LFF IV Timber Holding LLC v. Heartwood Forestland Fund IV, LLC, 2024 NCBC 58.

STATE OF NORTH CAROLINA ORANGE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23 CVS 1176
LFF IV TIMBER HOLDING LLC and LYME MOUNTAINEER TIMBERLANDS II LLC, Plaintiffs, v. HEARTWOOD FORESTLAND FUND IV, LLC; HEARTWOOD FORESTLAND FUND IV LIMITED PARTNERSHIP; and HEARTWOOD FORESTLAND ADVISORS IV, LLC, Defendants.	**ORDER AND OPINION ON DEFENDANTS' MOTIONS TO DISMISS**

THIS MATTER is before the Court on Defendant Heartwood Forestland Fund IV, LLC ("Heartwood Fund") and Heartwood Forestland Fund IV Limited Partnership's ("Heartwood LP") Motion to Dismiss Plaintiffs' Complaint ("First Motion," ECF No. 31), and Defendant Heartwood Forestland Advisors IV, LLC's ("Heartwood GP") Motion to Dismiss Plaintiffs' Complaint ("Second Motion," ECF No. 34) (collectively, the "Motions").[1]

THE COURT, having considered the Motions, the parties' briefs, the arguments of counsel, the applicable law, and all appropriate matters of record, **CONCLUDES** that the Motions should be **GRANTED** in part and **DENIED** in part as set forth below.

Robinson, Bradshaw & Hinson, P.A., by Edward F. Hennessey, IV, Garrett Steadman, and Andrew R. Wagner, for Plaintiffs LFF IV Timber Holding LLC and Lyme Mountaineer Timberlands II LLC.

[1] Both of the Motions are based on substantively identical arguments. Therefore, the Court does not differentiate in this Opinion between the First Motion and the Second Motion.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Michael W. Mitchell and John E. Harris, and Susman Godfrey, LLP, by Alexander Kaplan, Krisina Janaye Zuniga, Julia Risley, Geoffrey Harrison and John McCauley, and Eversheds Sutherland LLP, by Timothy McCaffrey, for Defendants Heartwood Forestland Fund IV LLC and Heartwood Forestland Fund IV Limited Partnership.

Womble Bond Dickenson LLP, by Patrick Grayson Spaugh, Sarah Motley Stone, and Peyton Poston, for Defendant Heartwood Forestland Advisors IV, LLC.

Davis, Judge.

INTRODUCTION

1. This case involves claims for indemnification by the purchaser of several large timberlands against the sellers of the property. In a nutshell, the purchaser contends that the sellers overstated carbon stocking data regarding the timberlands to a state agency in connection with a "carbon cap-and-trade" program, thereby exposing the purchaser to millions of dollars in potential liability. The sellers seek dismissal of this action in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

2. The Court does not make findings of fact in connection with a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and instead recites those facts contained in the complaint (and in documents attached to, referred to, or incorporated by reference in the complaint) that are relevant to the Court's determination of the motion. *See, e.g.*, *Window World of Baton Rouge, LLC v. Window World, Inc.*, 2017 NCBC LEXIS 60, at *11 (N.C. Super. Ct. July 12, 2017).

3. Plaintiffs LFF IV Timber Holding LLC and Lyme Mountaineer Timberlands II LLC (collectively, "Lyme") are companies that purchase and operate timber investment properties in several states. (Defs.' Br. Supp. Mot. Dismiss Pls.' Compl., ECF No. 32, at 5–6).

4. Lyme is organized under Delaware law and has its principal offices in New Hampshire. (Compl. ¶¶ 2–3, ECF No. 3.)

5. Defendant Heartwood LP is also in the timberland business. The company is organized as a limited partnership under North Carolina law and has its principal address in Orange County, North Carolina. (Compl. ¶ 4.)

6. Prior to a merger discussed below, Defendant Heartwood GP served as Heartwood LP's general partner. (Compl. ¶ 5.) Heartwood GP is a limited liability company that is organized under North Carolina law and headquartered in Orange County. (Compl. ¶ 5.) Lyme asserts that as Heartwood LP's general partner, Heartwood GP is jointly and severally liable with Heartwood LP for the claims Lyme has asserted in this action. (Compl. ¶ 5.)

7. At all relevant times, Heartwood GP had a single manager, The Forestland Group, LLC ("Forestland Group"). Forestland Group is a North Carolina limited liability company based in Orange County, North Carolina. (Compl. ¶ 6.)

8. On 25 October 2022, Heartwood LP merged with a company called Anew Merger Sub IV, LLC, a Delaware limited liability company. The surviving entity upon completion of the merger was Heartwood LP, which at the time was still a North

Carolina-organized limited partnership, but is now principally based in Cottonwood Heights, Utah. (Compl. ¶ 7.)

9. That same day, Heartwood LP converted to Heartwood Fund, a Delaware limited liability company with a mailing address in Cottonwood Heights, Utah. (Compl. ¶ 8.) According to Lyme's Complaint, Heartwood Fund has either "succeeded to all liability to Lyme held by [Heartwood LP]" or "shares such liability jointly and severally with [Heartwood LP]." (Compl. ¶ 8.)[2]

10. Prior to December 2017, Heartwood owned approximately 97,323 acres of timberland stretching across Wyoming, McDowell, and Logan counties in West Virginia (the "Property"). (Compl. ¶¶ 23, 32.)

11. On 23 March 2015, Heartwood voluntarily enrolled the Property in a "carbon cap-and-trade" program operated by the State of California's Air Resources Board ("ARB"). (Compl. ¶¶ 1, 23.)

12. The Complaint explains, as background information, how the ARB's carbon cap-and-trade program is part of a larger market for "carbon offsets." Carbon offsets are "tradeable credits representing a reduction in emissions of one metric ton of greenhouse gas, generally carbon dioxide." (Compl. ¶ 12.) An emitter can use carbon offset credits to comply with "[environmental] regulatory requirements or to voluntarily achieve its emission reduction goals." (Compl. ¶ 12.)

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[2] For ease of reading and in an effort to avoid losing the forest for the trees, this Opinion hereafter refers to Heartwood LP, Heartwood GP, Heartwood Fund, and Forestland Group collectively as "Heartwood."

13. Timberland owners such as Heartwood are able to earn carbon offset credits through the ARB's cap-and-trade program "by agreeing to cap future [timber] harvesting activity" on their properties. (Compl. ¶ 14.) Consequently, carbon offset credits serve as valuable economic incentives to reduce a timberland owner's carbon footprint. (Compl. ¶ 14.)

14. To begin earning carbon offset credits through the ARB's cap-and-trade program, a timberland owner must first take several steps. (Compl. ¶ 15.) These include (1) making "a full inventory of [the timberland owner's] property's carbon stocking"; (2) allowing an ARB-approved third party to verify the accuracy of the inventory; (3) allowing "[a] private third-party registry . . . [to confirm] . . . the proposed carbon project's compliance with its standards"; and ultimately, (4) seeking registration of the timberland owner's property as a "carbon project" with the ARB. (Compl. ¶¶ 15–16.)

15. Once the ARB designates a property as a "carbon project," it will grant that property's owner an "initial issuance" of carbon offset credits. (Compl. ¶ 16.) According to the Complaint, "[t]he initial issuance generally represents the largest issuance of carbon offsets, and the largest revenue event, for an ARB-administered carbon project." (Compl. ¶ 16.) Shortly thereafter, the carbon offset credits are deposited into the property owner's ARB-administered account, which is akin to a "bank debit account for carbon offsets." (Compl. ¶ 16.)

16. Participation in the ARB's cap-and-trade program necessarily requires a timberland owner to subject itself to the ARB's oversight, which continues for at

least 100 years following the initial issuance of carbon offset credits. (Compl. ¶ 17.) During that century-long period, the current owner of the carbon project property is referred to as the Offset Project Operator ("OPO"). (Compl. ¶ 17.)

17. An OPO is tasked with submitting annual reports (known as "desktop reports"), which document the levels of carbon that are stored on the subject property. (Compl. ¶ 18.) Additionally, every seven years, the OPO must conduct a "reverification" process and submit a reverification report, which includes a complete re-inventorying of carbon stocks. (Compl. ¶ 20.)

18. An OPO's "desktop" and "reverification" reports may occasionally reflect increases in the amount of carbon stored on the project property since the date of the ARB's initial issuance, in which case the ARB will issue additional carbon offset credits to account for any increases in carbon stockage. (Compl. ¶ 19.) Conversely, if the amount of carbon stored on the OPO's property decreases below levels recorded at the time of the initial issuance (or any subsequent issuances), that property will incur a "reversal of some or all of the previous credit issuances." (Compl. ¶ 21.)

19. If a reversal is caused by factors outside of the OPO's control—such as natural disasters that affect carbon stocks on the OPO's property—the ARB will deem that reversal to be "unintentional," and may issue replacement carbon offset credits to compensate for any losses. (Compl. ¶ 22.) However, if a reversal is caused by factors within the OPO's control, the ARB will consider it an "intentional" reversal and may impose penalties, including a requirement that the OPO purchase additional carbon offset credits in order to rectify any deficiencies. (Compl. ¶ 22.)

20. One type of intentional reversal (the type alleged by Lyme in this lawsuit) is that resulting from an overstatement of carbon stocks on the property at issue. (Compl. ¶ 22.)

21. In anticipation of participating in the ARB's cap-and-trade program, Heartwood hired a third party to begin the process of conducting an initial inventory of the carbon stocks on its Property in 2014 (the "Initial Inventory"). (Compl. ¶ 24.)

22. Upon completing the Initial Inventory in 2015, Heartwood submitted an Initial Report—which is attached as Exhibit A to Lyme's Complaint—to the ARB. (Compl. ¶ 25; Ex. A.) This Initial Report summarized information about the carbon stocks present on the Property during the period of time between 23 March 2015 and 23 September 2015. This period is referred to as "Reporting Period 1," or "RP1." (Compl. ¶ 25.)

23. In its Complaint, Lyme has alleged that the carbon levels listed in the Initial Report were "significantly overstated." (Compl. ¶ 26.)

24. Heartwood received its initial issuance of carbon offset credits from the ARB on 23 May 2017, and the Property was officially enrolled as a "carbon project" (the "Wyoming Project"). (Compl. ¶ 27.) That initial issuance of credits was based upon the carbon levels reflected in the Initial Report.

25. Heartwood subsequently provided the ARB with a second report "quantifying the purported quantity of additional carbon sequestered during the Carbon Project's second reporting period ("RP2")." (Compl. ¶ 28.) RP2 encompassed the period of time between 24 September 2015 and 23 September 2016. (Compl. Ex.

B, at 2.)[3] The ARB subsequently issued additional carbon offsets to Heartwood based upon this second report. (Compl. ¶ 28.)

26. All in all, the ARB issued a total of 4,765,002 carbon offset credits for RP1 and RP2. Those credits were allegedly worth over $50 million. (Compl. ¶ 29.)

27. In or around 2016, Heartwood invited Lyme to purchase portions of its timberland, including the Property encompassing the Wyoming Project. (Compl. ¶ 30.)

28. On 20 July 2017, the parties entered into a Contract for the Purchase and Sale of Property (the "PSA"), pursuant to which Heartwood agreed to sell to Lyme 182,476 acres of timberland across West Virginia, Kentucky, and Pennsylvania, including the land encompassing the Wyoming Project (the "2017 Transaction"). (Compl. ¶ 31.) At or around that same time, the parties executed a series of special warranty deeds reserving to Heartwood the rights to all carbon offset credits that were attributable through the end of RP2, including the full initial issuance of credits from the ARB. (Compl. ¶ 33.)

29. Over the following months, the parties executed several amendments to the PSA. The most relevant amendment to the PSA for purposes of this lawsuit is the Fourteenth Amendment (ECF No. 33.3), which is discussed in more detail below.

30. The parties officially closed the 2017 Transaction on 18 December 2017 (the "Closing Date"). (Compl. ¶ 32.)

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[3] The remaining reporting period referenced in the Complaint ("RP3") lasted from 24 September 2016 until 23 September 2017. (Compl., Ex. B, at 3.)

31. Pursuant to the terms of the Fourteenth Amendment to the PSA and as a part of the 2017 Transaction, Lyme and Heartwood executed a "Carbon Cooperation Agreement" (the "Wyoming CCA")[4], with respect to the Wyoming Project. (Compl. ¶ 34, Ex. B.) The Wyoming CCA provided—among other things—that Lyme would ultimately "step into Heartwood's shoes" as the Wyoming Project's OPO once certain conditions were met. (Wyo. CCA § 2(d); Compl. ¶ 34.) Once Lyme became the OPO, Lyme would officially become the party answerable to the ARB regarding the Wyoming Project. (Compl. ¶ 36.)

32. Notably, the Wyoming CCA also contained indemnity provisions, which are at the core of this lawsuit. (Wyo. CCA § 9.)

33. At some point, Lyme took over for Heartwood as OPO for the Wyoming Project (the "OPO Change Date").[5] (Compl. ¶ 35.)

34. During the intervening period between the Closing Date and the OPO Change Date, Heartwood continued to submit annual "desktop" reports to the ARB pursuant to Section 2(b) of the Wyoming CCA. (Tr., at 13.)

35. Following the OPO Change Date, Lyme began submitting its own "desktop" reports to the ARB through 2021, although—unbeknownst to Lyme—these

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[4] The parties also entered into a second Carbon Cooperation Agreement, (the "Buffalo CCA," ECF No. 33.2), in connection with another ARB carbon project pertaining to an entirely separate property purchased by Lyme. Unlike the Wyoming CCA (which serves as the basis for Lyme's indemnification claims in this action), the Buffalo CCA is not at issue in this lawsuit.

[5] The precise OPO Change Date is unclear from the Complaint, although at the hearing on the Motions the attorneys estimated that it occurred during "the second quarter of 2018." (Tr., at 6–7.)

reports were based upon the alleged overstatements contained in the carbon inventories that had been previously submitted by Heartwood. (Compl. ¶ 39.)

36. In or around 2023, in anticipation of the next seven-year "reverification" report, Lyme commissioned a new physical inventory of the Property (the "Updated Inventory"). (Compl. ¶ 40.)

37. According to Lyme, the results of the Updated Inventory reflected carbon stocks that were "significantly below what the annual desktop inventories had modeled, resulting in a reversal" (the "2023 Reversal"). (Compl. ¶ 41.)

38. On 1 June 2023, Lyme notified the ARB of the 2023 Reversal. (Compl. ¶ 42.)

39. Lyme asserts that as a result of the 2023 Reversal, it has incurred—or will incur—the following expenses and costs:

> [O]ut-of-pocket legal, investigative, and other costs relating to the Updated Inventory, the 2023 Reverification and the 2023 Reversal and their implications; [c]osts in relation to engagement with the ARB in respect of the 2023 Reverification and the 2023 Reversal; [c]osts to purchase carbon offsets to resolve the 2023 Reversal; [c]osts associated with the ongoing management of the Property based on the lower carbon stocking (i.e. the need to maintain additional carbon stocking from new growth moving forward or to limit harvests from what had been represented to Lyme as acceptable harvest levels); and [c]osts in the course of efforts to pursue as against Defendants its rights under the [indemnification provisions of the Wyoming CCA].

(Compl. ¶ 44.)

40. Lyme initiated this action by filing a Complaint in Orange County Superior Court on 20 October 2023. In its first four claims, Lyme asserted causes of action against Heartwood for declaratory and monetary relief with respect to Heartwood's alleged duty to indemnify Lyme pursuant to the terms of the Wyoming

CCA for its current and future losses resulting from the reversal. (Compl. ¶¶ 47–56.) In its fifth claim, Lyme pled a claim for unjust enrichment. (Compl. ¶ 57–60.)

41. This matter was designated as a mandatory complex business case and assigned to the undersigned on 23 October 2023. (ECF Nos. 1, 2.)

42. Heartwood Fund and Heartwood LP filed their respective Motions on 20 December 2023.

43. The Court held a hearing on the Motions on 26 June 2024 at which all parties were represented by counsel.

44. The Motions have been fully briefed and are ripe for resolution.

LEGAL STANDARD

45. In ruling on a motion to dismiss under Rule 12(b)(6), the Court may only consider the pleading and "any exhibits attached to the [pleading,]" *Krawiec v. Manly*, 370 N.C. 602, 606 (2018), in order to determine whether "as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some recognized legal theory." *Forsyth Mem'l Hosp., Inc. v. Armstrong World Indus., Inc.*, 336 N.C. 438, 442 (1994) (cleaned up). The Court must view the allegations in the complaint "in the light most favorable to the non-moving party." *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5 (2017) (cleaned up).

46. "It is well established that dismissal pursuant to Rule 12(b)(6) is proper when '(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good

claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.' " *Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 615 (2018) (quoting *Wood v. Guilford Cty.*, 355 N.C. 161, 166 (2002)).

ANALYSIS

47. The bulk of the arguments in Heartwood's briefs are based on its assertion that neither of the two indemnification provisions in the Wyoming CCA relied upon by Lyme apply to any overstatement of carbon deposits Heartwood may have made in its Initial Inventory. This is so, Heartwood argues, because the indemnification provisions only apply to events that occurred *after* the Closing Date. (Defs.' Br. Supp. Mot. Dismiss Pls.' Compl., at 3–4, 13–14, 24–26.)

48. Before delving into the specific arguments raised by the parties on this topic, the Court will address three threshold issues.

49. First, the Court must determine which of the various documents discussed by the parties in their respective briefs it is permitted to consider on the present Motions.

50. In addressing a Rule 12(b)(6) motion, the Court "can reject allegations that are contradicted by the documents attached [to], specifically referred to, or incorporated by reference in[,] the complaint." *Moch v. A.M. Pappas & Assocs., LLC*, 251 N.C. App. 198, 206 (2016) (quoting *Laster v. Francis*, 199 N.C. App. 572, 577 (2009)). Moreover, the Court "may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App.

52, 60 (2001) (citing *Robertson v. Boyd*, 88 N.C. App. 437, 441 (1988)). The Court is permitted to consider such documents without converting the Rule 12(b)(6) motion to dismiss into a motion for summary judgment under Rule 56. *Schlieper v. Johnson*, 195 N.C. App. 257, 261 (2009).

51. However, consideration of any other types of documents on a Rule 12(b)(6) motion is improper, as "[p]erhaps the most fundamental concept of motions practice under Rule 12 is that evidence outside the pleadings cannot be considered in determining whether the complaint states a claim on which relief can be granted." *Vanguard Pai Lung, LLC v. Moody*, 2019 NCBC LEXIS 39, at *10 (N.C. Super. Ct. June 19, 2019) (cleaned up).

52. Here, neither party disputes the fact that the Court can properly consider the PSA, the Fourteenth Amendment to the PSA, and the Wyoming CCA.

53. The only point of contention on this subject relates to the Buffalo CCA. Heartwood submits that consideration of this document is proper because it was executed at the same time as the other documents referenced in the Complaint. (Defs.' Reply Br. Supp. Mot. Dismiss Pls.' Compl., ECF No. 47, at 9.) However, because the Buffalo CCA is neither attached to the Complaint nor expressly referenced therein, the Court declines to consider it in connection with the present Motions.

54. Second, Heartwood contends that the Complaint is impermissibly vague and that Lyme should be required to file a more detailed recitation of its claims. (Defs.' Br. Supp. Mot. Dismiss Pls.' Compl., at 4, 12, 21–24.)

55. It is well-settled that North Carolina is a notice pleading state, meaning that, as a general proposition, claims pled in a complaint

> 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 Envt'l. LLC v. A&D Holdings, Inc., 2018 NCBC LEXIS 13, at *77–78 (N.C. Super. Ct. Feb. 9, 2018).

56. Here, although the Complaint is quite specific in all other respects as to the factual background of the parties' dispute and the provisions of the Wyoming CCA under which Lyme seeks indemnification, it is admittedly short on specifics as to the actual overstatement by Heartwood of the carbon estimates at issue that forms the basis for its indemnification request. The most relevant allegations in the Complaint on this subject merely state as follows:

> Upon information and belief, the Initial Inventory significantly overstated the carbon stocking on the property.
>
> . . .
>
> The Updated Inventory indicated that carbon stocks were significantly below what the annual desktop inventories had modeled, resulting in a reversal[.]

(Compl. ¶¶ 26, 41.)

57. Lyme has also attached as Exhibit A to the Complaint the Initial Report that was submitted to the ARB by Heartwood—a document technically captioned the "U.S. Forest Offset Project Data Report"—which contains numerical data that allegedly reflects the overstatements at issue. (Compl., Ex A.)

58. The Court finds that Lyme's Complaint meets North Carolina's notice pleading standard. The Complaint (and its attachments) sufficiently put Heartwood on notice as to the nature of Lyme's claims and the specific provisions of the Wyoming CCA under which it seeks indemnity.

59. Read as a whole, the Complaint alleges that Heartwood's Initial Inventory submitted to the ARB contained overstated carbon estimates (as set forth in the Initial Report), that the ARB relied on those estimates in issuing carbon offset credits to Heartwood for which it received millions of dollars, and that Lyme (as the purchaser of the Property) will be held liable for the consequences of the 2023 Reversal resulting from Heartwood's overstatements so as to trigger the indemnification provisions of the Wyoming CCA.

60. We have previously observed that "stating a claim for breach of contract is a relatively low bar." *Vanguard Pai Lung, LLC*, 2019 NCBC LEXIS 39, at *11. Although Lyme will, of course, have to make a more detailed showing at later stages of this litigation, the Court concludes that its allegations are sufficient to pass muster under Rule 12(b)(6). *See, e.g.*, *Dunn Holdings I, Inc. v. Confluent Health LLC*, 2018 NCBC LEXIS 215, at *12–13 (N.C. Super. Ct. Dec. 10, 2018) (finding that when a

complaint alleges each of the elements of the claim pled therein, "it is error to dismiss . . . [that claim] . . . under Rule 12(b)(6).") (cleaned up).

61. Third, Heartwood contends that the overstatements alleged by Lyme, if proven, would have resulted simply from pure *estimates* of carbon deposits by Heartwood and that mere estimates (even if later proven to be incorrect) cannot form the basis for the indemnification Lyme is seeking. (Defs.' Br. Supp. Mot. Dismiss Pls.' Compl., at 23.)

62. However, the Court rejects this argument as well—at least at the current pleadings stage of this case. Lyme has asserted that the "estimates" were made under oath and formed the basis for the ARB's issuance of credits to Heartwood worth millions of dollars. (Pls.' Br. Responding Jointly Defs.' Mots. Dismiss, ECF No. 43, at 21.) Therefore, Heartwood's attempt to minimize the formality of the carbon data information it provided to the ARB is not sufficient to warrant dismissal of Lyme's Complaint.

63. Having resolved these threshold issues, the Court next addresses Lyme's indemnification claims and then its unjust enrichment claim.

A. Indemnification Claims

64. The Wyoming CCA sets out various terms regarding the rights and obligations of Heartwood and Lyme in connection with the Wyoming Project. Section 9(b) of the Wyoming CCA contains four provisions setting out the indemnity obligations of Heartwood toward Lyme. Two of those provisions—sections 9(b)(i) and

(iii)—form the basis for Lyme's arguments in this case. Those two provisions (along with the introductory language of Section 9(b)) state, in relevant part, as follows:

> b. **[Heartwood] Indemnities.** [Heartwood] shall indemnify, defend and hold [Lyme] and [Lyme]'s affiliates and their respective members, managers, partners, officers, directors, employees, shareholders, and agents (collectively, the "[Lyme] Indemnified Parties") harmless from and against any and all liabilities, losses, damages, claims, costs, fees, penalties, charges, assessments, taxes, fines or expenses (including reasonable and actual attorneys' fees, investigation costs and all other reasonable costs and expenses actually incurred) (collectively, "Costs") and any actions or proceedings in connection therewith, arising out of or in connection with:
>
> i. Any reversal or invalidation of the Reserved Carbon Credits due to: (y) any act or omission by [Heartwood] occurring or which should have occurred prior to the OPO Change Date with respect to the Property; or (z) [Heartwood]'s willful failure to carry out its obligations under this Agreement, except to the extent such failure results from the negligence or willful act or omission of any of the [Lyme] Indemnified Parties;
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> . . .
>
> iii. [Heartwood]'s breach of the representation and warranty contained in Section 2.e. of this Carbon Cooperation Agreement or of any representation or warranty made by [Heartwood] as OPO in any Reserved Offset Period Submissions or any RP3 Submissions[.]

(Wyo. CCA § 9(b)(i), (iii).)

65. The crux of the parties' dispute in this case largely concerns whether Lyme is entitled to indemnity from Heartwood for losses attributable to events occurring before the Closing Date. (Lyme says yes and Heartwood says no.)

66. Heartwood insists that the Wyoming CCA was purely "forward-looking"—that is, solely intended to set out the parties' rights and obligations from the Closing Date until the OPO Change Date. (Defs.' Br. Supp. Mot. Dismiss Pls.'

Compl., at 13–14, 24–26.) Lyme acknowledges that the rights and duties of the parties during the period when Lyme was the owner of the Property yet Heartwood remained the OPO were among the key subjects addressed in the Wyoming CCA. Nevertheless, Lyme contends, certain provisions of the Wyoming CCA also govern conduct occurring *before* the Closing Date and that the two above-quoted indemnification provisions fall into this category. Lyme further asserts that when the parties intended for a particular provision of the Wyoming CCA to apply only to future conduct, they used specific language to make their intentions clear, but did not do so in sections 9(b)(i) and (iii). (Pls.' Br. Responding Jointly Defs.' Mots. Dismiss, at 13–16.)

67. Each party tries to put a favorable spin on the fact that the original version of the PSA included a Schedule 9(d) that would have expressly allowed indemnification for pre-Closing Date conduct but was ultimately deleted pursuant to the Fourteenth Amendment to the PSA and replaced by the Wyoming CCA. (Fourteenth Am. § 4.) Schedule 9(d) stated, in relevant part, as follows:

> 5. [Heartwood] shall indemnify [Lyme] and any purchaser of carbon offsets *attributable to the period prior to the Closing Date* for losses incurred as a result of a reversal or invalidation, and shall be responsible for actions or obligations (including without limitation costs incurred or resources expended by [Lyme] in connection with any ARB investigation) arising from such reversal or invalidation, *due to any act or omission occurring or which should have occurred prior to the Closing*, or arising out of the [Heartwood] OPO Responsibilities.

(Schedule 9(d), ECF No. 43.1 (emphasis added).)

68. Lyme argues that the presence of Schedule 9(d) in the PSA (before the parties ultimately decided to delete it in favor of a more comprehensive document—

the Wyoming CCA) shows that, during the parties' relationship, there was a meeting of the minds that pre-Closing Date conduct could trigger indemnity obligations by Heartwood. (Pls.' Br. Responding Jointly Defs.' Mots. Dismiss, at 7–8.)

69. Heartwood, conversely, contends that the fact that the parties later chose to delete Schedule 9(d) and to avoid using such express language in the Wyoming CCA suggests that the parties lacked a meeting of the minds on this issue when it mattered most—that is, at the time the Wyoming CCA was executed. (Defs.' Reply Br. Supp. Mot. Dismiss Pls.' Compl., at 8.)

70. With the parties' respective contentions in mind, the Court must analyze the actual language of sections 9(b)(i) and (iii). In so doing, the Court interprets the Wyoming CCA in accordance with the usual principles of contract construction. "[Courts] must construe [a] contract as a whole and an indemnity provision must be appraised in relation to all other provisions." *WakeMed v. Surgical Care Affiliates, LLC*, 243 N.C. App. 820, 825 (2015) (cleaned up).

i. Section 9(b)(i)

71. It is well settled that a contract interpretation issue cannot be resolved at the Rule 12(b)(6) stage where each party has shown that the provision at issue is reasonably susceptible to materially different interpretations. *See, e.g.*, *Schenkel & Schultz, Inc. v. Hermon F. Fox & Assocs., P.C.,* 362 N.C. 269, 273 (2008) (noting that "[a]n ambiguity exists in a contract when either the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations[,]" (quoting *Register v. White*, 358 N.C. 691, 695 (2004)), and holding that "[w]hen an agreement

is ambiguous and the intention of the parties is unclear . . . , interpretation of the contract is for the jury"); *WakeMed*, 243 N.C. App. at 827 (reversing trial court's dismissal under Rule 12(b)(6) after finding a contractual provision to be ambiguous due to the contractual language being "reasonably susceptible to either of the interpretations asserted by the parties" (quoting *Dockery v. Quality Plastic Custom Molding, Inc.*, 144 N.C. App. 419, 422 (2001)), and further holding that "interpretation of an ambiguous contract is best left to the trier of fact").

72. In accordance with these principles, the Court finds that Lyme has offered a plausible interpretation of Section 9(b)(i) in support of its position, thereby foreclosing the dismissal of this action under Rule 12(b)(6).

73. Stripped of its non-essential words, Section 9(b)(i) reads as follows: "Any reversal . . . of the Reserved Carbon Credits due to . . . any act or omission by [Heartwood] occurring . . . prior to the OPO Change Date with respect to the Property . . .[.]" (Wyo. CCA § 9(b)(i).)

74. As even Heartwood's counsel conceded at the June 26 hearing, if read in a vacuum, this language encompasses Lyme's theory of indemnity in this case. After all, the entire basis for this lawsuit is Lyme's contention that a reversal of the reserved carbon credits previously issued by the ARB has occurred due to Heartwood's act of overstating the carbon stocking on the Property in its Initial Inventory, which occurred "prior to the OPO Change Date."

75. However, Heartwood argues that this language should not be read in a vacuum. Instead, Heartwood asserts, the language should be construed in light of

the fact that the underlying purpose of the Wyoming CCA was to provide guidance to the parties during the time when Heartwood was still the OPO, despite Lyme being the Property's owner. In furtherance of this argument, Heartwood offers an alternative interpretation of Section 9(b)(i) that seeks to give the phrase "occurring . . . prior to the OPO Change Date" a more restrictive meaning—the period of time between the Closing Date and the OPO Change Date. (Defs.' Br. Supp. Mot. Dismiss Pls.' Compl., at 13–14.)

76. Lyme, in turn, asks the Court to adopt a "plain meaning" approach, arguing that the phrase "occurring . . . prior to the OPO Change Date" means just what it says and is satisfied here given that the Initial Inventory was submitted by Heartwood on a date earlier in time than the OPO Change Date (regardless of whether the Initial Inventory was submitted before or after the Closing Date). (Pls.' Br. Responding Jointly Defs.' Mots. Dismiss, at 3, 12–13.)

77. Heartwood makes three specific arguments as to why its proffered construction is superior to that of Lyme.

78. First, Heartwood contends that certain provisions of the PSA disclaim any warranties or representations made by Heartwood in connection with the Property, which would include (according to Heartwood) any overstatements contained in the Initial Inventory. (Defs.' Br. Supp. Mot. Dismiss Pls.' Compl., at 14–15.)

79. However, Lyme counters this argument by contending that these disclaimers only apply to misrepresentations made to *Lyme*, rather than to a *third party* such as the ARB. (Pls.' Br. Responding Jointly Defs.' Mots. Dismiss, at 6.)

80. Additionally, Lyme points to Schedule 9(d) of the PSA which—as noted above—expressly provided for Lyme to be indemnified for *pre*-Closing Date acts committed by Heartwood. (Schedule 9(d) § 5.) Although Schedule 9(d) was ultimately deleted from the PSA pursuant to the Fourteenth Amendment thereto upon the parties' agreement to instead execute the Wyoming CCA, its initial inclusion lends credence to Lyme's argument that the disclaimer provisions in the body of the PSA relied upon by Heartwood were not meant to entirely preclude Lyme from seeking indemnity from Heartwood for acts or omissions committed prior to the Closing Date.

81. Moreover, as Lyme points out, the concept of "reversals" is not mentioned—much less disclaimed—in the PSA, yet it is expressly (indeed, prominently) referenced in Section 9(b)(i) of the Wyoming CCA's indemnification provisions. (Pls.' Br. Responding Jointly Defs.' Mots. Dismiss, at 4–5.)

82. Second, Heartwood contends that Lyme's interpretation of Section 9(b)(i) conflicts with the canon of construction that the specific controls over the general. (Defs.' Reply Br. Supp. Mot. Dismiss Pls.' Compl., at 6.) *See, e.g.*, *McClure v. Ghost Town in the Sky, LLC*, 2022 NCBC LEXIS 151, at **6 (N.C. Super. Ct. Dec. 5, 2022) (discussing the traditional rule that "general terms should give way to the specifics" in a contract) (cleaned up).

83. Heartwood bases this argument on the notion that the phrase "act or omission" in Section 9(b)(i) is not as specific as the phrase "breach of . . . any representation or warranty" found in Section 9(b)(iii). As a result, Heartwood argues, because Lyme's assertion that Heartwood overstated the carbon deposits, if proven, would constitute a misrepresentation, it could only be potentially covered by Section 9(b)(iii) rather than 9(b)(i), and Section 9(b)(iii) lacks the phrase "occurring . . . prior to the OPO Change Date." (Defs.' Reply Br. Supp. Mot. Dismiss Pls.' Compl., at 6.)

84. However, an alternative application of this canon would be to say that, on these facts, Section 9(b)(i) is actually more specific than Section 9(b)(iii) in that the former is limited to losses resulting from reversals (the very type of loss Lyme is asserting in this case) while the latter encompasses numerous other types of losses.

85. Similar logic defeats Heartwood's third argument, which is that Lyme's proposed interpretation would render Section 9(b)(iii) superfluous. (Defs.' Reply Br. Supp. Mot. Dismiss Pls.' Compl., at 7.)

86. Once again, a plausible interpretation of Section 9(b)(i) is that it is the sole indemnification provision addressing losses incurred due to reversals and that Section 9(b)(iii), in turn, covers other types of losses not attributable to reversals. Under that interpretation, neither provision would be superfluous.

87. In sum, the Court concludes that Lyme has offered a plausible competing interpretation of Section 9(b)(i). As a result, the Court cannot adopt one party's interpretation over the other at the Rule 12(b)(6) stage.

ii. Section 9(b)(iii)

88. As noted above, Section 9(b)(iii) covers breaches of "any representation or warranty made by [Heartwood] as OPO in any Reserved Offset Period Submissions or any RP3 Submissions." (Wyo. CCA § 9(b)(iii).) The fifth recital in the Wyoming CCA defines "Reserved Offset Period" as follows:

> **WHEREAS**, the Reserved Offset Period is comprises [sic] two reporting periods: (i) a six month period, commencing March 23, 2015 and ending on September 23, 2015 ("***RP1***"); and (ii) a twelve month period commencing September 24, 2015 and ending on September 23, 2016 ("***RP2***");

(Wyo. CCA, at 2.)

89. The phrase "Reserved Offset Period Submissions" is defined in Section 2(b) of the Wyoming CCA as follows:

> b. **[Heartwood] OPO Responsibilities re Reserved Offset Period.** While [Heartwood] remains OPO, [Heartwood] shall be solely responsible for preparing, executing and submitting to the Offset Project Registry (the "***OPR***") the Offset Project Data Report and related documentation, instruments, filings, and attestations for the Reserved Offset Period, if any (the "***Reserved Offset Period Submissions***").

(Wyo. CCA § 2(b).)

90. The language used in these provisions appears to support Heartwood's argument that Section 9(b)(iii) is forward-looking in nature. However, in light of its determination that Lyme's interpretation of Section 9(b)(i) is plausible, the Court need not fully analyze the parties' arguments regarding Section 9(b)(iii). As a result, the Court makes no determination at the present time as to whether any ambiguity exists as to the latter provision.

91. Accordingly, the Motions are **DENIED** as to Lyme's indemnity claims.

B. Unjust Enrichment Claim

92. The Court reaches a different conclusion as to Lyme's claim for unjust enrichment.

93. In its unjust enrichment claim, Lyme contends that to the extent it cannot recover from Heartwood under the indemnity provisions of the Wyoming CCA, Lyme would still be entitled to equitable relief on account of Heartwood unfairly receiving "substantial benefits" from overstating the carbon quantities that were provided to the ARB through the Initial Inventory. (Compl. ¶¶ 57–60.)

94. In the Motions, Heartwood argues that an unjust enrichment claim cannot exist where, as here, the parties agree that a legally valid express contract existed between them. (Defs.' Br. Supp. Mot. Dismiss Pls.' Compl., at 26–28.)

95. The elements of a claim for unjust enrichment are as follows:

> First, one party must confer a benefit upon the other party. . . . Second, the benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. . . . Third, the benefit must not be gratuitous. . . . Fourth, the benefit must be measurable. . . . Last, the defendant must have consciously accepted the benefit.

Butler v. Butler, 239 N.C. App. 1, 8 (2015) (quoting *JPMorgan Chase Bank, Nat'l Ass'n v. Browning*, 230 N.C. App. 537, 541–42 (2013)).

96. It is clear that neither party in this case is challenging the validity of either the PSA or the Wyoming CCA.

97. This Court has previously stated as follows:

> The general rule of unjust enrichment is that where services are rendered and expenditures made by one party to or for the benefit of another, without an express contract to pay, the law will imply a promise

> to pay a fair compensation therefor. The claim is not based on a promise but is imposed by law to prevent an unjust enrichment. However, if there is a contract between the parties[,] the contract governs the claim and the law will not imply a contract.

Value Health Sols. Inc. v. Pham. Research Assocs., Inc., 2020 NCBC LEXIS 65, at *37 (N.C. Super. Ct. May 22, 2020), *aff'd in part, rev'd in part on other grounds,* 385 N.C. 250 (2023) (cleaned up). Other North Carolina courts have similarly held that "an express contract precludes an implied contract with reference to the same matter." *Ron Medlin Constr. v. Harris*, 364 N.C. 577, 580 (2010) (quoting *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713 (1962)). *See also U.S. Bank Nat'l Ass'n v. Sofield*, No. 5:16-cv-00084-RLV-DSC, 2017 WL 256740, at *4 (W.D.N.C. June 13, 2017) ("An implied contract and an express contract cannot co-exist[.]"); *Rongotes v. Pridemore*, 88 N.C. App. 363, 368 (1988) ("The unjust enrichment theory does not operate to alter the terms of a[n] enforceable contract.").

98. The Court notes that the facts of this case are particularly ill-suited for an unjust enrichment claim. Here, as discussed in detail throughout this opinion, the parties expressly drafted provisions in the Wyoming CCA to govern the circumstances under which each side would be entitled to indemnification from the other. Ultimately, either the Court or a jury will make a final decision as to whether the indemnification provisions at issue entitle Lyme to relief. It would make little sense to hold that a party unsuccessful at seeking indemnification under explicit contractual provisions could nevertheless obtain the same relief under an equitable theory of recovery.

99. Therefore, Heartwood's Motions to dismiss Lyme's unjust enrichment claim are **GRANTED** and that claim is dismissed with prejudice.[6] *See Total Merch. Servs., LLC v. TMS NC, Inc.,* 2022 NCBC LEXIS 83, at **35 (N.C. Super. Ct. July 29, 2022) ("[G]iven that the parties do not dispute the existence of the 2008 Agreement and both Plaintiff and Defendants assert claims based on its alleged breach, the . . . Original Counterclaim against Plaintiff for unjust enrichment is hereby dismissed with prejudice."); *Krieger v. Johnson*, 2014 NCBC LEXIS 13, at **8 ("A claim for unjust enrichment is properly dismissed where the complaint reveals the existence of a contract between the parties."); *Wrightsville Beach Prop., LLC v. Attwa*, NO. 7:23-CV-1062-FL, 2023 WL 8100189, at *9 –*10 (E.D.N.C. Nov. 21, 2023) (distinguishing cases in which the Court "allowed an unjust enrichment claim to be [pled] in the alternative 'when the validity of the contract [was] in question[,]' " (quoting *Indep. Warehouse v. Kim*, No. 4:17-CV-49-BO, 2017 WL 4322399, at *2 (E.D.N.C. Sept. 28, 2017)), from the case at bar in which "there [was] no such question of contract validity arising from the facts alleged in the . . . complaint").

CONCLUSION

THEREFORE, IT IS ORDERED as follows:

1. The First and Second Motions are **DENIED** with respect to Lyme's first, second, third, and fourth claims for relief.

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[6] Heartwood also argues that Lyme's unjust enrichment claim is time-barred under the relevant statute of limitations. (Defs.' Br. Supp. Mot. Dismiss Pls.' Compl., at 5, 28–30.) However, this argument is moot due to the Court's dismissal of the unjust enrichment claim on the ground set out above.

2. The First and Second Motions are **GRANTED** with regard to Lyme's fifth claim for relief (unjust enrichment), and that claim is **DISMISSED** with prejudice.

SO ORDERED, this the 6th day of September, 2024.

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