STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 24CV018718-590
DAPPER DEVELOPMENT, L.L.C.; TANTALUM HOLDINGS, LLC; BRENDAN GELSON; KYLE TUDOR; and MASON HARRIS, Plaintiffs, v. ANDREW CORDELL, Defendant.	**ORDER AND OPINION ON DEFENDANT'S MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)**

1. **THIS MATTER** is before the Court upon Defendant's Motion to Dismiss (the "Motion"), filed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure (the "Rule(s)") on 18 June 2024 in the above-captioned case.[1]

2. Having considered the Motion, the parties' briefs in support of and in opposition to the Motion, the Complaint and attached exhibits[2], the arguments of counsel at the hearing on the Motion, and other appropriate matters of record, the Court hereby **GRANTS** in part and **DENIES** in part the Motion.

Venn Law Group, by Megan Sadler and Gordon Wikle, for Plaintiffs Dapper Development, L.L.C., Tantalum Holdings, LLC, Brendan Gelson, Kyle Tudor, and Mason Harris.

Wagner Hicks, PLLC, by Sean C. Wagner and James Ray, for Defendant Andrew Cordell.

Bledsoe, Chief Judge.

[1] (Def.'s Mot. Dismiss [hereinafter, "Mot."], ECF No. 12.)

[2] (Compl., ECF No. 2.)

I.

FACTUAL AND PROCEDURAL BACKGROUND

3. The Court does not make findings of fact when ruling on a motion to dismiss under Rule 12(b)(6). Rather, the Court recites the allegations asserted and documents referenced in the challenged pleading—here, the Complaint—that are relevant and necessary to the Court's determination of the Motion.

4. Plaintiffs Brendan Gelson ("Gelson"), Kyle Tudor ("Tudor"), and Mason Harris ("Harris") (collectively, the "Individual Plaintiffs") and Defendant Andrew Cordell ("Cordell" or "Defendant") are the sole owners of Plaintiffs Dapper Development, L.L.C. ("Dapper") and Tantalum Holdings, LLC ("Tantalum"; together with Dapper, the "Companies").[3] Dapper's primary business purposes are to construct new homes and to renovate and resell single family homes.[4] Tantalum primarily acquires and rents various residential properties in Mecklenburg County as well as one property in Watauga County, North Carolina.[5]

5. On 10 February 2022, Gelson, Tudor, Harris, and Cordell entered into the Restated Operating Agreement of Dapper Development L.L.C. and the Operating Agreement of Tantalum Holdings LLC (collectively, the "Operating Agreements").[6]

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[3] (Compl. ¶ 19; *see* Compl., Exs. 1, 2.)

[4] (Compl. ¶¶ 13–14.)

[5] (Compl. ¶ 16.)

[6] (Compl. ¶ 17; Compl. Exs. 1, 2.)

The Dapper and Tantalum Operating Agreements contain substantially similar provisions.

6. The Operating Agreements identify Gelson, Tudor, Harris, and Cordell as the sole Members of the Companies.[7] Pursuant to Section 5.2 of the Operating Agreements, "[e]ach Member, by virtue of his . . . status as a Member, shall be a Manager of [Dapper/Tantalum]."[8] The Individual Plaintiffs and Cordell therefore are also the sole Managers of the Companies.

7. Section 5.1 of the Operating Agreements outlines the rights and duties of the Companies' Managers, providing that the "business and affairs of [Dapper/Tantalum] shall be managed by its Manager or Managers . . . [who] shall have full and complete authority, power and discretion to manage and control the business, affairs and properties of [Dapper/Tantalum], to make all decisions regarding those matters and to perform any and all other acts or activities customary or incident to the management of [Dapper's/Tantalum's] business."[9]

8. Section 5.2 further specifies that "[e]ach Manager shall have a voting interest which is proportional to his . . . Member's interest in [Dapper/Tantalum]."[10] At the time the Operating Agreements were signed, Gelson, Tudor, Harris, and

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[7] (Compl. Exs. 1, 2.)

[8] (Compl. Exs. 1, 2.)

[9] (Compl. Exs. 1, 2.)

[10] (Compl. Exs. 1, 2.)

Cordell each owned a 25% membership interest in each of the Companies, granting them equal voting interests in each Company.[11]

9. In the first quarter of 2023, the Individual Plaintiffs "became concerned regarding Cordell's behavior and decision-making" and began discussing Cordell's exit from the Companies.[12] From approximately April to June of 2023, the Individual Plaintiffs sought to negotiate an appropriate valuation for the Companies, pursuant to the valuation process outlined in Section 10.2.d of the Operating Agreements, to buy out Cordell and redeem his membership interests.[13]

10. Following a breakdown in their buyout negotiations, on 14 June 2023, the Individual Plaintiffs, together constituting a majority of the membership interest of the Companies, voted to terminate Cordell from the Companies and to remove Cordell as a Member/Manager of both Companies pursuant to Sections 5.2 and 10.2.b of the Operating Agreements.[14] A termination notice was sent to Cordell that same day.[15]

11. Section 5.2 of the Operating Agreements describes a process for the termination of Managers, stating that "[t]o elect or remove a Manager shall require

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[11] (Compl. ¶ 19; Compl. Exs. 1, 2.)

[12] (Compl. ¶¶ 35, 47.)

[13] (Compl. ¶¶ 50–66.; Compl. Exs. 1, 2.)

[14] (Compl. ¶¶ 26–29, 69.)

[15] (Compl. ¶ 69.)

the affirmative vote of Members owning at least a majority of all interests in the Company."[16] Section 10.2.b of the Operating Agreements further provides as follows:

> A Member shall be terminated from the Company upon an affirmative vote in favor of such termination from the Members constituting a majority of the membership interest of the Company. Upon a Member's termination of employment with [Dapper/Tantalum] (other than retirement), or upon a Member's expiration of the term of employment ("Triggering Event"), the Member shall sell and the Company or the surviving Members shall purchase all of the Membership and Economic Interest of the Member. The procedures for purchase described in Section 10.2.a shall apply. The purchase price shall be determined in accordance with Section 10.2.d below, and unless otherwise agreed among the parties the purchase price shall be due and payable in cash at closing.[17]

12. In response to the Individual Plaintiffs' alleged termination and removal of Cordell as a Member/Manager of both Companies, on 23 June 2023, Cordell filed the lawsuit styled, *Andrew Cordell v. Brendan Gelson, et al.*, 2023-CVS-10868 (the "Initial Lawsuit") in Mecklenburg County Superior Court. The case was thereafter designated a mandatory complex business case and assigned to the undersigned.[18]

13. In his amended complaint filed in that action on 14 July 2023, Cordell alleged that:

(i) the 14 June 2023 vote to terminate had the limited effect of terminating Cordell's status as an employee of the Companies[19];

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[16] (Compl. ¶ 24; Compl. Exs. 1, 2.)

[17] (Compl. Exs. 1, 2.)

[18] (Initial Lawsuit Designation Order, ECF No. 1, Initial Lawsuit Assignment Order, ECF No. 2.)

[19] (First Am. Compl. ¶¶ 51—57 [hereinafter, "Initial Lawsuit Compl."], ECF No. 4.)

(ii) Cordell's status as a Member and Manager of the Companies was unaffected until the closing for the sale of his membership interest[20];

(iii) The assets of the Companies should be valued at their fair market value for the purpose of a buyout of Cordell's membership interest under Section 10.2.d of the Operating Agreements[21];

(iv) Gelson, Tudor, and Harris breached the Operating Agreements by refusing to hire an MAI-designated appraiser to value Cordell's membership interest, as required by Section 10.2 of the Operating Agreements[22];

(v) Gelson, Tudor, and Harris breached the Operating Agreements' implied covenant of good faith and fair dealing[23];

(vi) The Companies were unjustly enriched by continuing to use Cordell's general contractor's license on necessary permits for ongoing construction and renovation projects after Cordell's termination of employment on 14 June 2023[24];

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[20] (Initial Lawsuit Compl. ¶¶ 58–73.)

[21] (Initial Lawsuit Compl. ¶¶ 74–80.)

[22] (Initial Lawsuit Compl. ¶¶ 81–89.)

[23] (Initial Lawsuit Compl. ¶¶ 89–95.)

[24] (Initial Lawsuit Compl. ¶¶ 96–101.)

(vii) The Companies appropriated Cordell's name or likeness by continuing to use Cordell's general contractor's license after the termination of his employment from the Companies[25]; and

(viii) The Companies violated N.C.G.S. § 57D-3-04(d) by refusing to permit Cordell to inspect the Companies' books and records.[26]

14. On 13 December 2023, this Court entered a Consent Scheduling Order (the "Consent Order") in the Initial Lawsuit. In the Consent Order, the Companies agreed to "various deadlines related [to] the process of the redemption of Cordell's interest, the timing of the valuation of the fair market value of the assets to determine the value to be paid to fully redeem Cordell from both Companies, and significant disclosure of confidential information of the Companies to Cordell to support that redemption."[27]

15. On 10 April 2024, after the parties engaged two appraisers and Gelson, Tudor, and Harris made several additional, but unfruitful, attempts to buy out Cordell's interest, Cordell voluntarily dismissed the Initial Lawsuit without prior notice to the Companies.[28]

16. Less than two weeks after Cordell's voluntary dismissal of the Initial Lawsuit, on 23 April 2024, Gelson, Tudor, and Harris, individually and on behalf of

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[25] (Initial Lawsuit Compl. ¶¶ 102–06.)

