STATE OF NORTH CAROLINA GUILFORD COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23 CVS 5734
BCORE TIMBER EC OWNER LP, Plaintiff, v. QORVO US, INC., Defendant.	**ORDER AND OPINION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

1. BCORE Timber EC Owner LP ("BCORE") is the landlord, and Defendant Qorvo US, Inc. ("Qorvo") is the tenant subject to a lease agreement involving a 120,000 square foot building in an industrial park in Greensboro, North Carolina. When it moved into the building, Qorvo's predecessor, RF Micro Devices, Inc. ("RFMD"), made modifications in preparation for manufacturing semiconductors. BCORE contends that the lease required Qorvo to restore the building to its shell condition when it moved out on 30 September 2022, at the end of the lease term. Qorvo disagrees with BCORE's interpretation of the lease and has refused BCORE's demands. It now moves pursuant to Rule 56 of the North Carolina Civil Procedure (the "Rules(s)") for summary judgment on statute of limitations grounds (the "Motion"), (ECF No. 29).

2. Having considered the Motion, the related briefing, the arguments of counsel at a hearing on the Motion held 30 April 2024, and other relevant matters of record, the Court hereby **DENIES** the Motion.

Troutman Pepper Hamilton Sanders LLP, by Jason D. Evans and Jacquelyn Arnold, and Barack Ferrazzano Kirschbaum & Nagelberg LLP, by Roger H. Stetson, Joshua W. Mahoney, and David B. Lurie, for Plaintiff BCORE Timber EC Owner LP.

Robinson, Bradshaw & Hinson, P.A., by Andrew W.J. Tarr, Brendan Biffany, and Leighton E. Whitehead, for Defendant Qorvo US, Inc.

Earp, Judge.

I. FACTUAL BACKGROUND

3. The Court does not make findings of fact on a motion for summary judgment. Instead, the Court summarizes below the material facts it considers to be uncontested. *See, e.g., Vizant Techs., LLC v. YRC Worldwide, Inc.*, 373 N.C. 549, 551 (2020).

4. On 2 October 2007, Highwoods Realty Limited Partnership ("Highwoods") leased a 120,000 square-foot shell building (the "Property") to RFMD (the "Lease"). (Aff. of Jason Gray ["Gray Aff."] ¶ 3, Ex. A ["Lease"], ECF No. 35.1.) The Lease expired on 30 September 2022. (Lease 1.)

5. Relevant to the parties' dispute, Section 13 of the Lease, titled "Tenant Repairs; Alterations," provides:

> At Landlord's option, Landlord may require that Tenant remove any or all alterations or improvements at Tenant's expense upon termination of the Lease.

Section 45 of the Lease, titled "Surrender," provides:

> The Tenant shall surrender the Premises in good and clean condition and repair, excepting only normal wear and tear and damage by fire or other casualty damage covered by insurance and paid to Landlord.

(Lease 7, 14.)

6. RFMD intended to use the Property as a semiconductor fabrication facility. (Gray Aff. ¶ 4.) The Lease permitted RFMD to alter and improve the Property, and between 2007 and 2008 RFMD spent approximately $34 million doing so. (Gray Aff. ¶ 4.) Modifications included, among other things, the addition of a steel-framed mezzanine, removal of portions of the building's foundation slab, and construction of an acid waste neutralization room beneath and outside the building envelope. (Gray Aff. ¶ 4.)

7. In March 2008, RFMD acquired a semiconductor fabrication facility in the United Kingdom, obviating its need to continue preparing the Property for that purpose. (Gray Aff. ¶ 5.) Instead, RFMD decided to use the Property for general storage and warehousing. (Gray Aff. ¶ 6.)

8. In 2016, RFMD merged with TriQuint Semiconductor, Inc. to form Qorvo. (Gray Aff. ¶ 7.) As a result of the merger, Qorvo succeeded to RFMD's interest as tenant under the Lease. (Gray Aff. ¶ 7, Ex. B.)

9. On 30 January 2020, BCORE purchased the Property, along with several other properties, from Highwoods and became landlord under the Lease. (Compl. Ex. C, ECF No. 2; Gray Aff. ¶ 8; Aff. of Nicholas Brady ["Brady Aff."] ¶ 3, ECF No. 45.)

