes that there are no genuine issues of material fact regarding Karki's other alleged breaches, (Am. Compl. ¶¶ 31–42), and grants summary judgment in Karki's favor on those alleged breaches.

83. Therefore, Defendant's Motion is **GRANTED** in part as to Count One for breach of contract, and that claim is **DISMISSED**.

2. Plaintiffs' Count Two: Breach of the Duty of Good Faith and Fair Dealing

84. Karki seeks summary judgment on Plaintiffs' Count Two, arguing in relevant part that "there is no evidence to substantiate that Karki breached any provision of the September Agreement or its implied covenant of good faith and fair dealing." (Br. Supp. Def.'s Mot. 23.)

85. "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." *Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 228 (1985) (citation omitted). However, the Court may not imply a term that already exists in the contract. *See Heron Bay Acquisition, LLC v. United Metal Finishing, Inc.*, 2014 NCBC LEXIS 16, at **42 (N.C. Super. Ct. May 7, 2014); *see also Campbell v. Blount*, 24 N.C. App. 368, 371 (1975) ("There cannot be an express and an implied contract for the same thing existing at the same time.").

86. Plaintiffs' claim for breach of the duty of good faith and fair dealing is based on Karki's alleged failure to facilitate the transfer of the Liberty Tax Franchises. (Br. Opp. Def.'s Mot. 9.) The Court has herein granted summary judgment in Karki's favor on this issue, and as a result, it would be inappropriate for the Court to permit this claim to move forward. *See Suntrust Bank v. Bryant/Sutphin Props., LLC*, 222 N.C. App. 821, 833 (2012) ("As the jury determined that plaintiff did not breach any of its contracts with defendants, it would be illogical

for this Court to conclude that plaintiff somehow breached implied terms of the same contracts.”), *disc. rev. denied*, 366 N.C. 417, (2012).

87. Therefore, the Court hereby **GRANTS** in part Defendant’s Motion as to Count Two for breach of the duty of good faith and fair dealing, and that claim is hereby **DISMISSED**.

V. CONCLUSION

88. **THEREFORE**, for the foregoing reasons, the Court hereby **GRANTS** in part and **DENIES** in part the Motions as follows:

a. The Court **GRANTS** in part Plaintiffs’ Motion as to Karki’s Counterclaim Three for breach of fiduciary duty and Counterclaim Four for constructive fraud, to the extent that those claims rely on Lamichhane’s failure (i) to honor payment obligations under the September Agreement, (ii) to take transfer of the franchise rights and obligations for the Liberty Tax Franchises, and (iii) to abide by Liberty Tax’s policies and regulations. Those claims are hereby **DISMISSED** to that extent; and

b. The Court **GRANTS** in part Defendant’s Motion as to Plaintiffs’ Count One for breach of contract, Plaintiffs’ Count Two for breach of the duty of good faith and fair dealing, and Karki’s Counterclaim One for breach of contract in part. Plaintiffs’ Counts One and Two are hereby **DISMISSED**; and

c. Except as expressly granted, the Motions are otherwise **DENIED**.

89. For the avoidance of doubt, the following claims will proceed to trial: (1) Karki's Counterclaim One for Breach of Contract, to determine which Plaintiff(s) were obligated to remit payment to Karki on 15 May 2022 pursuant to the September Agreement, and to determine damages related thereto; (2) Karki's Counterclaim Two; (3) Karki's Counterclaims Three and Four, to the extent those claims concern Lamichhane's use of the Liberty Tax Franchises for his own benefit to the detriment of Karki; and (4) Karki's Counterclaim Five, to the extent that Karki's Counterclaims Two, Three, or Four serve as a basis for that claim.

SO ORDERED, this the 20th day of May, 2024.

/s/ Michael L. Robinson

Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases