STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 24CV010060-910
AUTO PROVISIONS, LLC and RECON PARTNERS, LLC, Plaintiffs, v. G1.34 HOLDINGS, LLC, Defendant.	**ORDER AND OPINION ON PLAINTIFFS' MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS**

1. **THIS MATTER** is before the Court following the 8 July 2024 filing of *Plaintiffs' Motion to Dismiss Defendant's Counterclaims* (the "Motion"), filed by Plaintiffs Auto ProVisions, LLC ("AP") and Recon Partners, LLC ("RP"; and with AP, "Plaintiffs"). (ECF No. 25 ["Mot."].) Pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure (the "Rule(s)"), Plaintiffs seek dismissal, in whole or in part, of most of the counterclaims alleged against them by Defendant G1.34 Holdings, LLC ("G1.34"). (*See* Mot.)

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

Michael Best & Friedrich LLP by Justin G. May and Joseph Lucas Taylor for Plaintiff Auto ProVisions, LLC.

Wyrick Robbins Yates & Ponton LLP by Charles George for Plaintiff Recon Partners, LLC.

Parry Law by Alan K. Parry and Jonah Garson for Defendant G1.34 Holdings, LLC.

Robinson, Judge.

I. INTRODUCTION

3. This case arises from a broken business relationship between two former friends. RP was created by AP and G1.34 for the purpose of developing and marketing proprietary software for auto dealerships. However, the business relationship between AP and G1.34 began to fall apart, with G1.34 contending Plaintiffs breached the Operating Agreement of RP by failing to provide G1.34 necessary documentation, freezing G1.34 out of RP's business decisions, failing to provide G1.34 the additional ownership interest and compensation it was owed as a result of its work done for RP, and failing to pay back a loan and other funds extended to RP by G1.34.

II. FACTUAL BACKGROUND

4. The Court does not make findings of fact on a motion to dismiss pursuant to Rule 12(b)(6), but instead recites only those factual allegations included in the Counterclaims that are relevant to the Court's determination of the Motion.

A. The Parties

5. AP is a North Carolina limited liability company with its principal place of business in Wake County, North Carolina. (Answer & Countercl. of G1.34 ¶ 2, ECF No. 8 ["Countercl."].) Jeff Chapman ("Chapman") is AP's principal. (Countercl. ¶ 8.)

6. RP is a North Carolina limited liability company with its principal place of business in Wake County, North Carolina. (Countercl. ¶ 3.) RP is owned by AP and G1.34, with AP holding a sixty percent (60%) interest and G1.34 holding the

remaining forty percent (40%) interest. (*See* Compl. Ex. 1 at 20,[1] ECF No. 3 ["Op. Agt."].) Chapman is RP's named manager. (Countercl. ¶ 8.)

7. G1.34 is a North Carolina limited liability company with its principal place of business in Wake County, North Carolina. (Countercl. ¶ 1.) Nicholas Medendorp, Jr. ("Medendorp") is G1.34's principal. (Countercl. ¶ 8.)

B. Formation of RP and its Operating Agreement

8. Chapman and Medendorp met in 2008, and Medendorp served as a mentor and professional advisor to Chapman during Chapman's transition from auto sales into software sales. (Countercl. ¶ 9.)

9. At that time, Chapman owned and controlled a software sales business known as Chapman Group, Inc. (the "Chapman Group"). (Countercl. ¶ 16.) Medendorp acted as an unpaid consultant to Chapman and helped Chapman refine his business plan, reviewed contracts, discussed projects, and offered other guidance. (Countercl. ¶ 18.)

10. Chapman and Medendorp agreed to form RP "to develop and market proprietary software for auto dealerships," with the intent to "provide [RP's] software as a service, partnering with auto dealerships to operate and manage the vehicle reconditioning process[.]" (Countercl. ¶ 7.)

---

[1] The Operating Agreement is the subject of, and attached to, Plaintiffs' Complaint and is specifically referred to in the Counterclaim. *See Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60 (2001) (citations omitted) ("[T]his Court has stated that a trial court's consideration of a contract which is the subject matter of an action does not expand the scope of a Rule 12(b)(6) hearing and does not create justifiable surprise in the nonmoving party" and that "when ruling on a Rule 12(b)(6) motion, a 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.")

11. Medendorp proposed to Chapman that "he provide [RP] with a no-interest loan to help get [RP] off the ground, and to pay for software programmers going forward[.]" (Countercl. ¶ 37.) A framework document memorializing this agreement was allegedly signed on 7 November 2019, and purportedly states "[Medendorp's] capital contributions for the software was to be paid back as a 'note repayment[.]' " (Countercl. ¶ 37.) Chapman later confirmed by email that "[RP's] initial funding through a 'line of credit loan' from [G1.34] [was] to be treated as a 'note payable' by [RP]." (Countercl. ¶ 38.)

12. On 6 December 2019, Chapman, on behalf of AP, and Medendorp, on behalf of G1.34, signed the Operating Agreement of RP ("Operating Agreement"). (*See* Op. Agt.) AP and G1.34 are RP's only members, with membership interests of 60% and 40%, respectively. (Op. Agt. at 20.)

13. The Operating Agreement states that RP "shall directly enter into contracts with programmers for the development of computer software (the "Software")[.]" (Op. Agt. at 15.) G1.34 was to fund the software development and "immediately remit payments to [RP] in the amount of any invoices received by [RP] for the Software." (Op. Agt. at 15).

14. Under the Operating Agreement, G1.34 was responsible for delivering a "Minimum Viable Product" ("MVP") of software. (*See* Op. Agt. Ex. A.) Once G1.34 had developed the product to reach MVP status in a manner that satisfied the specifications and requirements set forth in the Operating Agreement, (Op. Agt. at 15; *see also* Op. Agt. Ex. A), and RP generated "revenue of at least $10,000.00 from

clients that have contracted to purchase and/or subscribe for such product," AP would transfer an additional nine percent (9%) equity interest to G1.34, (Op. Agt. at 15).

C. <u>The Business Dynamic of RP</u>

15. G1.34 was responsible for "funding and developing [RP's] principal asset, its Software," which included "remitting payments to [RP] in the amount of any invoices received by the Company for the Software, and delivering a 'minimum viable product' in operational, market-ready enterprise software." (Countercl. ¶ 39.) G1.34 agreed to "take principal responsibility for attendant risks to [RP] in going about its business, expressly indemnifying [RP] against losses related to the Software." (Countercl. ¶ 40.)

16. Conversely, Chapman was to "bring his considerable marketing and sales skills and industry experience to bear on [RP's] behalf, and commit a significant amount of his time and energy to running [RP]." (Countercl. ¶ 44.)

17. RP allowed Chapman Group "an exclusive, perpetual, irrevocable, worldwide license to use the Software, allowing Chapman Group clients to use the Software, as opposed to" other software. (Countercl. ¶ 41.)

18. The Operating Agreement provides G1.34 with certain rights, including "the right to 'review all material contracts and agreements being considered by [RP] prior to the execution by [Chapman].' " (Countercl. ¶ 43.) Also, Chapman was required to "furnish unaudited quarterly financial statements and audited annual financial statements to each Member." (Countercl. ¶ 43.)

19. G1.34, contributed in various ways to RP, including, but not limited to, "sourcing, vetting, and interviewing potential contractors for development and programming of the Software[,]" (Countercl. ¶ 45.a.), coordinating RP's brand and website design, (Countercl. ¶ 45.b.–c.), and monitoring company accounts, (Countercl. ¶ 45.h.). (*See also* Countercl. ¶¶ 45.e.–g., i.–j.)

D. <u>Events Giving Rise to Litigation</u>

20. G1.34 alleges AP failed to contribute to RP, and acted in ways contrary to RP's best interests, including "sharing confidential/proprietary information" with outsiders, "failing to follow up with business leads on behalf of [RP]," "failing to learn the rudiments of software development and marketing," and "refusing to do the marketing and sales for [RP.]" (Countercl. ¶ 47.)

21. G1.34 alleges that Chapman, and thus AP, "deliberately distanced himself from [RP] and obstructed [G1.34's] efforts," while simultaneously investing "more time and resources" into Chapman's separate enterprise–the Chapman Group. (Countercl. ¶¶ 48.a.–h.) Thereafter, AP was notified that its "continued business relationship with [unrelated third parties] represented an irreconcilable conflict of interest." (Countercl. ¶ 50.)

22. By the end of 2022, G1.34 had "fulfilled [its] obligation to deliver the Software as a 'minimal viable product.' " (Countercl. ¶ 52.)

23. In January 2023, while at a company retreat, Chapman represented that he "had not made cold calls in years" on behalf of RP, "complained about the 'time and stress' of juggling his responsibilities," complained "about the burden of paying

back the [l]oan," and informed Medendorp that G1.34 "would have to continue to do the bulk of the work for [RP] going forward." (Countercl. ¶ 54.) Chapman later repeated these remarks on a phone call with Medendorp. (Countercl. ¶ 56.)

24. G1.34 alleges that thereafter AP "began to take steps to freeze [G1.34] out of [RP]," including transferring various RP accounts; locking Medendorp out of RP's email accounts, software development platform, and text message tools; and "forbidding [G1.34] from having anything to do with [RP's] Software's final stages of development, product launch, and marketing." (Countercl. ¶ 57, 57.a.–f.)

25. Since the filing of this action by Plaintiffs, AP has "failed to deliver audited annual financial statements to [G1.34] or [RP] tax filings as required under the Operating Agreement," and has failed to repay any money to G1.34. (Countercl. ¶ 67.)

III. PROCEDURAL BACKGROUND

26. On 26 March 2024, Plaintiffs initiated this action upon the filing of their Complaint, (ECF No. 3), asserting four claims against G1.34.

27. On 7 May 2024, G1.34 filed its Answer and Counterclaims. (*See* Countercl.) G1.34 asserts nine counterclaims against Plaintiffs, including, at issue in this Motion: (1) breach of contract against RP ("Counterclaim Two"), (Countercl. ¶¶ 76–82); (2) breach of the implied duties of good faith and fair dealing against RP ("Counterclaim Three"), (Countercl. ¶¶ 83–86); (3) unjust enrichment against RP ("Counterclaim Four"), (Countercl. ¶¶ 87–91); (4) breach of contract against AP ("Counterclaim Five"), (Countercl. ¶¶ 92–97); (5) breach of the implied duties of good

faith and fair dealing against AP ("Counterclaim Six"), (Countercl. ¶¶ 98–101); (6) unjust enrichment against AP ("Counterclaim Seven"), (Countercl. ¶¶ 102–06); and (7) conversion against both RP and AP ("Counterclaim Eight"), (Countercl. ¶¶ 107–09).

28. On 8 May 2024, this case was designated to the Business Court and assigned to the undersigned on the same day. (ECF Nos. 1–2.)

29. On 8 July 2024, Plaintiffs filed the Motion. Following briefing,[2] the Court held a hearing on the Motion on 18 September 2024 (the "Hearing"), (*see* ECF No. 40), at which all parties were represented by counsel.

30. The Motion is now ripe for resolution.

IV. LEGAL STANDARD

31. In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the Court reviews the allegations in the Counterclaims in the light most favorable to G1.34. *See Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5 (2017). The Court's inquiry is "whether, as a matter of law, the allegations of the [Counterclaims] . . . are sufficient to state a claim upon which relief may be granted under some legal theory[.]" *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 670 (1987). The Court accepts all well-pleaded factual allegations in the relevant pleading as true. *See Krawiec v. Manly*, 370 N.C. 602, 606 (2018). The Court is therefore not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact,

[2] Along with the Motion, Plaintiffs filed a supporting brief. (*See* Br. Supp. Mot., ECF No. 26 ["Br. Supp."].) Thereafter, G1.34 filed its brief in opposition to the Motion on 5 August 2024. (*See* Br. Opp. Mot., ECF No. 37 ["Br. Opp."].) Plaintiffs did not file a reply brief.

or unreasonable inferences." *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 274 (2005) (citation omitted).

32. Furthermore, the Court "can reject allegations that are contradicted by the documents attached, specifically referred to, or incorporated by reference in the [Counterclaims]." *Moch v. A.M. Pappas & Assocs., LLC.*, 251 N.C. App. 198, 206 (2016) (citation omitted). The Court may consider these attached or incorporated documents without converting the Rule 12(b)(6) motion into a motion for summary judgment. *Id.* (citation omitted). Moreover, the Court "may properly consider documents which are the subject of [the Counterclaims] and to which the [Counterclaims] specifically refer[ ] even though they are presented by the [Plaintiffs]." *Oberlin Capital, L.P.,* 147 N.C. App. at 60 (2001) (citation omitted).

33. Our Supreme Court has observed that "[i]t is well-established that dismissal pursuant to Rule 12(b)(6) is proper when '(1) the [Counterclaims] on [their] face reveal[ ] that no law supports the [non-movant's] claim; (2) the [Counterclaims] on [their] face reveal[ ] the absence of facts sufficient to make a good claim; or (3) the [Counterclaims] disclose[ ] some fact that necessarily defeats the [non-movant's] claim.' " *Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 615 (2018) (quoting *Wood v. Guilford Cnty.*, 355 N.C. 161, 166 (2002)). This standard of review for Rule 12(b)(6) motions is the standard our Supreme Court "routinely uses . . . in assessing the sufficiency of [Counterclaims] in the context of complex commercial litigation." *Id.* at 615 n.7 (citations omitted).

V. ANALYSIS

34. The Court first analyzes Plaintiffs' request for dismissal, in whole or in part, of Counterclaims Two, Three, Five, and Six, as they are related to G1.34's claims of breach of contract and breach of the implied duties of good faith and fair dealing against both Plaintiffs. Next, the Court considers Plaintiffs' request for dismissal, in whole or in part, of Counterclaims Four and Seven related to G1.34's claims of unjust enrichment against both Plaintiffs. Finally, the Court reviews Plaintiffs' request for dismissal of Counterclaim Eight for conversion asserted against both Plaintiffs.

A. Counterclaims Two, Three, Five, and Six: Breach of Contract and Breach of Implied Duty of Good Faith and Fair Dealing

35. G1.34 has asserted Counterclaim Two against RP for breach of contract as to both the Operating Agreement and the Loan Agreement entered into between RP and G1.34, (Countercl. ¶¶ 76–82), and a related claim for breach of the implied duties of good faith and fair dealing, (Countercl. ¶¶ 83–86).

36. Additionally, G1.34 has asserted Counterclaim Five against AP for breach of contract as to the Operating Agreement, (Countercl. ¶¶ 92–97), asserting a related claim, Counterclaim Six, for breach of the implied duties of good faith and fair dealing, (Countercl. ¶¶ 98–101).

37. To properly plead a breach of contract claim, a plaintiff need only allege "(1) [the] existence of a valid contract and (2) [a] breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26 (2000). When these elements are alleged, "it is error to dismiss a breach of contract claim under Rule 12(b)(6)," and our appellate courts routinely reverse trial court orders that require anything more. *Woolard v.*

Davenport, 166 N.C. App. 129, 134 (2004). "[S]tating 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).

38. If the contract "contains some condition precedent to [plaintiffs'] liability," G1.34 must also allege that the condition has been met. *Beachboard v. S. Ry. Co.*, 16 N.C. App. 671, 681 (1972) (citation omitted); *see also* Rule 9(c). "A condition precedent is a fact or event that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty." *Mosely v. WAM, Inc.*, 167 N.C. App. 594, 600 (2004) (citation omitted).

39. Under North Carolina law, every enforceable contract contains an underlying, implied covenant of good faith and fair dealing. *Bicycle Transit Auth. v. Bell*, 314 N.C. 219, 228 (1985). "A claim for breach of this implied covenant arises when one party 'wrongfully deprives' the other of some benefit 'to which they were entitled,' or takes some other action for a 'wrongful or unconscionable purpose.' " *Wadhwania v. Wake Forest Univ. Baptist Med. Ctr.*, 262 N.C. App. 510 (2018) (citing *Dull v. Mut. Of Omaha Ins. Co.*, 85 N.C. App. 310, 318 (1987)). In North Carolina:

> [a]s a general proposition, where a party's claim for breach of the implied covenant of good faith and fair dealing is based upon the same acts as its claim for breach of contract, we treat the former claim as "part and parcel" of the latter. *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 19 (1996), *disc. review denied*, 345 N.C. 344 (1997); *see Suntrust Bank v. Bryant/Sutphin Props., LLC*, 222 N.C. App. 821, 833 ("As the jury determined that plaintiff did not breach any of its contracts with defendants, it would be illogical for this Court to conclude that plaintiff somehow breached implied terms of the same contracts."), *disc. review denied*, 366 N.C. 417 (2012).

Cordaro v. Harrington Bank, FSB, 260 N.C. App. 26, 38–39 (2018). In other words, if a party "brings a breach of contract claim and a claim for breach of the covenant of good faith and fair dealing based on the same facts, the two causes of action are treated as one and the same." *Eye Dialogue LLC v. Party Reflections, Inc.*, 2020 NCBC LEXIS 90, at **19–20 (N.C. Super. Ct. July 28, 2020).

1. Counterclaims Two & Three – Breach of Contract and Breach of Implied Duty of Good Faith and Fair Dealing as to RP

40. Plaintiffs contend G1.34 has failed to adequately state a claim as to Counterclaim Two as it relates to the Loan Agreement. (Br. Supp. 5–7.)

41. G1.34 alleges that RP has breached "its express and implied contractual obligations to [G1.34] under the Loan Agreement" by "repudiating the Loan Agreement and failing to pay amounts due thereunder." (Countercl. ¶ 80.)

42. Plaintiffs contend that nowhere in the Counterclaims "does it set forth what the terms of the Loan were, and while it refers to the defined term 'Loan Agreement' it never defines what it is referring to when it references the 'Loan Agreement.' " (Br. Supp. 6.) Further, Plaintiffs contend that "G1.34's funding of RP's software development expenses is not an agreement to advance money in return for a promise to make payment," but instead is subject to the requirements set forth in the Operating Agreement. (Br. Supp. 6.)

43. Notwithstanding Plaintiffs' arguments, the Court concludes that, at this early stage of the proceeding, G1.34 has adequately pled a claim for breach of contract based on the Loan Agreement, alleging that it is a "valid and enforceable contract[ ]," (Countercl. ¶ 77), and that RP has "materially breached its express and implied

contractual obligations to [G1.34]" under the Loan Agreement, (Countercl. ¶ 80). *See Woolard,* 166 N.C. App. at 134.

44. Therefore, the Motion is **DENIED** as to Counterclaim Two for breach of contract against RP.

45. The Motion is similarly **DENIED** as to Count Three for breach of the implied duties of good faith and fair dealing regarding the Loan Agreement. *See Haigh v. Superior Ins. Mgmt. Grp.*, 2017 NCBC LEXIS 100, at *12–17 (N.C. Super. Ct. Oct. 24, 2017) (denying motion to dismiss under Rule 12(b)(6) a good faith and fair dealing claim that was "the same as the claim for" breach of contract where motion to dismiss breach of contract claim was also denied).

2. Counterclaims Five & Six – Breach of Contract and Breach of Implied Duty of Good Faith and Fair Dealing as to AP

46. G1.34 alleges that AP has breached "its express and implied contractual obligations to [G1.34] under the Operating Agreement" by "failing to transfer an additional 9% membership interest in [RP] to [G1.34] for [G1.34]'s successful delivery of the Software as a 'minimal viable product.' " (Countercl. ¶ 95.)

47. Plaintiffs contend G1.34 has failed to adequately state a claim as to Counterclaim Five, arguing that G1.34 has failed to allege that "the product or delivery met the [Operating] Agreement's required specifications." (Br. Supp. 5.) Plaintiffs argue that "without allegations that MVP conformed to the [Operating] Agreement's required specifications," G1.34 failed to sufficiently allege its breach of contract claim against AP. (Br. Supp. 5.) Further, Plaintiffs contend that even if G1.34 did allege that MVP was met, it made no allegation that "RP generated revenue

of at least $10,000.00 from clients to purchase or subscribe for any such product." (Br. Supp. 5; *see also* Op. Agt. at 15.)

48. The Court concludes that G1.34 has adequately pled a claim for breach of contract based on the Operating Agreement, alleging that the Operating Agreement is a "valid and enforceable contract[ ]," (Countercl. ¶ 93), and that G1.34 has "satisfied all conditions precedent to recovering the relief sought[,]" (Countercl. ¶ 94). G1.34 further alleges that AP "materially breached its express and implied contractual obligations to [G1.34] under the Operating Agreement[.]" (Countercl. ¶ 95.) *See Woolard,* 166 N.C. App. at 134.

49. Therefore, the Motion is **DENIED** as to Counterclaim Five for breach of contract against AP.

50. G1.34 has similarly alleged breach of the implied duties of good faith and fair dealing with respect to the Operating Agreement. Therefore, the Motion is similarly **DENIED** as to Count Six for breach of the implied duties of good faith and fair dealing. *See Haigh,* 2017 NCBC LEXIS 100, at *12–17.

B. <u>Counterclaims Four & Seven: Unjust Enrichment</u>

51. G1.34 has asserted Counterclaim Four against RP for unjust enrichment, (Countercl. ¶¶ 87–91), and has similarly asserted Counterclaim Seven against AP for unjust enrichment, (Countercl. ¶¶ 102–06).

52. In order to state a claim for unjust enrichment, a party must allege: "(1) it conferred a benefit on another party; (2) the other party consciously accepted the benefit; and (3) the benefit was not conferred gratuitously or by an interference in the

affairs of the other party." *Worley v. Moore*, 2018 NCBC LEXIS 114, at *25 (N.C. Super. Ct. Nov. 2, 2018) (citing *Se. Shelter Corp. v. BTU, Inc.*, 154 N.C. App. 321, 330 (2002)). "The doctrine of unjust enrichment was devised by equity to exact the return of, or payment for, benefits received under circumstances where it would be unfair for the recipient to retain them without the contributor being repaid or compensated." *Collins v. Davis*, 68 N.C. App. 588, 591 (1984).

53. G1.34 alleges that RP "holds money that in equity and good conscience belongs to [G1.34]." (Countercl. ¶ 88.) G1.34 further asserts that RP "obtained this money from [G1.34] in the form of the Loan," that RP "has now repudiated without justification," (Countercl. ¶ 89), and "[RP] would be enriched unjustly if permitted to retain the benefit of this wrongfully held money," (Countercl. ¶ 90).

54. In addition, G1.34 alleges that AP "holds membership interests in [RP] that in equity and good conscience belong to [G1.34]." (Countercl. ¶ 103.) G1.34 also contends that "[AP] has pretextually retained these membership interests," (Countercl. ¶ 104), and "[AP] would be enriched unjustly if permitted to retain the benefit of this [sic] wrongfully held membership interests," (Countercl. ¶ 105).

55. Plaintiffs contend G1.34 has failed to adequately state a claim as to Counterclaims Four and Seven, arguing that "[a]ll parties plead the Operating Agreement is a 'valid, binding, and enforceable contract[,]' " and therefore, G1.34's failure to "plead the absence of an express agreement of the parties" requires dismissal of Counterclaims Four and Seven. (Br. Supp. 7.)

56. First, as to the Operating Agreement, Plaintiffs contend that all parties agree that the Operating Agreement is a valid and binding contract, (*see* Br. Supp. 7), citing to Plaintiffs own Complaint and Answer to G1.34's Counterclaims, (*see* Compl.; Answer, ECF No. 27), to support this contention, which are beyond the scope of the pending Motion. The Court is limited at the Rule 12(b)(6) stage to consider only the allegations of the Counterclaims and any documents attached, referred to, or incorporated by reference therein. *See Can-Dev, ULC v. SSTI Centennial, LLC*, 2018 NCBC LEXIS 9, at *23 (N.C. Super. Ct. Jan. 25, 2018). Thus, Plaintiffs' Complaint and Answer to G1.34's Counterclaims may not properly be considered without converting the Motion into a 12(c) motion, which the Court, in its discretion, declines to do.

57. Second, as to the Loan Agreement, it appears to the Court based on the record before it, along with comments made at the Hearing, that Plaintiffs dispute the validity of the Loan Agreement.

58. Both of G1.34's unjust enrichment counterclaims are pled in the alternative to G1.34's breach of contract counterclaims. (*See* Countercl. at 46, 48.) This Court has on multiple occasions permitted both a breach of contract claim and, in the alternative, an unjust enrichment claim to proceed at the Rule 12 stage. *See Sparrow Sys., Inc. v. Private Diagnostic Clinic, PLLC*, 2014 NCBC LEXIS 70, at *23 n.4 (N.C. Super. Ct. Dec. 24, 2014) ("[A]lthough Plaintiff will not ultimately be able to recover under both an express and implied contract [unjust enrichment] theory, Plaintiff is not foreclosed from properly pleading these claims in the alternative in its

Complaint."); *see also Haddock v. Volunteers of Am., Inc.*, 2021 NCBC LEXIS 8, at *16 (N.C. Super. Ct. Jan. 22, 2021) ("[A] plaintiff may plead unjust enrichment as an alternative claim to a breach of contract claim 'even if [the] plaintiff may not ultimately prevail on both.' ") (citation omitted).

59. As a result, the Motion is **DENIED** as to Counterclaims Four and Seven for unjust enrichment.

C. <u>Counterclaim Eight: Conversion</u>

60. G1.34 alleges that AP attempted "through various coercive means to convert the value of [G1.34's] contributions to [RP], namely the Loan and the value of the Software developed with [G1.34's] labor and resources on behalf of [RP], to itself and its principal." (Countercl. ¶ 72.a.) G1.34 also alleges that the acts of RP and AP "constitute conversion of [G1.34]'s property," as they have "assumed and exercised the right of ownership over property and money belonging to [G1.34], to the exclusion of [G1.34]'s rights to those assets." (Countercl. ¶ 108.)

61. Plaintiffs seek dismissal of Counterclaim Eight for conversion, arguing that "G1.34 failed to sufficiently plead a wrongful deprivation of any property or money by AP or RP." (Br. Supp. 9.)

62. Under North Carolina law, "[t]wo essential elements are necessary in a claim for conversion: (1) ownership in the plaintiff, and (2) a wrongful conversion by the defendant." *Steele v. Bowden*, 238 N.C. App. 566, 574 (2014) (cleaned up). In cases where defendant comes into possession of plaintiff's property lawfully, plaintiff must show that it made a demand for the return of the property that was refused by

defendant. *Hoch v. Young*, 63 N.C. App. 480, 483 (1983) (citations omitted). Further, " 'there is no conversion until some act is done which is a denial or violation of the plaintiff's dominion over or rights in the property.' " *Bartlett Milling Co. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 86 (2008) (quoting *Lake Mary Ltd. P'ship. v. Johnston*, 145 N.C. App. 525, 532, *rev. denied*, 354 N.C. 363 (2001)). "In North Carolina, only goods and personal property are properly the subjects of a claim for conversion." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 414 (2000).

63. G1.34 offers in its brief in opposition that it has alleged "four different, separate deprivations," including (1) the Loan funds, (2) the Software, (3) the additional nine percent equity interest in RP, and (4) funds separate and apart from the Loan provided to RP by G1.34. (Br. Opp. 21.)

64. Upon review of G1.34's Counterclaims, it appears to the Court that there are only three categories of assets that G1.34 lists as part of its conversion claim: (1) the Loan; (2) the value of the Software; and (3) funds separate and apart from the Loan provided to RP by G1.34. (*See* Countercl.) As such, the Court limits its analysis to whether G1.34 has adequately stated a claim for conversion based on these three categories of assets or interests.

65. As an initial matter, G1.34's conversion claim as to nonpayment of the Loan balance, and the funds provided to RP separate and apart from the Loan, cannot serve as a basis for a conversion claim. *See Kumar v. Patel*, 2024 NCBC LEXIS 36,

at **15 (N.C. Super. Ct. Feb. 28, 2024) (holding that "a mere failure to pay a debt does not amount to a civil claim for conversion.").

66. As a result, the Motion is **GRANTED** in part as to Counterclaim Eight for conversion as it relates to both the Loan and any funds provided to RP separate and apart from the Loan by G1.34, and that claim is **DISMISSED** with prejudice to that extent.

67. Next, the Court turns its attention to G1.34's claim for conversion as it relates to "the value of the Software developed with [G1.34's] labor and resources on behalf of [RP], to itself and its principal[,]" (Countercl. ¶ 72.a.).

68. Based on a review of G1.34's Counterclaims, as well as representations made by counsel for all parties at the Hearing, the Software is admittedly owned by RP. As such, G1.34 has no ownership interest in the Software that could, in turn, be converted by RP, as RP is the rightful owner of the Software. *See Comput. Design & Integration, LLC v. Brown,* 2018 NCBC LEXIS 216, at **67 (N.C. Super. Ct. Dec. 10, 2018) ("Because Plaintiffs did not own the [equipment at issue], it cannot properly be the subject of a conversion claim.").

69. While RP's ownership in the Software is dispositive as to G1.34's conversion counterclaim, even assuming the value of the Software did belong to G1.34, there are no allegations within the Counterclaims that G1.34 demanded the return of the Software, and counsel for G1.34 admitted as much at the Hearing. *See Stratton v. Royal Bank of Can.*, 2010 NCBC LEXIS 1, *20–21 (N.C. Super. Ct. Feb. 5, 2010) ("If there is no wrongful taking, i.e., if the defendant rightfully comes into possession and

then refuses to surrender the goods, then demand and refusal is necessary for the tort of conversion to exist.").

70. As a result, the Motion is **GRANTED** in part as to Counterclaim Eight for conversion as it relates to the value of the Software, and that claim is **DISMISSED** with prejudice.

VI. CONCLUSION

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

a. The Motion is **GRANTED** in part as to Counterclaim Eight for conversion, and that claim is **DISMISSED**; and

b. Except as expressly granted, the Motion is otherwise **DENIED**.

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

/s/ Michael L. Robinson

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