10. Prior to closing on the Property, in December 2019 representatives of BCORE toured the building and discussed various topics, including the condition of the Property. (Brady Aff. ¶ 4-5.) Qorvo's Director of Facilities, Steve Bean ("Bean"), reported that Qorvo "had been keeping in mind a budget of millions of dollars to

restore the Property when the Lease term ended." (Brady Aff. ¶ 5; Br. Supp. of Def.'s Mot. for Summ. J. ["Def.'s Br. Supp."] Ex. 2, ECF No. 41.1.)

11. Shortly thereafter, on 3 January 2020, representatives of both Highwoods and BCORE participated in a telephone meeting with Bean. (Brady Aff. ¶ 6; Def.'s Br. Supp. Ex. 3, ECF No. 41.2.) During this meeting, Bean again informed Highwoods and BCORE that he believed it would cost $3.5 million to restore the Property to its shell condition. (Def.'s Br. Supp. Ex. 2; Brady Aff. ¶ 6.)

12. Following these discussions, on 13 January 2020, Highwoods sent Qorvo a letter to confirm that Qorvo understood its obligation to restore the Property at the end of the Lease. (Gray Aff. ¶ 9, Ex. C ["Tenant Estoppel Letter"].) At BCORE's request, the following provision was included in the Tenant Estoppel Letter:

> [P]ursuant to Sections 13 and 45 of the Lease, Tenant is solely responsible for the restoration of the building back to its initial shell condition, including but not limited to, the obligations to (i) restore the slab which was removed by Tenant, (ii) remove the mezzanine space that was added by Tenant, and (iii) remove any tenant alterations/improvements to the truck court.

(Gray Aff. ¶ 9; Tenant Estoppel Letter § 7; Def.'s Br. Supp. Ex. 4, ECF No. 41.3.)[1] Qorvo responded by striking the above-quoted language from the Tenant Estoppel Letter. (Gray Aff. ¶ 10, Ex. D; Def.'s Br. Supp. Ex. 5, ECF No. 41.4.)

13. On 21 January 2020, Sharon Wall, Highwoods' Legal Director of Real Estate Investments, contacted Jason Gray ("Gray"), Qorvo's Assistant Treasurer, to

[1] The National Association for Industrial and Office Parks ("NAIOP") defines "truck court" as the "[e]xterior area adjacent to an industrial building's loading docks where trucks maneuver." *See* https://www.naiop.org/education-and-career/industry-terms-and-definitions/#defT (last visited 12 June 2024).

ask why Qorvo had deleted language from the Tenant Estoppel Letter. Gray responded: "Per our legal department, we deleted that portion of Section 7 because under the terms of the lease we are not responsible for restoring the building back to its initial shell condition." (Def.'s Br. Supp. Ex. 5.) Highwoods then requested a telephone call with Qorvo's legal team to discuss the issue. (Gray Aff. ¶ 11; Def.'s Br. Supp. Ex. 5.)

14. On 23 January 2020, Gray, along with Qorvo's in-house counsel, Philip Smith, and its outside counsel, Phil Runkel, engaged in a telephone call with representatives of both Highwoods and BCORE. (Gray Aff. ¶ 11; Def.'s Br. Supp. Ex. 5.) Qorvo contends that during that call its representatives "unequivocally stated to Highwoods and BCORE that Qorvo had no obligation to restore the Property to its shell condition, never intended to perform any such restoration work, and would not do so." (Gray Aff. ¶ 11.) BCORE contends that while Qorvo's counsel stated that Qorvo did not intend to restore the Property to its "shell" condition, counsel "did not specify what work [Qorvo] did intend to perform at the end of the Lease term, nor did [Qorvo] make a distinct, unequivocal, and absolute refusal to perform all its remaining Lease obligations or otherwise state that [Qorvo] would not remove any 'alterations or improvements' if [BCORE] so elected consistent with Section 13 of the Lease." (Brady Aff. ¶ 9.)

15. The next day Highwoods sent Qorvo a revised version of the Tenant Estoppel Letter, deleting the challenged language. (Gray Aff. ¶ 12; Def.'s Br. Supp.

Ex. 5.) Qorvo signed the revised Tenant Estoppel Letter on 27 January 2020. (Gray Aff. ¶ 12, Ex. D.)

16. On 28 January 2020, BCORE's attorney, Michael Goldberg ("Goldberg"), emailed Highwoods' general counsel, Jeff Miller ("Miller"), regarding BCORE's planned purchase of the Property and expressing concern: "[t]his deal (and the agreed upon purchase price) has always hinged on the estimated $4 million restoration of the Qorvo space being a tenant (not landlord) responsibility. However, this estoppel (and the subsequent emails and phone calls with Highwoods and Qorvo) have made it clear that this point is very much in dispute." (Def.'s Br. Supp. Ex. 7, ECF No. 41.6.) Goldberg continued that "[w]e received both (i) an estoppel certificate that struck tenant's obligations with respect to the $4M restoration and (ii) an unequivocal confirmation from Qorvo that 'per our legal department, we deleted that portion of Section 7 because under the terms of the lease we are not responsible for restoring the building back to its initial shell condition.' This quite clearly is a matter adverse to the landlord in a material respect[.]" (Def.'s Br. Supp. Ex. 7.)

17. Highwoods subsequently entered into a Cost Sharing Agreement with BCORE on 30 January 2020 to address this concern. (Defs.' Br. Supp. Ex. 8 ["Cost Sharing Agreement"] ECF No. 41.7.) The Cost Sharing Agreement provides: "notwithstanding the terms of the Lease, [Qorvo] has indicated that it does not intend to undertake the Restoration Work[2] at the end of the term of the Lease and, in the

[2] Restoration Work "includ[es] without limitation, (i) restoring the slab which was removed by the Tenant and (ii) removing the mezzanine space that was added by the Tenant, but specifically excluding the paving and asphalt work located in the truck court." (Cost Sharing Agreement ¶ C.)

event that [Qorvo] fails to undertake the Restoration Work, [Highwoods] and [BCORE] desire to set forth their respective obligations with respect thereto." (Cost Sharing Agreement ¶ D.)

18. The same day the Cost Sharing Agreement was signed, Highwoods, again at BCORE's request, sent a letter to Qorvo reiterating its position that Section 13 of the Lease made it Qorvo's responsibility to remove all alterations and improvements at the conclusion of the Lease. (Gray Aff. ¶ 13, Ex. E; Def.'s Br. Supp. Ex. 9, ECF No. 41.8.) Qorvo responded on 24 February 2020, stating, "[a]s we discussed on our conference call, it is [Qorvo's] position that it is not obligated to perform the work referenced in your letter . . . . Pursuant to Section 45 [of the Lease], the only requirement upon termination of the Lease is that we surrender the Premises 'in good and clean condition and repair[.]'" (Gray Aff. ¶ 14, Ex. F.)

19. Despite Qorvo's insistence in January and February 2020 that it was not obligated to perform the requested work, Qorvo, internally, planned for the restoration work. (*See e.g.,* Aff. of David Lurie ["Lurie Aff."] Ex. 3, ECF No. 44 (7 February 2020 email from Steve Bean to Landmark Builders "to discuss getting a very rough estimate for some demo work" at the Property); Lurie Aff. Ex. 5 (2 March 2020 email from Steve Bean to Rick Kroon, another Qorvo employee, stating that restoration "work should start around July 2021."); Lurie Aff. Ex. 6 (29 June 2020 email from Steve Bean to Katy Zahn, a Qorvo employee, stating that Bean was "working under the assumption that everything comes out, including the

mezzanine."); Lurie Aff. Ex. 8 (10 July 2020 email from Steve Bean discussing timeline and budget for "returning the [Property] back to a shell unit.").

20. When restoration work had not begun by 17 September 2021, approximately one year before the expiration of the Lease, BCORE sent Qorvo a Notice of Breach of Lease stating,

> Tenant has expressed to Landlord that it does not intend to comply with [Section 13] of the Lease. This is a direct repudiation of Tenant's contractual obligations, and Landlord deems this to constitute an anticipatory breach of the Lease. As such, in order to protect its rights in the Premises and under the Lease, Landlord hereby demands that Tenant provide written affirmation within fifteen (15) days of the date of this correspondence that (a) it will comply with its obligation under the Lease to restore the Premises to the shell condition it was delivered, and (b) that it will complete all such work by no later than the termination of the Lease term on September 30, 2022.

(Brady Aff. Ex. 1.) The Notice also demanded that Qorvo cure certain safety violations issued by the Greensboro Fire Department, Life and Safety Division (the "FLS Violations"). Qorvo responded on 1 October 2021 stating,

> Tenant has never stated that it will not comply with its obligations under Section 13 (or any other provision) of the Lease. Rather, Tenant disagrees with Landlord's attempts to broaden the requirements of the Lease beyond what the original parties intended 14 years ago when they executed it. According to the Landlord's Notice, the last sentence of Section 13 of the Lease requires that Tenant 'restore the Premises to the shell condition it was delivered.' The words in the Landlord's Notice are found nowhere in Section 13 (or anywhere else in the Lease) because the original parties to the Lease never intended for Tenant to restore the building to its original condition.

(Brady Aff. Ex. 2.)

21. The Lease expired on 30 September 2022, and Qorvo returned the Property to BCORE that day. (Gray Aff. ¶ 15.) Qorvo did not restore the Property to its shell condition, but it did remedy the FLS Violations. (Gray Aff. ¶¶ 15-16, Ex. G.) Upon re-entering the Property, BCORE commenced the restoration work that it contends Qorvo failed to complete. (Brady Aff. ¶ 24.)

II. PROCEDURAL BACKGROUND

22. On 21 July 2022, approximately two months before the expiration of the Lease, BCORE filed suit against Qorvo in Delaware Superior Court (the "Delaware Action"). (Gray Aff. ¶ 17, Ex. H ["Delaware Compl."].) On 18 November 2022, Qorvo moved to dismiss the Delaware Action under the doctrine of *forum non conveniens*. (Gray Aff. ¶ 17.) The Delaware court granted Qorvo's motion and dismissed the case on 18 April 2023. *See BCORE Timber EC Owner LP v. Qorvo US, Inc.*, No. N22C-07-139, 2023 Del. Super. LEXIS 198 (Apr. 18, 2023).

23. BCORE then initiated the action in this Court by filing its Complaint on 9 June 2023. BCORE asserts claims for waste and breach of contract, and it seeks a declaratory judgment that (i) Defendant was obligated under the Lease to remove the Alterations[3] and restore the Property to its shell condition by no later than the conclusion of the Lease; (ii) Defendant's failure and refusal to comply with this obligation is a material breach of the Lease; and (iii) Defendant is obligated to indemnify Plaintiff for any damage or injury arising from its breach. (*See generally* Compl.)

[3] "Alterations" is defined at length in the Complaint. (*See* Compl. ¶ 23(a)-(i), ECF No. 2.)

24. On 19 June 2023, the case was designated as a complex business case and assigned to the undersigned pursuant to Rules 2.1 and 2.2 of the General Rules of Practice for the Superior and District Courts, (ECF No. 1).

25. Defendant filed the Motion on 26 February 2024. After full briefing, the Court held a hearing on the Motion on 30 April 2024. (Not. of Hr'g, ECF No. 47.) The Motion is now ripe for disposition.

III. LEGAL STANDARD

26. "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.'" *Da Silva v. WakeMed*, 375 N.C. 1, 10 (2020) (quoting N.C. R. Civ. P. 56(c)). "A genuine issue of material fact 'is one that can be maintained by substantial evidence.'" *Curlee v. Johnson*, 377 N.C. 97, 101 (2021) (quoting *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 335 (2015)). "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." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681 (2002) (cleaned up).

27. The party moving for summary judgment "bears the burden of establishing that there is no triable issue of material fact[.]" *Cummings v. Carroll*, 379 N.C. 347, 358 (2021) (citation and quotation marks omitted). A movant may satisfy its burden 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 [the] claim[.]" *Dobson v. Harris*, 352 N.C. 77, 83 (2000) (citations omitted). "The trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Belmont Ass'n v. Farwig*, 381 N.C. 306, 310 (2022) (quoting *Dalton v. Camp*, 353 N.C. 647, 651 (2001)).

IV. ANALYSIS

28. Defendant contends that the Court should grant summary judgment in its favor because each of Plaintiff's claims is time–barred by the statute of limitations. Plaintiff argues that summary judgment on this basis is improper because (1) the Lease is a sealed instrument, making a claim for breach subject to the ten year statute of limitations in Section 1-47 of the North Carolina General Statutes; and (2) even if the three year statute of limitations in Section 1-52 applies, Plaintiff's cause of action for breach did not accrue until October 2021, less than three years before this suit was filed.

29. "Ordinarily, the question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. However, when the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes one of law, and summary judgment is appropriate." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491 (1985) (internal citations and quotation marks omitted).

A. Breach of Contract

30. Plaintiff alleges that Defendant breached the Lease by, among other things, "[f]ailing and refusing to remove the Alterations and restore the [Property] to 'shell' condition by the conclusion of the Lease Term[.]" (Compl. ¶ 65(d).) Defendant responds that any such claim would have accrued at the latest by 30 January 2020, when Highwoods and BCORE entered into the Cost Sharing Agreement, and therefore the claim is barred by the three-year statute of limitations. (Def.'s Br. Supp. 11-19, ECF No. 40.) Plaintiff disputes that assertion and maintains that because the Lease is a sealed instrument, its claim for breach is subject to a ten-year statute of limitations. In any event, Plaintiff argues, its claim could not have accrued until October 2021, when Qorvo failed to provide the assurances demanded in BCORE's Notice of Breach of Lease. (Pl.'s Resp. in Opp. to Def.'s Mot. for Summ. J. ["Pl.'s Br. Opp."] 13-22, ECF No. 42.)

1. Applicable Statute of Limitations

31. In general, claims for a breach of a lease agreement are subject to a three-year statute of limitations. N.C.G.S. § 1-52(1); *Glynne v. Wilson Med. Ctr.*, 236 N.C. App. 42, 48 (2014) ("[C]laims for . . . breach of a lease agreement must be asserted within three years of the date of the underlying breach."). However, pursuant to Section 1-47(2) of the North Carolina General Statutes, a "sealed instrument" or "an instrument of conveyance of an interest in real property," is subject to a ten-year statute of limitations. "[T]he determination of whether an

instrument is a sealed instrument, commonly referred to as a specialty, is a question for the court." *Square D Co. v. C.J. Kern Contractors, Inc.*, 314 N.C. 423, 426 (1985).

32. In support of its position that its claim for breach of the Lease is subject to the ten–year statute of limitations, Plaintiff points to the face of the Lease. The signature page includes the Highwoods corporate seal, and the word "seal" appears in brackets beneath the signature of RFMD's assistant secretary. In addition, the signatures are notarized, and the Lease bears the notary's seal. Plaintiff argues that these marks establish the Lease as a sealed instrument. (Pl.'s Br. Opp. 15-17.)

33. Further, Plaintiff points to the affidavit of Rick Dehnert, formerly Vice President of Highwoods, who attests that, "[t]o the best of [his] recollection," seals were added to the Lease in 2007 "to provide the additional protections afforded to contracts under seal." (Aff. of Rick Dehnert ["Dehnert Aff."] ¶¶ 4, 8, ECF No. 43.)

34. It is well-settled that "[t]he seal of a corporation is not in itself conclusive of an intent to make a specialty[.]" *Square D*, 314 N.C. at 426 (citing 18 Am. Jur. 2d, Corporations § 158 (1965)); *see also Blue Cross & Blue Shield v. Odell Assocs., Inc.*, 61 N.C. App. 350, 362 (1983) ("Because the routine use of a corporate seal is merely to demonstrate authority to execute a document, the mere presence of a corporate seal, without more, does not convert the document into a specialty.").

35. In determining whether a corporate seal transforms a contract into a specialty, the Court looks at "whether the body of the contract contains any language that indicates that the parties intended that the instrument be a specialty or whether extrinsic evidence would demonstrate such an intention." *Square D*, 314 N.C. at 428.

But the language proposed by the Court that appears in *Square D*, decided more than thirty years ago, is noticeably absent here. *See id.* (explaining that language such as "I have hereunto set my hand and seal," "witness our hands and seals," or "other similar phrases contained within the contract" indicate intent to create a sealed instrument). The absence of this language is telling.

36. As for Mr. Dehnert's affidavit, the Court observes that he has changed positions three times since leaving his position with Highwoods. (Dehnert Aff. ¶¶ 1-4.) He is not a signatory on the Lease and does not claim to have been present when it was signed. Mr. Dehnert testified only that he was "involved in the negotiation for and creation of [the subject] lease," (Dehnert Aff. ¶ 6), and "[t]o the best of [his] recollection" seals were added to the Lease in 2007 "to provide the additional protections afforded to contracts under seal." (Dehnert Aff. ¶ 8.)

37. Mr. Dehnert bases his limited recollection of events occurring almost seventeen years ago on generalizations rather than on specific facts relating to this Lease. Thus, Mr. Dehnert's testimony is insufficient to support a conclusion that Highwoods intended for the Lease to be sealed. *See Waters v. Pumphrey*, 286 N.C. App. 151, 156 (2022) ("Only specific facts showing that there is a genuine issue for trial are sufficient for a non-movant to prevail on summary judgment, meaning statements of opinion which fail to express certainty about a thing are inadequate under this standard." (cleaned up)); *Hylton v. Koontz*, 138 N.C. App. 629, 634-35 (2000) (observing that affirmations based on "personal awareness," "information and

belief," "advised and informed," "believes," "believed," and what the affiant "thinks" do not comply with the personal knowledge requirement of Rule 56(e)).

38. Moreover, even if Mr. Dehnert's testimony were sufficient to establish *Highwoods*' intent, it does not speak to then-tenant *RFMD's* intent. Both parties must intend for the Lease to be sealed in order for it to be a sealed instrument subject to the ten-year statute of limitations. *See Kornegay v. Aspen Asset Grp., LLC*, 2006 NCBC LEXIS 13, at **14 (N.C. Super. Ct. Sept. 26, 2006) ("[A] contract's 'legal consequences are not dependent upon the impressions or understanding of one alone of the parties to it. It is not what either thinks, but what both agree.'" (quoting *N. & W. Overall Co. v. Holmes*, 186 N.C. 428, 431 (1923))).

39. Citing our Supreme Court's opinion in *Dunes S. Homeowners Ass'n v. First Flight Builders,* 341 N.C. 125 (1995), Plaintiff points to the Declaration of Covenants, Conditions and Restrictions appended to the Lease as Exhibit E and argues that it provides the support necessary to establish that the Lease is an instrument of conveyance of an interest in real property and, therefore, the ten–year statute of limitations applies to its claim for breach.

40. It is true, as Plaintiff argues, that the Supreme Court distinguished the Declaration of Covenants and Restrictions at issue in *Dunes* from the construction contract at issue in *Square D. Dunes*, 341 N.C. at 132. It is also true that the Supreme Court concluded that the nature of the former instrument—a restrictive covenant—"constitutes an interest in land in the nature of a negative easement[,]" and therefore provided substantive support for a conclusion that the parties intended

for the instrument to be sealed. *Id.* But the document at issue in *Dunes* was the Declaration itself, which "[w]hile technically not a deed . . . did affect an interest in land[.]" *Id.* In this case, the document at issue is not the Declaration. Instead, BCORE alleges that Qorvo breached the Lease, to which the Declaration was appended as an unreferenced, unincorporated exhibit. Without more, the Court cannot conclude as a matter of law that the Lease is a sealed instrument.

41. Accordingly, the Court concludes that the Lease is not a sealed instrument, and Plaintiff's breach of contract claim is subject to the three-year statute of limitations generally applicable to breach of contract claims. N.C.G.S. § 1-52(1). Nevertheless, for the reasons discussed below, Plaintiff's claim is not barred by the statute of limitations because it was filed within three years of the date it accrued.

2. <u>Claim Accrual</u>

42. Qorvo maintains that it repudiated any obligation to restore the Property to its shell condition more than three years prior to the initiation of BCORE's claim for breach and, therefore, the statute of limitations on the contract claim expired before the claim was brought.

43. Qorvo bases its argument on three undisputed facts. First, Qorvo points out that, on 16 January 2020, it struck from the Tenant Estoppel Letter the language purporting to obligate it to restore the Property to its shell condition. (Def.'s Br. Supp. Ex. 5.) Second, Qorvo explained to Highwoods that it deleted the relevant language from the Tenant Estoppel Letter "because under the terms of the lease [Qorvo was]

not responsible for restoring the building back to its initial shell condition." (Def.'s Br. Supp. Ex. 5.) Third, Qorvo repeated during a 23 January 2020 telephone call that it would not perform the restoration work requested by Highwoods and BCORE. (Gray Aff. ¶ 11; Brady Aff. ¶ 9.)

44. The statements Qorvo highlights are certainly blunt, but BCORE disputes whether, in context, they were clear and unequivocal refusals to perform what the Lease required. Instead, BCORE presents evidence that it understood Qorvo's statements "as an attempt to open discussions regarding the scope of [Qorvo's] responsibilities and the meaning of Section 13 of the Lease—and not as an unequivocal indication that [Qorvo] would in fact refuse to perform its material restoration obligations under the Lease." (Brady Aff. ¶ 15.) For example, on 21 January 2020, in response to Highwoods' inquiry regarding the Tenant Estoppel Letter, Qorvo stated, "*under the terms of the Lease*, we are not responsible for restoring the building back to its initial shell condition." (Def.'s Br. Supp. Ex. 5 (emphasis added).) [4]

45. Furthermore, citing *D.G. II, LLC v. Nix*, 211 N.C. App. 332, 338-39 (2011), BCORE argues that it is up to the nonbreaching party to decide whether to

[4] Qorvo relies on the Cost Sharing Agreement between Highwoods and BCORE as evidence that BCORE treated its statements as an unequivocal repudiation, but a factfinder could conclude that the language of the Cost Sharing Agreement proves otherwise. Highwoods and BCORE agreed that "*in the event that* [Qorvo] fails to undertake the Restoration Work . . . [Highwoods] and [BCORE] desire to set forth their respective obligations with respect thereto." (Cost Sharing Agreement ¶ D (emphasis added).) At the time the Cost Sharing Agreement was signed, Qorvo still had over two-and-a-half years to complete the restoration work. There is evidence that BCORE and Highwoods entered into the Cost Sharing Agreement as a precautionary measure. (Brady Aff. ¶¶ 10-11, 16-17.)

treat the other contracting party's conduct as anticipatory repudiation. Here, at BCORE's direction, Highwoods did not do so but rather sent a letter to Qorvo on 30 January 2020 stating, "Landlord hopes that this matter can be resolved amicably at the time of expiration or termination of the Lease." (Gray Aff. Ex. E.)

46. BCORE's arguments highlight what appears to the Court to be a misapplication of the concept of anticipatory breach to this dispute, which is not one involving repudiation of the Lease, but rather is one in which both parties embrace the Lease but simply disagree over its terms. "For repudiation to result in a breach of contract, 'the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute[.]'" *Profile Invs. No. 25, LLC v. Ammons East Corp.*, 207 N.C. App. 232, 237 (2010) (quoting *Edwards v. Proctor*, 173 N.C. 41, 44 (1917)).

47. Qorvo continued to occupy the Property and to pay rent through the term of the Lease. As reflected in its 21 January 2020 statement above, its position was simply that the language of the Lease did not obligate it to perform the work requested of it. On 24 February 2020 Qorvo sent a letter to Highwoods with its interpretation of the Lease: "[I]t is [Qorvo's] position that it is not obligated to perform the work referenced in your letter. The language in Section 13 of the Lease plainly applies to 'alterations' and not to the initial upfit. The items you mention were part of the initial upfit of the [Property]." (Gray Aff. Ex. F.) Furthermore, in response to BCORE's Notice of Breach of Lease in October 2021, Qorvo stated, "[t]enant has never stated that it will not comply with its obligations under Section 13 (or any other

provision) of the Lease. Rather, Tenant disagrees with Landlord's attempts to broaden the requirements of the Lease beyond what the original parties intended 14 years ago when they executed it." (Brady Aff. Ex. 2.) Thus, Qorvo's protestations that it was not obligated to restore the Property to its shell condition were not an unequivocal repudiation of the Lease, "but merely an expression of [Qorvo's] position regarding its interpretation of one part of the [Lease]." *See W&W Partners, Inc. v. Ferell Land Co.*, 2019 NCBC LEXIS 45, at *21 (N.C. Super. Ct. July 25, 2019).

48. On 17 September 2021, as the end of the Lease approached, BCORE sent Qorvo a Notice of Breach of Lease demanding that Qorvo "provide written affirmation within fifteen (15) days" regarding its obligation to restore the Property and that it would "deem [Qorvo's] lack of response" as a repudiation. (Brady Aff. Ex. 1.) When Qorvo failed to respond within fifteen days and then failed to restore the Property to its shell condition when the Lease ended in September 2022, this action followed on 9 June 2023, less than three years later.

49. Accordingly, Defendant's Motion as to Plaintiff's claim for breach of contract shall be **DENIED**.[5]

B. <u>Declaratory Judgment</u>

50. The statute of limitations for a declaratory judgment action is that associated with the substantive claim that most closely approximates the basis for the requested declaration. *Chisum v. Campagna*, 376 N.C. 680, 718-19 (2021) (collecting cases); *cf. Asheville Lakeview Props., LLC v. Lake View Park Comm'n, Inc.*,

[5] Given the Court's determination, it does not address Plaintiff's estoppel argument. (*See* Pl.'s Br. Opp. 26-28.)

254 N.C. App. 348, 353 (2017) ("If the statute of limitations is properly applied to plaintiff's underlying claims, no relief can be afforded under the Declaratory Judgment Act." (cleaned up)).

51. Plaintiff's declaratory judgment claim is predicated upon its claim that Defendant breached the Lease by failing to restore the Property to shell condition at the end of the Lease. (*See* Compl. ¶ 75.) Accordingly, the three-year statute of limitations for Plaintiff's breach of contract claim applies to its declaratory judgment claim.

52. For the same reasons that Plaintiff's contract claim is not time-barred, its declaratory judgment claim is also not time-barred. Accordingly, Defendant's Motion with respect to Plaintiff's claim for declaratory judgment shall be **DENIED.**

C. <u>Waste</u>

53. Moving to BCORE's final claim, the complaint alleges that Qorvo committed waste "[b]y turning over the Property . . . in poor, unsafe, damaged and not reasonably usable condition" at the end of the Lease period. (Compl. ¶ 59.)

54. In North Carolina, claims for waste are subject to the three-year statute of limitations found in Section 1-52(16) of the North Carolina General Statutes. *McCarver v. Blythe*, 147 N.C. App. 496, 498 (2001) ("The applicable statute of limitations for permissive waste is three years." (citing *Sherrill v. Connor*, 107 N.C. 630, 638 (1890))). Such claims are subject to a discovery rule, however, and "shall not accrue until . . . physical damage to [the claimant's] property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first

occurs." N.C.G.S. § 1-52(16). "[O]nce some physical damage has been discovered, the [damage or] the injury springs into existence and completes the cause of action." *McCarver*, 147 N.C. App. at 499 (quoting *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 69 N.C. App. 505, 509 (1984)) (alteration in original).

55. Qorvo argues that the condition of the Property became apparent to BCORE at least by 13 January 2020, after it had toured the building and demanded that Highwoods include in its Tenant Estoppel Letter to Qorvo a statement that Qorvo must "restore the slab" and "remove the mezzanine." (*See* Def.'s Br. Supp. 22-23.) Because BCORE failed to assert its waste claim within three years of that date, Qorvo contends that the claim is barred by the statute of limitations.

56. BCORE responds that no actionable waste could have occurred with respect to modifications to the Property until the Lease expired on 30 September 2022 and Qorvo refused to honor its obligations under the Lease. Therefore, it argues, the earliest the statute of limitations could have begun to run on a claim for waste was 30 September 2022. (*See* Pl.'s Br. Opp. 25.) The Court agrees.

57. Under North Carolina law, a tenant does not commit waste where the property can be returned to its original position before the lease is terminated. *See Homeland, Inc. v. Backer*, 78 N.C. App. 477, 482 (1985) (holding that plaintiff failed to establish a prima facie case on the issue of waste where the houses moved by the defendant "could be replaced in their original positions before the lease terminated."). Moreover, the Lease expressly permitted the tenant to make "alterations, additions, or improvements" to the Property during the Lease term and provided that "[a]t

Landlord's option, Landlord may require that Tenant remove any or all alterations or improvements at Tenant's expense upon termination of the Lease." (Lease § 13.) It was not until 30 September 2022, when the Lease ended and Qorvo returned the Property to BCORE in its unrestored condition, that Plaintiff's claim for waste accrued.

58. Accordingly, Defendant's Motion as to Plaintiff's claim for waste shall be **DENIED**.

V. CONCLUSION

59. For these reasons, Defendant's Motion for Summary Judgment, (ECF No. 29), is **DENIED.** The stay previously entered in this action, (ECF No. 49), is lifted. The parties are **ORDERED** to confer and to file within ten days an updated case management report and proposed case management order suggesting deadlines for the close of the fact and expert discovery periods, additional dispositive motions, and mediation.

IT IS SO ORDERED, this 21st day of June, 2024.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases