STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 22 CVS 14885
B&D SOFTWARE HOLDINGS, LLC, Plaintiff, v. INFOBELT, INC. and SRINIVAS MANNAVA, Defendants.	**ORDER AND OPINION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT [PUBLIC][1]**

THIS MATTER is before the Court on Plaintiff's Motion for Summary Judgment (ECF No. 28) and Defendants' Motion for Summary Judgment (ECF No. 31) (collectively, the "Motions").

THE COURT, having considered the Motions, the parties' briefs, the arguments of counsel, the applicable law, and all appropriate matters of record, **CONCLUDES** that Defendants' Motion for Summary Judgment should be **GRANTED**, and Plaintiff's Motion for Summary Judgment should be **DENIED**.

Hamilton Stephens Steele + Martin, PLLC, by Mark R. Kutny, for Plaintiff B&D Software Holdings, LLC.

Robinson Elliott & Smith, by Dorothy M. Gooding and William C. Robinson, for Defendants Infobelt, Inc., and Srinivas Mannava.

Davis, Judge.

[1] The Court elected to file this Order and Opinion under seal on 1 August 2024. The Court then permitted the parties an opportunity to propose redactions to the public version of this document. The parties proposed the redactions contained herein, and the Court finds that those redactions are narrowly and appropriately tailored. Accordingly, the Court now files the redacted, public version of this Order and Opinion.

INTRODUCTION

1. This lawsuit involves an investor's attempt to recoup its ill-fated investment in a now unprofitable company. The investor primarily argues that it was fraudulently induced by the company's founder to make its investment through his failure to disclose key facts about both the company's improper business practices and the long-term fragility of the company's relationship with its sole customer. Both sides seek the entry of summary judgment in their favor.

FACTUAL AND PROCEDURAL BACKGROUND

2. "The Court does not make findings of fact on motions for summary judgment; rather, the Court summarizes material facts it considers to be uncontested." *McGuire v. Lord Corp.*, 2021 NCBC LEXIS 4, at **1–2 (N.C. Super. Ct. Jan. 19, 2021) (cleaned up).

3. Defendant Infobelt, Inc. ("Infobelt") is a Delaware corporation that is registered to do business in North Carolina. (Compl. ¶ 2; Answer ¶ 2.) Defendant Srinivas Mannava, a North Carolina resident, founded Infobelt's predecessor, Infobelt LLC, in 2013.[2] (Defs.' Br. Supp. Defs.' Mot. Summ. J., Ex. 14C, at 15:2–16:14, ECF No. 32.27.) Currently, Mannava is the majority shareholder of Infobelt, holding seventy percent (70%) of its shares. (Pl.'s Br. Supp. Pl.'s Mot. Summ. J., Ex. B, at 25:17–26:2, ECF No. 30.2.) Moreover, since Infobelt's incorporation, Mannava has

[2] A certificate of conversion was filed on 25 January 2019 with the Delaware Secretary of State, which converted InfoBelt LLC from a Delaware limited liability corporation to a Delaware corporation with the name Infobelt, Inc. (*See* Defs.' Br. Supp. Defs.' Mot. Summ. J., Ex. 7, ECF No. 32.17.)

been the sole member of Infobelt's board of directors. (Pl.'s Br. Supp. Pl.'s Mot. Summ. J., Ex. B, at 68:1–11.)

4. Mannava founded Infobelt to develop software and provide associated consulting services that would assist with data management and retention at financial institutions in the face of increasing legal and regulatory scrutiny. (Defs.' Br. Supp. Defs.' Mot. Summ. J, Ex. 14C, at 16:5–17:24.) In addition to developing software and providing consulting services, Infobelt also began generating revenue through the licensing of its software. (Davis Aff. ¶¶ 14, 17, ECF No. 32.15.)

5. Bank of America became Infobelt's first customer when it purchased a software prototype created by Infobelt to address "an immediate need in one of their international platforms where they had a data loss issue[.]" (Defs.' Br. Supp. Defs.' Mot. Summ. J, Ex. 14C, at 18:4–25, 19:23–25.) After Bank of America purchased Infobelt's software prototype, Infobelt continued to provide support for that software prototype for the next few months. (Defs.' Br. Supp. Defs.' Mot. Summ. J, Ex. 14C, at 19:1–7.) However, Infobelt and Bank of America's business relationship did not continue after early 2014. (Pl.'s Br. Supp. Pl.'s Mot. Summ. J., Ex. B, at 20:25–21:2.)

6. In 2015, Infobelt began providing consulting services to a banking customer[3] as a "Tier 2" vendor, meaning that Infobelt "did not have a direct contract with [the Customer] . . . [and] went in as a subcontractor to a primary contractor[.]" (Pl.'s Br. Supp. Pl.'s Mot. Summ. J., Ex. B, at 21:20–22:8.)

[3] The parties have requested that the banking customer's name not be used in this Opinion. Therefore, for the remainder of this Opinion, the Court will refer to it simply as "the Customer."

7. The Customer invited Infobelt to become a direct vendor in 2016 because, according to Mannava, the Customer "saw the value in what [Infobelt] w[as] bringing to the table and . . . they wanted to keep us long term." (Pl.'s Br. Supp. Pl.'s Mot. Summ. J., Ex. B, at 22:9–22.)

8. Infobelt and the Customer entered into a Master Services Agreement ("MSA," ECF No. 32.2) in early 2016. The MSA memorialized the parameters and processes through which Infobelt would provide services to the Customer. Notably, the MSA provided for Infobelt and the Customer to enter into "Transaction Documents," which were primarily referred to as "Statements of Work" ("SOW"). (MSA § I(z); Marlow Aff. ¶ 5, ECF No. 30.21.)

9. Mannava explained the purpose of SOWs as follows:

> [The Customer], in partnership with the vendor, identifies all the tasks that need to be done and the timeline. And then the vendor goes off, and they put an estimated cost and what type of personnel would be needed from the vendor's side to provide those tasks.
>
> And -- so the tasks, the timelines, the costs -- estimated costs and what type of personnel are needed are what constitute a statement of work.

(Pl.'s Br. Supp. Pl.'s Mot. Summ. J., Ex. B, at 156:2–12.) These SOWs formed the basis for the series of consulting projects Infobelt performed for the Customer for the next few years.

10. At all relevant times, Infobelt serviced only two clients—the Customer and a company affiliated with Plaintiff called Blystone & Donaldson, LLC. (Pl.'s Br. Supp. Pl.'s Mot. Summ. J., Ex. B, at 21:3–13.)

11. Blystone & Donaldson, LLC is a professional investment group that was founded in 2018 by Tom Donaldson and John Blystone, who are its sole owners. (Donaldson Dep., at 9:12–10:21, 39:1–19, 43:3–16, ECF No. 32.25.)

12. Blystone & Donaldson, LLC, in turn, founded B&D Software Holdings, LLC ("B&D"), the plaintiff in this lawsuit, on 23 January 2019, for the sole purpose of acquiring a 30% ownership interest in Infobelt, which it purchased on 11 September 2019. (Donaldson Dep., at 9:18–10:2, 42:13–17.) Blystone & Donaldson, LLC is the sole member of B&D, and Donaldson serves as B&D's manager. (Donaldson Aff. ¶ 3, ECF No. 30.22.)

13. B&D's investment in Infobelt occurred through the issuance of a Common Stock Purchase Warrant ("Purchase Warrant") by Infobelt to B&D on 25 January 2019, which entitled B&D to purchase 30% of the issued and outstanding shares of Infobelt for the purchase price of 30% of the "Agreed Enterprise Value," which was set at $12,000,000 through 31 December 2019. (*See* Pl.'s Br. Supp. Mot. Summ. J., Ex. F, ECF No. 30.6; Donaldson Aff. ¶ 5.)

14. During the due diligence period between the issuance and exercise of the Purchase Warrant, B&D was "provided [information regarding] the revenue, the employees, the agreements and the statements of work" of Infobelt for its review. (Donaldson Dep., at 90:16–18.) Donaldson testified that "[w]e had already made the determination that we would like to make an investment, hence the warrant[,]" and were waiting to exercise the warrant "to see what the revenue did, and the revenue went up[.]" (Donaldson Dep., at 132:3–6.)

15. On 11 September 2019, B&D executed a Notice of Exercise of the Common Stock Purchase Warrant, informing Infobelt of its election to exercise the Purchase Warrant with respect to 30% of the company's issued and outstanding shares. (Pl.'s Br. Supp. Mot. Summ. J., Ex. G., ECF No. 30.7.) Pursuant to the parties' agreement, B&D paid Infobelt the sum of $3,600,000 that same day. (Compl. ¶¶ 14–15; Answer ¶¶ 14–15.) Since that date, B&D has been a minority shareholder of Infobelt.

16. Over the next two years, Infobelt continued to perform consulting services for the Customer based on a series of SOWs between the parties. In 2021, however, the Customer notified Infobelt of its decision to take in-house the consulting services that Infobelt had been providing. (Marlow Aff. ¶ 10.) As a result, Infobelt's consulting services to the Customer ceased as of 31 December 2021.[4] (Pl.'s Br. Supp. Pl.'s Mot. Summ. J., Ex. B, at 37:7–14.) This caused a major decline in B&D's revenue.

17. B&D initiated this lawsuit by filing a Complaint against Infobelt and Mannava in Mecklenburg County Superior Court on 8 September 2022. The Complaint contained claims against both Defendants for fraudulent inducement, fraud, negligent misrepresentation, conversion, and violation of the North Carolina Securities Act as well as claims against Mannava alone for breach of fiduciary duty and constructive fraud. (*See* Compl. ¶¶ 29–76, ECF No. 3.)

[4] However, the Customer continues to license Infobelt's software. (Davis Aff. ¶¶ 52–53.)

18. This case was designated as a complex business case and assigned to the undersigned on 9 September 2022. (*See* ECF Nos. 1, 2.)

19. On 30 November 2023, the parties filed the present Motions. (*See* Pl.'s Mot. Summ. J., ECF No. 28; Defs.' Mot. Summ. J., ECF No. 31.) Both parties are seeking summary judgment as to all of B&D's claims.

20. A hearing was held on 18 April 2024 at which all parties were represented by counsel. The Motions are now ripe for resolution.

LEGAL STANDARD

21. It is well established that "[s]ummary judgment is proper '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.' " *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018) (quoting N.C. R. Civ. P. 56(c)). "[A] genuine issue is one which can be maintained by substantial evidence." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534 (1971). "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." *Daughtridge v. Tanager Land, LLC*, 373 N.C. 182, 187 (2019) (cleaned up).

22. On a motion for summary judgment, "[t]he evidence must be considered 'in a light most favorable to the non-moving party.' " *McCutchen v. McCutchen*, 360 N.C. 280, 286 (2006) (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470 (2004)). "[T]he party moving for summary judgment ultimately has the burden of

establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491 (1985).

23. The party moving for summary judgment 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). "If the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to 'set forth specific facts showing that there is a genuine issue for trial.' " *Lowe v. Bradford*, 305 N.C. 366, 369–70 (1982) (quoting N.C. R. Civ. P. 56(e)). If the nonmoving party does not satisfy its burden, then "summary judgment, if appropriate, shall be entered against [the nonmovant]." *United Cmty. Bank (Ga.) v. Wolfe*, 369 N.C. 555, 558 (2017) (quoting N.C. R. Civ. P. 56(e)).

24. When a party requests offensive summary judgment on its own claims for relief, "a greater burden must be met." *Brooks v. Mt. 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). For that reason, 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).

ANALYSIS

25. As noted above, both parties are seeking summary judgment as to all claims asserted by B&D in this action. The Court therefore deems it appropriate to address each side's arguments together with respect to the individual claims B&D has asserted.

A. Fraud and Fraudulent Inducement

26. B&D has asserted claims for both fraud and fraudulent inducement against Infobelt and Mannava. Our Supreme Court has held that the elements for a fraudulent inducement claim are identical to those for a fraud claim. *Value Health Sols., Inc. v. Pharm. Rsch. Assocs.*, 385 N.C. 250, 264 (2023). As a result, the Court shall consider the two claims together. *See Hale v. MacLeod*, 2024 N.C. App. LEXIS 525, at *17 (N.C. Ct. App. June 18, 2024) ("because the elements for showing fraud and fraudulent inducement are identical, we consider the first and second causes of action together").

27. This Court has previously articulated the elements of a claim based on both fraudulent misrepresentations and fraudulent omissions as follows:

> The "essential elements of actionable 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." *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974). As a general rule, a claimant's reliance on allegedly false statements must be reasonable, though the reasonableness of such reliance is typically a question for the jury. *Forbis v. Neal*, 361 N.C. 519, 527, 649 S.E.2d 382, 387 (2007); *Johnson v. Owens*, 263 N.C. 754, 758, 140 S.E.2d 311, 314 (1965) ("[W]here reliance ceases to be reasonable and becomes such negligence and inattention that it will, as a matter of law, bar recovery for fraud is frequently very difficult to determine.").

. . .

> The basic elements of a claim for fraud based on omission are the same as those for any other claim for fraud, as recited above. *See, e.g., Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 696, 682 S.E.2d 726, 733 (2009). In addition to these, the claimant must also allege that the party who failed to disclose the material fact owed the claimant a duty to disclose. *Id*.
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> . . .
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> When two parties are engaged in an arm's-length transaction, two different scenarios will create a duty to disclose. The first is when one party takes an affirmative step to conceal a material fact from the other. *Hardin*, 199 N.C. App. at 696, 682 S.E.2d at 733. A concealed fact is considered material when it would have influenced the decision or judgment of another party, if known. *Godfrey v. Res-Care, Inc.*, 165 N.C. App. 68, 75-76, 598 S.E.2d 396, 402 (2004). The second is when "one party has knowledge of a latent defect in the subject matter of the negotiations about which the other party is both ignorant and unable to discover through reasonable diligence." *Hardin*, 199 N.C. App. at 696, 682 S.E.2d at 733 (quoting *Sidden v. Mailman*, 137 N.C. App. 669, 675, 529 S.E.2d 266, 270-71 (2000)). In addition to these situations, even when no duty to disclose exists, a party who chooses to speak has a duty to make a full and fair disclosure of facts concerning the matters on which he chooses to speak. *Ragsdale*, 286 N.C. at 139, 209 S.E.2d at 501 (citing *Low v. Wheeler*, 207 Cal. App. 2d 477, 24 Cal. Rptr. 538, 543 (Ct. App. 1962) ("Even where there is no duty to make a disclosure, when one does undertake to inform, he must speak the whole truth.")).

Tillery Envtl. LLC v. A&D Holdings, Inc., 2018 NCBC LEXIS 13, at *19–23 (N.C. Super. Ct. Feb. 9, 2018).

28. B&D's fraud-based claims are primarily based on its allegations of fraudulent omissions. In its summary judgment briefing, B&D asserts two theories in support of these claims. It contends that although Defendants provided various financial information and revenue projections to B&D during the due diligence period relating to Infobelt's work for the Customer, Defendants deliberately failed to disclose

the fact that (1) they knew all along that "[the Customer] intended to bring [the consulting] work in-house (and thus eliminate that revenue stream to Infobelt)" (the "Taking Work In-House Theory"); and (2) the revenue projections reflected on the documents provided to B&D were artificially inflated in that they were based on fraudulent billing practices on the part of B&D toward the Customer (the "Fraudulent Billing Theory"). (Pl.'s Br. Supp. Pl.'s Mot. Summ. J., at 12, ECF No. 29.)

29. B&D asserts that the above-referenced omissions "made the financial statements and the corresponding value of the company facially misleading[,]" (Pl.'s Reply Br. Supp. Pl.'s Mot., at 3, ECF No. 51), and that "[h]ad B&D known of these facts, it would not have invested the $3.6 million with Infobelt." (Pl.'s Br. Supp. Pl.'s Mot. Summ J., at 13.)

30. In response, Defendants argue that summary judgment should be granted in their favor because (1) the Taking Work In-House Theory is now being asserted by B&D for the first time in this litigation and therefore should not be considered by the Court; (2) B&D has failed to put forth evidence that Infobelt's billings to the Customer were fraudulent; and (3) B&D cannot show that it was injured as a result of its reasonable reliance on any misrepresentation or omission by Defendants.

i. Taking Work In-House Theory

31. Defendants contend that B&D's attempt to use the Taking Work In-House Theory as a basis for its fraud claims is barred by Rule 9(b) of the North

Carolina Rules of Civil Procedure because it was not alleged in the Complaint. The Court agrees.

32. Rule 9(b) requires that "the circumstances constituting fraud" be alleged "with particularity." N.C. R. Civ. P. 9(b). "The purpose of Rule 9(b) is to provide a defendant with sufficient notice of the fraud alleged in order to meet the charges." *Provectus Biopharm., Inc. v. RSM US LLP*, 2018 NCBC LEXIS 101, at *63 (N.C. Super. Ct. Sept. 28, 2018) (cleaned up). Our Supreme Court has held that "in pleading actual fraud[,] the particularity requirement is met by alleging time, place[,] and content of the fraudulent representation, identity of the person making the representation[,] and what was obtained as a result of the fraudulent acts or representations." *Terry v. Terry*, 302 N.C. 77, 85 (1981). Furthermore, "an alleged misrepresentation must be 'definite and specific.' " *Value Health Sols., Inc.*, 385 N.C. at 263 (citing *Ragsdale*, 286 N.C. at 139).

33. This Court has observed the following with respect to Rule 9(b)'s requirements when alleging fraud by omission:

> Although fraudulent concealment or fraud by omission "is by its very nature, difficult to plead with particularity," *Breeden v. Richmond Cmty. Coll.*, 171 F.R.D. 189, 195 (M.D.N.C. 1997), this Court has previously ruled that a litigant pleading an omission-based fraud claim must comply with Rule 9(b) by specifically pleading:
>
> (1) the relationship between plaintiff and defendant giving rise to the duty to speak; (2) the event that triggered the duty to speak or the general time period over which the relationship arose and the fraud occurred; (3) the general content of the information that was withheld and the reason for its materiality; (4) the identity of those under a duty who failed to make such disclosures; (5) what the defendant gained from withholding the information; (6) why the plaintiff's reliance on the

> omission was reasonable and detrimental; and (7) the damages the fraud caused the plaintiff.

Tillery Envtl. LLC, 2018 NCBC LEXIS 13, at *21–22.

34. Although B&D's Complaint contains express allegations pertaining to the Fraudulent Billing Theory, it is utterly devoid of *any* allegations underlying the Taking Work In-House Theory. There is simply no hint of an assertion in the Complaint that any of Plaintiff's fraud claims are premised on Defendants' failure to disclose to B&D their knowledge that the Customer always intended to take the consulting services being performed by Infobelt in-house. As our Supreme Court has plainly stated, "[a] complaint that fails to allege a legal theory that is later briefed does not meet Rule (9)(b)'s pleading requirement." *Value Health Sols., Inc.*, 385 N.C. at 263.

35. Therefore, summary judgment is **GRANTED** in favor of Defendants on Plaintiff's fraud and fraudulent inducement claims premised on the Taking Work In-House Theory. *See id.* at 264 (affirming trial court's dismissal of fraud and fraudulent inducement claims where the amended complaint failed to meet Rule 9(b)'s heightened standard).

36. B&D similarly invokes the Taking Work In-House Theory (along with the Fraudulent Billing Theory) in connection with its remaining claims. Defendants contend that B&D's attempt to assert the Taking Work In-House Theory at the eleventh hour to escape summary judgment is fundamentally unfair—even if Rule 9(b) did not apply—based on B&D's failure to formally disclose this theory of recovery

prior to the summary judgment stage. In the interest of judicial economy, the Court deems it appropriate to address this issue before going any further.

37. Although North Carolina is a notice pleading state, even under that liberal standard it is axiomatic that a defendant must be put on notice of what it is defending against in order to avoid being ambushed.

> Unlike a claim for fraud, a pleading alleging breach of contract need only meet the requirements of Rule 8(a) of the North Carolina Rules of Civil Procedure. *See Haynie v. Cobb*, 207 N.C. App. 143, 148, 698 S.E.2d 194, 198 (2010) ("The general standard for civil pleadings in North Carolina is notice pleading." (quoting *Murdock v. Chatham Cty.*, 198 N.C. App. 309, 316, 679 S.E.2d 850, 855 (2009)). Under Rule 8(a)(1), a pleading asserting a claim must contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[.]" N.C. R. Civ. P. 8(a)(1). Under this "notice pleading" standard, "a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of res judicata, and to show the type of case brought." *Wake Cty. v. Hotels.com, L.P.*, 235 N.C. App. 633, 646, 762 S.E.2d 477, 486 (2014) (quoting *Sutton*, 277 N.C. at 102, 176 S.E.2d at 165).

Tillery Envtl. LLC, 2018 NCBC LEXIS 13, at *77–78.

38. As discussed above, the Taking Work In-House Theory was not pled in B&D's Complaint. Nor was B&D's intent to pursue this theory disclosed to Defendants in its discovery responses. During discovery, Defendants sent B&D several interrogatories asking B&D to specifically identify the misrepresentations and omissions forming the basis for its Complaint and to clarify its allegations in the Complaint. In B&D's responses to these interrogatories, it did not mention the Taking Work In-House Theory at all.

39. Thus, neither B&D's Complaint nor its interrogatory responses put Defendants on notice that the bases for B&D's claims included the Taking Work In-House Theory.

40. Our Rules of Civil Procedure (and the policies underlying them) are based on notions of fairness. *See Lemons v. Old Hickory Council, Boy Scouts of America, Inc.*, 322 N.C. 271, 274 (1988) (stating that "[t]he Rules of Civil Procedure were adopted by the General Assembly at the urging of the North Carolina Bar Association 'to eliminate the sporting element from litigation' "). A basic tenet of our civil justice system is that a claimant's initial pleading must adequately inform the responding party of what it is alleged to have done wrong so that it can defend itself accordingly. This principle is undermined in cases where, as here, a party seeks to assert a new theory of recovery for the first time at the summary judgment stage.

41. Our Rules of Civil Procedure recognize that a claimant may obtain new information about the case through the discovery process and provide mechanisms for both pleadings and interrogatory responses to be amended. Although nothing prohibited B&D from seeking to amend its Complaint or from supplementing its interrogatory responses to assert the Taking Work In-House Theory during the nine-month discovery period in this case, it did neither.[5]

42. For these reasons, the Court **CONCLUDES** that B&D is barred from proceeding under the Taking Work In-House Theory in connection with any of its

[5] Despite persistent questions from the Court at the 18 April hearing on the Motions as to why B&D failed to either seek leave to amend its Complaint or its interrogatory responses for this purpose, B&D's counsel failed to provide any meaningful answer.

claims in this case. *See*, *e.g.*, *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 257–58 (2009) (holding that plaintiff had not created genuine issue of material fact at summary judgment stage by offering new, additional allegation in affidavit regarding defendants' alleged breach of standard of care); *In re Southeastern Eye Center-Pending Matters*, 2019 NCBC LEXIS 29, at *62–63 (N.C. Super. Ct. May 7, 2019) (rejecting plaintiff's attempt to defeat summary judgment by submitting affidavit containing "previously unmentioned promises or representations").

ii. Fraudulent Billing Theory

43. With regard to B&D's Fraudulent Billing Theory, B&D asserts that Infobelt's SOWs either contained the names of fictitious employees as having performed work on behalf of the project or of actual employees who never actually worked on matters for the Customer. In addition, B&D asserts that Infobelt would deliberately manipulate the "mouse" on company computers to increase the total amount of screen time allegedly being used to perform work for the Customer in order to justify billing the Customer for larger fees. (Pl.'s Br. Supp. Pl.'s Mot. Summ. J., at 12–14.)

44. B&D argues that as a result of this fraudulent billing, the revenue figures and projections that Defendants provided to B&D were deliberately inflated and thus failed to present an accurate picture of Infobelt's current and future financial stability. B&D asserts that it would not have purchased an ownership interest in Infobelt had Infobelt provided this information.

45. In response, Defendants deny that any improper billing occurred and contend that Infobelt's billing practices were at all times fully consistent with the course of dealing that existed between Infobelt and the Customer.

46. At the outset, the Court notes the oddity of B&D's Fraudulent Billing Theory in this case—that is, a claim alleging fraudulent billings to a client where the *client* is not the claimant and where there is no evidence that the client ever voiced any objection to the legitimacy of the billings.

47. Defendants have put forth substantial evidence explaining the process by which Infobelt earned fees for its consulting services for the Customer. This evidence largely consists of the testimony of Mannava and Kevin Davis, who serves as the Chief Technology Officer and Chief Delivery Officer of Infobelt. (Davis Aff. ¶ 4.)

48. Before a SOW was formally drafted, "[the Customer], in partnership with [Infobelt], identifie[d] all the tasks that need[ed] to be done and the timeline." (Pl.'s Br. Supp. Pl.'s Mot. Summ. J., Ex. B, at 156:2–4.) Infobelt would then "put [together] an estimated cost and what type of personnel would be needed from [its] side to provide those tasks." (Pl.'s Br. Supp. Pl.'s Mot. Summ. J., Ex. B, at 156:5–11.) Infobelt compiled this information into an SOW using a form provided by the Customer that was then submitted to the Customer for its review. (Davis Aff. ¶ 19.) Davis explained that "[e]ach SOW details the terms related to Infobelt's and [the Customer]'s obligations to each other, including but not limited to requirements and specifications of the deliverables, approved Infobelt personnel who could receive [the

Customer]'s confidential information, outlines of costs, estimated delivery dates, and contract end dates." (Davis Aff. ¶ 20.) "These estimates would be used by [the Customer] to assess the reasonableness of the overall proposed cost and ultimately approve each SOW for the amounts documented." (Davis Aff. ¶ 35.) Only after receiving the Customer's approval would Infobelt begin working on the tasks set forth in that particular SOW.

49. Per the terms of the MSA, Infobelt was responsible for invoicing the Customer "within (30) thirty days after the provision of the Products or Services" described in the SOW. (MSA § (V)(A)(1).) The SOWs required that these invoices be submitted "to [the Customer] via certain designated . . . employees [of the Customer], in the form and manner approved by [the Customer]." (Davis Aff. ¶ 43.)

50. Mannava testified that Infobelt typically billed the Customer in monthly increments by taking the total amount listed on a SOW and "divid[ing] that number up by 12 and submit[ting] the invoices." (Pl.'s Br. Supp. Pl.'s Mot. Summ. J., Ex. B, at 159:6–10.)

51. The MSA stated that the Customer would normally "provide a written acceptance or rejection to [Infobelt] within thirty (30) days after the delivery of the Professional Services or the Work Product." (MSA, Prof. Servs. Attach. § IV(A).) Davis testified that as a practical matter, however, "[the Customer] accepted all of Infobelt's work." (Davis Aff. ¶ 40.) Moreover, Davis stated that the Customer "has never complained about the quality or quantity of lnfobelt's work, and [the Customer]

has never asked or required Infobelt to fix or redo any work performed." (Davis Aff. ¶ 41.)

52. Mannava testified that the invoices Infobelt sent to the Customer were never based on the actual amount of work performed by Infobelt's employees or how many employees worked on a project. Additionally, Davis stated that the Customer "has never asked for documentation of any Infobelt personnel's actual time spent performing the tasks listed in any SOW, and [the Customer] has never asked Infobelt to include any Infobelt personnel's time on its invoices." (Davis Aff. ¶ 46.) For this reason, Infobelt's employees did not log or track the hours they spent on a project, and there were no timecards or time sheets utilized. (*See* Pl.'s Br. Supp. Pl.'s Mot. Summ. J., Ex. B, at 127:6–14; Pl.'s Br. Supp. Pl.'s Mot. Summ. J., Ex. D, at 63:15–18, ECF No. 30.4.)

53. Davis explained the purpose of naming individual employees, as well as listing their hourly rates, in the SOWs as follows:

> The purpose of listing the names of specific personnel in the SOWs was to give [the Customer] assurance that Infobelt would only give access to its confidential information to Infobelt personnel who had been or would be approved and provisioned by [the Customer]. It was always standard and acceptable practice to provide names of potential personnel, their projected roles, approximate time they may spend on tasks related to the deliverables of an SOW, etc., for the sole purpose of determining an estimate of the time and cost of the deliverables. These estimates would be used by [the Customer] to assess the reasonableness of the overall proposed cost and ultimately approve each SOW for the amounts documented. However, there was no prohibition against using one approved person to fill-in for another approved person who could not do the work assigned or had left Infobelt, and there was no prohibition against switching the roles of approved Infobelt personnel.

(Davis Aff. ¶ 35.) Mannava similarly described this information as "just sample names of people . . . because they are our staff . . . and those names are there, but they can be replaced anytime." (Pl.'s Br. Supp. Pl.'s Mot. Summ. J., Ex. B, at 124:15–18.) Mannava testified that "[t]hey are not really material to the SOW, the names of who the individuals are." (Pl.'s Br. Supp. Pl.'s Mot. Summ. J., Ex. B, at 124:19–21.)

54. B&D attempts to rely on the testimony of John Pinto, a former employee of Infobelt, who formed the belief that Infobelt was overbilling the Customer upon discovering that he had been listed on certain SOWs as one of the Infobelt employees who would be performing work on projects for the Customer (despite the fact that he never actually did so). (Pl.'s Br. Supp. Pl.'s Mot. Summ. J., Ex. C, at 18:19–21, ECF No. 30.3.)

55. With regard to Pinto's concerns, Mannava testified that "we thought that John Pinto would be actually running the [redacted] development team, but he ended up not doing it. So we actually replaced him with someone else." (Pl.'s Br. Supp. Pl.'s Mot. Summ. J., Ex. B, at 159:15–160:3)

56. Moreover, in his deposition, Pinto admitted that he did not have personal knowledge relating to the manner in which Infobelt billed the Customer for its work pursuant to the SOWs.

> Q. I take it you had no discussions with anyone at [the Customer] about anything related to that change in the relationship?
>
> A. I did not discuss anything with [the Customer].
>
> . . .

Q. And that's fine. That's fine. I want to ask you, how did billing work between the master services agreement, the statement of work and then actual payment between Infobelt and [the Customer]?

A. I do not know the answer to that. I -- I can make an assumption, but I don't know the answer to that.

. . .

Q. Yes, sir. So I don't want you to do that, speculate. The bottom line is what you said: You don't know?

A. Correct

. . .

Q. Okay. And with respect to the statements of work, do you know how they operate between Infobelt and [the Customer] from a billing standpoint?

A. I do not.

Q. Okay. Do you know how the invoicing process works?

A. In general or with -- at Infobelt?

Q. Between Infobelt and [the Customer] pursuant to the MSA vis-a-vis the statements of work?

A. I do not.

Q. Okay. Do you know during the periods of statement of work whether any actual accounting of time and expense is made before an invoice is actually sent following the statement of work?

A. I do not have -- I do not.

. . .

Q. Okay. All right. And certainly, if no one at [the Customer] talked to you at all about the relationship, no one at [the Customer] told you, "We're having billing problems, fraud problems, statement of work problems with Infobelt," correct?

A. [The Customer]?

Q. Yes.

A. Correct.

(Defs.' Resp. Br. Opp. Pls.' Mot. Summ. J., Ex. 13, at 114:14–18, 193:24–194:2, ECF No. 45.14; Defs.' Br. Supp. Defs.' Mot. Summ. J., Ex. 14E, at 182:10–17, 182:22–25, 183:18–184:9, ECF No. 32.29.)

57. Thus, the only specific evidence in the summary judgment record by persons with personal knowledge of the course of dealing between Infobelt and the Customer is the above-described testimony from Mannava and Davis—both of whom have offered competent evidence that disproves the allegation that Infobelt fraudulently billed the Customer for the consulting services at issue.

58. B&D's failure to put forth evidence from the Customer on this issue to rebut Defendants' evidence is glaring. As Defendants note, B&D sought leave from the Court to take a Rule 30(b)(6) deposition of the Customer, as the discovery period in this case was about to expire. Despite the Court issuing two orders allowing B&D's request to take this deposition, (*see* ECF Nos. 23, 26), B&D ultimately cancelled the scheduled deposition at the last minute and instead subsequently filed an affidavit from [redacted] Marlow, an employee of the Customer. In his affidavit (which consists of less than two pages), Marlow briefly summarized the relationship between Infobelt and the Customer. With regard to a specific SOW that was attached as an exhibit to the affidavit, Marlow stated that the exhibit contained terms concerning Infobelt's fees for the services to be provided, including a box that was checked to indicate that

the fees referenced were for "Time and Materials," listed names of Infobelt representatives who would be providing services at the rates and hours specified therein, and that the total amount of fees associated with this SOW would not exceed $247,768.00 absent a change order evidencing the parties' agreement on a different amount. (Marlow Aff. ¶¶ 4–9.)

59. Marlow's affidavit is more notable, however, for what it does not say. It does not suggest that any of Infobelt's billings to the Customer were fraudulent (or in any way perceived by the Customer to be fraudulent), that Infobelt ever invoiced the Customer for a sum that exceeded the authorized amount in the applicable SOW that had previously been approved by the Customer, that the Customer had any concerns about Infobelt's billing practices, or that the Customer ever refused to pay any of Infobelt's invoices. Nor does it refute the testimony of Mannava and Davis regarding the course of dealing between Infobelt and the Customer**.** *See Connolly v. Asheville Contracting Co.*, 269 N.C. 423, 427 (1967) ("Whether Power Company is obligated to Contracting Company does not depend solely upon the provisions of the prime contract but in material part upon their course of dealings during the progress of the work and in relation to settlement therefor"); *see also Air Prods. & Chems., Inc. v. Roberts Oxygen Co.*, 2011 Del. Super. LEXIS 592, at *7 (Del. Super. Ct. Nov. 30, 2011) ("A course of dealing is a 'sequence of conduct concerning previous transactions between the parties to a transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.'

Course of dealing may help supplement or qualify terms of the agreement.") (cleaned up).[6]

60. With respect to Plaintiff's assertion that Infobelt manipulated a computer mouse to increase its billings to the Customer, Defendants' testimony likewise refutes this argument. Davis testified that Mannava used a "mouse interrupter" because "[the Customer] installed automatic log-outs on its VPN network, such that the user would be required to seek access to its VPN network each time he or she had ten (10) minutes of perceived inactivity, such as reading without moving the mouse or using the keyboard." (Davis Aff. ¶ 30.) The automatic log-out feature could pose problems because "Mannava was tasked with viewing the software's running code script to monitor for [redacted], which did not involve viewing [the Customer's] confidential information but required constant monitoring." (Davis Aff. ¶ 37.) However, it did not require Mannava to constantly move his mouse or type on his keyboard. (*See* Davis Aff. ¶ 37.) Accordingly, Mannava utilized the mouse interrupter because "[i]f he were logged out from the VPN, he could miss a critical [redacted] code." (Davis Aff. ¶ 37.)

61. In addition, a separate and independent ground exists that likewise demonstrates the invalidity of B&D's Fraudulent Billing Theory. B&D has also failed to show a genuine issue of material fact with regard to causation between Infobelt's billing practices and any injury B&D claims to have suffered. Although, as stated

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[6] "North Carolina courts have frequently looked to Delaware for guidance because of the special expertise and body of case law developed in the Delaware Chancery Court and the Delaware Supreme Court." *First Union Corp. v. SunTrust Banks, Inc.*, 2001 NCBC LEXIS 7, at *31 (N.C. Super. Ct. Aug. 10, 2001).

above, the Customer ultimately took its consulting business in-house in 2021, there is simply no evidence in the record suggesting that this decision was due to any concerns over Infobelt's billing practices. Indeed, in his affidavit, Marlow simply stated that "[the Customer] brought the services that Infobelt was providing, pursuant to some SOWs, in-house in order to reduce the costs to [the Customer]." (Marlow Aff. ¶ 10.)

62. Mannava has provided unrebutted testimony that years earlier the Customer had stated its intent to ultimately take the consulting work in-house. (*See* Pl.'s Br. Supp. Pl.'s Mot. Summ. J., Ex. B, at 29:2–22.) Mannava testified that this "was the understanding from day one." (Pl.'s Br. Supp. Pl.'s Mot. Summ. J., Ex. B, at 29:21.) Moreover, Davis stated the following on this subject:

> [The Customer] has always expressed its intention to eventually bring the services provided by Infobelt in-house once it felt its employees could manage the software and extensive onboarding without Infobelt's assistance because it is cheaper to pay employees than consultants.
>
> . . .
>
> Infobelt has always provided training and support to [the Customer's] employees with the understanding that we were training our replacements.

(Davis Aff. ¶¶ 49–50.)

63. Not only has B&D made no serious effort to rebut this testimony on that issue but, to the contrary, B&D's entire Taking Work In-House Theory is premised

on the fact that the Customer had previously made it known that it planned to take this work in-house at some point.[7]

64. Accordingly, for all of these reasons, Defendants' Motion for Summary Judgment is **GRANTED** as to B&D's claims for fraud and fraudulent inducement, and B&D's Motion for Summary Judgment on these claims is **DENIED**.

B. North Carolina Securities Act

65. B&D has also asserted claims under the North Carolina Securities Act ("NCSA").

66. Section 78A-56(a) of "[t]he NCSA contains two antifraud provisions that impose primary liability on 'any person' for (1) fraud, or (2) materially false statements or omissions made in connection with an offer or sale of a security." *Piazza v. Kirkbride*, 246 N.C. App. 576, 598 (2016) (quoting N.C.G.S. § 78A-56(a)), *aff'd as modified*, 372 N.C. 137 (2019).

67. Section 78A-56(a)(1) of the NCSA provides that a defendant will be liable to the person purchasing the security from him if the defendant "[o]ffers or sells a security in violation of G.S. 78A-8(1) [or] 78A-8(3)[.]" N.C.G.S. § 78A-56(a)(1).

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[7] The Court notes that in its summary judgment briefing, B&D merely states that the Customer's decision to ultimately take the consulting work in-house was "*possibly* because Infobelt had been inflating its earnings." (*See* Pl.'s Br. Supp. Mot. Summ. J., at 13, ECF No. 29.) It need hardly be said that such speculation is not enough to create a genuine issue of material fact. *See Henson v. Green Tree Servicing LLC*, 197 N.C. App. 185, 189 (2009) (stating that under Rule 56 "[t]he plaintiff must offer evidence, beyond mere speculation or conjecture, sufficient for a jury to find every essential element of [its] claim."); *Howard v. Chambers*, 2016 N.C. App. LEXIS 140, at *6 (N.C. Ct. App. Feb. 2, 2016) (unpublished) (holding that trial court properly granted summary judgment where claim was "based entirely on speculation and conjecture); *Cutter v. Vojnovic*, 2024 NCBC LEXIS 26, at **26 (N.C. Super. Ct. Feb. 16, 2024) (holding that "speculation is insufficient to create an issue of fact under Rule 56").

68. Here, B&D seeks to impose liability on Defendants for violating section 78A-8 of the NCSA, which states in pertinent part as follows:

> It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:
>
> (1) To employ any device, scheme, or artifice to defraud, [or]
>
> . . .
>
> (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

N.C.G.S. §§ 78A-8(1), (3).

69. As this Court has previously noted, "[i]n effect, this liability is similar to common law fraud." *Tillery Envtl. LLC*, 2018 NCBC LEXIS 13, at *61 (cleaned up). Furthermore, a claim under subsection (a)(1) "is comparable to federal actions based upon Rule 10b-5 of Section 10(b) of the Securities Act of 1934." *Piazza*, 246 N.C. App. at 598.

70. The elements of a claim under subsection (a)(1) of section 78A-56 based on a violation of section 78A-8 are as follows:

> (1) defendant is a seller or offeror of a security who either (a) "employ[ed] any device, scheme, or artifice to defraud," or (b) "engage[d] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person"; (2) defendant acted with scienter; and (3) plaintiff justifiably relied.

Tillery Envtl. LLC, 2018 NCBC LEXIS 13 at *61–62 (alterations in original).

71. Because the relevant provisions of section 78A-8 "sound in fraud, a plaintiff claiming violations of those subsections must do so with particularity sufficient to satisfy Rule 9(b)." *Skoog v. Harbert Private Equity Fund II, LLC*, 2013

NCBC LEXIS 16, at **34 (N.C. Super. Ct. March 25, 2013); *see Haigh v. Superior Insur. Mgmt. Grp., Inc.*, 2017 NCBC LEXIS 100, at *27 (N.C. Super. Ct. Oct. 24, 2017) (stating that "Plaintiffs' claims for fraud and securities fraud must be pleaded with particularity"). As recently explained by this Court:

> When claims under the NCSA are based on allegations of fraud in the sale of investments, the allegations must be pleaded with particularity. *Bucci v. Burns*, 2017 NCBC LEXIS 83, at *11 (N.C. Super. Ct. Sept. 14, 2017). Where claims for fraud and negligent misrepresentation have been dismissed and the conduct with respect to alleged violation of the NCSA is the same, the NCSA claims are likely similarly deficient. *Id.*

Burton v. Hobart Fin. Grp., Inc., 2024 NCBC LEXIS 34, at **77 (N.C. Super. Ct. Feb. 26, 2024).

72. "Section 78A-56(a)(2) is the state equivalent of a federal section 12(a)(2) claim of the Securities Act of 1933." *Piazza*, 246 N.C. App. at 599. Section 78A-56(a)(2) provides that a defendant will be liable to a person purchasing a security from him if the defendant

> [o]ffers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission[.]

N.C.G.S. § 78A-56(a)(2).

73. In other words, in order to sustain a claim under subsection (a)(2), a plaintiff must put forth evidence of

> (1) a false or misleading statement, or a statement which, because of the circumstances under which it was made, was made false or misleading because of the omission of other facts; (2) that the statement was

> material; and (3) that the statement was made by one who offered or sold a security.

Skoog, 2013 NCBC LEXIS 16, at **15.

74. Here, the legal distinction between the requirements for a valid claim under subsections (a)(1) and (a)(2) is immaterial because B&D's Fraudulent Billing Theory cannot support a claim under either theory. For the same reasons discussed in detail above with regard to B&D's fraud-based claims, the absence of a genuine issue of material fact as to the Fraudulent Billing Theory makes summary judgment likewise appropriate for Defendants on B&D's claims under the NCSA in their entirety. Accordingly, Defendants' Motion for Summary Judgment as to B&D's NCSA claims is **GRANTED**, and B&D's cross-motion on these claims is **DENIED**.

C. Negligent Misrepresentation

75. "The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206 (1988).

76. In the context of a claim for negligent misrepresentation, liability occurs where

> [o]ne who, in the course of his business, profession or employment, or in any other transaction in which he *has a pecuniary interest*, supplies false information for the guidance of others in *their business transactions*, [and thus] is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Kindred of N.C., Inc. v. Bond, 160 N.C. App. 90, 100 (2003) (emphasis in original).

77. North Carolina courts have recognized "that a separate duty of care may arise between adversaries in a commercial transaction." *Rountree v. Chowan Cnty.*, 252 N.C. App. 155, 161 (2017). More specifically, "[o]ur appellate courts have held that a party has a duty not to give false information for the purpose of inducing another to execute a contract." *Lipov v. Flagship Healthcare Props., LLC*, 2021 NCBC LEXIS 80, at **5 (N.C. Super. Ct. Sept. 20, 2021).

78. This Court has explained that, unlike fraud claims, a claim for negligent misrepresentation must be based on an *actual misrepresentation*, not merely an omission or failure to disclose information:

> [U]nder North Carolina law, a negligent misrepresentation claim cannot be based on an omission. *See Aldridge v. Metro. Life Ins. Co.*, 2019 NCBC LEXIS 116, at *112–13 (N.C. Super. Ct. Dec. 31, 2019) ("[A] claim for negligent misrepresentation can only be based on affirmative misrepresentations, not on omissions." (citing *Harrold v. Dowd*, 149 N.C. App. 777, 783, 561 S.E.2d 914, 919 (2002))).

McGuire v. Lord Corp., 2020 NCBC LEXIS 15, at *13 (N.C. Super. Ct. Feb. 11, 2020).

79. The North Carolina Supreme Court has recently made clear that Rule 9(b) applies to claims for negligent misrepresentation just as it does to claims based on fraud.

> We hold that, in North Carolina, claims for negligent misrepresentation must satisfy the heightened pleading standard of North Carolina Rules of Civil Procedure Rule 9(b). A claim of negligent misrepresentation is "closely akin to fraud, differing primarily in the requisite state of mind of the purported actor." *Dealers Supply Co., Inc. v. Cheil Indus., Inc.*, 348 F. Supp. 2d 579, 590 (2004) (citing *Breeden v. Richmond Cmty. Coll.*, 171 F.R.D. 189, 202 n.14 (M.D.N.C. 1997)). Similar to a claim for fraud or mistake, "negligent misrepresentation is based upon some 'confusion or delusion of a party such as by some misrepresentation.' " *Id.* at 590 (quoting *Breeden*, 171 F.R.D. at 203). The similarity of the claims supports the extension of Rule 9(b) to "all cases where the gravamen of

> the claim is fraud even though the theory supporting the claim is not technically termed fraud." *Id.* (quoting *Toner v. Allstate Ins. Co.*, 821 F. Supp. 276, 283 (D. Del. 1993)).
>
> The key distinction between negligent misrepresentation claims and ordinary negligence claims is that the former requires proof not merely of a breach of duty, but also the additional requirement that the claimant *justifiably relied* to his detriment on the information communicated without reasonable care. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609 (1988). As in a fraud case, we require the plaintiff to identify this alleged negligent misrepresentation with particularity so that the defendant can understand the time, place, and content of the representation, the identity of the person making the representation, and how the plaintiff justifiably relied on that information. *Cf. Terry*, 302 N.C. at 85. As a federal court succinctly explained when applying Rule 9(b) to negligent misrepresentation claims, "[u]nless defendant and others share plaintiff's view of the situation, they will find it difficult to grasp plaintiff's claim." *Breeden*, 171 F.R.D. at 202.

Value Health Sols., Inc., 385 N.C. at 265–66.

80. In support of this claim, B&D contends that during the due diligence period, Donaldson inquired as to whether there were any concerns about Infobelt's revenue stream, and Mannava responded that there were " '[n]o issues with the revenue, and we're very optimistic about the revenue continuing to grow.' " (Donaldson Dep., at 133:21–134:12.) B&D asserts that because Mannava was aware of the fact that Infobelt was fraudulently billing the Customer, this statement was false.

81. B&D's negligent misrepresentation claim fails for several reasons. First, once again, the Court has found that B&D has failed to show a genuine issue of material fact regarding the Fraudulent Billing Theory.

82. Second, the above-quoted statement by Mannava is insufficient to support a claim for negligent misrepresentation for other reasons as well. The assertion that "[n]o issues with the revenue" existed is simply too vague and ambiguous to meet the test for negligent misrepresentation. As a court in another jurisdiction has noted, "[a] statement that is 'vague and indefinite in its nature and terms, or is merely a loose conjectural or exaggerated statement, is not sufficient to support' either a fraud or negligent misrepresentation action[.]" *Goldstein v. Miles***,** 159 Md. App. 403, 436 (Md. Ct. App. 2004) (cleaned up).

83. Moreover, the latter part of this statement is akin to a mere expression of opinion regarding future conditions. *See Carmayer, LLC v. Koury Aviation, Inc.*, 2017 NCBC LEXIS 82, at *28–29 (N.C. Super. Ct. Sept. 11, 2017) (dismissing negligent misrepresentation claim premised on a "contingent, future estimate" because a "misrepresentation must be as to matters of fact substantially affecting his interest, not as to matters of opinion, judgment, probability, or expectation" (internal quotation and alterations omitted)); *Express Gene LLC v. Tecan United States, Inc.*, 2024 U.S. Dist. LEXIS 56776, at *14–15 (E.D.N.C. Mar. 28, 2024) (noting that "statements of opinion or puffery are generally not actionable" in connection with a negligent misrepresentation claim under North Carolina law).

84. Therefore, Defendants' Motion for Summary Judgment is **GRANTED** as to B&D's negligent misrepresentation claim, and B&D's cross-motion on this claim is **DENIED**.

D. Breach of Fiduciary Duty and Constructive Fraud

85. B&D has also asserted claims for breach of fiduciary duty and constructive fraud, which have only been brought against Defendant Mannava. (*See* Compl. ¶¶ 50–61.)

86. "To establish a claim for breach of fiduciary duty, a plaintiff must show that: (1) the defendant owed the plaintiff a fiduciary duty; (2) the defendant breached that fiduciary duty; and (3) the breach of fiduciary duty was a proximate cause of injury to the plaintiff." *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 339 (2019).

87. Claims for breach of fiduciary duty and constructive fraud are similar yet legally distinct.

> Although the elements of these causes of action overlap, each is a separate claim under North Carolina law. . . . [A] cause of action for constructive fraud must allege (1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured. Intent to deceive is not an element of constructive fraud. The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself.

White v. Consol. Plan., Inc, 166 N.C. App. 283, 293 (2004).

88. The receipt of the improper benefit must be alleged for each defendant individually. *See Trail Creek Invs. LLC v. Warren Oil Holding Co., LLC*, 2023 NCBC LEXIS 70, at **30–32 (N.C. Super. Ct. May 9, 2023); *White*, 166 N.C. App. at 294. Moreover, "[t]he benefit sought by the defendant must be more than a continued relationship with the plaintiff." *Sterner v. Penn*, 159 N.C. App. 626, 631 (2003) (cleaned up).

89. Defendants argue that any fiduciary relationship between Mannava and B&D could only have been based on their majority shareholder/minority shareholder relationship. *See*, *e.g.*, *Johnston v. Johnston Props., Inc.*, 2018 NCBC LEXIS 119, at **28 (N.C. Super. Ct. Nov. 15, 2018) (concluding that the Estate, as majority shareholder, owed fiduciary duties to plaintiff, a minority shareholder, because "[m]ajority shareholders owe fiduciary duties to minority shareholders"). Defendants then contend that B&D's status as a minority shareholder would not have existed until *after* it made its investment in Infobelt and thus that any improper acts by Mannava in inducing B&D to invest in Infobelt would have occurred before a relationship of trust and confidence between them existed.

90. B&D originally alleged in its Complaint that Mannava breached his fiduciary duties by "[f]ailing to disclose the actual assets and business practices of InfoBelt; [d]iverting InfoBelt's assets unlawfully and for Mannava's own use; and [e]ngaging in self-dealing." (Compl. ¶ 54.) However, in its summary judgment briefs, the only arguments advanced by B&D in support of these two claims are premised upon the Fraudulent Billing Theory and the Taking Work In-House Theory. For all of the reasons discussed above, neither theory is viable, and B&D is deemed to have abandoned its earlier allegations regarding these claims by failing to argue them at the summary judgment stage. *See Bucci*, 2020 NCBC LEXIS 79, at *17 ("Having offered no argument about or evidence of the [alleged] misrepresentation, Plaintiffs have abandoned it").

91. Therefore, Defendants' Motion for Summary Judgment is **GRANTED** as to B&D's breach of fiduciary duty and constructive fraud claims, and B&D's cross-motion on these claims is **DENIED**.

E. Conversion

92. Finally, the Court also finds that summary judgment is appropriate for Defendants as to B&D's conversion claim.

93. This Court has previously stated the following regarding the tort of conversion:

> Conversion is a tort with deep roots in the common law. It "is defined as 'an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.' " *Spinks v. Taylor*, 303 N.C. 256, 264-65, 278 S.E.2d 501, 506 (1981) (quoting *Peed v. Burleson, Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956)). "The essence of conversion is not the acquisition of property by the wrongdoer, but a wrongful deprivation of it to the owner." *Bartlett Milling Co. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 86, 665 S.E.2d 478, 488 (2008).

Addison Whitney, LLC v. Cashion, 2017 NCBC LEXIS 51, at *15 (N.C. Super. Ct. June 9, 2017).

94. The essential elements for a conversion claim therefore require "ownership in the plaintiff and a wrongful conversion by defendant." *Lake Mary L.P. v. Johnston*, 145 N.C. App. 525, 532 (2001).

95. Here, the property allegedly converted is the $3.6 million that B&D invested in Infobelt.

96. In support of its conversion claim, B&D argues that "Defendants have exercised a right of ownership over Plaintiff's assets and monies to the exclusion of

Plaintiff and used that property to benefit themselves." (Pl.'s Br. Supp. Pl.'s Mot. Summ. J., at 25.) B&D further argues that "Defendants knew that Infobelt's revenue stream was inflated when B&D made its investment[,]" and contends that "[n]ow that Infobelt is no longer profitable, the Defendants are using B&D's investment to continue to pay the salary of Mr. Mannava[,]" which, in B&D's view, amounts to conversion. (Pl.'s Br. Supp. Pl.'s Mot. Summ. J., at 25.)

97. The Court finds that Plaintiff's evidence simply does not satisfy the elements for a conversion claim. Neither the Court's own research nor B&D's briefs have disclosed any cases allowing a conversion claim to go forward on analogous facts.

98. The Court has now held as a matter of law that no fraud occurred in connection with B&D's decision to purchase an ownership interest in Infobelt. Accordingly, Infobelt's retention of the funds paid by B&D in connection with its investment does not amount to conversion.

99. Therefore, Defendants' summary judgment motion is **GRANTED** as to B&D's conversion claim, and B&D's cross-motion on this claim is **DENIED**.

CONCLUSION

THEREFORE, IT IS ORDERED as follows:

1. Defendants' Motion for Summary Judgment is **GRANTED** in its entirety, and all claims asserted by B&D in this action are hereby dismissed with prejudice.

2. Plaintiff's Motion for Summary Judgment is **DENIED** in all respects.

SO ORDERED, this the 1st day of August, 2024.[8]

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge for
Complex Business Cases

[8] This Order and Opinion was originally filed under seal on 1 August 2024. This public version of the Order and Opinion is being filed on 6 August 2024. To avoid confusion in the event of an appeal, the Court has elected to state the filing date of the public version of the Order and Opinion as 1 August 2024.