[26] (Initial Lawsuit Compl. ¶¶ 107–12.)

[27] (Initial Lawsuit Consent Scheduling Order, ECF No. 41; *see also* Compl. ¶ 119.)

[28] (Initial Lawsuit Notice Vol. Dism'l, ECF No. 59; *see also* Compl. ¶ 137.)

Dapper and Tantalum, filed the complaint initiating this action (the "Complaint"). In the current action, Plaintiffs assert claims against Cordell for (i) breach of contract for his alleged failure to abide by the terms of the Operating Agreements[29]; (ii) declaratory judgment determining "the rights, duties and liabilities as between Plaintiffs and Cordell under the Operating Agreements"[30]; (iii) breach of the implied duty of good faith and fair dealing[31]; (iv) breach of contract for his failure to abide by the Consent Order in the Initial Lawsuit[32]; and (v) abuse of process.[33]

17. Cordell filed the Motion on 18 June 2024, and, after full briefing, the Court held a hearing on the Motion on 27 August 2024 (the "Hearing"), at which all parties were represented by counsel. The Motion is now ripe for resolution.

II.

LEGAL STANDARD

18. When deciding whether to dismiss for failure to state a claim under Rule 12(b)(6), the Court considers "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Corwin v. Brit. Am. Tobacco PLC*, 371 N.C. 605, 615 (2018) (quoting *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51 (2016)).

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[29] (Compl. ¶¶ 150–60.)

[30] (Compl. ¶¶ 161–69.)

[31] (Compl. ¶¶ 170–75.)

[32] (Compl. ¶¶ 176–83.)

[33] (Compl. ¶¶ 184–94.)

19. "[D]ismissal 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*, 371 N.C. at 615 (quoting *Wood v. Guilford County*, 355 N.C. 161, 166 (2002)).

20. Under Rule 12(b)(6), "the trial court is to construe the pleading liberally and in the light most favorable to the plaintiff, taking as true and admitted all well-pleaded factual allegations contained within the [pleading]." *Donovan v. Fiumara*, 114 N.C. App. 524, 526 (1994) (cleaned up); *see also, e.g., Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332 (2019) (recognizing that, under Rule 12(b)(6), the allegations of the complaint should be "view[ed] as true and in the light most favorable to the non-moving party") (cleaned up). The claim is not to be dismissed unless it appears beyond doubt that the non-moving party could prove no set of facts in support of his claim which would entitle him to relief. *U.S. Bank Nat'l Ass'n ex rel. C-BASS Mortg. Loan Asset-Backed Certificates, Series 2006-RP2 v. Pinkney*, 369 N.C. 723, 726 (2017).

21. When analyzing a motion to dismiss, the Court may "also consider any exhibits attached to the complaint because '[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.' " *Krawiec v. Manly*, 370 N.C. 602, 606 (2018) (quoting N.C. R. Civ. P. 10(c)).

III.

ANALYSIS

22. Defendant's Motion seeks to dismiss Plaintiffs' claims for breach of contract, declaratory judgment, breach of the duty of good faith and fair dealing, and breach of the Consent Order.[34] The Court will take up each in turn.

A. Breach of Contract

23. Plaintiffs' claim for breach of contract is premised on Cordell's alleged breach of the Operating Agreements by (i) refusing to accept a buyout offer in June 2023 in breach of Section 10, and (ii) unilaterally causing Bank OZK (the "Bank") to freeze the Companies' funds in late June or early July 2023 in breach of Article 5.[35]

24. "Unlike claims subject to Rule 9, a claim for breach of contract is not subject to heightened pleading standards[.]" *AYM Techs., LLC. v. Rodgers*, 2018 NCBC LEXIS 14, at *52–53 (N.C. Super. Ct. Feb. 9, 2018). "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26 (2000). "Thus, in any breach of contract action, the complaint must allege the existence of a contract between the plaintiff and the defendant, the specific provisions breached, the facts constituting the breach, and the amount of damages resulting to the plaintiff from such breach." *Howe v. Links Club Condo. Ass'n*, 263 N.C. App. 130, 139 (2018) (cleaned up).

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[34] (Def.'s Mot. Dismiss 1.) Defendant has not moved to dismiss Plaintiffs' claim for abuse of process.

[35] (Compl. ¶¶ 89–91, 152–58.)

25. Cordell argues that his alleged conduct is insufficient to establish a breach of the Operating Agreements, even under North Carolina's liberal notice pleading requirements and even when viewed in a light most favorable to Plaintiffs.[36]

26. Cordell first argues that Plaintiffs have failed to adequately plead that the terms of the Operating Agreements were breached when he refused to accept the Individual Plaintiffs' buyout offer in June 2023. Specifically, Cordell contends that the plain language of the Operating Agreements mandates that any existing *employment relationship* between a Member and the Companies must be terminated in order to constitute a "triggering event" pursuant to Section 10.2.b (the "Buyout Provision").[37] Cordell asserts that Plaintiffs failed to "allege—because they cannot do so in good faith—that he was ever a Dapper and Tantalum employee subject to termination."[38] According to Cordell, since Plaintiffs did not plead adequate facts to establish that a "triggering event" had occurred, the Buyout Provision is inapplicable,

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[36] (Def.'s Br. Supp. Mot. Dismiss 7, ECF No. 13.)

[37] (Def.'s Br. Supp. Mot. Dismiss 8–10.) In relevant part, Section 10.2.b of the Operating Agreements provides:

> A Member shall be terminated from the Compan[ies] upon an affirmative vote in favor of such termination from the Members constituting a majority of the membership interest of the Compan[ies]. ***Upon a Member's termination of employment with [the Companies] (other than retirement), or upon a Member's expiration of the term of employment ("Triggering Event")***, the Member shall sell and the Compan[ies] or the surviving Members shall purchase all of the Membership and Economic Interest of the Member. (Emphasis added.)

(Def.'s Br. Supp. Mot. Dismiss 9; *see also* Compl. Exs. 1, 2.)

[38] (Def.'s Br. Supp. Mot. Dismiss 10.)

and Plaintiffs' "complaint on its face reveals the absence of facts sufficient to make a good claim" for breach of Section 10 of the Operating Agreements. *Corwin*, 371 N.C. at 615 (quoting *Wood*, 355 N.C. at 166).

27. The Court disagrees. When analyzing a motion to dismiss, the Court may not only consider the complaint, but also any exhibits attached to the complaint. *Krawiec*, 370 N.C. at 606; N.C. R. Civ. P. 10(c). An exhibit, attached to and made a part of the pleading, is considered a part of the pleading and "[t]he terms of such exhibit control other allegations of the pleading attempting to paraphrase or construe the exhibit, insofar as these are inconsistent with its terms." *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 206 (1970).

28. In the Complaint, Plaintiffs allege that on 14 June 2023 they "voted to *terminate Cordell from the Companies* and to remove Cordell as a Member/Manager of both Companies." (Emphasis added).[39] Plaintiffs then refer to the 14 June 2023 termination notice sent to Cordell, a copy of which is attached to the Complaint as Exhibit 4.[40] In the termination notice, the Individual Plaintiffs state that they, as majority Members of Dapper and Tantalum, had voted affirmatively in favor of "the termination of the *employment* of Andrew Cordell" from both Companies and that "from and after [14 June 2023], Mr. Cordell shall no longer be an *employee* . . . of Dapper or Tantalum." (Emphasis added.)[41]

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[39] (Compl. ¶ 69.)

[40] (Compl. ¶¶ 69–70.)

[41] (Compl. Ex. 4.)

29. Cordell contends that, while the 14 June 2023 termination notice was incorporated into Plaintiffs' Complaint and states that Cordell's employment was terminated, neither the notice, nor Plaintiffs' Complaint, allege that he was actually an employee.[42] Cordell's contention ignores, however, that the trial court must "take the allegations in the complaint as true and *draw all reasonable inferences in the plaintiff's favor*" when evaluating whether a complaint adequately states a claim for relief for purposes of Rule 12(b)(6). *New Hanover Cnty. Bd. Of Educ. v. Stein*, 380 N.C. 94, 107 (2022) (quoting *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 439 (1974)) (emphasis added). Inarguably, it is a reasonable inference that, if a person's employment has been terminated and that person is "no longer an employee," the impacted person was an employee of the terminating company prior to that person's termination.

30. Accordingly, drawing all reasonable inferences in Plaintiffs' favor, the Court concludes that between the Complaint and the 14 June 2023 termination notice, Plaintiffs have alleged sufficient facts to establish that (i) Cordell was an employee of Dapper and Tantalum subject to termination, and (ii) by voting to terminate Cordell's employment with Dapper and Tantalum, a "triggering event" had occurred, requiring Cordell to sell "all of [his] Membership and Economic Interest" in the Companies.[43] As a result, Defendant's Motion is denied with respect to Plaintiffs' breach of contract

[42] (Reply Br. Supp. Mot. Dismiss 3.)

[43] (Compl. ¶ 27, Compl. Exs. 1, 2.)

claim for Cordell's refusal to accept a buyout offer in June 2023 in alleged violation of Section 10.[44]

31. Cordell next argues that Plaintiffs failed to adequately plead that Cordell's communication with the Bank constituted a breach of the Operating Agreements.[45] Specifically, Cordell asserts that (i) Plaintiffs failed to specify which part of Article 5 Cordell's actions breached; (ii) Cordell was not prohibited from communicating with the Companies' financial institutions, in either his capacity as a Member or a Manager; and (iii) Plaintiffs have not alleged that Cordell actually requested the Bank to freeze the Companies' funds.[46]

32. Defendant seeks to impose a higher pleading burden than is required under North Carolina law. Under Rule 8, Plaintiffs need only make a "short and plain

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[44] In their opposition brief, Plaintiffs call attention to Cordell's repeated and unequivocal admissions in the Initial Lawsuit that he was an employee of the Companies and that a "triggering event" under Section 10.2.b had occurred, such that the Companies were required to redeem his interests. (Pls.' Br. Opp'n Def.'s Mot. Dismiss 14 [hereinafter "Pls.' Br. Opp'n"], ECF No. 19.) Plaintiffs contend that the doctrine of judicial estoppel, formally recognized by the North Carolina Supreme Court in *Whitacre P'Ship v. Biosignia, Inc.*, 358 N.C. 1 (2004), prevents Cordell from seeking to "swap horses in mid-stream." (Pls.' Br. Opp'n 15). The Court will not address Plaintiffs' judicial estoppel arguments at this time, however, as they are irrelevant to a Rule 12(b)(6) motion. At the motion to dismiss stage, "the trial court . . . may not consider evidence outside the four corners of the complaint and the attached [exhibits]." *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 203–04 (2007). Evidence of a defendant's inconsistent factual allegations in a prior lawsuit may not compensate for or overcome shortcomings in the filed complaint in the current action. That said, Plaintiffs certainly may raise judicial estoppel through proper motions practice at any time. *See, e.g.*, *Old Republic Nat'l Title Ins. Co. v. Hartford Fire Ins. Co.*, 369 N.C. 500, 506 (2017) ("[a] party is generally not allowed to change his position with respect to a material matter, during the course of litigation, nor should he be allowed to blow hot and cold in the same breath") (cleaned up).

[45] (Def.'s Br. Supp. Mot. Dismiss 13.)

[46] (Def.'s Br. Supp. Mot. Dismiss 13.)

statement of the claim," N.C. R. Civ. P. 8(a), and our courts have held that "stating a claim for breach of contract is a relatively low bar." *Vanguard Pai Lung, LLC v. Moody*, 2019 NCBC LEXIS 39, at *11 (N.C. Super. Ct. June 19, 2019); *see, e.g.*, *Poor*, 138 N.C. App. at 26.

33. Here, Plaintiffs plead that the "Operating Agreements are valid contracts which bind Cordell,"[47] that "Cordell unilaterally took action—after having been removed as a Manager—to cause the Bank to make the Funds unavailable to the Companies," and that "in so doing, [Cordell] breached Article 5 [Rights and Duties of Managers] of the Operating Agreements[.]"[48] Plaintiffs identify the specific contract provisions that were allegedly breached (Article 5—Rights and Duties of Managers), the facts constituting the alleged breach (Cordell's unilateral action to cause the Bank to make the Funds unavailable to the Companies after he had been removed as a Manager), and the amount of damages resulting from the breach (in excess of $25,000).[49] *See Howe*, 263 N.C. App. at 139. Since Plaintiffs have met the low burden established by Rule 8(a), the Court shall deny Defendant's Motion as to Plaintiffs' claim based on Cordell's alleged breach of Article 5.

[47] (Compl. ¶ 151.)

[48] (Compl. ¶¶ 157–58.)

[49] (Compl. Prayer for Relief ¶ 1.)

B. Declaratory Judgment

34. Defendant next seeks the dismissal of Plaintiffs' claim for a declaratory judgment determining the "rights, duties and liabilities as between Plaintiffs and Cordell under the Operating Agreement[s]."[50]

35. Under the Declaratory Judgment Act, "[a]ny person interested under a . . . written contract . . . , or whose rights, status or other legal relations are affected by a . . . contract . . . , may have determined any question of construction or validity arising under the . . . contract . . . , and obtain a declaration of rights, status, or other legal relations thereunder." N.C.G.S. § 1-254. When asserting a claim for declaratory judgment, the claimant "must set forth in his pleading all facts necessary to disclose the existence of an actual controversy between the parties . . . with regard to their respective rights and duties." *Lide v. Mears*, 231 N.C. 111, 118 (1949). A motion to dismiss pursuant to Rule 12(b)(6) is "seldom an appropriate pleading in actions for declaratory judgments, and . . . is allowed only when the record clearly shows that there is no basis for declaratory relief as when the complaint does not allege an actual, genuine existing controversy." *Duke Power Co.*, 285 N.C. at 439.

36. In seeking to dismiss Plaintiffs' claim for declaratory judgment, Defendant argues that "[t]here can be no dispute that Cordell remains a Member and Manager of the Companies, because there is no mechanism for involuntarily removing a Member or Manager, except for termination of an employment relationship pursuant to Section 10.2 of the Operating Agreements" and that "Cordell was never an

[50] (Compl. ¶ 169.)

employee of the Companies subject to termination, which is dispositive as to his status as a Member and Manager."[51] Plaintiffs contend in opposition that Cordell was removed as a Member and Manager from both Companies by the 14 June 2023 termination vote.[52]

37. As discussed above, the Court has concluded that Plaintiffs have alleged sufficient facts to permit the conclusion that (i) Cordell was an employee of Dapper and Tantalum subject to termination, and (ii) by voting to terminate Cordell's employment with Dapper and Tantalum, a "triggering event" under Section 10.2.b of the Operating Agreements occurred, resulting in Cordell forfeiting his status as a Member and triggering an obligation to sell "all of [his] Membership and Economic Interest" in the Companies.[53]

38. The Court further concludes that Plaintiffs have alleged sufficient facts to permit a reasonable factfinder to find that Cordell was terminated as a Manager of the Companies. Section 5.2 of the Operating Agreements provides that "[t]o . . . remove a Manager shall require the affirmative vote of Members owning at least a majority of all interests in the Compan[ies]."[54] Plaintiffs allege that under Section 5.2, Harris, Tudor, and Gelson, together constituting a majority of all interests in the Companies, voted to terminate Cordell as a Manager of both

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[51] (Reply Br. Supp. Mot. Dismiss 11.)

[52] (Compl. ¶ 69.)

[53] (Compl. Exs. 1, 2.)

[54] (Compl. ¶ 24; Compl. Exs. 1, 2.)

Companies.[55] Therefore, the Court concludes that Plaintiffs have pleaded sufficient facts to establish that an actual controversy exists between the parties. Defendant's Motion seeking to dismiss Plaintiffs' declaratory judgment claim shall therefore be denied.

C. Breach of Duty of Good Faith and Fair Dealing

39. Defendant next seeks to dismiss Plaintiffs' claim for breach of the implied duty of good faith and fair dealing under the Operating Agreements.

40. North Carolina law has long recognized that, in addition to its express terms, in every contract there is an implied covenant of good faith and fair dealing that "neither party will do anything which injures the right of the other to receive the benefits of the agreement." *Gay v. Peoples Bank*, 2015 NCBC LEXIS 62, at *27 (N.C. Super. Ct. June 10, 2015) (quoting *Governor's Club Inc. v. Governor's Club Ltd. P'ship*, 152 N.C. App. 240, 251 (2002)). Moreover, our courts have held that "[a] contract . . . encompasses not only its express provisions but also all such implied provisions as are necessary to effect the intention of the parties unless express terms prevent such inclusion." *Gay*, 2015 NCBC LEXIS, at *27–28 (quoting *Lane v. Scarborough*, 284 N.C. 407, 410 (1973)).

41. To state a valid claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must "plead that the party charged took action 'which injure[d] the right of the other to receive the benefits of the agreement,' thus 'depriv[ing] the other of the fruits of [the] bargain.' " *Conleys Creek Ltd. P'ship v. Smoky Mt. Country*

[55] (Compl. ¶¶ 24, 69.)

Club Prop. Owners Ass'n, 255 N.C. App. 236, 253 (2017) (quoting *Bicycle Transit Auth. v. Bell*, 314 N.C. 219, 228–29 (1985)). "Evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance" may each constitute a breach of the implied covenant of good faith and fair dealing. *Intersal, Inc. v. Wilson*, 2023 NCBC LEXIS 29, at *67 (N.C. Super. Ct. Feb. 23, 2023) (quoting *Restatement 2d of Contracts* § 205 cmt. d (1981)).

42. Plaintiffs argue that Cordell breached the duty of good faith and fair dealing by:

(a) "Recommending that [the Individual Plaintiffs] use a lender with a higher interest rate for a March 2023 transaction for no business reason"[56];

(b) "Misleading [the Individual Plaintiffs] about the interest rate of the financing related to the Winston Property acquisition in 2023"[57];

(c) "Demanding unsupportable amounts to be redeemed by the Companies"[58];

(d) "Refusing to acknowledge his termination/expulsion from the Companies"[59];

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[56] (Compl. ¶ 174(a).)

[57] (Compl. ¶ 174(b).)

[58] (Compl. ¶ 174(c).)

[59] (Compl. ¶ 174(d).)

(e) "Taking action to have the Bank freeze funds" even though Gelson, Tudor, and Harris "are fully authorized under the Operating Agreements to use the funds in the ordinary course of business"[60];

(f) "Taking specific steps to impede [the Individual Plaintiffs'] efforts and/or ability to change bank account numbers for recurring monthly mortgage payments in the name of the Companies for no business reason"[61];

(g) "Keeping Dapper from disposing of the Winston Property in September 2023 to an interested third-party buyer by threatening the potential buyer and then attempting to obtain the Winston Property from Dapper for about $40,000 less than the third-party buyer would have paid"[62];

(h) "Refusing to allow the Funds to be utilized by the Companies"[63];

(i) "Demanding that the Funds be distributed without regard for the definition of 'Distributable Cash' under Section 1.6 of the Operating Agreements"[64];

(j) "Making outrageous monetary demands of the Companies which were unsupported by any factual or legal basis"[65];

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[60] (Compl. ¶ 174(e).) Plaintiffs allege the Bank holds approximately $473,698.01 plus any accruing interest on behalf of the Companies (the "Funds"). Plaintiffs further allege that the Funds are not distributable cash under the Operating Agreements. (Compl. ¶¶ 147–48.)

[61] (Compl. ¶ 174(f).)

[62] (Compl. ¶ 174(g).)

[63] (Compl. ¶ 174(h).)

[64] (Compl. ¶ 174(i).)

[65] (Compl. ¶ 174(j).)

(k) "Requiring [the Individual Plaintiffs] to expend over $100,000 in attorneys' fees by refusing to accept the 14 June 2023 [buyout offer]"[66]; and

(l) "Refusing to accept his termination as a Member and Manger under the Operating Agreement."[67]

43. In response to Plaintiffs' claims, Cordell contends that Plaintiffs "failed to make allegations sufficient to establish that (1) Cordell acted to frustrate Plaintiffs' performance of an *express* provision of the Operating Agreements, or (2) Cordell performed obligations of an *express* provision of the Operating Agreements in bad faith."[68] (Emphasis added.)

44. Once again, Cordell seeks to impose a higher pleading burden on Plaintiffs than Rule 8 requires. In pleading a claim for breach of the implied covenant of good faith and fair dealing, Plaintiffs are not required to plead with particularity the express terms that were breached. To survive a Rule 12(b)(6) motion to dismiss, Plaintiffs need only plead the existence of a valid contract and that Defendant took action "which injure[d] the right of the other to receive the benefits of the agreement." *Conleys Creek Ltd. P'ship*, 255 N.C. App. at 253.

45. As a Manager, Cordell was entrusted with performing a wide range of activities for the Companies; he had "full and complete authority, power and

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[66] (Compl. ¶ 174(k).)

[67] (Compl. ¶ 174(l).)

[68] (Reply Br. Supp. Mot. Dismiss 12.)

discretion to manage and control the business, affairs and properties of the Compan[ies], to make all decisions regarding those matters and to perform any and all other acts or activities customary or incident to the management of the Compan[ies'] business."[69] In addition, Cordell had "the authority to act on behalf of the Compan[ies] in the execution of all documents necessary to sell, purchase or mortgage the property for or owned by the Compan[ies], and such signature from Andrew Cordell [bound] the Compan[ies] without the need for signature from any of the other Members or Managers."[70] In undertaking these rights and duties, Cordell had an implied duty to act in good faith and to make reasonable efforts to perform his obligations under the Operating Agreements.

46. Considering the above, the Court holds that the allegations set forth in subparagraphs (a), (b), (e), (f), (g), and (h) of paragraph 174 of Plaintiffs' Complaint, viewed as true and in a light most favorable to Plaintiffs, permit a reasonable factfinder to conclude that Cordell took action "which injure[d] the right of the [Plaintiffs] to receive the benefits of the [Operating Agreements]." *Gay*, 2015 NCBC LEXIS, at *27. Accordingly, the Court finds that these allegations state a viable claim for breach of the covenant of good faith and fair dealing and will deny Defendants' Motion as to this aspect of Plaintiffs' claim.

47. In contrast, however, the Court concludes that Plaintiffs' allegations at subparagraphs (c), (d), (i), (j), (k), and (l) of paragraph 174 of the Complaint involve

[69] (Compl. Exs. 1, 2.)

[70] (Compl. Exs. 1, 2.)

Cordell's assertion of his alleged rights under the Operating Agreements and thus, as pleaded, do not permit a reasonable conclusion that these actions injured Plaintiffs' rights to receive the benefits of the Operating Agreements. As a result, the Court will grant Defendant's Motion as to these allegations, and subparagraphs (c), (d), (i), (j), (k), and (l) of paragraph 174 of Plaintiffs' Complaint shall be dismissed.

48. Cordell also argues that "Plaintiffs' contention that Cordell was terminated as a Member and Manager of the Companies on June 14, 2023, if taken as true and viewed in a light most favorable to Plaintiffs, mandates dismissal of their claim for breach of the implied covenant."[71] Dismissal is mandated, Cordell contends, because "assuming that Cordell had no obligations to the Companies as either a Member or Manager, then it follows that Cordell had no performance obligations under the Operating Agreements as of June 14, 2023."[72]

49. Cordell ignores, however, that North Carolina permits alternative pleading. Under Rule 8(e)(1), "[a] party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses . . . A party may also state as many separate claims or defenses as he has regardless of consistency[.]" Thus, as Cordell posits, if a factfinder concludes that the 14 June 2023 vote terminated Cordell's status as a Member and Manager, Cordell can only be liable on the implied covenant claim for his actions which occurred on or before 14 June 2023. But if a factfinder concludes that Cordell has not been

[71] (Def.'s Br. Supp. Mot. Dismiss 17.)

[72] (Def.'s Br. Supp. Mot. Dismiss 17.)

terminated as a Member and Manager of the Companies, the 14 June 2023 vote would not limit Plaintiffs' right to pursue their claim. The Court reads Plaintiffs' claim in this respect to state an alternative claim for relief and therefore rejects Cordell's Motion based on this separate ground.

D. Breach of the Consent Order

50. Plaintiffs' fourth claim for relief for breach of contract is premised on Defendant's alleged breach of the 13 December 2023 Consent Order. During the course of the Initial Lawsuit, the parties entered into the Consent Order in which "the Companies agreed to voluntarily provide certain information not otherwise required by the discovery process in the Initial Litigation, in exchange for Cordell's agreement to comply with the terms of Section 10 of the Operating Agreements on a mutually agreed upon timeframe."[73] Plaintiffs contend that Cordell breached the Consent Order by "failing to accept the Companies' tender on the agreed-upon timeframe."[74]

51. Cordell seeks dismissal of this claim on grounds that "Plaintiffs have failed to allege facts sufficient to demonstrate that the Consent [ ] Order was a binding contract, as opposed to a court order, which has no legal effect following the voluntary dismissal of the prior litigation."[75]

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[73] (Compl. ¶ 178.)

[74] (Compl. ¶ 180.)

[75] (Mot. 3.)

52. Under North Carolina law, "[t]he general rule is that a consent judgment is the contract of the parties entered upon the record with the sanction of the court." *Crane v. Green*, 114 N.C. App. 105, 106 (1994). Thus, a consent judgment is "both an order of the court and a contract between the parties." *Ibele v. Tate*, 163 N.C. App. 779, 781 (2004). Furthermore, as our courts have stated, "[i]f a consent judgment is merely a recital of the parties' agreement and not an adjudication of rights, it is [enforceable] . . . through a breach of contract action." *Id.* Since the Consent Order is a valid and enforceable contract between the parties under North Carolina law and Plaintiffs have adequately alleged facts that, if taken as true, establish that Cordell breached its terms, the Court concludes that Plaintiffs' claim for breach of the Consent Order survives Rule 12(b)(6) scrutiny and therefore shall deny Cordell's Motion with respect to this claim.

IV.

CONCLUSION

53. **WHEREFORE**, for the reasons set forth above, the Court hereby **GRANTS in part** and **DENIES in part** the Motion as follows:

a. Defendant's Motion is hereby **DENIED** as to Plaintiffs' claims against Cordell for breach of contract, declaratory judgment, and breach of the Consent Order.

b. Defendant's Motion is hereby **DENIED in part** as to Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing with

respect to subparagraphs (a), (b), (e), (f), (g) and (h) of paragraph 174 of the Complaint.

c. Defendant's Motion is hereby **GRANTED** as to Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing with respect to subparagraphs (c), (d), (i), (j), (k) and (l) of paragraph 174 of the Complaint, and Plaintiffs' claim is hereby **DISMISSED with prejudice** to this extent.

d. Defendants' Motion is otherwise **DENIED**.

SO ORDERED, this the 25th day of September, 2024.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge