STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23CV004552-910

BIOGAS CORP.; NC BIOGAS, LLC; and LAKESIDE BIOGAS, LLC,

Plaintiffs and Counterclaim Defendants,

v.

NC BIOGAS DEVELOPMENT, LLC; ERIK M. LENSCH; LEYLINE RENEWABLE CAPITAL, LLC; WINDSTAR BIOGAS I MASTER, LLC; SAN DIEGO AD PLANT LLC; SAN DIEGO AD PLANT II LLC; VICOMTE SOLAR, LLC, and NEW YORK AD, LLC,

Defendants and Counterclaim Plaintiffs,

v.

S. ANWAR SHAREEF,

Counterclaim Defendant.

ORDER AND OPINION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT
[Public][1]

1. **THIS MATTER** is before the Court following the 14 June 2024 filings of (1) *Plaintiffs and Counterclaim Defendants' Motion for Partial Summary Judgment* ("Plaintiffs' Motion"), filed by Plaintiffs and Counterclaim Defendants BioGas Corp.; NC BioGas, LLC; Lakeside BioGas, LLC; and S. Anwar Shareef (collectively,

[1] Recognizing that this Opinion cites to and discusses the subject matter of documents that the Court has allowed to remain under seal in this action, the Court filed this Order and Opinion under seal on 7 November 2024. (*See* ECF No. 69.) On 21 November 2024, the parties notified the Court that all parties conferred and agreed to the limited redactions found within this Order and Opinion. Accordingly, the Court now files this public version of the Order and Opinion.

"Plaintiffs"),[2] (ECF No. 45 ["Pls.' Mot."]); and (2) *Defendants and Counterclaim Plaintiffs' Motion for Summary Judgment* ("Defendants' Motion"; and with Plaintiffs' Motion, the "Motions"), filed by NC BioGas Development, LLC; Erik M. Lensch; Leyline Renewable Capital, LLC; Windstar BioGas I Master, LLC; San Diego AD Plant LLC; San Diego AD Plant II LLC; Vicomte Solar, LLC; and New York AD, LLC (collectively, "Defendants"), (ECF No. 49 ["Defs.' Mot."]).

2. Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure (the "Rule(s)"), the Motions seek summary judgment, either in whole or in part, as to Plaintiffs' claims and Defendants' counterclaims.

3. For the reasons set forth herein, the Court **GRANTS** in part and **DENIES** in part the Motions.

Buckmiller, Boyette & Frost, PLLC by Matthew W. Buckmiller for Plaintiffs/Counterclaim Defendants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP by Clifton L. Brinson and Isaac A. Linnartz for Defendants/Counterclaim Plaintiffs.

Robinson, Judge.

I. INTRODUCTION

4. This case arises from a lending relationship where Defendants provided funding through various promissory notes and subsequent extensions to Plaintiffs related to multiple biogas projects. The funds provided by Defendants, and the

[2] For purposes of this Order and Opinion, the Court refers to BioGas Corp., NC BioGas, LLC, Lakeside BioGas, LLC, and S. Anwar Shareef as "Plaintiffs", even though S. Anwar Shareef is a counterclaim defendant, as these parties are aligned in interest with regard to the Motions at issue and are represented by the same counsel of record.

conduct related thereto, initiated a chain of other agreements, many of which Plaintiffs contend Defendants breached by failing to satisfy numerous duties and obligations owed to Plaintiffs. Defendants, in turn, argue that Plaintiffs' failure to remit payment related to the promissory notes, all of which relate to the biogas projects at issue, is the conduct which instigated this litigation.

5. Following fulsome discovery, the filing and briefing of the Motions, and oral argument conducted by the Court, the Court must now consider the undisputed evidence of record to determine what claims, if any, should proceed to trial.

II. FACTUAL BACKGROUND

6. The Court does not make findings of fact when ruling on a motion for summary judgment. "[T]o provide context for its ruling, the court may state either those facts that it believes are not in material dispute or those facts on which a material dispute forecloses summary adjudication." *Ehmann v. Medflow, Inc.*, 2017 NCBC LEXIS 88, at *6 (N.C. Super. Ct. Sept. 26, 2017); *see also Hyde Ins. Agency, Inc. v. Dixie Leasing Corp.*, 26 N.C. App. 138, 142 (1975) (encouraging the trial court to articulate a summary of the relevant evidence of record to provide context for the claims and motion(s)).

A. The Parties

1. Plaintiffs

7. BioGas Corp. is a corporation organized under the laws of North Carolina, with its principal place of business in Wake County, North Carolina. (Joint Appendix 1 at ¶ 2, ECF No. 63 ["J.A"]; J.A. 23 at ¶ 2.)

8. S. Anwar Shareef ("Shareef") is a resident of Wake County, North Carolina, and is the founder and Chief Executive Officer of BioGas Corp. (J.A. 41 at ¶¶ 1, 3; J.A. 230–31 at ¶¶ 1, 3.)

9. NC BioGas, LLC ("NC BioGas") is a limited liability company organized under the laws of North Carolina, with its principal place of business in Wake County, North Carolina. (J.A. 1–2 at ¶ 3; J.A. 23 at ¶ 3.) BioGas Corp. is the owner of NC BioGas, and Shareef is the manager of NC BioGas. (J.A. 280 at 219:5–10.)

10. Lakeside BioGas, LLC ("Lakeside BioGas") is a limited liability company organized under the laws of California. (J.A. 2 at ¶ 4; J.A. 24 at ¶ 4.)

2. Defendants

11. NC BioGas Development LLC ("BioGas Development"); Leyline Renewable Capital, LLC ("Leyline"); Windstar Biogas I Master, LLC ("Windstar"); San Diego AD Plant LLC ("San Diego I"); San Diego AD Plant II LLC ("San Diego II"); Vicomte Solar, LLC ("Vicomte"); and New York AD, LLC ("New York AD") are limited liability companies organized under the laws of North Carolina, with their principal places of business in Durham County, North Carolina. (J.A. 2 at ¶¶ 5–12; J.A. 24 at ¶¶ 5–12.)

12. Erik M. Lensch ("Lensch") is a citizen and resident of Orange County, North Carolina. (J.A. 2 at ¶ 6; J.A. 23 at ¶ 6.) Lensch is the Chief Executive Officer of Leyline, and he also manages Biogas Development; San Diego I; San Diego II; Windstar; Vicomte; and New York AD. (J.A. 338–39 at ¶ 3.)

B. The Promissory Notes

13. Between January 2017 and November 2019, Defendants entered into a series of promissory notes, and subsequent extensions thereto, with Plaintiffs for use in financing renewable energy projects. (*See* J.A. 54–229; J.A. 339 at ¶ 5.) Shareef personally guaranteed several of the promissory notes at issue. (J.A. 74–79; 103–08.)

14. It is undisputed that Plaintiffs did not and have not paid the loans as they became due. (J.A. 231–34 at ¶¶ 9, 15, 21, 24, 28, 32, 36; J.A. 339 at ¶ 6.)

15. On 8 June 2021, Defendants and BioGas Corp. "stipulated that the total amount due from BioGas Corp. under the promissory notes as of [8 June 2021] was $3,152,496.54." (J.A. 340 at ¶ 7; *see* J.A. 81–82.) Additionally, "[n]o payments have been made by BioGas Corp. or [ ] Shareef since the June 2021 stipulation." (J.A. 340 at ¶ 8; *see also* J.A. 428 at ¶ 9.)

C. The Tillamook Project

16. The first of three projects in which Defendants provided financing to BioGas Corp. was an anaerobic digestor project in Tillamook Bay, Oregon (the "Tillamook Project"). (J.A. 340 at ¶ 11.)

17. By November 2019, Tillamook BioGas, LLC, which was a "special project entity that owned the assets comprising the Tillamook Project[,]" was in "default on its promissory note to [ ] Oregon AD, LLC[,]" an affiliate of Defendants. (J.A. 340 at ¶ 12.) Additionally, "BioGas Corp. was also delinquent on payments for property taxes, insurance, rent, and utilities for the Tillamook Project." (J.A. 341 at ¶ 13; J.A. 351.) For example, Regenis, which was a "company that [BioGas Corp.] had

engaged to operate[ ] and maintain the Tillamook Project[,]" later terminated their contract with BioGas Corp. because BioGas Corp. failed to make timely payments. (J.A. 341 at ¶ 13; *see also* J.A. 457–58.)

18. As a result, Defendants had "serious concerns that BioGas Corp. was not managing the Tillamook Project effectively[.]" (J.A. 341 at ¶ 13.)

19. Instead of having Oregon AD, LLC exercise its step-in rights or foreclose on Tillamook BioGas, LLC, Defendants "negotiated with BioGas Corp. to buy the Tillamook Project." (J.A. 341 at ¶ 14; J.A. 353–92.) As a result, on 26 November 2019, Leyline, as the buyer, and BioGas Corp., as the seller, entered into the Membership Interest Purchase and Sale Agreement (the "MIPA"). (*See* J.A. 353–92.)

20. The Purchase Price of the MIPA, to be paid by Leyline to BioGas Corp., was as follows:

> a. Ten Thousand US Dollars (US $10,000) (the "Closing Payment"), plus
> b. an amount not to exceed Two Million and 00/100 Dollars ("Contingent Purchase Payment"), provided such Contingent Purchase Payment shall only be payable from Net Cash available following any payments that must first be paid from Net Cash pursuant to the D[eveloper]S[ervices]A[greement], plus
> c. 30% of any remaining Net Cash, if and only if, all amounts payable under the DSA and full amount of the Contingent Purchase Payment have been paid ("Excess Contingent Payment").

(J.A. 360 at § 2.1(a).)

21. Additionally, the MIPA provided that

> Seller shall, and shall cause the Project Company to, regularly communicate and consult with the Buyer and keep Buyer informed with respect to continued development of the System, including arranging for Buyer's participation in meetings or calls related to the development of the System, and Seller shall reasonably incorporate Buyer's input and

> comments with respect to any matters in connection with such continued development.

(J.A. 373 at § 5.4(c).) The MIPA also stated that "[u]ntil such time as Buyer has paid Seller the entire Purchase Price, Buyer agrees to keep Seller reasonably informed of the status of the development and construction of the System[.]" (J.A. 373 at § 5.6.)

22. The lasting impact of the MIPA was that Defendants "purchased BioGas Corp.'s 82% stake in Tillamook BioGas, LLC[,]" with the "remaining 18% belong[ing] to Oregon AD, LLC." (J.A. 341 at ¶ 15; *see also* J.A. 360 at § 2.1; J.A. 447 at ¶ 7; J.A. 464–67.)

23. After the MIPA was executed, Leyline took over control and operation of the Tillamook Project. (J.A. 324 at 52:20–22.) At that time, the Tillamook Project "was not operational, and was in a severe state of disrepair." (J.A. 342 at ¶ 19.)

24. On 11 December 2019, Leyline sent a document titled "Developer Services Agreement, which was a "non-binding indicative proposal" to engage BioGas Corp. "in the development of [Leyline's] majority-owned subsidiary, Tillamook BioGas, LLC[,]" (the "DSA"). (J.A. 394.)

25. The DSA provided insight into what Leyline was seeking to achieve for the Tillamook Project. (J.A. 394–95.) However, the DSA expressly stated that

> [t]his Proposal is an extension of interest and does not constitute a commitment by the Investor to enter into the DSA or with respect to any other matter and does not create in favor of any person or entity, including the Sponsor or Investor, a right to seek any remedy against the other for failure to consummate the DSA.

(J.A. 395.) Additionally, the DSA provided that "[e]xcept with respect to obligations of confidentiality, this Proposal is not intended to constitute or create any binding obligation on the part of the Investor or the Sponsor." (J.A. 395.)

26. Thereafter, the DSA was modified on 8 June 2021, providing, in relevant part, that the total amount owed to Defendants related to the promissory notes was equal to $3,152,496.54. (J.A. 81–82.)

27. In July 2021, Defendants "sought to find a third-party purchaser for the [Tillamook P]roject." (J.A. 342 at ¶ 21.) BioGas Corp. "was interested in re-purchasing the project, arranged for financing of the re-purchase and provided a bid to Leyline." (J.A. 449 at ¶ 12; *see* J.A. 443 at ¶¶ 5–8.) BioGas Corp. represented that it was prepared to offer $15,000,000.00 to secure the purchase of the Tillamook Project. (J.A. 464–69 (providing numerous communications between BioGas Corp. and various funding institutions related to obtaining financing in the amount of $15,000,000.00.))

28. However, given the debt that BioGas Corp. still owed to Defendants for the Tillamook Project, Defendants did not accept BioGas Corp.'s offer. (J.A. 331–32 at 73:2–74:21.)

29. Thereafter, Defendants were "unable to reach agreement with any of the entities that [expressed possible interest in purchasing the property]; they either walked away from the deal or made offers dramatically lower than their initial indications of interest." (J.A. 343 at ¶ 23.) Presently, Defendants "remain[ ] open to offers to purchase the Tillamook Project[,]" (J.A. 344 at ¶ 24), and "continue to invest

resources into the Tillamook Project, including working toward converting it to a renewable natural gas project[,]" (J.A. 344 at ¶ 25; *see also* J.A. 435 at ¶¶ 3–4). However, "[t]o date the Tillamook Project has not generated any profit[,]" and not enough "to repay the BioGas [Corp.] loans or satisfy the other obligations that are a prerequisite to BioGas Corp. receiving any payments" pursuant to the MIPA. (J.A. 344 at ¶ 26.)

D. <u>The Lakeside Project</u>

30. Another project in which Defendants provided financing to BioGas Corp. was located in Lakeside, California (the "Lakeside Project"). (J.A. 344 at ¶ 27.)

31. An Investment Agreement was initially entered into between BioGas Corp. and Windstar, in which Windstar represented its intent to loan up to $725,000.00 to BioGas Corp. "in exchange for (i) the issuance by [BioGas Corp.] to [Windstar] of a promissory note . . . and (ii) the issuance to [Windstar] of a Guaranty Agreement of [BioGas Corp.][.]" (J.A. 211.) Thereafter, San Diego I entered into promissory notes with Lakeside Biogas to provide financing for the Lakeside Project. (*See* J.A. 110–62; J.A. 169–88.)

32. As a result of San Diego I providing funds to BioGas Corp. for the Lakeside Project, San Diego I was granted Step-In Rights related to the Lakeside Project. (J.A. 157 at ¶ 9.) Specifically, on 23 October 2019, the promissory note was amended, providing as follows:

> If the [BioGas Corp.] fails to make the payments required pursuant to Section 2 of this Note and fails to bring its account current within fifteen (15) calendar days after written notice thereof from the Payee, then the Payee shall have the right, at its sole election, and without limitation to

> any other right or remedy available to the Payee, to assume and complete some or all of the [BioGas Corp.'s] *development activities related to the Lakeside Project (the* "*Project*") at any point prior to the full repayment or cancellation of this Note. Such rights shall include, but are not limited to: (i) serving as the developer and/or manager of the Project, (ii) receiving market-based compensation for its Project-related services, and (iii) retaining the right to sell, assign, transfer, pledge, or otherwise dispose of the Project in its discretion. If the Payee so elects to assume and complete any of the development activities originally, to the extent requested by the Payee in writing, [BioGas Corp.] shall assign to the Payee any or all third-party agreements relating to such development activities. In such event, with respect to all such activities, at the Payee's option, [BioGas Corp.] shall cooperate with the Payee to ensure a smooth and orderly transition thereof that will not involve any disruption.

(J.A. 157 at ¶ 9 (emphasis added).)

33. Thereafter, BioGas Corp. "failed to pay its loans associated with the Lakeside Project when due[,]" and BioGas Corp. was "in default on its lease for the property where the Lakeside Project was to be constructed, owing more than $600,000 to the landlord." (J.A. 344 at ¶ 28; J.A. 402–03.)

34. In March 2020, as a result of BioGas Corp.'s inability to pay its debts, "San Diego [I] exercised [its] rights to step-in to the Lakeside Project and took over control of the Lakeside Project." (J.A. 15 at ¶ 114; J.A. 34 at ¶ 114; J.A. 258; J.A. 344 at ¶ 29.)

35. Following the exercise of San Diego I's Step-In Rights, Defendants "looked for a third party to purchase the Lakeside Project[.]" (J.A. 345 at ¶ 30.) Similar to the Tillamook Project, Plaintiffs sought to purchase the Lakeside Project for $2,500,000.00. (J.A. 443 at ¶ 9; J.A. 326 at 57:13–24.) These funds would purportedly be provided by Rehan Khan, who "agreed to provide BioGas Corp.

w[ith] $2,500,000.00[.]" (J.A. 443 at ¶ 10; *see also* J.A. 495–500.) However, Defendants did not accept this proposal. (J.A. 326 at 57:2–24; J.A. 443 at ¶ 12.)

36. Ultimately, Defendants "entered into a Term Sheet with a company called Bioenergy Devco[,]" which is "an experienced developer of anaerobic digestion projects[.]" (J.A. 345 at ¶ 30; J.A. 289–91.)

37. [redacted]. (J.A. 345 at ¶ 31.) Upon execution of the Term Sheet, Defendants "no longer had any involvement in the management or operation of the Lakeside Project." (J.A. 345 at ¶ 31; *see also* J.A. 283 at ¶ 9.)

38. Thereafter, an Indemnification Agreement was signed by BioGas Corp., Lakeside Biogas, Tillamook Biogas, LLC, Leyline, and Windstar on 8 June 2021. (J.A. 405–12; J.A. 345 at ¶ 32.) The Indemnification Agreement provided a release provision, which stated, in relevant part, that

> [i]n further consideration for Leyline's conditional agreement to the sharing provisions above, and its conditional agreement not to exercise its rights or its remedies, with respect to the [Windstar] Investment Agreement and the [Windstar] Note, each Biogas Party, on behalf of itself and its affiliates, hereby releases, acquits, and forever discharges each Leyline Party, and each and every past and present subsidiary, affiliate . . . from any and all claims, causes of action, suits, debts, liens, obligations . . . of any kind, character, or nature whatsoever, known or unknown, fixed or contingent, which it or any of its affiliates may have or claim to have now or which may hereafter arise with respect to any act of commission or omission of any Leyline Party with respect to the [Windstar] Investment Agreement, the [Windstar] Note, or *any other agreement*, matter, or action relating to the [Lakeside] Project, which such act of commission or omission existed or occurred prior to the date of this letter.

(J.A. 408 at § 5 (emphasis added).)

39. In April 2022, "after devoting considerable time, money, and effort to the Lakeside Project, Bioenergy [Devco] concluded that [the Lakeside Project] was not a viable project." (J.A. 283 at ¶ 10.)

40. However, "[n]o payments (other than reimbursement of lease payments) were made to [Defendants] by Bioenergy Devco," and in turn, "no payments were made to BioGas Corp. under the Indemnification Agreement." (J.A. 346 at ¶ 34; *see also* J.A. 325 at 56:6–9.)

E. <u>The Monroe Project</u>

41. The third project in which Defendants provided financing to BioGas Corp. was located in Monroe, North Carolina (the "Monroe Project"). (J.A. 346 at ¶ 35.) Specifically, Biogas Development entered into promissory notes with BioGas Corp. to provide financing for the Monroe Project. (*See* J.A. 54–79, 84–108.)

42. The loans related to the Monroe Project came due on 31 October 2019. (J.A. 346 at ¶ 38; J.A. 413–20.)

43. The promissory note was extended by agreement by Biogas Development on 23 October 2019, which contained a Step-In Rights provision. (J.A. 347 at ¶ 40; J.A. 67–68.) That provision provided:

> If the Maker fails to make the payments required pursuant to Section 2 of this Note and fails to bring its account current within fifteen (15) calendar days after written notice thereof from the Payee, then the Payee shall have the right, at its sole election, and without limitation to any other right or remedy available to the Payee, to assume and complete some or all of the Maker's development activities related to the Monroe Project (the "Project") at any point prior to the full repayment or cancellation of this Note. Such rights shall include, but are not limited

> to: (i) serving as the developer and/or manager of the Project, (ii) receiving market-based compensation for its Project-related services, and (iii) retaining the right to sell, assign, transfer, pledge, or otherwise dispose of the Project in its discretion. If the Payee so elects to assume and complete any of the development activities originally, to the extent requested by the Payee in writing, the Maker shall assign to the Payee any or all third-party agreements relating to such development activities. In such event, with respect to all such activities, at the Payee's option, the Maker shall cooperate with the Payee to ensure a smooth and orderly transition thereof that will not involve any disruption.

(J.A. 68 at § 9.)

44. The promissory notes related to the Monroe Project were not, and have not, been paid. (J.A. 42 at ¶ 9; J.A. 231 at ¶ 9.)

45. In February 2020, Defendants "sent formal notices of default on the loans[.]" (J.A. 347 at ¶ 39; J.A. 414.) Thereafter, on 20 February 2023, Biogas Development "invoked its Step-In Rights on the Monroe Project by sending written notice [to] BioGas Corp. and Shareef." (J.A. 347 at ¶ 41; *see* J.A. 208.) However, BioGas Corp. has not acknowledged Biogas Development's Step-In Rights, (J.A. 347 at ¶ 42), contending the "Monroe Project is owned and managed by NC BioGas[,]" (J.A. 5 at ¶ 36). There is a dispute amongst the parties as to who holds a legal interest in the Monroe Project. (*See* J.A. 7 at ¶ 57; J.A. 29 at ¶ 57.)

III. PROCEDURAL BACKGROUND

46. The Court sets forth here only those portions of the procedural history relevant to its determination of the Motions.

47. Plaintiffs initiated this action on 1 March 2023 with the filing of their Verified Complaint, (ECF No. 3), which asserted the following claims against Defendants: (1) Declaratory Judgment ("Count One"), (J.A. 16–17 at ¶¶ 127–29);

(2) Permanent Injunction ("Count Two"), (J.A. 17–18 at ¶¶ 130–36); (3) Breach of Contract as to all Defendants except New York AD ("Count Three"), (J.A. 18–19 at ¶¶ 137–49); (4) Breach of Fiduciary Duty as to all Defendants except New York AD ("Count Four"), (J.A. 19–20 at ¶¶ 150–54); and (5) Negligence as to all Defendants except New York AD ("Count Five"), (J.A. 20–21 at ¶¶ 155–59).

48. On 27 July 2023, Defendants filed their Answer and Counterclaim, adding Shareef to this action as a counterclaim defendant, (*see* J.A. 41 at ¶¶ 1–4), and asserting the following claims against Plaintiffs: (1) Breach of Contract – Promissory Notes as to BioGas Corp. and Shareef ("Counterclaim One"), (J.A. 41–46 at ¶¶ 5–36); (2) Breach of Contract – Step-In Rights as to BioGas Corp. ("Counterclaim Two"), (J.A. 46–47 at ¶¶ 37–42); (3) Breach of Contract – Information Rights as to BioGas Corp. and Shareef ("Counterclaim Three"), (J.A. 47–49 at ¶¶ 43–55); and (4) Breach of Fiduciary Duty as to BioGas Corp. ("Counterclaim Four"), (J.A. 49–50 at ¶¶ 56–61).

49. On 12 June 2024, the Court entered its Consent Order on Counterclaim Plaintiff NC BioGas Development, LLC's Motion for Temporary Restraining Order and Preliminary Injunction, (ECF No. 44 ["12 June Order"]), which enjoined BioGas Corp. and NC BioGas from "entering into any contract, agreement, or other binding obligation or commitment concerning the Monroe Project without consulting [ ] Biogas Development[.]" (12 June Order at 3.)

50. Thereafter, the Motions were filed. (*See* Pls.' Mot.; Defs.' Mot.) Following full briefing, the Court held a hearing on the Motions on 8 October 2024 (the "Hearing") at which all parties were represented through counsel. (*See* ECF No. 67.)

51. The Motions are ripe for resolution.

IV. LEGAL STANDARD

52. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). "A 'genuine issue' is one that can be maintained by substantial evidence." *Dobson v. Harris*, 352 N.C. 77, 83 (2000) (citation omitted). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' and means 'more than a scintilla or a permissible inference.' " *Head v. Gould Killian CPA Grp., P.A.*, 371 N.C. 2, 8 (2018) (quoting *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 335 (2015)).

53. The moving party bears the burden of showing that there is no genuine issue of material fact, and that the movant is entitled to judgment as a matter of law. *Hensley v. Nat'l Freight Transp., Inc.*, 193 N.C. App. 561, 563 (2008). The movant may make the required showing by proving that "an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense, or by showing through discovery that the opposing party cannot

produce evidence to support an essential element of her claim." *Dobson*, 352 N.C. at 83 (citations omitted).

54. "Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784–85 (2000) (citation omitted). The Court must view the evidence in the light most favorable to the nonmovant. *Dobson*, 352 N.C. at 83 (citation omitted). However, the nonmovant(s)

> may not rest upon the mere allegations or denials of [their] pleading, but [their] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If [the nonmovant] does not so respond, summary judgment, if appropriate, shall be entered against [the nonmovant].

N.C.G.S. § 1A-1, Rule 56(e).

55. "For affirmative summary judgment on a party's own claim, the burden is heightened." *Futures Grp. v. Brosnan*, 2023 NCBC LEXIS 7, at **4 (N.C. Super. Ct. Jan. 19, 2023); *see Brooks v. Mt. Airy Rainbow Farms Ctr., Inc.*, 48 N.C. App. 726, 728 (1980). The movant "must show that there are no genuine issues of fact, that there are no gaps in his proof, that no inferences inconsistent with his recovery arise from the evidence, and that there is no standard that must be applied to the facts by the jury." *Parks Chevrolet, Inc. v. Watkins*, 74 N.C. App. 719, 721 (1985); *accord Kidd v. Early*, 289 N.C. 343, 370 (1976). Consequently, "rarely is it proper to enter

summary judgment in favor of the party having the burden of proof." *Blackwell v. Massey*, 69 N.C. App. 240, 243 (1984).

V. ANALYSIS

56. There appear to be two distinct groups of issues related to the Motions: (1) the legal ownership interest of the Monroe Project; and (2) the various contracts and related conduct between the parties. As such, the Court addresses these two groups, and the related issues and claims raised in the Motions, in turn.

A. The Legal Ownership Interest of the Monroe Project

57. There is a dispute as to who holds a legal ownership interest in the Monroe Project, arising from various representations and agreements entered into, including the relevant promissory notes. The claims and issues related to the legal ownership interest of the Monroe Project include: (1) Plaintiffs' request for a declaration regarding the Monroe Project's ownership; (2) Defendants' request for summary judgment as to Count One; (3) Defendants' request for summary judgment as to Count Two; and (4) Defendants' request for affirmative summary judgment as to Counterclaim Two.

1. Plaintiffs' Motion

58. Plaintiffs seek a Court determination that Defendants have no legal interest in the Monroe Project. (Pls.' Memo. Supp. Pls.' Mot. at 8–9, ECF No. 46 ["Pls.' Br. Supp."].)

59. Plaintiffs contend the Monroe Project is owned by Plaintiff NC Biogas. (Pls.' Br. Supp. 8.) It is undisputed that the promissory note, and subsequent

extension thereof, regarding the Monroe Project were entered into between Defendant Biogas Development, on the one hand, and BioGas Corp.—not NC Biogas—on the other hand. (J.A. 55–73.) As a result, Plaintiffs argue "the Defendants cannot have any legal interest in the Monroe Project, except as to their 'Step-In Rights' which would only apply to [ ] BioGas [Corp.] and its development activities related to the Monroe Project[.]" (Pls.' Br. Supp. 9.)

60. Defendants disagree, contending BioGas Corp. has been identified by Plaintiffs as "the sole owner and developer of the [Monroe] [P]roject." (Resp. Opp'n Pls.' Mot. at 8 (citing J.A. 422–24), ECF No. 60 ["Defs.' Br. Opp."].)

61. Upon review of the record, there has been no evidence presented which definitively states who holds the legal title or other ownership interest in the Monroe Project, whether that be the land on which the Monroe Project sits, the assets utilized in the development of the Monroe Project, or otherwise. Based on the record at this stage, it appears to the Court that the question of who has a legal ownership interest in the Monroe Project is an issue that the trier of fact needs to determine, based on evidence presented at trial.

62. As such, Plaintiffs' Motion is **DENIED** in part as to Plaintiffs' request for summary judgment in the form of a Court declaration that Defendants have no legal interest in the Monroe Project.

2. Defendants' Motion

63. Defendants' seek summary judgment as to three claims related to the Monroe Project—Counts One and Two asserted by Plaintiffs—as well as affirmative

summary judgment as to Counterclaim Two. The Court will address each claim in turn.

a. Count One: Declaratory Judgment

64. Plaintiffs initially asserted eleven topics on which they sought declaratory judgment. (*See* J.A. 16–17 at ¶¶ 128.a.–k.) Plaintiffs now concede that many of the topics are "duplicative of issues raised by the claims and counterclaims in this case." (Pls.' Memo. Opp'n Defs.' Mot. at 23, ECF No. 58 ["Pls.' Br. Opp."].) However, Plaintiffs contend that one topic is unique: "whether [ ] BioGas Dev[elopment] can exercise their step-in rights regarding the Monroe Project." (Pls.' Br. Opp. 23.)

65. Under the North Carolina Declaratory Judgment Act (the "Act"), "[a]ny person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the . . . statute, ordinance, contract or franchise, and obtain a declaration of rights, status, or other legal relations thereunder." N.C.G.S. § 1-254. "The purpose of the [Act] is to settle and afford relief from uncertainty concerning rights, status and other legal relations[.]" *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 446 (1974). A court may render judgment declaring the rights and liabilities of the respective parties, and affording relief to which the parties are entitled under the judgment, when: (1) "a real controversy exists between or among the parties"; (2) "such controversy arises out of [the parties'] opposing contentions"; and (3) the parties "have or may have legal

rights, or are or may be under legal liabilities [that] are involved in the controversy, and may be determined by a judgment or decree in the action[.]" *Id.* at 449.

66. The Court has already addressed this issue. (*See supra* § V.A.1.) Because a genuine issue of material fact exists as to who has a legal ownership interest in the Monroe Project, the Court **DENIES** in part Defendants' Motion as to Count One for declaratory judgment on the same issue. However, Defendants' Motion is **GRANTED** in part as to the remaining ten topics upon which Plaintiffs sought a declaratory judgment, as Plaintiffs concede that those topics seek relief duplicative to that requested in other claims raised in this case and are therefore unnecessary.

b. Count Two: Permanent Injunction

67. Plaintiffs assert a claim for permanent injunction that would "prohibit[ ] Defendants from exercising [their] step-in rights with the Monroe Project; [and] prohibit[ ] Defendants from contacting any third parties regarding the Monroe Project which could reduce the value of the Project." (J.A. 17 at ¶ 131.)

68. "A permanent injunction is an extraordinary equitable remedy and may only properly issue after a full consideration of the merits of a case." *CB&I Constructors, Inc. v. Town of Wake Forest*, 157 N.C. App. 545, 548 (2003) (citation and quotation marks omitted).

69. Defendants seek summary judgment as to Count Two for permanent injunction, arguing that Plaintiffs have not properly pursued the relief requested through a motion "in accordance with the Business Court Rules." (Br. Supp. Defs.' Mot. at 20 (citing BCRs 7.2, 7.13), ECF No. 61 ["Defs.' Br. Supp."].)

70. However, as previously noted, (*see supra* § V.A.1), a genuine issue of material fact exists as to who has legal ownership interest in the Monroe Project, and, as such, the Court cannot determine the merits of this claim without making that determination. As the merits of this issue have not yet been fully determined, it would be premature to issue a permanent injunction or to determine that under no circumstances might such relief be warranted. *See Levin v. Jacobsen*, 2015 NCBC LEXIS 111, at **32 (N.C. Super. Ct. Dec. 7, 2015) (denying motion for permanent injunction as premature).

71. Therefore, the Court hereby **DENIES** Defendants' Motion in part as to Defendants' request for a summary judgment that Plaintiffs are not, as a matter of law, entitled to relief under Count Two in the form of a permanent injunction.

c. Counterclaim Two: Breach of Contract as to Step-In Rights

72. Defendants bring Counterclaim Two against BioGas Corp., alleging that pursuant to a promissory note extension dated 23 October 2019, Biogas Development was granted Step-In Rights to the Monroe Project upon the occurrence of specific circumstances. (J.A. 46 at ¶ 38.) Defendants allege that BioGas Corp. has failed to comply with its obligations under the note, (J.A. 46 at ¶ 39), and as a result, on 20 February 2023, "Biogas Development [ ] exercised its Step-In Rights for the Monroe Project[,]" (J.A. 47 at ¶ 40); but "BioGas Corp. has refused to cooperate with [ ] Biogas Development [ ] in the management transition for the Monroe Project," resulting in a breach of that contract, (J.A. 47 at ¶ 42).

73. Defendants contend they are entitled to summary judgment on Counterclaim Two, as Plaintiffs have admitted that the Biogas Development note is in default, and BioGas Corp. has "refused to relinquish management of the Monroe Project." (Defs.' Br. Supp. 22.)

74. However, Plaintiffs contend that "the Monroe Project is owned by Plaintiff NC Biogas" and argue that since "[t]here are no contracts between [ ] NC Biogas [ ] and the Defendants, nor do the Defendants assert any claims against NC Biogas," Defendants cannot have a legal ownership interest in the Monroe Project. (Pls.' Br. Opp. 23.)

75. Once again, the Court has addressed this legal issue previously, (*see supra* § V.A.1), and has found that a genuine issue of material fact exists as to who has a legal ownership interest in the Monroe Project, and as such, Defendants' Motion is **DENIED** in part as to Counterclaim Two for breach of contract based on the Monroe Project Step-In Rights.

B. Contracts at Issue and Related Conduct

76. Next, there is a dispute amongst the parties as to what duties and obligations were owed by Defendants in relation to the agreements entered into between them, including the promissory notes, the MIPA, and other related transactions. As such, the Court will address the claims and issues related to these contracts and the conduct related thereto, including: (1) Plaintiffs' request for a declaration regarding the implied covenant of good faith and fair dealing; (2) Plaintiffs' request for a declaration regarding the duty to mitigate; (3) Plaintiffs'

request for a declaration regarding nominal damages; (4) Defendants' request for summary judgment as to Count One; (5) Defendants' request for summary judgment as to Counterclaim One; and (6) Defendants' request for summary judgment as to Counts Four and Five for breach of fiduciary duty and negligence.

1. Plaintiffs' Motion

77. Plaintiffs' seek three legal declarations related to the contracts at issue and the conduct related thereto. The Court will address each legal declaration sought in turn.

a. Implied Covenant of Good Faith and Fair Dealing

78. First, Plaintiffs seek under the guise of Rule 56 a declaration that Defendants owed them a duty of good faith and fair dealing as it pertains to several contracts at issue in this case. (Pls.' Br. Supp. 6–7.)

79. "Under North Carolina law, every contract contains 'an implied covenant of good faith and fair dealing that neither party will do anything which injures the rights of the other to receive the benefits of the agreement.' " *Cordaro v. Harrington Bank, FSB*, 260 N.C. App. 26, 38 (2018) (quoting *Bicycle Transit Auth. v. Bell*, 314 N.C. 219, 228 (1985)). "A breach of the implied covenant of good faith and fair dealing 'requires the wrongful intent of a party to deprive another party of its contractual rights.' " *Herrera v. Charlotte Sch. of Law, LLC*, 2018 NCBC LEXIS 35, at *30 (N.C. Super. Ct. Apr. 20, 2018) (quoting *RREF BB Acq. v. MAS Props., L.L.C.*, 2015 NCBC LEXIS 61, at *47 (N.C. Super. Ct. June 9, 2015)).

80. Plaintiffs contend the following contracts contain the implied covenant of good faith and fair dealing: (1) the promissory notes entered into between BioGas Corp., Defendants, and their affiliates, (2) the MIPA, (3) the DSA and any modification thereof, (4) guaranty agreements related to the promissory notes, and (5) the investment agreements entered into between Lakeside, San Diego I and Windstar. (Pls.' Br. Supp. 6–7.) Plaintiffs argue that "[t]here should be no dispute that pursuant to those various contracts the Defendants owed [ ] BioGas Corp. and Lakeside Biogas[ ] a duty of good faith and fair dealing." (Pls.' Br. Supp. 7.)

81. Defendants concede that "North Carolina law recognizes an implied covenant of good faith and fair dealing in contracts[.]" (Defs.' Br. Opp. 5.) However, Defendants argue that "the motion does not seek any declaration applying the covenant of good faith and fair dealing to the events in this case, much less a declaration that any Defendant breached such a covenant." (Defs.' Br. Opp. 5.)

82. As to the (1) MIPA; (2) DSA; and (3) Investment Agreements between both (a) Lakeside and San Diego I and (b) Lakeside and Windstar, it is clear based on the law of North Carolina that every contract has an implied duty of good faith and fair dealing, and as a result, summary judgment is appropriate on the issue of whether Defendants owed Plaintiffs an implied duty of good faith and fair dealing under these contracts. *See Cordaro,* 260 N.C. App. at 38.

83. As to the promissory notes and related guaranty agreements, once again the Court notes that North Carolina law provides that every contract has an implied covenant of good faith and fair dealing. However, upon review of the Verified

Complaint in this case, there is no claim for breach of contract based on the promissory notes or the guaranty agreements. (J.A. 18 at ¶¶ 138–42 (providing that Plaintiffs base their breach of contract claim on five agreements, none of which are the promissory notes or guaranty agreements).) As such, Plaintiffs' contention that Defendants owed them a duty of good faith and fair dealing pursuant to the promissory notes and guaranty agreements, while correct under the law, provides no relief for the Plaintiffs in this action, as no claim for breach of the implied duty of good faith and fair dealing claim, and no related breach of contract claim, has been alleged. As a result, summary judgment would be inappropriate, as it is not determinative of any legal issue in this case.

84. Therefore, Plaintiffs' Motion is **GRANTED** in part, and the Court declares that the (1) MIPA; (2) DSA; and (3) Investment Agreements between both (a) Lakeside and San Diego I and (b) Lakeside and Windstar, as a matter of law, contain an implied covenant of good faith and fair dealing. However, Plaintiffs' Motion is **DENIED** in part as to Count One to the extent it seeks a declaration that Defendants owed Plaintiffs an implied duty of good faith and fair dealing as to the promissory notes and guaranty agreements, given the fact that no relief can be given to Plaintiffs in this action based on these contracts.

b. Duty to Mitigate Damages

85. Second, Plaintiffs seek a declaration that Defendants had a duty to mitigate their damages as it relates to Counterclaim One for breach of contract as to the promissory notes. (Pls.' Br. Supp. 8.)

86. A plaintiff has a duty to mitigate its damages when it "can do so with reasonable exertion or at trifling expense; and ordinarily, [it] will be allowed to recover from the delinquent party only such damages as [it] could not, with reasonable effort, have avoided." *Biemann and Rowell Co. v. Donohoe Companies, Inc.*, 147 N.C. App. 239, 247 (2001).

87. Defendants admit that "North Carolina law generally recognizes a duty to mitigate damages[.]" (Defs.' Br. Opp. 7.) As such, it appears there is no genuine issue of material fact as to whether Defendants had a duty to mitigate their damages related to the promissory notes, and as a result, Plaintiffs' Motion is **GRANTED** in part to that extent.

c. Nominal Damages

88. Finally, Plaintiffs seek a declaration that, if Defendants prevail on their breach of contract claims, or if San Diego I prevails on its breach of fiduciary duty claim, they should only be entitled to nominal damages. (Pls.' Br. Supp. 9.)

89. "Under North Carolina law, proof of damages is not an element of a claim for breach of contract." *Crescent Univ. City Venture, LLC v. AP Atl., Inc.*, 2019 NCBC LEXIS 46, at *127 (N.C. Super. Ct. Aug. 8, 2019) (citation omitted). Rather, "in a suit for damages for breach of contract, proof of the breach would entitle the plaintiff to nominal damages at least." *Delta Envtl. Consultants, Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 172 (1999) (citation and quotation marks omitted). On that basis, our Court of Appeals has stressed that it would be error to enter summary judgment

based on a failure to offer evidence of damages. *See Hodges v. Young*, 2011 N.C. App. LEXIS 370, at *6 (2011) (unpublished).

90. Plaintiffs contend that "Defendants cannot show that they have been damaged in any respect by these purported breaches of contract or fiduciary duty[,]" and as a result, Plaintiffs are "entitled to an order prohibiting Defendants from recovering actual damages for the purported breaches[.]" (Pls.' Br. Supp. 9.)

91. Defendants argue in response that "Plaintiffs offer no support whatsoever for th[is] request–no citation to any materials in the record, and no legal argument or authority." (Defs.' Br. Opp. 9.) Additionally, Defendants offer that they are "under no obligation to prove their damages at this juncture," and even if they were, "the nature of Plaintiffs' misconduct supports claims for substantive damages." (Defs.' Br. Opp. 10.)

92. The Court agrees with Defendants. Without a citation to relevant legal authority, and with many facts remaining in dispute as to damages allegedly sustained by Defendants, the Court is not inclined to declare that Defendants' damages be limited to nominal damages.

93. Therefore, Plaintiffs' Motion is **DENIED** in part as to Plaintiffs' request for a declaration that Defendants' damages related to their claims for breach of contract and breach of fiduciary duty are limited to only nominal damages.

2. Defendants' Motion

94. Defendants seek summary judgment on four claims related to the contracts at issue and conduct related thereto: (1) Count Three for breach of contract;

(2) Counts Four and Five for breach of fiduciary duty and negligence; and (3) Counterclaim One for breach of contract related to the promissory notes. The Court addresses each in turn.

a. Count Three: Breach of Contract

95. Plaintiffs allege that Defendants, apart from New York AD, have breached the following contracts: (1) the MIPA between BioGas Corp. and Leyline; (2) the DSA between Plaintiffs and Leyline, Windstar, San Diego I, San Diego II, and Vicomte; (3) the Indemnification Agreement between Plaintiffs and Leyline, Windstar, San Diego I, San Diego II, and Vicomte; (4) the Investment Agreement between Lakeside and San Diego I; and (5) the Investment Agreement between Lakeside and Windstar. (J.A. 18–19 at ¶¶ 138–42, 146.)

96. As an initial matter, there are several contracts that the Court finds are not subject to any genuine issue of material fact as it relates to any alleged breaches thereof.

97. First, as to (1) the DSA between BioGas Corp. and Leyline,[3] (2) the Indemnification Agreement, (3) the Investment Agreement between Lakeside and San Diego I,[4] and (4) the Investment Agreement entered into by Lakeside and Windstar, there is no evidence offered by Plaintiffs, including any argument in their

[3] Although the DSA was alleged to have been between all Plaintiffs and Defendants Leyline, Windstar, San Diego I, San Diego II, and Vicotme, (J.A. 18 at ¶ 139), upon review of the DSA, the only parties to the DSA are BioGas Corp. and Leyline.

[4] The Investment Agreement between Lakeside and San Diego I was not made a part of the record in this case, such that the Court cannot review the terms and provisions therein.

brief opposing Defendants' Motion or oral argument at the Hearing, that any breach of these agreements by Defendants occurred.

98. As a result, Defendants' Motion is **GRANTED** in part as to Count Three to the extent Count Three is based on the following contracts: (1) the DSA; (2) the Indemnification Agreement; (3) the Investment Agreement between Lakeside and San Diego I; and (4) the Investment Agreement between Lakeside and Windstar; and Count Three is **DISMISSED** as to those contracts.

99. As the MIPA is the only contract left in dispute relating to Count Three, and the MIPA is an agreement between two parties—BioGas Corp. and Leyline—Defendants' Motion is **GRANTED** in part as to Count Three to the extent Count Three was asserted against any Defendant other than Leyline.

100. The Court's analysis is thus narrowed to the alleged breaches by Leyline of the MIPA.

101. "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) (citation omitted). "Courts may enter summary judgment in contract disputes because they have the power to interpret the terms of contracts." *McKinnon v. CV Indus.*, 213 N.C. App. 328, 333 (2011). If the terms to be interpreted "are plain and unambiguous, there is no room for construction [and] [t]he contract is to be interpreted as written." *Jones v. Casstevens*, 222 N.C. 411, 413 (1942); *see e.g., Walton v. City of Raleigh*, 342 N.C. 879, 881 (1996) ("If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract.").

102. Plaintiffs allege that Leyline breached the MIPA by

a. Failing to mitigate its damages;
b. Engaging in transactions that did not benefit Plaintiffs or Defendants;
c. Refusing to engage in transactions that would have been for the benefit of Plaintiffs and Defendants;
d. Failing to maximize the value of the Tillamook and Lakeside Projects;
e. Failing to inform Plaintiffs of any change in conditions of the Tillamook and Lakeside Projects; and
f. Breaching the implied covenant of good faith and fair dealing.

(J.A. 19 at ¶¶ 144–46.) The Court addresses each alleged breach in turn.

103. As to the alleged breach of the MIPA by Leyline for "failing to mitigate damages," (J.A. 19 at ¶ 146.a.), the failure to mitigate damages is not a breach of contract, but rather an affirmative defense the breaching party may raise—and in this case, has raised—after a breach has occurred. As such, Defendants' Motion is **GRANTED** in part as to Count Three to the extent it seeks summary judgment on the alleged breach for failing to mitigate damages, and Count Three is **DISMISSED** to that extent.

104. Next, as to the alleged breaches of the MIPA for engaging or refusing to engage in transactions that the breaching party believes would or would not benefit the company, (*see* J.A. 19 at ¶¶ 146.b.–c.), the Court finds that these are not grounds for a breach of contract in this case. Upon review of the MIPA, there is no express obligation bestowed upon Leyline to engage, or disengage, in transactions based on any proposed benefit, or detriment, to any party. Likewise, there was no express obligation of Leyline to "maximize the value" of either the Tillamook Project or the Lakeside Project, (*see* J.A. 19 at ¶ 146.e.). As such, Defendants' Motion is **GRANTED**

in part as to Count Three to the extent it seeks summary judgment as to the alleged breaches of the MIPA for engaging or refusing to engage in transactions that the breaching party believes would or would not benefit the company, or for failing to maximize the value of the Tillamook and Lakeside Projects, and Count Three is **DISMISSED** as to those alleged breaches.

105. Next, Plaintiffs assert that Leyline "[f]ail[ed] to inform Plaintiffs of any change in conditions of the Tillamook and Lakeside Projects." (J.A. 19 at ¶ 146.b.) Upon review of the MIPA, it appears the only express provision relating to this alleged breach is that "[u]ntil such time as Buyer has paid Seller the entire Purchase Price, Buyer agrees to keep Seller reasonably informed of the status of the development and construction of the System[,]" (J.A. 373 at § 5.6).

106. However, upon review of the record before the Court, there has been no evidence presented which tends to show that Leyline has failed to comply with any information requests or obligations pursuant to the MIPA. While Plaintiffs contend they have "provided ample evidence regarding the unreasonableness of Leyline's actions after it took over the Tillamook Project[,]" (Pls.' Br. Opp. 18), there was no express provision within the MIPA that governed the reasonableness of how Leyline would oversee the Tillamook Project.

107. As such, Defendants' Motion is **GRANTED** in part as to Count Three based on Leyline's alleged failure to inform Plaintiffs of any change in conditions of the Tillamook and Lakeside Projects; and Count Three is **DISMISSED** as to that alleged breach.

108. Finally, as the Court has previously stated, "[i]n 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." *Bicycle Transit Auth.,* 314 N.C. at 228.

109. On this point, Plaintiffs contend they have "provided ample evidence regarding the unreasonableness of Leyline's actions after it took over the Tillamook Project[,]" as the MIPA "required [ ] Leyline to act in good faith in completing the refurbishment, restart, and RNG conversion of the Tillamook Project." (Pls.' Br. Opp. 18.) Additionally, Plaintiffs argue Defendants could have accepted Plaintiffs' offer to buy the Tillamook Project, which in turn would settle all outstanding amounts due under the promissory notes, and Plaintiffs stood to receive a portion of proceeds from any sale of the Tillamook Project. (Pls.' Br. Opp. 8.) Specifically, the MIPA provided that the purchase price that Leyline owed to Plaintiffs included:

> a. Ten Thousand US Dollars (US $10,000) (the "Closing Payment"), plus
> b. an amount not to exceed Two Million and 00/100 Dollars ("Contingent Purchase Payment"), provided such Contingent Purchase Payment shall only be payable from Net Cash available following any payments that must first be paid from Net Cash pursuant to the DSA, plus
> c. 30% of any remaining Net Cash, if and only if, all amounts payable under the DSA and full amount of the Contingent Purchase Payment have been paid ("Excess Contingent Payment").

(J.A. 360 at § 2.1(a).) Based on the evidence before the Court, a jury could conclude that Leyline failed to meaningfully investigate Plaintiffs' offer to purchase the Tillamook Project for a seemingly sufficient sum of money. As a result, there is a

genuine issue of material fact as to whether Leyline breached the implied covenant of good faith and fair dealing contained within the MIPA related to this conduct. As such, whether Defendants' decision to not pursue Plaintiffs' offer to purchase the Tillamook Project for $15,000,000.00 was reasonable is a question of fact for a jury to decide.

110. Therefore, Defendants' Motion is **DENIED** in part as to Count Three to the extent it relates to Plaintiffs' allegations that Leyline breached the implied covenant of good faith and fair dealing related to the MIPA.

b. Counts Four & Five: Breach of Fiduciary Duty and Negligence

111. Lastly, Defendants seek summary judgment as to Counts Four and Five for breach of fiduciary duty and negligence, arguing those claims are barred by the economic loss rule. (Defs. Br. Supp. 15.)

112. Plaintiffs allege that "[a]s a result of the partnership type relationship between the [p]arties, and the taking over of the Tillamook Project and the Lakeside Project by Defendants," the Defendants, excluding New York AD, owed fiduciary duties to the Plaintiffs. (J.A. 19–20 at ¶ 151.) Plaintiffs assert that this duty requires that Defendants "discharge their duties in good faith, with the care an ordinary prudent person in a like position would exercise under similar circumstances, and in the manner Defendants reasonably believe to be in the best interests of both Plaintiffs and Defendants." (J.A. 20 at ¶ 152.) As a result, Plaintiffs allege Defendants have "breached their fiduciary duties[,]" (J.A. 20 at ¶ 154), or, in the alternative, "breached

their duty of care to Plaintiffs" such that their claim for negligence should be tried by a jury, (J.A. 21 at ¶ 159).

113. A breach of fiduciary duty requires the existence of a fiduciary relationship. *Dalton v. Camp*, 353 N.C. 647, 651 (2001). "[A] fiduciary relationship is generally described as arising when there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Dallaire*, 367 N.C. 363, 367 (2014) (quotation marks omitted). Domination and influence are an essential component of any fiduciary relationship. *Dalton*, 353 N.C. at 652. "The standard for finding a *de facto* fiduciary relationship is a demanding one: 'Only when one party figuratively holds all the cards—all the financial power or technical information, for example—have North Carolina courts found that the special circumstance of a fiduciary relationship has arisen.' " *Lockerman v. S. River Elec. Membership Corp.*, 250 N.C. App. 631, 636 (2016) (quoting *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 613 (2008)).

114. Similarly, a claim for negligence requires that Plaintiffs must show "the existence of a legal duty or standard of care owed to the plaintiff by the defendant, breach of that duty, and a causal relationship between the breach of duty and certain actual injury or loss sustained by the plaintiff." *Sterner v. Penn*, 159 N.C. App. 626, 630 (2003) (quotation marks omitted). A party may bring a negligence claim based on conduct that is also alleged to be a breach of contract where the plaintiff can "identify a duty owed by the defendant separate and distinct from any duty owed

under a contract." *Forest2Market, Inc. v. Arcogent, Inc.*, 2016 NCBC LEXIS 3, at **8 (N.C. Super. Ct. Jan. 5, 2016) (quotation marks omitted); *see also Rountree v. Chowan Cnty.,* 252 N.C. App. 155, 160 (2017) ("[A] viable tort action must be grounded on a violation of a duty imposed by operation of law, and the right invaded must be one that the law provides without regard to the contractual relationship of the parties." (emphasis omitted)).

115. Defendants seek summary judgment as to Counts Four and Five, arguing that the economic loss rule bars the claims at hand, as the "injury alleged by BioGas Corp., and damages it seeks to recover for [their] breach of fiduciary duty and negligence claims, are created and available only under the earnout provisions of the [MIPA]." (Defs.' Br. Supp. 15.)

116. "The economic loss rule, as it has developed in North Carolina, generally bars recovery in tort for damages arising out of a breach of contract[.]" *Rountree,* 252 N.C. App. at 159 (2017). A claimant may not maintain a tort action "against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract." *Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 639 (2007). "To state a viable claim in tort for conduct that is also alleged to be a breach of contract, 'a plaintiff must also allege a duty owed to him by the defendant separate and distinct from any duty owed under a contract.' " *Akzo Nobel Coatings, Inc. v.*

Rogers, 2011 NCBC LEXIS 42, at **48 (N.C. Super. Ct. Nov. 3, 2011) (quoting *Kelly v. Georgia-Pacific LLC*, 671 F. Supp. 2d 785, 791 (E.D.N.C. 2009)).

117. Plaintiffs concede that "[t]o the extent it is determined that the terms of the MIPA, express *or implied*, required Leyline to complete the refurbishment, restart, and RNG conversion of the Tillamook Project[,]" then Plaintiffs "agree that BioGas Corp.'s tort claims for negligence and breach of fiduciary duty against Leyline related to Tillamook would be barred by the economic loss rule." (Pls.' Br. Opp. 19 (emphasis added).)

118. As the Court has held that (1) Plaintiffs' Count Three for breach of contract survives as to the alleged breach of the implied covenant of good faith and fair dealing related to Leyline and its conduct pursuant to the MIPA, and (2) the alleged duty owed to Plaintiffs by Leyline arises from the MIPA, it appears that the tort claims brought by Plaintiffs—Counts Four and Five—cannot survive. *See, e.g., Wilkins v. Wachovia Corp.*, 2011 U.S. Dist. LEXIS 30896, at *6 (E.D.N.C. Mar. 24, 2011) (applying economic loss rule to bar breach of fiduciary duty claims that arose "out of the duties in the . . . agreement and relate to contract performance"); *Haigh v. Superior Ins. Mgmt. Grp., Inc.*, 2017 NCBC LEXIS 100, at *19 (N.C. Super. Ct. Oct. 24, 2017) (dismissing breach of fiduciary duty claim where alleged wrongdoing was "a result of the parties' contractual relationship, not as a result of a fiduciary relationship" and would be "better resolved through contract principles, rather than general principles of fiduciary relationships").

119. Therefore, Defendants' Motion is hereby **GRANTED** in part as to Count Four for breach of fiduciary duty and Count Five for negligence.

c. Counterclaim One: Breach of Contract as to Promissory Notes

120. Defendants allege valid promissory notes were entered into between Defendants, BioGas Corp., and their affiliates. (J.A. 41–46.) Further, Defendants allege that these notes have not been repaid, (J.A. 42–46 at ¶¶ 9, 15, 21, 24, 28, 32, 36), and BioGas Corp. and Shareef "do not dispute that the promissory notes are in default[,]" (Pls.' Br. Opp. 23).

121. As a result, the Court **GRANTS** in part Defendants' Motion as to Counterclaim One for breach of contract related to the promissory notes as it pertains to Plaintiffs' liability. This includes liability as to Shareef, as Shareef personally guaranteed certain of those promissory notes.

122. However, Plaintiffs argue that Defendants' collection of the promissory notes should be denied "based on (i) a failure to mitigate affirmative defense, and (ii) a set off defense." (Pls.' Br. Opp. 23.)

123. As to Defendants' duty to mitigate, Plaintiffs contend that because Defendants are "seeking to collect from Plaintiff[s] related to promissory notes entered related to" the Tillamook and Lakeside Projects, when they "took over the project[s], they had an obligation to mitigate their damages." (Pls.' Br. Opp. 24.)

124. Under North Carolina law, "the burden is on the breaching party to prove that the nonbreaching party failed to exercise reasonable diligence to minimize the loss." *Isbey v. Crews*, 55 N.C. App. 47, 51 (1981). In addition, a nonbreaching party

"need not pursue a particular corrective measure if a reasonable person would conclude the measure was imprudent, impractical, or would likely be unsuccessful." *Smith v. Childs*, 112 N.C. App. 672, 683 (1993).

125. Defendants contend that Plaintiffs have failed to identify "any specific evidence tending to show a breach of the duty to mitigate," and further, the damages in this case, that is, the failure to remit payment to Defendants for the promissory notes, "are not a downstream result of the breach–they are the breach." (Defs.' Reply Br. Supp. Defs.' Mot. 11.)

126. Given conflicting evidence as to the nature of the promissory notes, the numerous extensions and amendments allowed by Leyline as to each promissory note, and the contemplated set-off defense as to the proposed purchase of the Tillamook Project—which Plaintiffs contend they were prepared to purchase for $15,000,000.00—the Court concludes that a genuine issue of material fact exists requiring trial as to whether Defendants mitigated their damages and whether a set-off defense is available to Plaintiffs related to the promissory notes.

127. As a result, Defendants' Motion is **DENIED** in part as to Counterclaim One as to damages, as the trier of fact must determine whether Defendants sufficiently mitigated their damages, or if there is a set-off to be had under these circumstances.

VI. CONCLUSION

128. **THEREFORE**, the Plaintiffs' Motion is hereby **GRANTED** in part and **DENIED** in part as follows:

a. Plaintiffs' Motion is **DENIED** in part as to Plaintiffs' request for a declaration that Defendants have no legal interest in the Monroe Project.

b. Plaintiffs' Motion is **GRANTED** in part as to Plaintiffs' request for a declaration that the (1) MIPA; (2) DSA; and (3) Investment Agreements between both (a) Lakeside and San Diego I and (b) Lakeside and Windstar, as a matter of law, contain an implied covenant of good faith and fair dealing. However, Plaintiffs' Motion is **DENIED** in part to the extent it seeks a declaration that Defendants owed Plaintiffs an implied duty of good faith and fair dealing as to the promissory notes and guaranty agreements, given that no relief can be given to Plaintiffs in this action based on these contracts.

c. Plaintiffs' Motion is **DENIED** in part as to Plaintiffs' request for a declaration that Defendants' damages related to their claims for breach of contract and breach of fiduciary duty are limited to only nominal damages.

d. Plaintiffs' Motion is **GRANTED** in part as to Plaintiffs' request for a declaration that Defendants had a duty to mitigate their damages related to the promissory notes.

129. Further, Defendants' Motion is hereby **GRANTED** in part and **DENIED** in part as follows:

a. Defendants' Motion is **DENIED** in part as to Count One for declaratory judgment that Defendants have no legal interest in the Monroe

Project. Defendants' Motion is **GRANTED** in part as to the remaining ten topics on which Plaintiffs sought declaratory judgment.

b. Defendants' Motion is **DENIED** in part as to Count Two for a permanent injunction.

c. Defendants' Motion is **DENIED** in part as to Counterclaim Two for breach of contract based on Step-In Rights.

d. Defendants' Motion is **DENIED** in part as to Count Three to the extent it relates to Plaintiffs' allegations that Leyline breached the implied covenant of good faith and fair dealing related to the MIPA.

e. Defendants' Motion is **GRANTED** in part as to Counterclaim One as to Plaintiffs' liability. However, Defendants' Motion is **DENIED** in part as to Counterclaim One as to damages, as the trier of fact must determine whether Defendants sufficiently mitigated their damages, or if there is a set-off to be had under these circumstances.

f. Defendants' Motion is **GRANTED** in part as to Count Four for breach of fiduciary duty and Count Five for negligence.

130. For the avoidance of doubt, the following claims will proceed to trial in this matter:

a. Plaintiffs' Count One for declaratory judgment as to whether Biogas Development has any legal interest in the Monroe Project;

b. Plaintiffs' Count Two for permanent injunction against all Defendants;

c. Plaintiffs' Count Three for breach of contract against Leyline related to the implied covenant of good faith and fair dealing contained within the MIPA;

d. Defendants' Counterclaim One for breach of contract against BioGas Corp. and Shareef, as guarantor, as to the damages incurred through the breach of the promissory notes;

e. Defendants' Counterclaim Two for breach of contract against BioGas Corp. as to the Step-In Rights for the Monroe Project;

f. Defendants' Counterclaim Three for breach of contract against BioGas Corp. and Shareef as to information rights; and

g. Defendants' Counterclaim Four for breach of fiduciary duty against BioGas Corp.

SO ORDERED, this the 26th day of November, 2024.

/s/ Michael L. Robinson

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