STATE OF NORTH CAROLINA UNION COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 24CVS001900-890
SHAUN MCCARRON, Plaintiff, v. HAROLD HOWELL, SPARTAN CORPORATE ADVISERS, INC.; US CAPTIVE GROUP, LLC; and RISK SOLUTIONS, INC., Defendants.	**ORDER AND OPINION ON DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

THIS MATTER is before the Court on Defendants Harold Howell, Spartan Corporate Advisors, Inc.[1] ("Spartan"), US Captive Group, LLC ("US Captive"), and Risk Solutions, Inc.'s ("Risk Solutions") (collectively, "Defendants") Motion to Dismiss Plaintiff's Complaint ("Motion to Dismiss," ECF No. 10).

THE COURT, having considered the Motion to Dismiss, the parties' briefs, the arguments of counsel, the applicable law, and all appropriate matters of record, **CONCLUDES** that the Motion to Dismiss should be **GRANTED** in part and **DENIED** in part.

Weaver, Bennett & Bland, P.A., by Michael David Bland and David Bruce Sherman, and Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Andrew Howell, for Plaintiff Shaun McCarron.

Marcellino & Tyson, PLLC, by Clay A. Campbell and Daniel Vander Woude, for Defendants Harold Howell; Spartan Corporate Advisors, Inc.; US Captive Group, LLC; and Risk Solutions, Inc.

Davis, Judge.

[1] The Court notes that the correct spelling of this entity's name is Spartan Corporate Advisors, Inc., but the name is misspelled in the caption of the Complaint as Spartan Corporate Advisers, Inc.

INTRODUCTION

1. Plaintiff Shaun McCarron obtained a monetary judgment in a prior lawsuit against Defendant Risk Solutions in 2022. In the current action, McCarron asserts that the owner and director of Risk Solutions, Harold Howell, fraudulently transferred the assets of the company to several newly formed companies for the purpose of preventing McCarron from being able to collect on that judgment. In the present Motion to Dismiss, Howell, Risk Solutions, and the newly formed companies all seek dismissal of the claims asserted against them by McCarron in this action.

FACTUAL AND PROCEDURAL BACKGROUND

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

3. McCarron is a former resident of Union County, North Carolina, who currently lives in Oregon. (Compl. ¶ 1.)

4. Defendant Howell is a resident of Union County, North Carolina. (Compl. ¶ 2.)

5. Defendant Spartan is a North Carolina corporation, which was established on 10 December 2019 and maintains its principal place of business in Mecklenburg County, North Carolina. (Compl. ¶ 4.)

6. At all relevant times, Howell has served as Spartan's president and registered agent. (Compl. ¶ 5.)

7. Defendant US Captive is a North Carolina limited liability company, which was established on 30 September 2019. (Compl. ¶ 7.)

8. At all relevant times, Howell has served as US Captive's president and managing member. (Compl. ¶ 7.)

9. Defendant Risk Solutions is a now-dissolved North Carolina corporation, which maintained its principal place of business in Mecklenburg County, North Carolina. (Compl. ¶¶ 3, 21.)

10. At all relevant times, Howell was an officer, director, and the controlling shareholder of Risk Solutions. (Compl. ¶ 17.)

11. On 15 May 2018, McCarron filed a civil action against Howell, Risk Solutions, and another entity, Bravo Six, LLC, in Union County Superior Court (the "Prior Action"). (Compl. ¶ 12.)

12. During the pendency of the Prior Action, Howell formed Spartan and US Captive for the purpose of allowing Risk Solutions' business to continue if a judgment was later entered against it. (Compl. ¶ 19.)

13. To that end, Howell subsequently began transferring physical assets, accounts receivable, customers, clients, and funds belonging to Risk Solutions to himself, his family members, Spartan, and US Captive. (Compl. ¶ 20.)

14. The Complaint asserts that Risk Solutions did not receive reasonably equivalent value in exchange for the transfers and that the company was either

insolvent prior to the transfers or became insolvent due to the transfers. (Compl. ¶¶ 37–38.)

15. On 13 October 2020, Risk Solutions filed an annual report with the North Carolina Secretary of State. (Compl. ¶ 15.) However, the company was later issued two notices from the Secretary of State's office stating that its 2021 and 2022 annual reports had not been filed and were past due. (Compl. ¶ 16.)

16. On 31 October 2022, a final judgment was entered in the Prior Action, in which Risk Solutions was found liable to McCarron for the amount of $373,110.99 (the "Judgment"). (Compl. ¶ 13.)

17. Risk Solutions has not made any payments to satisfy the Judgment in whole or in part. (Compl. ¶ 14.)

18. Risk Solutions was administratively dissolved by the Secretary of State on 17 February 2023. (Compl. ¶ 21.)

19. On 14 June 2024, McCarron initiated the present action by filing a Complaint in Union County Superior Court naming Howell, Risk Solutions, Spartan, and US Captive as Defendants. In the Complaint, McCarron has asserted claims for breach of fiduciary duty and constructive fraud against Howell and Risk Solutions, along with claims for fraudulent transfer, unfair and deceptive trade practices ("UDTP"), and facilitation of fraud/civil conspiracy against all Defendants. (ECF No. 3.) The Complaint further alleges that Howell was the alter ego of Risk Solutions, Spartan, and US Captive and that their corporate form should therefore be disregarded so that Howell is held individually liable for the wrongful acts of these entities. (ECF No. 3.)

20. This action was designated as a complex business case and assigned to the undersigned on 14 June 2024. (ECF Nos. 1–2.)

21. On 22 August 2024, Defendants filed the present Motion to Dismiss.

22. On 5 November 2024, the Court held a hearing on the Motion to Dismiss at which all parties were represented by counsel.

23. The Motion to Dismiss has been fully briefed and is now ripe for resolution.

LEGAL STANDARD

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

25. "It is well established that dismissal pursuant to Rule 12(b)(6) is proper when (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 615 (2018) (cleaned up).

ANALYSIS

A. Breach of Fiduciary Duty

26. "It is well-settled that to establish a claim for breach of fiduciary duty, a plaintiff must show that: (1) the defendant owed the plaintiff a fiduciary duty; (2) the defendant breached that fiduciary duty; and (3) the breach of fiduciary duty was a proximate cause of the injury to the plaintiff." *Lafayette Vill. Pub, LLC v. Burnham*, 2022 NCBC LEXIS 104, at *14–15 (N.C. Super. Ct. Sept. 12, 2022) (cleaned up).

27. As noted above, this claim has been asserted against both Howell and Risk Solutions.

28. "As a general rule, directors of a corporation do not owe a fiduciary duty to creditors of the corporation." *Hale v. MacLeod*, __ N.C. App. __, 2024 N.C. App. LEXIS 525, at *22 (2024) (quoting *Whitley v. Carolina Clinic, Inc.*, 118 N.C. App. 523, 526 (1995)).

29. However, "a corporate director has a fiduciary duty to creditors under circumstances amounting to a 'winding-up' or dissolution of the corporation." *Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 31 (2002) (quoting *Whitley*, 118 N.C. App. at 528)).

30. Defendants first argue that dismissal of this claim is proper as to Howell because the Complaint fails to adequately allege that Risk Solutions was "winding-up," dissolved, or insolvent. Specifically, Defendants contend that the Complaint fails to allege "any investigation performed to determine the solvency of any Defendant" and whether "[McCarron] has researched any specific assets of Risk Solutions at any point." (Defendants' Brief in Support ("Defs.' Br."), ECF No. 11, at 8.)

31. However, claims for breach of fiduciary duty are not held to a heightened pleading standard and instead must only comply with North Carolina's liberal notice pleading standard. *See Sivadhanam v. 7 Hills Learning, LLC*, 2021 NCBC LEXIS 74, at *21 (N.C. Super. Ct. Sept. 8, 2021) (noting that when considering claims of breach of fiduciary duty, "the [c]ourt applies a notice pleading standard" (citing *Glob. Textile All., Inc. v. TDI Worldwide, LLC*, 2018 NCBC LEXIS 159, at *11 (N.C. Super. Ct. Nov. 29, 2018)); *see also Feltman v. City of Wilson*, 238 N.C. App. 246, 252 (2014) (noting that "[u]nder notice pleading, a statement of a claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of res judicata, and to show the type of case brought").

32. Our Court of Appeals has held that the following factors may be considered in determining whether circumstances evidence a "winding-up" or dissolution of a corporation in this context:

> (1) whether the corporation was insolvent, or nearly insolvent, on a balance sheet basis; (2) whether the corporation was cash flow insolvent; (3) whether the corporation was making plans to cease doing business; (4) whether the corporation was liquidating its assets with a view of going out of business; and (5) whether the corporation was still prosecuting its business in good faith, with a reasonable prospect and expectation of continuing to do so.

Keener Lumber Co., 149 N.C. App. at 31.

33. On this issue, the Complaint makes the following factual allegations:

> Upon information and belief, Defendant Harold Howell intentionally created the other Defendant entities during the pendency of the original lawsuit with the Plaintiff (Union County CVS 001213) with the specific intent to continue the business of Risk Solutions, Inc., under the new

> business entities after a judgment was entered against the Defendant Risk Solutions, Inc.
>
> Upon information and belief, Defendant Harold Howell and Defendant Risk Solutions, Inc. transferred physical assets, accounts receivable, customers, clients, and funds belonging to Risk Solutions, Inc. to Defendant Howell, to his family members, and to the other Defendant entities that Defendant Howell created and owned, with the specific intent to breach his fiduciary duties to creditors by willfully, wantonly, and maliciously cheating the Plaintiff and evading the payment of Plaintiff's claims and judgment against Risk Solutions, Inc.
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> Risk Solutions, Inc. was administratively dissolved on February 17, 2023.
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> . . .
>
> Defendant Harold Howell, as President and a director of Defendant Risk Solutions, Inc., took advantage of the fiduciary relationship he owed to the Plaintiff, as a creditor of Risk Solutions, Inc., which was either insolvent or was in the process of winding up its affairs.
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> . . .
>
> Specifically, the intent by Defendant Harold Howell and Defendant Risk Solutions, Inc. was to transfer assets and to create legal entities for the purpose of carrying on Defendant Risk Solutions, Inc's. [sic] business under the names of the new separate legal entities.
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> . . .
>
> The Defendant debtor, Risk Solutions, Inc. either was insolvent prior to the transfers or became insolvent as a result of the transfer made to Defendant Harold Howell, Defendant US Captive Group, LLC, and Defendant Spartan Corporate Advisors, Inc.

(Compl. ¶¶ 19–21, 28, 31, 38.)

34. These allegations—when read in the light most favorable to McCarron—sufficiently allege Risk Solutions' insolvency.

35. Moreover, the Complaint specifically alleges that Risk Solutions was administratively dissolved by the Secretary of State. (Compl. ¶ 21.)

36. N.C.G.S. § 55-14-21(c) provides that any corporation administratively dissolved by the North Carolina Secretary of State must comply with N.C.G.S. § 55-14-05, which states that a dissolved corporation "may not carry on any business except that appropriate to wind up and liquidate its business and affairs[.]" N.C.G.S. § 55-14-05.

37. To be sure, the Complaint is bare-bones in certain respects. Nevertheless, for purposes of notice pleading, the Court is satisfied that these factual allegations are sufficient to allege that Howell owed a fiduciary duty to McCarron as a judgment creditor of Risk Solutions based on the dissolution and insolvency of the company for which Howell served as a director, that Howell breached that duty by transferring the assets of Risk Solutions to other entities, and that McCarron suffered a resulting injury.

38. Finally, Defendants argue that McCarron lacks standing to assert this claim because he has failed to allege that he "was treated differently than any other creditor of Risk Solutions in the same class as he is." (Defs.' Br., at 8.) *See*, *e.g.*, *Associated Hardwoods, Inc. v. Lail*, 2018 NCBC LEXIS 81, at *10–23 (N.C. Super. Ct. Aug. 6, 2018) (holding that a creditor lacked standing to bring a breach of fiduciary duty claim due to the absence of any "allegation[s] that it was treated any differently than other unsecured creditors of [defendant]").

39. However, such standing exists where, as here, the plaintiff alleges that the claim at issue is based on an injury personal to him as an individual creditor. *See Phillips & Jordan v. Bostic*, 2012 NCBC LEXIS 36, at *18–19 (N.C. Super. Ct. June 1, 2012) (holding that plaintiff possessed standing to bring claim alleging that

defendants "breached a [fiduciary] duty that they owed directly to the creditor rather than an injury that is common to all creditors").

40. Therefore, Defendants' Motion to Dismiss is **DENIED** as to McCarron's breach of fiduciary duty claim against Howell.

41. The Court agrees with Defendants, however, that McCarron has failed to state a valid claim for breach of fiduciary duty against Risk Solutions itself. Neither McCarron's brief nor the Court's own research have disclosed any case in which a North Carolina court has held that a corporation owes a fiduciary duty to its creditors.[2]

42. Accordingly, Defendants' Motion to Dismiss is **GRANTED** as to McCarron's breach of fiduciary duty claim against Risk Solutions, and that claim is **DISMISSED** with prejudice.

B. Constructive Fraud

43. Our Supreme Court has recognized that the elements of a constructive fraud claim largely overlap with the elements of a claim for breach of fiduciary duty. *See Chisum v. Campagna*, 376 N.C. 680, 706–07 (2021). "[A] cause of action for constructive fraud [requires] (1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured." *White v. Consol. Planning Inc.*, 166 N.C. App. 283, 294 (2004) (citation omitted). "The primary difference between pleading a claim

[2] McCarron's counsel conceded the absence of such case law at the 5 November hearing.

for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself." *Id.*

44. The Supreme Court has also made clear that a claim of constructive fraud need not comply with the heightened pleading requirements of Rule 9(b) of the North Carolina Rules of Civil Procedure. *See Terry v. Terry*, 302 N.C. 77, 85 (1981). Rather, the pleading must simply allege "facts and circumstances (1) which created the relation of trust and confidence, and (2) which led up to and surrounded the consummation of the transaction in which [the defendant] is alleged to have taken advantage of his position of trust to the hurt of [the plaintiff]." *Id.* at 85 (cleaned up).

45. As noted above, the Complaint makes numerous allegations that through the transfers of Risk Solutions' assets, Howell sought to confer a benefit upon himself at the expense of McCarron. Such allegations include the following:

> Upon information and belief, Defendant Harold Howell and Defendant Risk Solutions, Inc. transferred physical assets, accounts receivable, customers, clients, and funds belonging to Risk Solutions, Inc. to Defendant Howell, to his family members, and to the other Defendant entities that Defendant Howell created and owned, with the specific intent to breach his fiduciary duties to creditors by willfully, wantonly, and maliciously cheating the Plaintiff and evading the payment of Plaintiff's claims and judgment against Risk Solutions, Inc.
>
> . . .
>
> Defendant Harold Howell sought to benefit himself by breaching his fiduciary duty and by transferring the assets of Risk Solutions, Inc. to himself, to his family, and the Defendant corporations Spartan Corporate Advisors, Inc., and US Captive Group, LLC, each of which he owned or held controlling interest therein.
>
> . . .
>
> The purpose of Defendant Harold Howell's actions in setting up his alternate corporate entities and in transferring corporate assets, corporate accounts receivable, corporate funds, corporate personal

> property, corporate clients and customers, both prior to and following the entry of the judgment against Defendant Risk Solutions, Inc., to these new corporate entities was to benefit himself.

(Compl. ¶¶ 20, 24, 30.)

46. Because McCarron has made sufficient allegations that Howell's breach of fiduciary duty was undertaken for his own personal benefit, McCarron has sufficiently pled a claim for constructive fraud.

47. Therefore, the Motion to Dismiss is **DENIED** as to McCarron's constructive fraud claim against Howell.

48. However, for the same reason that McCarron's breach of fiduciary duty claim against Risk Solutions fails as a matter of law, so too is his constructive fraud claim against the company legally deficient.

49. Therefore, the Motion to Dismiss is **GRANTED** as to McCarron's constructive fraud claim against Risk Solutions, and that claim is **DISMISSED** with prejudice.

C. Fraudulent Transfer

50. Pursuant to the North Carolina Uniform Voidable Transactions Act:

> A transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

N.C. Gen. Stat. § 39-23.5(a).

51. As this Court has noted:

> The [Uniform Voidable Transactions Act] defines a creditor as "[a] person that has a claim[;]" a debtor as "[a] person that is liable on a

> claim[;]" and a claim as "a right to payment, whether or not the right is reduced to judgment, . . . contingent, disputed, [or] legal." N.C.G.S. § 39-23.1(3)–(4), (6). Furthermore, the official comment to [N.C.]G.S. § 39-23.1 states that "the holder of an unliquidated tort claim or a contingent claim may be a creditor protected by this act." N.C.G.S. § 39-23.1, cmt. 4 (2014).

Glob. Textile All., Inc., 2018 NCBC LEXIS 159, at *35–36.

52. As our Court of Appeals has noted, "[a]n essential element of a transfer in fraud of creditors claim . . . is that the transfer was made without the debtor receiving reasonably equivalent value." *General Fid. Ins. Co. v. WFT, Inc.*, 269 N.C. App. 181, 188 (2020) (cleaned up).

53. Defendants assert that McCarron's claim for fraudulent transfer fails because the allegations in the Complaint as to this claim are impermissibly vague.

54. Unlike McCarron's claims for breach of fiduciary duty and constructive fraud, "[c]laims for fraudulent [transfer] must . . . comply with the heightened pleading standard set by Rule 9(b)[,]" requiring the plaintiff to plead the claim with particularity. *BIOMILQ, Inc. v. Guiliano*, 2024 NCBC LEXIS 58, at *48 (N.C. Super. Ct. Apr. 19, 2024) (cleaned up); *see also Azure Dolphin, LLC v. Barton*, 2017 NCBC LEXIS 90, at *26 (N.C. Super. Ct. Oct. 2, 2017) (dismissing a claim for fraudulent transfer where the plaintiff failed to "specifically identify the property transferred, the timing of the transfer, and the consideration paid for the property"); *Bivins v. Pacheco*, 2023 NCBC LEXIS 76, at *16–17 n.7 (N.C. Super. Ct. June 2, 2023) (dismissing a claim for fraudulent transfer for failure to allege the dates of the purportedly fraudulent transactions).

55. Here, McCarron's allegations in support of his fraudulent transfer claim are insufficient to comply with Rule 9(b) based on their lack of specificity. The Complaint does not identify (1) what "physical assets, accounts receivable, customers, clients, and funds" were transferred; (2) which Defendant was the recipient of each transfer; (3) when each transfer was made; and (4) what consideration, if any, was received by Risk Solutions in exchange for each transfer.

56. Therefore, Defendants' Motion to Dismiss is **GRANTED** as to McCarron's fraudulent transfer claim against all Defendants, and that claim is **DISMISSED** without prejudice.[3]

D. Facilitation of Fraud and Civil Conspiracy

57. McCarron's fifth claim for relief in the Complaint purports to be based on theories of facilitation of fraud and civil conspiracy.

58. "The law permits one defrauded to recover from anyone who facilitated the fraud by agreeing for it to be accomplished." *Brown v. Secor*, 2020 NCBC LEXIS 134, at *26 (N.C. Super. Ct. Nov. 13, 2020). "A claim based upon facilitation of fraud extends liability to those persons where (a) they operate under an agreement to do an unlawful act, or to do a lawful act in an unlawful way; (b) wrongful acts were in fact done in furtherance of that agreement; and (c) that resulted in injury to plaintiff." *Estate of Capps v. Blondeau*, 2015 NCBC LEXIS 41, at *41–42 (N.C. Super. Ct. Mar. 5, 2015). Thus, on a meritorious facilitation of fraud claim, "all of the conspirators are liable, jointly and severally, for the act of any one of them done in furtherance of

[3] "The decision to dismiss an action with or without prejudice is in the discretion of the trial court[.]" *First Fed. Bank v. Alridge*, 230 N.C. App. 187, 191 (2013).

the agreement." *Bucci v. Burns*, 2018 NCBC LEXIS 37, at *14 (N.C. Super. Ct. Apr. 25, 2018) (cleaned up).

59. A claim for facilitation of fraud must "be based on the conspiring parties' agreement to carry out alleged misconduct that supports a separate, underlying claim." *Loray Mill Devs., LLC v. Camden Loray Mill Phase 1, LLC*, 2023 NCBC LEXIS 21, at *52 (N.C. Super. Ct. Feb. 7, 2023).

60. With regard to civil conspiracy, this Court has previously stated:

> Civil conspiracy is not an independent cause of action in North Carolina. Rather, liability for civil conspiracy must be alleged in conjunction with an underlying claim for unlawful conduct. *Toomer v. Garrett*, 155 N.C. App. 462, 483 (2002). To state a claim for civil conspiracy, a plaintiff must allege: "(1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme." *Piraino Bros., LLC v. Atlantic Fin. Grp., Inc.*, 211 N.C. App. 343, 350 (2011) (internal citations and quotations omitted).

Glob. Textile All., Inc., 2018 NCBC LEXIS 159, at *35–36.

61. Where the complaint alleges that the defendants' agreement was for the purpose of defrauding the plaintiff, "a claim for civil conspiracy to commit fraud and a claim for facilitating fraud are essentially the same claim." *TaiDoc Tech Corp. v. OK Biotech Co.*, 2016 NCBC LEXIS 26, at *30 (N.C. Sup. Ct. Mar. 28, 2016).

62. The Court finds that dismissal of this claim is proper here for two reasons.

63. First, the alleged conspiracy is that the Defendants conspired with each other to "defraud the Plaintiff by transferring assets to avoid Plaintiff's collection on

a judgment." (Compl. ¶ 48; *see also* Compl. ¶¶ 49–51.) Therefore, the underlying claim is the fraudulent transfer claim.

64. However, because the Court has determined that this underlying claim is insufficiently pled, resulting in its dismissal, the facilitation of fraud/civil conspiracy claim must also be dismissed. *See Lau v. Constable*, 2017 NCBC LEXIS 10, at *20 (N.C. Super. Ct. Feb. 7, 2017) (noting that "if the underlying claim fails, the conspiracy claim must also fail" (citation omitted)); *see also Worley v. Moore*, 2018 NCBC LEXIS 114, at *17–18 (N.C. Super. Ct. Nov. 2, 2018) (holding that because "[t]he [c]ourt has dismissed the claims for fraud against [defendants] in this order . . . the claim for conspiracy to defraud also must fail" (citation omitted)).

65. Second, the Complaint alleges that Howell exercised "sole control," (Compl. ¶ 62), and "complete[] dominat[ion]," (Compl. ¶ 58), over Spartan, US Captive, and Risk Solutions—such that they existed as his alter ego without "a separate mind, will, or existence of their own," (Compl. ¶ 60).

66. As a result, because McCarron has asserted that these entities had no actual existence separate and apart from Howell himself, the resulting implication is that Howell sought to conspire with himself.

67. It would defy logic to hold that a natural person can conspire with himself. *See*, *e.g.*, *Templeton v. CB Med., LLC*, No. 1:19-CV-01292, 2020 U.S. Dist. LEXIS 221160, at *14–16 (W.D. La. Nov. 24, 2020) (noting that "[i]t is well-settled that a natural person cannot conspire with himself" and holding that since the individual defendant "is the sole natural person alleged to have acted on behalf of

[two corporate defendants][,]" he "could not have conspired with himself to defraud [the plaintiff]" (citations omitted)).

68. Therefore, Defendants' Motion to Dismiss is **GRANTED** as to McCarron's facilitation of fraud/civil conspiracy claim against all Defendants, and that claim is **DISMISSED** without prejudice.

E. UDTP

69. "To prevail on a claim of unfair and deceptive trade practices a plaintiff must show (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business." *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 460–61 (1991).

70. With regard to the UDTP claim against Howell, "North Carolina case law has held that conduct which constitutes a breach of fiduciary duty and constructive fraud is sufficient to support a UDTP claim." *Compton v. Kirby*, 157 N.C. App. 1, 20 (2003) (citing *Spence v. Spaulding & Perkins, Ltd.*, 82 N.C. App. 665, 668 (1986)).

71. Thus, because the Court has concluded that the Complaint sufficiently states claims for breach of fiduciary duty and constructive fraud against Howell, these same allegations are sufficient to sustain an action against him for UDTP.

72. Defendants nevertheless argue that because only one person—McCarron—could have been harmed by the alleged transfers, they did not "affect the public, the marketplace, or commerce," and, therefore, do not satisfy the second element of a UDTP claim. (Defs.' Br., at 11–13.)

73. For the purposes of a UDTP claim, commerce generally "includes all business activities, however denominated[.]"[4] N.C.G.S. § 75-1.1(b). North Carolina courts have broadly defined "business activity" as the "regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 594 (1991).

74. Despite the sweeping definition of commerce supplied in the UDTPA, our Supreme Court has stated that "the Act is not intended to apply to all wrongs in a business setting." *HAJMM Co.*, 328 N.C. at 592. "The Act is not focused on the internal conduct of individuals within a single market participant, that is, within a single business." *White v. Thompson*, 364 N.C. 47, 53 (2010).

75. However, our Court of Appeals has rejected, under similar circumstances, an argument virtually identical to the one being made by Defendants here, stating the following: "[Defendant] transferred all of WFT's assets to other companies, which either quickly failed or never conducted any business; the asset transfer prevented Plaintiff from enforcing its judgment against WFT; and all of this, in turn, had a harmful effect on commerce." *General Fid. Ins. Co.*, 269 N.C. App. at 192; *see also Ehmann v. Medflow, Inc.*, 2022 NCBC LEXIS 114, at *36–37 (N.C. Super. Ct. Sept. 12, 2022) (finding that "a scheme of fraudulent transfer between multiple companies . . . each [] owned by [the defendant]" was "in or affecting commerce").

[4] Although not relevant here, professional services rendered by a member of a learned profession are excluded from the definition of "commerce." N.C.G.S. § 75-1.1(b).

76. Therefore, Howell's Motion to Dismiss the UDTP claim against him is **DENIED**.

77. However, with regard to the UDTP claims against Spartan, US Captive, and Risk Solutions, dismissal of those claims is proper. The Court has now dismissed all claims against those entities such that there are no predicate claims left against them that could form the basis for a UDTP claim (as is the case regarding Howell). Moreover, the Complaint does not otherwise allege any specific acts by those remaining Defendants that would independently give rise to a UDTP claim.

78. For this reason, the Motion to Dismiss is **GRANTED** as to McCarron's UDTP claims against Spartan, US Captive, and Risk Solutions, and those claims are **DISMISSED** without prejudice.

F. Alter Ego

79. Finally, in the Complaint, McCarron alleges that Howell was the alter ego of Risk Solutions, Spartan, and US Captive such that the corporate form of those entities should therefore be disregarded. As a result, McCarron asserts, he should be permitted to "pierce the corporate veil" as to these entities and hold Howell individually liable for their wrongful acts.

80. "The doctrine of piercing the corporate veil is not a theory of liability. Rather, it provides an avenue to pursue legal claims against corporate officers or directors who would otherwise be shielded by the corporate form." *Green v. Freeman*, 367 N.C. 136, 147 (2013).

81. However, because the Court has now dismissed all claims asserted against Spartan, US Captive, and Risk Solutions, the Court need not consider

whether McCarron has sufficiently pled facts to allow him to pierce the corporate veil. *See, e.g., Gen. Fid. Ins. Co.*, 269 N.C. App. at 188–90 (holding that where all claims against the corporate defendants have been dismissed, "[the court] need not continue [its] analysis on piercing the corporate veil").

CONCLUSION

THEREFORE, IT IS ORDERED as follows:

1. Defendant Risk Solutions' Motion to Dismiss is **GRANTED** as to Plaintiff's claims for breach of fiduciary duty and constructive fraud, and those claims are **DISMISSED** with prejudice.
2. Defendants Spartan, US Captive, and Risk Solutions' Motion to Dismiss is **GRANTED** as to Plaintiff's claim for UDTP, and those claims are **DISMISSED** without prejudice.
3. The Motion to Dismiss of all Defendants is **GRANTED** as to Plaintiff's claims for fraudulent transfer and civil conspiracy/facilitation of fraud, and those claims are **DISMISSED** without prejudice.
4. In all other respects, Defendants' Motion to Dismiss is **DENIED**.

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

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