STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 24CV029650-590
WPATRICK WHALEN, individually, and CU SOBE, LLC, Plaintiffs, v. MICHAEL M. TUTTLE, Defendant.	**ORDER AND OPINION ON MOTION TO STRIKE AND MOTION TO DISMISS**

1. Patrick Whalen and Michael Tuttle are co-owners (with other individuals) of half a dozen restaurant businesses, including CU SOBE, LLC. In a private mediation earlier this year, Whalen and Tuttle signed a written agreement to settle a host of long-smoldering disputes between them. Just a few months later, Whalen and CU SOBE brought this suit against Tuttle, claiming that he breached the settlement agreement and engaged in misconduct related to CU SOBE's funding and operations.

2. Tuttle has moved to strike certain allegations in the complaint and to dismiss all claims asserted against him. For the following reasons, the Court **DENIES** the motion to strike and **GRANTS in part** and **DENIES in part** the motion to dismiss.

Parton Law PLLC, *by Corey Parton and Leslie Muse*, *for Plaintiffs Patrick Whalen and CU SOBE, LLC.*

Michael Best & Friedrich LLP, *by Justin G. May*, *Rebecca R. Thornton, J. Luke Taylor, and Matt B. Couch, for Defendant Michael M. Tuttle.*

Conrad, Judge.

I.
BACKGROUND

3. The following background assumes that the allegations in the complaint are true.

4. Whalen owns and operates many restaurants in the Carolinas and elsewhere. He first met Tuttle in 2018. At that time, Tuttle was a frequent patron of Whalen's restaurants with aspirations to become one of Whalen's investors. Tuttle approached Whalen to express his interest, offering assurances that he had ample means and experience to help fund future restaurant ventures. Eventually, Whalen and his business partners agreed to bring Tuttle into the fold. Starting in 2019, Tuttle made five investments in Whalen's restaurants, totaling more than $3 million, in return for ownership interests in the restaurants' operating companies. (*See* Compl. ¶¶ 11, 13–15, 17–19, 22, ECF No. 3.)

5. At issue here is a sixth investment. In June 2022, Whalen and Tuttle discussed opening a new restaurant in Miami, Florida, to be owned and operated by a North Carolina LLC called CU SOBE. On a visit to the prospective site, they struck an oral agreement. Tuttle promised to contribute $2 million toward the project; he would pay this amount in twenty installments beginning the following summer; and in return, he would get a 25% membership interest in CU SOBE. That December, CU SOBE leased space for the restaurant and began lining up contractors to handle its construction. (*See* Compl. ¶¶ 25, 27, 31, 36.)

6. Things began to go sideways as the due date for Tuttle's first installment approached. Although the schedule called for him to pay $100,000 in July 2023, he

asked Whalen to push back the due date by two months. Whalen was willing to grant the two-month delay on condition that CU SOBE would have the right to accelerate the unpaid balance at any time. Tuttle agreed. Then, on 5 July 2023 (apparently before Tuttle's delayed first installment would have been due), CU SOBE exercised its acceleration right and demanded that Tuttle to pay all $2 million immediately. When Tuttle refused, Whalen called for a meeting. In a testy exchange, Whalen pressed Tuttle about his financial commitment to CU SOBE and accused him of engaging in rude and disruptive behavior at several restaurants. Tuttle supposedly reaffirmed his $2 million pledge and apologized for his behavior. (*See* Compl. ¶¶ 44, 45, 47, 48, 50, 52, 60, 61.)

7. But this fragile truce did not last. Tuttle requested financial records from the entities in which he had invested and began disparaging Whalen in messages to fellow investors. Growing acrimony gave rise to a fight for control of CU SOBE and other companies in Whalen's restaurant empire. In one incident, Tuttle tried to fire a lawyer that Whalen retained to represent CU SOBE. This prompted a backlash from Whalen and other investors, who voted to ban Tuttle from restaurant grounds while affirming that Whalen alone had complete managerial authority over each restaurant and its operating entity. Meanwhile, having received no payments from Tuttle, CU SOBE turned to other investors for funding and delayed the opening of the Miami restaurant. (*See* Compl. ¶¶ 63, 68, 79, 83–85.)

8. In April 2024, Whalen and Tuttle held a private mediation to try to resolve their many disputes. At mediation, they negotiated and signed a written settlement agreement. (*See* Compl. ¶¶ 86, 87.)

9. Despite the apparently successful mediation, Whalen and CU SOBE filed this lawsuit. Their complaint asserts claims for breach of the settlement agreement, breach of the oral agreement to fund CU SOBE's operations, breach of CU SOBE's operating agreement, fraudulent inducement, and unfair or deceptive trade practices under N.C.G.S. § 75-1.1.

10. Tuttle has moved to strike a series of allegations in the complaint and to dismiss all claims. (*See* ECF Nos. 8, 11.) Following full briefing and a hearing on 15 November 2024, the motions are ripe.

II.
MOTION TO STRIKE

11. The Court begins with the motion to strike. A trial court "may order stricken from any pleading any . . . redundant, irrelevant, immaterial, impertinent, or scandalous matter." N.C. R. Civ. P. 12(f). "Matter should not be stricken unless it has no possible bearing upon the litigation. If there is any question as to whether an issue may arise, the motion should be denied." *Shellhorn v. Brad Ragan, Inc.*, 38 N.C. App. 310, 316 (1978).

12. Tuttle seeks to strike two groups of allegations. The first group includes five paragraphs alleging that Tuttle engaged in boorish and disruptive behavior at the restaurants in which he invested. (*See* Compl. ¶¶ 52–54, 64, 143.) Tuttle contends that these allegations are irrelevant. The second group includes six paragraphs

alleging that Tuttle disparaged and defamed Whalen in communications with fellow investors and other individuals. (*See* Compl. ¶¶ 67–71, 142.) Tuttle contends that these allegations are conclusory and insufficient to satisfy the heightened pleading standard for defamation.

13. Both arguments fall short. The complaint lists Tuttle's disruptive behavior as one of the aggravating circumstances giving rise to a claim for unfair or deceptive trade practices under section 75-1.1. Likewise, the complaint lists Tuttle's supposedly defamatory statements as an additional basis for that claim, as well as the claim for breach of CU SOBE's operating agreement. This does not necessarily mean that the allegations are sufficient to state a claim for relief. But Tuttle has not shown that they have "no possible bearing upon the litigation." *Shellhorn*, 38 N.C. App. at 316. In its discretion, the Court denies the motion to strike. *See, e.g.*, *Buckley LLP v. Series 1 of Oxford Ins. Co. NC LLC*, 2020 NCBC LEXIS 36, at *6–7 (N.C. Super. Ct. Mar. 23, 2020) (denying motion to strike "inflammatory allegations" relating to section 75-1.1 claim).

III.
MOTION TO DISMISS

14. Next, the Court turns to the motion to dismiss. *See* N.C. R. Civ. P. 12(b)(6). Familiar standards of review apply. Although the Court must treat all well-pleaded allegations as true and view the facts and permissible inferences in the light most favorable to the nonmoving party, *see, e.g.*, *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332 (2019), it "is not required to accept as true any conclusions of law or

unwarranted deductions of fact," *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 56 (2001).

15. One preliminary matter must be addressed. In support of his motion, Tuttle attached CU SOBE's articles of organization and the settlement agreement that he and Whalen signed in April 2024. (*See, e.g.*, Def.'s Exs. A, B, ECF Nos. 10.1, 10.2.) Whalen and CU SOBE object that these documents should not be considered because they are outside the four corners of the complaint. The Court overrules their objections. The articles of organization "are a public record available through the North Carolina Secretary of State" and subject to "judicial notice." *Truist Fin. Corp. v. Rocco*, 2024 NCBC LEXIS 62, at *31 n.75 (N.C. Super. Ct. Apr. 25, 2024) (citing N.C. R. Evid. 201). And "the complaint specifically refers" to, and asserts a claim for breach of, the settlement agreement. *Weaver v. St. Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204 (2007) (citation and quotation marks omitted). Neither document's authenticity is in dispute. Accordingly, the Court may consider them.

A. Breach of Settlement Agreement

16. Whalen claims that Tuttle breached their April 2024 settlement agreement. As Tuttle correctly observes, though, the allegations of breach are too conclusory to state a claim. All that the complaint alleges is that Tuttle's "failure to perform a material term of the Settlement Memorandum constitutes breach," that Tuttle "breached the Settlement Memorandum by repudiation, as evidenced by his words and conduct," and that Tuttle "further breached the Settlement Memorandum's implied provisions of good-faith and fair dealing." (Compl. ¶¶ 93–95.) At no point

does the complaint identify which material term Tuttle failed to perform or the actions or inactions that constituted the failure to perform. Nor does it describe the words and conduct manifesting either a repudiation or a breach of the implied covenant of good faith and fair dealing. The Court and Tuttle are left to guess at the basis for the claim.

17. Accordingly, the Court grants the motion to dismiss Whalen's claim for breach of the settlement agreement. *See Vogel v. Health Sci. Found., Inc.*, 2013 N.C. App. LEXIS 1287, at *14 (N.C. Ct. App. 2013) (unpublished) ("[W]e are unable to ascertain from our study of the complaint how Defendant's alleged actions constitute a breach of the contract between the parties."); *Glob. Promotions Grp., Inc. v. Danas Inc.*, 2012 NCBC LEXIS 40, at *17 (N.C. Super. Ct. June 22, 2012) (dismissing "conclusory" claim for breach of contract).

B. Breach of Oral Contract

18. CU SOBE claims that Tuttle breached an oral contract to fund its operations. As alleged, Tuttle has not made any of the promised installment payments toward his $2 million pledge. Nor did he pay the full contribution amount when CU SOBE exercised its right to accelerate the balance. (*See* Compl. ¶¶ 104, 106, 108.)

19. Tuttle contends, first, that CU SOBE lacks standing. This is so, he says, because he and Whalen reached their agreement in June 2022, (*see* Compl. ¶ 27), some five months before CU SOBE's articles of organization show that it was formed, (*see* Def.'s Ex. B). Because CU SOBE did not exist at the time of the contract, he

contends, the company is not a party to it and has no right to enforce it. But this argument rests on a misreading of the claim. The complaint alleges that Whalen and Tuttle renegotiated matters in May 2023—long after CU SOBE's formation—and amended the contract. A fair inference is that CU SOBE is a party to the amended contract. The allegations tend to show, for example, that Whalen negotiated on CU SOBE's behalf as its manager and that the amended contract gave CU SOBE the right to accelerate the balance owed by Tuttle. (*See* Compl. ¶¶ 2, 45, 83, 106.) Viewed in the light most favorable to CU SOBE, these allegations are sufficient to allege that the company is a party to an oral contract with Tuttle and that it has standing to enforce its contractual rights.

20. Second, Tuttle argues that the claim must be dismissed because his settlement agreement with Whalen includes a general release. It would be premature to dismiss the claim for that reason, however, because the meaning and enforceability of the settlement agreement are uncertain. (*See, e.g.*, Def.'s Ex. A ¶¶ 3, 12 (noting that the agreement was "subject to Michael Tuttle's satisfaction of due diligence" and that the parties anticipated drafting "a more formal agreement" with additional terms).) Whether the settlement agreement contains an enforceable general release barring this and other claims is an issue for discovery.* *See Brown v. Lanier*, 60 N.C. App. 575, 578 (1983) (reversing and remanding to address disputes about enforceability of release); *Islet Scis., Inc. v. Brighthaven Ventures, LLC*, 2017 NCBC

* This conclusion applies equally to Tuttle's argument that the settlement agreement's release provision bars the claims for breach of the operating agreement, fraud, and unfair or deceptive trade practices under section 75-1.1.

LEXIS 3, at *15–16 (N.C. Super. Ct. Jan. 12, 2017) (denying motion for judgment on the pleadings due to factual disputes concerning application of release).

21. The Court denies Tuttle's motion to dismiss CU SOBE's claim for breach of the oral contract.

C. Breach of CU SOBE's Operating Agreement

22. Whalen and CU SOBE claim that Tuttle breached at least three provisions in the company's operating agreement. (*See* Compl. ¶¶ 120, 122, 125.) In seeking to dismiss the claim, Tuttle argues that the complaint does not allege that he assented to the operating agreement's terms, meaning that a valid contract was never formed. At most, he argues, the complaint alleges an unenforceable agreement to agree.

23. Although the complaint is not as clear as it could be, the Court concludes that it sufficiently alleges that the operating agreement is a valid contract and that Tuttle is a party to it. Taking the allegations as true, they show that Tuttle became a member of CU SOBE, received "a printed copy of" its operating agreement, and "agreed to be bound by the terms" of that agreement. (Compl. ¶¶ 27, 29, 30, 117.) Moreover, the statutory default rule is that "[a] person who becomes an interest owner is deemed to assent to, and is bound by . . . and is otherwise deemed to be a party to, the operating agreement." N.C.G.S. § 57D-2-31(b).

24. The Court denies the motion to dismiss the claim for breach of CU SOBE's operating agreement.

D. Fraud

25. Whalen and CU SOBE claim that Tuttle fraudulently induced them to give him a membership interest in the company by falsely representing that he had sufficient liquidity to satisfy his $2 million pledge. (*See* Compl. ¶¶ 133, 135.) Tuttle seeks to dismiss the claim, arguing that the complaint does not allege that he made any specific representation and otherwise does not satisfy the heightened pleading requirements for fraud claims.

26. Fraud has five "essential elements": (a) a false representation or concealment of a material fact, (b) calculated to deceive, (c) made with intent to deceive, (d) that did in fact deceive, and (e) that resulted in damage to the injured party. *Rowan Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 17 (1992). Unlike contract claims, fraud claims must "be stated with particularity." N.C. R. Civ. P. 9(b). To satisfy the particularity requirement, a plaintiff typically must allege the "time, place and content" of the misrepresentation, the "identify of the person making the representation," and "what was obtained as a result." *Terry v. Terry*, 302 N.C. 77, 85 (1981).

27. The complaint does not come close to meeting this heightened standard. Just three paragraphs describe the negotiations that led to Tuttle's promise to fund CU SOBE's operations. Paragraph 25 states that Whalen and Tuttle first discussed opening a new restaurant in Miami, Florida in June 2022. Paragraph 26 states that they flew to Miami to visit a prospective restaurant site that same month. And paragraph 27 states that they formed an oral contract—with Tuttle promising $2

million in return for an interest in CU SOBE—during the flight. Missing from these paragraphs is any allegation, much less an allegation stated with particularity, that Tuttle made a representation about his liquidity to induce Whalen to accept these terms. *See, e.g.*, *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 612–13 (2008) (affirming dismissal of fraud claim due to lack of particularity about time, place, and content of alleged representation).

28. In their opposition brief, Whalen and CU SOBE try to fill the gap with allegations elsewhere in the complaint that Tuttle bragged in 2018 about his personal wealth and assured Whalen in 2019 "that he was an experienced investor with sufficient liquidity." (Compl. ¶¶ 14, 17.) These alleged statements do not concern Tuttle's capacity to invest *in CU SOBE*—a restaurant business that was not yet contemplated and that Whalen did not discuss with Tuttle for another three years. *See Charlotte Motor Speedway, LLC v. Cnty. of Cabarrus*, 230 N.C. App. 1, 10 (2013) (concluding that defendant's alleged representation about its "ability to fund the promised amounts" were not "definite and specific"). What's more, Whalen and CU SOBE have not alleged that Tuttle's statements about his wealth and liquidity were false when he made them in 2018 and 2019. Indeed, the complaint goes on to allege that Tuttle invested upwards of $3 million in five restaurant businesses before any discussions about CU SOBE occurred. (*See* Compl. ¶¶ 19, 21, 22.)

29. In addition, Whalen and CU SOBE point to events that took place long after the time of the oral contract, including discussions that Whalen and Tuttle allegedly had in 2023. But the fraud claim is limited to "misrepresentations regarding his

liquidity *prior to* the" contract. (Compl. ¶ 136 (emphasis added).) In any event, Whalen and CU SOBE do not explain how a misrepresentation that Tuttle might have made in 2023 could have induced Whalen to enter into a contract a year earlier.

30. At points in their brief, Whalen and CU SOBE also suggest that Tuttle's promise to pay $2 million was itself fraudulent. They did not plead that theory, however. Plus, an unfulfilled promise, standing alone, does not support an action for fraud. The plaintiff must also allege facts "from which a court and jury may reasonably infer that the defendant did not intend to carry out [the promissory] representations when they were made." *Whitley v. O'Neal*, 5 N.C. App. 136, 139 (1969). No allegations along those lines appear in the complaint.

31. The Court grants the motion to dismiss the claim for fraudulent inducement.

E. Section 75-1.1

32. The section 75-1.1 claim is a catchall claim premised on each of the other claims for fraud and breach of contract, as well as allegations that Tuttle defamed Whalen. (*See, e.g.*, Compl. ¶¶ 140–48.) Tuttle contends that the section 75-1.1 claim is defective for the same reasons as the other claims and for additional, independent reasons.

