STATE OF NORTH CAROLINA GUILFORD COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23CVS004844-400
BLUSKY RESTORATION CONTRACTORS, LLC, and BLUSKY HOLDCO, LLC, Plaintiffs, v. SASSER COMPANIES, LLC, Defendant.	**ORDER AND OPINION ON MOTION OF DEFENDANT SASSER COMPANIES, LLC FOR PARTIAL JUDGMENT ON THE PLEADINGS**

1. **THIS MATTER** is before the Court on the 1 March 2024 filing of the *Motion of Defendant Sasser Companies, LLC for Partial Judgment on the Pleadings* (the "Motion"). (ECF No. 23 ["Mot."].) Pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure (the "Rule(s)"), Defendant Sasser Companies, LLC ("Sasser") requests dismissal of seven of Plaintiffs' eight claims alleged in the First Amended Complaint. (*See* Mot.; First Am. Compl., ECF No. 11 ["Am. Compl."].)

2. For the reasons set forth herein, the Court **GRANTS** in part and **DENIES** in part the Motion.

Akerman, LLP, by Bryan G. Scott, Adam L. Massaro, and Jasmine M. Pitt, for Plaintiffs BluSky Restoration Contractors, LLC and BluSky HoldCo, LLC.

Wagner Hicks, PLLC, by Sean C. Wagner, Jonathon D. Townsend, and Meagan L. Allen for Defendant Sasser Companies, LLC.

Robinson, Judge.

I. INTRODUCTION

3. This action arises out of Plaintiffs' contention that Steven W. Brown ("Brown"), a former employee, left BluSky Restoration Contractors, LLC ("BluSky Restoration") for Sasser, a local competitor. Plaintiffs are presently engaged in related litigation with Brown and now seek to hold Sasser accountable for what Plaintiffs contend amounts to impermissible interference with contracts and a conspiracy. The Court now considers the pleadings before it to determine whether Sasser is entitled to judgment as a matter of law.

II. FACTUAL BACKGROUND

4. The Court does not make findings of fact on a Rule 12(c) motion for judgment on the pleadings and draws the following factual background from a review of the pleadings.

A. The Parties

5. Plaintiffs BluSky Restoration and BluSky HoldCo, LLC ("BluSky HoldCo"; with BluSky Restoration, "Plaintiffs") are Delaware limited liability companies, both with their principal place of business in Colorado. (Am. Compl. ¶¶ 2–3.) BluSky Restoration is registered to do business in North Carolina and is a subsidiary of BluSky HoldCo. (Am. Compl. ¶ 2.) BluSky Restoration is a national restoration firm with "over forty corporate and regional office locations in nineteen states across the United States" including four offices in North Carolina. (Am. Compl. ¶¶ 7–8.)

6. Sasser is a North Carolina limited liability company with its principal place of business in Whitsett, North Carolina. (Am. Compl. ¶ 4; Defenses & Answer of

Sasser ¶ 4, ECF No. 12 ["Answer"].) Sasser also performs restoration and remediation work, (Answer ¶ 15), with an office roughly twenty miles from BluSky Restoration's Greensboro, North Carolina location, (Am. Compl. ¶ 15). Plaintiffs allege that "Sasser is a direct, national competitor of BluSky Restoration[,]" (Am. Compl. ¶ 15), which Sasser denies, (*see* Answer ¶¶ 15, 55, 74, 84).

B. Sasser's Alleged Recruitment of Plaintiffs' Employees

7. Plaintiffs allege that Sasser began "recruiting and soliciting" Plaintiffs' current and former employees around 2019, resulting in Sasser hiring six of Plaintiffs' former employees including, in no particular order, Brown, Paul Miller ("Miller"), David Duta, Jerry Arevalo, Miguel Figueroa ("Figueroa"), and Wenceslao Salas. (Am. Compl. ¶¶ 20–21; Answer ¶ 21.) Of particular relevance to this action is Sasser's hiring of Brown in 2021 and its subsequent hiring of Miller. (*See* Am. Compl. ¶¶ 27, 114–15.)

8. At BluSky Restoration, Brown was the National Director of Restoration, meaning he managed the national team and engaged in restoration work. (Am. Compl. ¶¶ 25, 98.) In March 2021, "Brown was a Series B Common Unit limited partner and owner of BluSky Management Incentive, LP [("BMI")], a limited liability partnership [among] BluSky HoldCo, LLC, BluSky Management Incentive GP, LLC and various individuals[.]" (Am. Compl. ¶ 30.) As a limited partner in BMI and an alleged member in BluSky HoldCo, Plaintiffs aver that Brown was bound by both the Limited Partnership Agreement of BMI (the "LP Agreement") and the Amended and

Restated Limited Liability Company Agreement of BluSky HoldCo (the "LLC Agreement"). (Am. Compl. ¶¶ 30–31.)

9. Plaintiffs allege that the LP Agreement imposed duties of loyalty and care on Brown and the other limited partners, which duties they owed to both BMI and the subsidiaries of BluSky HoldCo, including BluSky Restoration. (Am. Compl. ¶ 41.) Plaintiffs allege that (1) Sasser was "aware" that Brown was subject to restrictive covenants and owed Plaintiffs fiduciary duties; (2) Figueroa, Sasser's Chief Operating Officer ("COO"), was aware of these facts from his own experience working for Plaintiffs; and (3) Sasser actually reviewed the LP Agreement and continued recruiting Brown despite its knowledge of Brown's contractual obligations. (*See* Am. Compl. ¶¶ 41–43; Answer ¶¶ 41–42.)

1. Background on Agreements Between Plaintiffs and Brown

10. Plaintiffs allege that Brown was party to three contracts that contain confidentiality, non-solicitation, and noncompete provisions: the LP Agreement; the LLC Agreement; and the Confidentiality, Noncompetition and Nonsolicitation Agreement ("2017 Agreement"). (Am. Compl. ¶¶ 30–31, 34, 36.) They contend that the restrictive covenants in these contracts are "substantially similar" as to their terms. (*See* Am. Compl. ¶ 37.)

11. Plaintiffs allege that, under these agreements, Brown agreed "to keep confidential all non-public information, including but not limited to, business or trade secrets . . . , price lists, methods, formulas, know-how, customer and supplier lists,

distributor lists, product costs, marketing plans, research and development and financial information . . . ." (Am. Compl. ¶ 118; *see* Answer ¶ 118.)

12. As discussed above, Plaintiffs also allege that the LP Agreement and LLC Agreement provide that Brown, as an employee of BluSky Restoration, owed the company fiduciary duties of loyalty and care in the performance of his duties. (Am. Compl. ¶ 39.)

2. Sasser's Recruitment and Hiring of Brown

13. Plaintiffs allege that in the Spring of 2021, Figueroa "began communicating with Brown about . . . coming to work for Sasser." (Am. Compl. ¶ 27.) In March 2021, Brown had dinner with Figueroa and Sasser partners Houston Summers and Sebastian Williams. (Am. Compl. ¶ 29.)

14. Plaintiffs further allege that, in July 2021, Sasser provided Brown with a proposed compensation plan if he came to work for Sasser, and that the proposal "included an artificially high salary increase and other benefits[.]" (Am. Compl. ¶ 44.) The compensation package was allegedly Sasser's attempt to "entice Brown" to violate the described restrictive covenants and to breach his fiduciary duties owed to Plaintiffs. (Am. Compl. ¶¶ 45–46.)

15. Sasser's proposal included an offer of "equity and net revenue sharing," that "was contingent on Brown's dealings with Sasser occurring without detection." (Am. Compl. ¶ 49.) According to Plaintiffs, Sasser "expressed to Brown [that] it would indemnify him for liability related to BluSky that might arise from his wrongful conduct." (Am. Compl. ¶ 48.)

16. Plaintiffs allege that "Sasser did not just extend fair offers of employment in the ordinary course of legitimate business competition[,]" but rather used non-public information received from Brown to induce other individuals to leave Plaintiffs. (*See* Am. Compl. ¶ 117.)

17. On 8 July 2021, Sasser offered Brown the position of Vice President of Operations. (Am. Compl. ¶ 50; Answer ¶ 50.) Brown accepted that offer and "executed an agreement with Sasser in July 2021." (Am. Compl. ¶ 50.) Plaintiffs allege that Brown drafted a resignation notice around this time, but "deliberately did not tender his resignation" because "he intended and planned to gather key files and documents of BluSky to bring with him to Sasser, as well as to scout out key employees to be poached by Sasser before his departure." (*See* Am. Compl. ¶¶ 51–52.)

18. Of particular relevance to this litigation, Plaintiffs allege that (1) on 19 May 2021, Brown emailed Figueroa a copy of the LP Agreement, (Am. Compl. ¶ 41; Answer ¶ 41 ("Admitted that, on May 19, 2021, Brown emailed Figueroa the LP Agreement")), and (2) at some point, Brown shared with Sasser "a confidential merger agreement" that set forth terms indicating that Brown was going to receive a payout from Plaintiffs, (Am. Compl. ¶ 59; Answer ¶ 59 ("Admitted that, at some point in time, Brown shared with Sasser a merger agreement.")).

19. On 14 October 2021, Brown signed merger documents to receive a six-figure payout from Plaintiffs for his units in BMI. (*See* Am. Compl. ¶¶ 53, 60, 66, 104.) Brown received those funds some time before 25 October 2021. (Am. Compl. ¶ 79.)

The First Amended Complaint does not contain further detail regarding the BMI merger or why Brown was entitled to receive "a six-figure payout from BluSky." (*See* Am. Compl. ¶ 60.)

3. Sasser's Recruitment of Other BluSky Restoration Employees

20. Plaintiffs also allege that Sasser recruited Miller from BluSky Restoration in 2021. (*See* Am. Compl. ¶¶ 109–10.) Throughout November 2021, while Brown was still working at BluSky Restoration, Figueroa communicated by text message with Brown about Miller. (Am. Compl. ¶¶ 109, 111.) According to Plaintiffs, "poaching" Miller would help Sasser build its asbestos remediation team to compete with Plaintiffs. (Am. Compl. ¶ 110.)

21. Brown ultimately resigned from BluSky Restoration later in November 2021, but he allegedly solicited information and employees from Plaintiffs while working for Sasser. (Am. Compl. ¶ 112.) On 22 November 2021, for example, Figueroa asked Brown, "where was Paul with [s]alary," while at BluSky Restoration. (Am. Compl. ¶ 113.) According to Plaintiffs, as a result of information Sasser got from Brown, Sasser was able to offer Miller compensation for employment in an amount higher than the amount he was making at BluSky Restoration. (Am. Compl. ¶ 113.)

22. Miller left BluSky Restoration, and on or about 3 January 2022 began working at Sasser. (Am. Compl. ¶ 115.)

23. Plaintiffs allege that "Sasser tried to solicit other current and former BluSky employees[,]" and it used "non-public information that Brown was uniquely

positioned to have because of his employment with BluSky Restoration" to induce at least Brown and Miller to go to Sasser. (Am. Compl. ¶¶ 116–17.)

C. The Alleged Conspiracy Between Brown and Sasser

24. According to Plaintiffs, during the Summer of 2021, "Sasser and Brown began a concerted and secretive effort to conceal that Brown . . . accepted the offer to move from BluSky Restoration to Sasser." (Am. Compl. ¶ 56.) This effort allegedly allowed Brown to "serve as an embedded confederate" to identify and take Plaintiffs' files and information, as well as identify which employees to poach. (Am. Compl. ¶ 56.) In this way Plaintiffs allege that Brown was able to avoid termination for cause, which would have resulted in Brown forfeiting the merger payout, salary, and other benefits. (Am. Compl. ¶¶ 58, 104.)

25. Plaintiffs allege that Brown and Sasser's conduct during this period evidences their intent to conceal their activities, pointing to text messages between them "where they even conferred over 'distractions' Brown planned" in order to deceive Plaintiffs, including misrepresenting his reason for leaving BluSky Restoration. (Am. Compl. ¶ 57.)

26. Plaintiffs allege that on 14 October 2021, Brown signed the merger documents to receive his "payout." (*See* Am. Compl. ¶ 60; *supra* ¶ 19.) Brown also signed Letters of Transmittal for the LP Agreement and LLC Agreement. (Am. Compl. ¶ 66.) In Plaintiffs' view, by signing the Letters of Transmittal Brown represented that he complied, and would continue to comply, with the obligations set forth in the LP Agreement and LLC Agreement. (Am. Compl. ¶ 72.) Plaintiffs allege

that this was "a material fact that directly impacted [Brown's] entitlement to receive the merger payout." (Am. Compl. ¶ 73.)

27. Plaintiffs allege that Brown remained at BluSky Restoration for approximately one month after the merger payout, "consistent with the plan he had made with Sasser" to avoid suspicion. (Am. Compl. ¶ 77.)

28. On 25 October 2021, Brown presented his resignation notice to BluSky Restoration. (Am. Compl. ¶ 79.) He informed Mike Erekson that he was resigning to spend more time with family, and that he was unsure what he was going to do next.[1] (Am. Compl. ¶ 79.) Plaintiffs allege that on the same day, Brown "drafted talking points to aid him in his effort to conceal his plans[.]" (Am. Compl. ¶ 81.) One such talking point was, "I am not a threat," intended to convince Plaintiffs to release Brown from the restrictive covenants in his agreements with BluSky Restoration. (Am. Compl. ¶¶ 81–82.) Brown and Figueroa communicated about Brown's "departure strategy and plan to deceive" Plaintiffs. (Am. Compl. ¶ 83.)

29. Plaintiffs allege that Sasser induced Brown to consult with it about Plaintiffs' profit margins and to provide information on at least one Sasser client before Brown's last day at BluSky Restoration. (Am. Compl. ¶ 84.)

30. Brown signed a new offer letter with Sasser on 5 November 2021, an act Plaintiffs allege was "to make it appear as though Brown had not actually accepted employment with Sasser months before[.]" (Am. Compl. ¶ 85; *see* Answer ¶ 85.)

[1] Mike Erekson's role at BluSky Restoration is not alleged in the pleadings. (*See* Am. Compl.; Answer.)

Plaintiffs allege, in some detail, efforts Sasser and Brown purportedly used to conceal "their plans and Brown's hiring[.]" (*See* Am. Compl. ¶¶ 87–89; Answer ¶¶ 87–88.)

31. Brown's last day at BluSky Restoration was 19 November 2021. (Am. Compl. ¶¶ 92, 112.)

D. Brown's Last Day with BluSky Restoration and After His Start at Sasser

32. Prior to leaving BluSky Restoration, Brown allegedly (1) deleted text messages with Figueroa on his BluSky Restoration issued phone, (Am. Compl. ¶ 90); (2) tampered with metadata on, and deleted files from, his company computer, (Am. Compl. ¶¶ 90, 132); and (3) downloaded or otherwise copied files from the laptop issued to him by Plaintiffs onto USB storage devices, (Am. Compl. ¶¶ 130–31, 143). Plaintiffs also allege that Brown made "a mobile backup" of his BluSky Restoration computer on 25 October 2021, (Am. Compl. ¶ 123), and that he transferred everything from his company phone to a personal cellphone, (Am. Compl. ¶¶ 124, 126).

33. The documents Brown accessed, downloaded, and transferred were allegedly "documents that he believed would be helpful to Sasser in competing against BluSky[.]" (Am. Compl. ¶ 134.) Plaintiffs allege that, during his final days of work, "Brown was engaged in mining BluSky's computers for sensitive financial data for the purpose of downloading the documents to one or more external hard drives and USB devices[.]" (Am. Compl. ¶ 142.)

34. On his last day at BluSky Restoration, Brown signed a Termination Certification, acknowledging his resignation from BluSky Restoration and certifying that he had returned all confidential information, trade secrets, copies of that

information, and any documents which evidence, refer, or relate to confidential or trade secret information. (Am. Compl. ¶ 135.) Plaintiffs allege these representations were false because Brown misappropriated BluSky Restoration's documents and information prior to turning in company devices. (Am. Compl. ¶¶ 136–38.)

35. Prior to and following his last day, Brown and BluSky Restoration discussed the possibility of him continuing part-time employment. (*See* Am. Compl. ¶¶ 157–73.) Plaintiffs allege that, in order "to have an orderly transition," they negotiated with Brown to allow BluSky Restoration "time to find adequate replacement license holders and qualifying agents [to succeed Brown], where necessary, without experiencing a lapse in licensure." (Am. Compl. ¶ 159.)

36. Plaintiffs sent Brown a proposed part-time employment agreement on 16 November 2021. (Am. Compl. ¶ 160.) Plaintiffs offered Brown continuing part-time work with the companies until they successfully transferred or assigned all licenses Brown held and used in his employment for BluSky Restoration, and until any litigation in which Brown was assisting had concluded. (Am. Compl. ¶ 161.) Plaintiffs allege that Brown forwarded the proposal to Sasser and Figueroa the same day. (Am. Compl. ¶¶ 164–65.)

37. Plaintiffs allege that they believed Brown was negotiating in good faith, but that Sasser instructed Brown not to sign the proposed part-time employment agreement or to otherwise enter into an agreement with Plaintiffs. (*See* Am. Compl. ¶¶ 168, 171, 173.) Plaintiffs allege that Brown ultimately declined the

proposal for continued part-time employment with BluSky Restoration. (Am. Compl. ¶ 172.)

38. Brown's first day at Sasser was on or about 6 December 2021. (Am. Compl. ¶ 92; Answer ¶ 92.) Brown became Sasser's COO, a position that required Brown to engage in "substantially the same type of restoration work" that was required of him in his role at BluSky Restoration. (Am. Compl. ¶¶ 99–100; Answer ¶ 99.)

39. Plaintiffs allege that after Brown began work at Sasser he "opened and accessed" Plaintiffs' confidential and trade secret information on his Sasser-issued computer. (Am. Compl. ¶ 146.) Plaintiffs allege that Brown had no authority to retain, access, or use that information. (Am. Compl. ¶ 149.) Plaintiffs also allege that Sasser refused to provide Brown with the equity and revenue sharing it initially offered him. (*See* Am. Compl. ¶¶ 49, 133; Answer ¶ 133 ("Admitted that Brown did not receive equity or revenue sharing in Sasser.").)

E. <u>Subsequent Litigation Between Plaintiffs and Brown</u>

40. On 22 December 2021, BluSky Restoration initiated a lawsuit against Brown seeking, in relevant part, enforcement of the restrictive covenants to which it contends he was bound and to hold Brown accountable for misappropriation of trade secrets. (*See* Am. Compl. ¶¶ 97, 101; Answer ¶ 97.) That action is captioned *BluSky Restoration Contractors LLC v. Brown* (2021 CVS 10032; Guilford Cty.), (the "Brown Litigation"), and remains pending in this Court.

41. Plaintiffs allege that they sent Sasser a copy of the above-described lawsuit on or about 30 December 2021. (Am. Compl. ¶ 101.)

III. PROCEDURAL BACKGROUND

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

43. This action was initiated on the 2 May 2023 filing of Plaintiffs' Complaint. (ECF No. 3.) It was thereafter designated and assigned to the undersigned on 6 June 2023. (ECF Nos. 1–2.)

44. On 29 June 2023, Plaintiffs filed their First Amended Complaint (the "Amended Complaint") as a matter of right. (*See* Am. Compl.)

45. Plaintiffs allege eight claims for relief against Sasser, including: (1) BluSky Restoration's claims for (i) tortious interference with contract ("Count One"), (Am. Compl. ¶¶ 174–92), (ii) tortious interference with prospective economic advantage ("Count Two"), (Am. Compl. ¶¶ 193–206), (iii) misappropriation of trade secrets ("Count Seven"), (Am. Compl. ¶¶ 286–306), and (iv) permanent injunctive relief ("Count Eight"), (Am. Compl. ¶¶ 307–20); (2) BluSky HoldCo's claim for tortious interference with contract ("Count Three"), (Am. Compl. ¶¶ 207–26); and (3) Plaintiffs' joint claims for (i) conspiracy to breach fiduciary duty ("Count Four"), (Am. Compl. ¶¶ 227–33), (ii) conspiracy to commit fraudulent concealment and/or omission ("Count Five"), (Am. Compl. ¶¶ 234–62), and (iii) conspiracy to commit fraud ("Count Six"), (Am. Compl. ¶¶ 263–85).

46. Sasser filed its Defenses and Answer to the Amended Complaint on 31 July 2023. (*See* Answer.) These documents complete the pleadings in this matter.

47. Sasser filed the Motion, which has been fully briefed. On 24 May 2024, the Court held a hearing on the Motion at which all parties were represented by counsel (the "Hearing"). (*See* ECF No. 37.)

48. Having considered the Motion, briefing, and arguments of counsel at the Hearing, the Motion is now ripe for resolution.

IV. LEGAL STANDARD

49. On a Rule 12(c) motion, "[t]he movant is held to a strict standard and must show that no material issue of facts exists and that he is clearly entitled to judgment." *Ragsdale v. Kennedy*, 286 N.C. 130, 137 (1974); *see also Carpenter v. Carpenter*, 189 N.C. App. 755, 761 (2008). "[T]he court cannot select some of the alleged facts as a basis for granting the motion on the pleadings if other allegations, together with the selected facts, establish material issues of fact." *J. F. Wilkerson Contracting Co. v. Rowland*, 29 N.C. App. 722, 725 (1976).

50. In deciding a Rule 12(c) motion, the Court must read the pleadings in the light most favorable to the nonmoving party, and

> [a]ll well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.

Ragsdale, 286 N.C. at 137 (citations omitted).

51. "Judgment on the pleadings is not favored by the law . . . ." *Huss v. Huss*, 31 N.C. App. 463, 466 (1976). The function of Rule 12(c) "is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit." *Ragsdale*, 286 N.C. at 137. "[J]udgment on the pleadings is not appropriate merely because the claimant's case is weak and he is unlikely to prevail on the merits." *Huss*, 31 N.C. App. at 469. Rather, it "is allowable only where the pleading of the opposite party is so fatally deficient in substance as to present no material issue of fact . . . ." *George Shinn Sports, Inc. v. Bahakel Sports, Inc.*, 99 N.C. App. 481, 486 (1990).

V. ANALYSIS

52. Through the filing of the Motion, Sasser seeks dismissal of all Plaintiffs' claims except for Count Seven, misappropriation of trade secrets. (*See* Mot.) The Court addresses the claims in order beginning with the tortious interference claims, turning next to the conspiracy claims, and concluding with Plaintiffs' claim for permanent injunctive relief.

53. As part of the Motion, Sasser requests that the Court take judicial notice of (1) all documents filed in the Brown Litigation, and (2) two of the contracts referenced in the Amended Complaint. (Mot. 3–4.)

54. The Court's consideration of a contract which is the subject matter of an action does not expand the scope of a Rule 12 hearing. *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60 (2001) (citations omitted). Consideration of the contracts does not convert a motion for judgment on the pleadings into one for summary judgment. *Bank of Am., N.A. v. Rice*, 244 N.C. App. 358, 370 (2015).

55. With these standards in mind, the Court reviews and considers the LP Agreement and LLC Agreement, (ECF Nos. 23.2–.3), each of which are the subject of Plaintiffs' tortious interference claims and are referenced throughout the Amended Complaint. " '[P]laintiffs cannot complain of surprise when the trial court desires to familiarize itself with the instrument upon which the plaintiffs are suing because the plaintiffs have failed to reproduce or incorporate by reference the particular instrument in its entirety in the complaint.' " *Rice*, 244 N.C. App. at 371 (quoting *Coley v. N.C. Nat. Bank*, 41 N.C. App. 121, 126 (1979)). Accordingly, the Court takes judicial notice of the contracts at issue.

56. However, the Court declines to take judicial notice of all filings in the Brown Litigation at this juncture. *See id.* at 371–72 (discussing when it is appropriate for the Court to consider matters outside the pleadings without converting a motion to dismiss into one for summary judgment). The Motion is therefore **DENIED** to that extent.

A. Counts One, Two, and Three: The Tortious Interference Claims

1. Counts One and Three: Tortious Interference with Contract

57. In Count One, BluSky Restoration alleges that Brown was bound by the restrictive covenants in the LP Agreement, LLC Agreement, and 2017 Agreement, and that Sasser, through Figueroa, induced Brown to breach those restrictive covenants and his contractually imposed fiduciary duties. (*See* Am. Compl. ¶¶ 175, 184–87.) BluSky HoldCo alleges the same in Count Three, excluding only the 2017

Agreement. (*See* Am. Compl. ¶¶ 208–09, 218–21.) The Court therefore addresses the claims together.

58. To state a claim for tortious interference with contract, a claimant must allege the following: (1) a valid contract exists between the claimant and a third person; (2) the opponent knows of the contract between claimant and the third party; (3) the opponent intentionally induces the third person not to perform the contract with claimant; (4) the opponent in doing so acts without justification; and (5) the interference results in actual damage to claimant. *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 661 (1988) (citing *Childress v. Abeles*, 240 N.C. 667, 674 (1954)). This Court has stated that " '[t]he pleading standards for a tortious interference with contract claim are strict.' " *Charah, LLC v. Sequoia Servs., LLC*, 2020 NCBC LEXIS 52, at *13 (N.C. Super. Ct. Apr. 17, 2020) (*quoting Kerry Bodenhamer Farms, LLC v. Nature's Pearl Corp.*, 2017 NCBC LEXIS 27, at *16 (N.C. Super. Ct. Mar. 27, 2017)).

59. Sasser argues that Counts One and Three fail because it "acted with legitimate business justifications" and Plaintiffs failed to allege that Sasser's sole motivation was legal malice. (Mot. 2; Br. Supp. Mot. 2, 8–12, ECF No. 24 ["Br. Supp."].) Sasser also contends that Plaintiffs failed to allege that Sasser knew about the restrictive covenants at issue. (Br. Supp. 11–12.)

60. As to whether the interference was justified, Plaintiffs argue that Sasser denies that it is a competitor, making whether Sasser acted with legitimate business justification a disputed fact improper for resolution at this juncture. (Br. Opp'n Mot. 2–3, ECF No. 31 ["Br. Opp."].) Plaintiffs continue that, even if Sasser and

Plaintiffs are considered competitors for purposes of the Motion, Sasser does not have an "unfettered license to interfere merely because it is a competitor." (Br. Opp. 3 (referencing without citation *Peoples Sec. Life Ins. Co. v. Hooks*, 322 N.C. 216 (1988).)

61. "Claims for tortious interference with contract and prospective economic advantage are properly dismissed under Rule 12(c) where the complaint shows that the interference was justified or privileged." *K&M Collision, LLC v. N.C. Farm Bureau Mut. Ins. Co.*, 2017 NCBC LEXIS 109, at *20 (N.C. Super. Ct. Nov. 21, 2017) (citing *Hooks*, 322 N.C. at 220). That said,

> there are a number of cases from this Court in which the Court has declined to dismiss a tortious interference claim notwithstanding the fact that defendant arguably had a legitimate business interest in plaintiff's contract with a third party where there was a question as to whether defendant's actions were related to defendant's legitimate interest or were done to harm the plaintiff.

Id. at *22 (citations omitted).

62. Here, the Court's review of the pleadings confirms Plaintiffs' assertion regarding Sasser's repeated denials that it is Plaintiffs' competitor. (*Compare* Am. Compl. ¶¶ 1, 15–16, 25, 74, 84, 107, 189, 205, *with* Answer ¶¶ 1, 15–16, 25, 74, 84, 107, 189, 205.) Nevertheless, the Court considers the companies to be competitors as alleged by Plaintiffs, given the standard it must employ on a Rule 12(c) motion. Thus, the Court next considers whether Sasser's alleged interference was justified or excused because it acted with a legitimate business justification. (*See* Br. Supp. 8–10.) Plaintiffs direct the Court to *Lunsford v. Viaone Servs., LLC*, 2020 NCBC LEXIS 111 (N.C. Super. Ct. Sept. 28, 2020), which the Court finds instructive. (Br. Opp. 4.)

63. In *Lunsford*, the plaintiff alleged that the defendant, its competitor, knew about the contract at issue but solicited the customers anyway, while also attempting to conceal that action. 2020 NCBC LEXIS 111, at *15. The plaintiff alleged that the defendant attempted to undermine the plaintiff's business by taking documents and business information and poaching both employees and customers. *Id.* The Court permitted the tortious interference with contract claim to proceed past the motion to dismiss stage because these allegations, when taken as true, adequately alleged that defendant acted without justification. *Id.*

64. Plaintiffs' allegations in this case are markedly similar. Plaintiffs allege that Sasser knew about the three contracts at issue, and Sasser admits that it received a copy of the LP Agreement. (Am. Compl. ¶¶ 41–43, 179–82, 214–16; Answer ¶¶ 33, 41, 43.) Following its receipt of the LP Agreement in May 2021, Sasser recruited Brown and Miller. (Am. Compl. ¶¶ 44, 109–10.) Plaintiffs allege that this activity went beyond normal competition because Sasser: (1) offered Brown an "artificially high compensation package," (Am. Compl. ¶¶ 44–46); (2) began a secretive effort to keep Plaintiffs "in the dark" about Brown's acceptance of employment with Sasser, (Am. Compl. ¶¶ 55–58); (3) concealed its conduct and Brown's plan to work for it, asking "Brown to gather information about which BluSky Restoration employees Brown believed he and Sasser could persuade to leave their employment," (Am. Compl. ¶ 105; *see also* Am. Compl. ¶ 117 ("Sasser used non-public information that Brown was uniquely positioned to have because of his employment with BluSky Restoration to induce at least one BluSky employee other than Brown

to move. Sasser did so knowing that Brown's actions were unlawful . . . .")); and (4) otherwise acted with the intent to harm and disadvantage Plaintiffs, (Am. Compl. ¶¶ 56, 110, 189, 205).

65. Reading these allegations in the light most favorable to Plaintiffs, there is at least a question this stage as to whether Sasser's actions were related to its legitimate interest in competition or were done to harm Plaintiffs. *See K&M Collision*, 2017 NCBC LEXIS 109, at *22. The Court cannot conclude that the Amended Complaint admits facts that would justify a dismissal of Counts One and Three at this stage. Therefore, the Court **DENIES** the Motion as to Count One and Count Three for tortious interference with contract.

2. Count Two: Tortious Interference with Prospective Economic Advantage

66. BluSky Restoration alleges that Sasser, through Figueroa as its COO, instructed Brown not to sign the proposed part-time employment agreement with BluSky Restoration. (Am. Compl. ¶¶ 195–98.) BluSky Restoration further alleges, on information and belief, that Brown did not enter into the proposed agreement because of that instruction. (Am. Compl. ¶¶ 201–02.) Plaintiffs allege that Sasser did so "in a deliberate effort to impair, if not prevent, BluSky from performing regulated work without BluSky having adequate time to find replacement license holders and qualifiers and to delay and impede BluSky from transitioning licenses for its operations." (Am. Compl. ¶ 204.)

67. Sasser argues, in relevant part, that Count Two fails because BluSky Restoration has not alleged that Sasser was the "but-for" cause of Brown deciding not

to sign the part-time employment agreement, and because BluSky Restoration failed to adequately allege that it was damaged by Sasser's interference.[2] (Mot. 2–3; *see* Br. Supp. 2–3, 13–14.) In response, Plaintiffs contend that BluSky Restoration is not required to allege that Sasser was the but-for cause of its harm and that it has adequately alleged at least nominal damages. (Br. Opp. 11–12.)

68. "[A] fundamental element of a claim for tortious interference with prospective economic advantage is that 'a contract would have resulted but for defendant's malicious intervention.' " *AYM Techs., LLC. v. Rodgers*, 2018 NCBC LEXIS 14, at *51 (N.C. Super. Ct. Feb. 9, 2018) (quoting *Beverage Sys. of the Carolinas, LLC v. Assocs. Bev. Repair, LLC*, 368 N.C. 693, 701 (2016)). "[A] plaintiff's mere expectation of a continuing business relationship is insufficient to establish such a claim." *Beverage Sys.*, 368 N.C. at 701. And, "[c]onclusory allegations that track the elements of a tortious interference claim alone are insufficient to state a legally sufficient claim for tortious interference." *Se. Anesthesiology Consultants, PLLC v. Rose*, 2019 NCBC LEXIS 52, at *33 (N.C. Super. Ct. Aug. 20, 2019) (cleaned up).

69. Here, BluSky Restoration alleges, "[o]n information and belief, [that] but for Sasser's interference, including its instructions on November 16, 2021 and November 22, 2021, BluSky [Restoration] and Brown would have entered into the Proposed Agreement for Brown to continue limited employment with BluSky

[2] The Court notes that nominal damages will suffice. *See rFactr, Inc. v. McDowell*, 2023 NCBC LEXIS 18, at *16 (N.C. Super. Ct. Jan. 27, 2023) ("North Carolina law recognizes that nominal damages may be awarded on tortious interference claims.").

[Restoration] for purposes of transitioning the licenses." (Am. Compl. ¶ 203.) These allegations are sufficient to state a claim.

70. In *Building Center, Inc. v. Carter Lumber, Inc.*, the Court determined that alleging that plaintiff "*reasonably expected* that, but for Defendants' conduct, its business relationships with its customers would have continued and grown[,]" was insufficient at the Rule 12 stage to allege that a contract would have ensued. 2016 NCBC LEXIS 79, at *29 (N.C. Super. Ct. Oct. 21, 2016) (cleaned up) (emphasis added). The Court dismissed the claim because an expectation of a continued relationship was not sufficient to plead that a contract would have resulted but for defendant's malicious intervention. *Id.*

71. But here, viewing the pleadings in the light most favorable to the nonmovants, BluSky Restoration alleges more than a mere expectation. It has sufficiently identified the contract at issue and alleges that Sasser's conduct was the but-for cause of Brown declining to enter into the proposed part-time employment agreement.[3] At this stage, the Court determines that BluSky Restoration's pleading in Count Two is minimally sufficient.

[3] While BluSky Restoration's pleading of this claim is less than ideal given that causation is alleged "on information and belief," the Court is mindful that "[o]ur courts have rejected the notion that allegations made 'upon information and belief' are insufficient to state a claim when challenged under Rule 12(b)(6)." *Husqvarna Pro. Prods., Inc. v. Robin Autopilot Holdings, LLC*, 2023 NCBC LEXIS 172, at **11–12 (N.C. Super. Ct. Dec. 22, 2023); *see also Governor's Club Inc. v. Governors Club Ltd. P'ship*, 152 N.C. App. 240, 247–48 (2002) (considering allegations of a fiduciary duty made on information and belief and determining that the breach of fiduciary duty claim was sufficiently pled to survive a motion for judgment on the pleadings).

72. Therefore, the Court **DENIES** the Motion as to Count Two for tortious interference with prospective economic advantage.

B. Counts Four, Five, and Six: The Conspiracy Claims

73. Sasser argues that Plaintiffs' Counts Four, Five, and Six fail because "Plaintiffs allege no underlying tort claims for breach of fiduciary duty, fraudulent concealment, or fraud against Sasser or Brown," either in this case or in the Brown Litigation. (Mot. 3; Br. Supp. 3, 18–20.) Plaintiffs take the position that pleading predicate torts as standalone claims is not required. (Br. Opp. 1, 16.) Thus, the issue presented is whether Plaintiffs were required to plead standalone claims for breach of fiduciary duty, fraudulent concealment, and fraud against Sasser and/or Brown for the conspiracy claims to survive the Motion.

74. Civil conspiracy requires "(1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme." *Strickland v. Hedrick*, 194 N.C. App. 1, 19 (2008) (quotation omitted). It is well established that there "is no independent cause of action for civil conspiracy. Only where there is an underlying claim for unlawful conduct can a plaintiff state a claim for civil conspiracy by also alleging the agreement of two or more parties to carry out the conduct and injury resulting from that agreement." *Toomer v. Garrett*, 155 N.C. App. 462, 483 (2002) (citations omitted). Put differently, civil conspiracy "requires a separate, underlying tort." *New Restoration & Recovery Servs., LLC v. Dragonfly Pond Works, LLC*, 2023 NCBC

LEXIS 80, at **23 (N.C. Super. Ct. June 15, 2023). This is "[b]ecause conspiracy is a mode of liability rather than a cause of action," and as a result, "it is derivative of the other claims against a party, and if the other claims fail, so does the conspiracy claim." *Fox v. Fox*, 283 N.C. App. 336, 347 (2022).

75. In sum, "[c]ivil conspiracy is a dependent claim." *BDM Invs. v. Lenhil, Inc.*, 264 N.C. App. 282, 300 (2019) (citing *Toomer*, 155 N.C. App. at 483).

76. However, our State's caselaw also provides that "[i]n order to maintain a civil conspiracy claim, the underlying unlawful conduct need not be separately stated; this Court reviews all sections of a complaint as to allegations to support such a claim." *BDM Invs.*, 264 N.C. App. at 300. This is not, however, a widely cited proposition. *See Bradshaw v. Maiden*, 2022 N.C. App. LEXIS 950, at **64–65 (2022) (Murphy, J. dissenting) (unpublished) (citing this proposition only in the dissenting opinion).

77. Rather, the bulk of our caselaw appears to deal with conspiracy claims that rely on a separately stated claim for wrongful conduct. For instance, Plaintiffs might allege fraud by Figueroa as an agent of Sasser and then allege conspiracy to commit fraud against Sasser for Figueroa's wrongful conduct, if there was an agreement between Figueroa and Brown to commit the wrongful act of fraud. As further support for Defendant's interpretation, this Court recently held that "to the extent Plaintiff attempts a conspiracy claim based on fraud, *it must be dismissed because no fraud claim has yet been pled*." *Hartsell v. Mindpath Care Ctrs.*, 2022 NCBC LEXIS 27, at *16 (N.C. Super. Ct. Apr. 8, 2022) (emphasis added).

78. Further, it has long been the practice of this Court and our State's higher courts to dismiss conspiracy claims where the claim for underlying wrongful conduct is dismissed, suggesting that where there is no standalone tort claim to accompany the conspiracy claim, the conspiracy claim must fail. *See, e.g., Krawiec v. Manly*, 370 N.C. 602, 615 (2018) (affirming the trial court's dismissal of the conspiracy "claim" because plaintiffs did not plead any wrongful acts done in furtherance of the conspiracy because they failed to plead a successful underlying claim); *Fox*, 283 N.C. App. at 347 (determining that the trial court did not err in dismissing the conspiracy claim because the underlying claims against that defendant failed and were therefore dismissed); *USA Trouser, S.A. de C.V. v. Williams*, 258 N.C. App. 192, 201 (2018) ("A civil conspiracy claim *must* be based on an adequately pled underlying claim." (emphasis added)); *Rockingham Cty. v. NTE Energy, LLC*, 2024 NCBC LEXIS 55, at **23–24 (N.C. Super. Ct. Apr. 15, 2024) (stating that "civil conspiracy must be alleged in conjunction with an underlying claim for unlawful conduct" and the complaint was devoid of allegations beyond conclusory assertions of wrongdoing); *Worley v. Moore*, 2017 NCBC LEXIS 15, at *78 (N.C. Super. Ct. Feb. 28, 2017) (dismissing civil conspiracy claim because allegation that defendants "agreed, colluded and conspired among themselves . . . to defraud Plaintiffs, which scheme or artifice included fraudulent inducement, constructive fraud, and common law fraud" was merely a legal conclusion); *Barefoot v. Barefoot*, 2022 NCBC LEXIS 8, at *34 (N.C. Super. Ct. Feb. 2, 2022) ("Because the Court has determined that all of [the] underlying claims must be dismissed, those claims cannot provide a basis for [the] civil conspiracy

claim."); *but see, e.g., New Restoration*, 2023 NCBC LEXIS 80, at **23 (where the misappropriation of trade secrets claim survived dismissal, the Court permitted the civil conspiracy claim to go forward as well).

79. Here, Plaintiffs allege three standalone claims for conspiracy against Sasser. Plaintiffs have not pled standalone claims for breach of fiduciary duty against Brown, who the Court notes is not a party here; fraudulent concealment or omission against Brown and/or Sasser; or fraud against Brown and/or Sasser. As described in this section, conspiracy is not an independent cause of action and will fail when not supported by an adequately pled standalone tort claim against a party. Therefore, the Court hereby **GRANTS** in part the Motion and **DISMISSES** Counts Four, Five, and Six for conspiracy without prejudice.[4]

C. Count Eight: Injunctive Relief

80. Plaintiffs' Count Eight requests permanent injunctive relief enjoining Sasser from (1) any future misappropriation of Plaintiffs' trade secrets, and (2) engaging in or encouraging Brown to violate the restrictive covenants at issue. (*See* Am. Compl. ¶¶ 311–12, 317.)

81. Injunctive relief "is an ancillary remedy, not an independent cause of action." *Revelle v. Chamblee*, 168 N.C. App. 227, 230 (2005). It is well-settled that "injunctive relief is not a standalone claim[.]" *Window World of St. Louis, Inc. v.*

[4] Notwithstanding the Court's conclusions that this claim should be dismissed, "[t]he decision to dismiss an action with or without prejudice is in the discretion of the trial court[.]" *First Fed. Bank v. Aldridge*, 230 N.C. App. 187, 191 (2013). The Court concludes, in the exercise of its discretion, that dismissal of Plaintiffs' Counts Four, Five, and Six should be without prejudice to Plaintiffs' right to attempt to reassert such claims through proper allegations by way of a motion to amend.

Window World of Bloomington, Inc., 2021 NCBC LEXIS 88, at **15 (N.C. Super. Ct. Oct. 6, 2021).

82. The Court therefore **GRANTS** the Motion as to Count Eight for permanent injunctive relief, and it is hereby **DISMISSED** without prejudice to Plaintiffs' right to seek appropriate injunctive relief later. *Lendingtree, LLC v. Intercontinental Capital Grp., Inc.*, 2017 NCBC LEXIS 54, at **16–17 (N.C. Super. Ct. June 23, 2017) (granting defendants' motion to dismiss and construing the claim as a request to file an appropriate motion during the litigation).

VI. CONCLUSION

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

a. The Motion is **GRANTED** as to Counts Four, Five, Six, and Eight and those claims are hereby **DISMISSED** without prejudice; and

b. The Motion is otherwise **DENIED**.

IT IS SO ORDERED, this the 9th day of August, 2024.

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