33. The Court agrees with Tuttle. First, the claims for breach of the settlement agreement and fraudulent inducement, having been dismissed, cannot support the section 75-1.1 claim.

34. Second, the remaining claims—for breach of the oral contract and breach of the operating agreement—cannot support the section 75-1.1 claim either. "A mere

breach of contract, even if intentional, is not an unfair or deceptive act under [section 75-1.1]." *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 42 (2006) (internal citation omitted). Rather, "a party must show substantial aggravating circumstances attending the breach of contract," *id.*, such as forgery, destruction of documents, or deception in the contract's formation, *see Post v. Avita Drugs, LLC*, 2017 NCBC LEXIS 95, at *10–12 (N.C. Super. Ct. Oct. 11, 2017). Nothing of the sort is alleged.

35. Third, although defamation "may be sufficient to make out a separate" section 75-1.1 claim, "the predicate tort must nevertheless be validly alleged." *Reid Pointe, LLC v. Stevens*, 2008 NCBC LEXIS 16, at *27 (N.C. Super. Ct. Aug. 18, 2008). "The claimant must recite the defamatory statement verbatim or 'with sufficient particularity to enable the court to determine whether the statement was defamatory.' " *Addison Whitney, LLC v. Cashion*, 2017 NCBC LEXIS 111, at *15 (N.C. Super. Ct. Dec. 1, 2017) (quoting *Stutts v. Duke Power Co.*, 47 N.C. App. 76, 84 (1980)). Here, though, the complaint is too vague, stating only that Tuttle "alleged poor management and potential financial improprieties" by Whalen. (Compl. ¶ 68.) The particularity requirement demands more. *See Greentouch USA, Inc. v. Lowe's Co. Inc*, 2024 NCBC LEXIS 132, at *17 (N.C. Super. Ct. Oct. 2, 2024) (dismissing claim based on insufficiently particular allegation that defendant made false statements about plaintiff's "financial condition"); *see also Wynn v. Tyrell Cnty. Bd. of Educ.*, 2017 N.C. App. LEXIS 358, at *8 (N.C. Ct. App. 2017) (unpublished) (observing that plaintiff must allege more than "the gist of the statements").

36. Fourth, Tuttle's alleged misconduct relates to his overdue capital contribution, interference with Whalen's managerial authority, disruption of restaurant operations, and noncompliance with CU SOBE's operating agreement. Even if true, these actions were not "in or affecting commerce" as required by section 75-1.1. They are simply internal company disputes or disputes involving extraordinary events unrelated to day-to-day business activities. *See Nobel v. Foxmoor Grp., LLC*, 380 N.C. 116, 121–22 (2022) (holding that section 75-1.1 does not apply to extraordinary events, such as "[i]nvestments and other mechanisms associated with financing business entities"); *White v. Thompson*, 364 N.C. 47, 51–52 (2010) (affirming dismissal of claim based on conduct "solely related to the internal operations" of business); *see also Upchurch v. Sapp*, 2020 NCBC LEXIS 118, at *7–8 (N.C. Super. Ct. Oct. 8, 2020) (collecting cases). That Whalen and Tuttle co-own several restaurants and related operating entities makes no difference. *See, e.g.*, *LLG-NRMH, LLC v. N. Riverfront Marina & Hotel, LLLP*, 2018 NCBC LEXIS 105, at *12 (N.C. Super. Ct. Oct. 9, 2018) ("The fact that separate entities comprise a single market participant does not make external what is otherwise internal to the business." (cleaned up)).

37. The Court therefore grants the motion to dismiss the section 75-1.1 claim.

IV.
CONCLUSION

38. For these reasons, the Court **DENIES** the motion to strike.

39. In addition, the Court **GRANTS** the motion to dismiss the claims for breach of the settlement agreement, fraudulent inducement, and violations of section 75-1.1.

In its discretion, the Court **DISMISSES without prejudice** the claims for breach of the settlement agreement and fraudulent inducement and **DISMISSES with prejudice** the section 75-1.1 claim. The Court **DENIES** the motion to dismiss the claims for breach of the oral contract and breach of the operating agreement.

SO ORDERED, this the 19th day of November, 2024.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases