STATE OF NORTH CAROLINA

WILKES COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15 CVS 1

WINDOW WORLD OF BATON ROUGE, LLC; WINDOW WORLD OF DALLAS, LLC; WINDOW WORLD OF TRI STATE AREA, LLC; and JAMES W. ROLAND,

Plaintiffs,

v.

WINDOW WORLD, INC.; WINDOW WORLD INTERNATIONAL, LLC; and TAMMY WHITWORTH,

Defendants.

ORDER AND OPINION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT, DEFENDANT WINDOW WORLD, INTERNATIONAL, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT, AND DEFENDANT TAMMY WHITWORTH'S MOTION FOR PARTIAL SUMMARY JUDGMENT [PUBLIC VERSION][1]

WILKES COUNTY

15 CVS 2

WINDOW WORLD OF ST. LOUIS, INC.; WINDOW WORLD OF KANSAS CITY, INC.; WINDOW WORLD OF SPRINGFIELD/PEORIA, INC.; JAMES T. LOMAX III; JONATHAN GILLETTE; B&E INVESTORS, INC.; WINDOW WORLD OF NORTH ATLANTA, INC.; WINDOW WORLD OF CENTRAL ALABAMA, INC.; MICHAEL EDWARDS; MELISSA EDWARDS; WINDOW WORLD OF CENTRAL PA, LLC; ANGELL P.

[1] Recognizing that this Order and Opinion cites and discusses the subject matter of documents that the Court has allowed to remain filed under seal in these actions, the Court elected to file this Order and Opinion under seal on 26 November 2024. The Court then permitted the parties an opportunity to propose redactions to the public version of this document. Plaintiffs and Defendant Tammy Whitworth did not propose any redactions. The Court has accepted the redactions currently proposed by Defendants Window World, Inc. and Window World International, LLC.

WESNER-FORD; KENNETH R. FORD, JR.; WORLD OF WINDOWS OF DENVER, LLC; RICK D. ROSE; CHRISTINA M. ROSE; WINDOW WORLD OF LEXINGTON, INC.; TOMMY R. JONES; JEREMY T. SHUMATE; WINDOW WORLD OF PHOENIX LLC; JAMES BALLARD; and TONI BALLARD,

Plaintiffs,

and

WINDOW WORLD OF ROCKFORD, INC.; WINDOW WORLD OF JOLIET, INC.; SCOTT A. WILLIAMSON; JENNIFER L. WILLIAMSON; and BRIAN C. HOPKINS,

Plaintiffs and Counterclaim Defendants,

v.

WINDOW WORLD, INC.; WINDOW WORLD INTERNATIONAL, LLC; and TAMMY WHITWORTH, individually and as trustee of the Tammy E. Whitworth Revocable Trust,

Defendants and Counterclaim Plaintiffs,

v.

WINDOW WORLD OF BLOOMINGTON, INC.,

Counterclaim Defendant.

1. **THIS MATTER** is before the Court on the following motions for summary judgment under Rule 56 of the North Carolina Rules of Civil Procedure (the "Rule(s)") in the above-captioned cases:

a. Defendants Window World, Inc., Window World International, LLC, and Tammy Whitworth's Motion for Summary Judgment ("Defendants' Motion")[2];

b. Plaintiffs' Motion for Partial Summary Judgment ("Plaintiffs' Motion"; together with Defendants' Motion, the "Cross-Motions")[3];

c. Defendant Window World International, LLC's Motion for Partial Summary Judgment Seeking Dismissal of Certain Plaintiffs' Claims Under the NCUVTA ("WWI's Motion")[4]; and

d. Defendant Tammy Whitworth's Motion for Partial Summary Judgment on Plaintiffs' Attempt to Impose Liability Arising Out of N.C.G.S. § 75-1.1 Due to Lack of In-State Injury ("Whitworth's Motion"; collectively with the Cross-Motions and WWI's Motion, the "Motions").[5]

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[2] (Defs.' Mot. Summ. J. [hereinafter "Defs.' Mot."], ECF No. 973.) By default, the Court's citations will be to documents filed in *Window World of Baton Rouge, LLC v. Window World, Inc.* (15-CVS-1); the Court will specify citations made to documents filed in *Window World of St. Louis, Inc. v. Window World, Inc.* (15-CVS-2) where applicable.

[3] (Pls.' Mot. Partial Summ. J. [hereinafter "Pls.' Mot."], ECF No. 975.)

[4] (Window World International, LLC's Mot. Partial Summ. J. Seeking Dismissal Certain Pls.' Claims Under NCUVTA [hereinafter "WWI's Mot."], 15-CVS-2 ECF No. 746.)

[5] (Tammy Whitworth's Mot. Partial Summ. J. Pls.' Attempt Impose Liability Arising Out N.C.G.S. § 75-1.1 Due Lack In-State Injury [hereinafter "Whitworth's Mot."], ECF No. 711.)

2. Having considered the Motions, the parties' briefs in support of and in opposition to the Motions, the parties' cited evidence, the arguments of counsel at the hearing on the Motions, and other appropriate matters of record, the Court hereby **GRANTS in part** and **DENIES in part** the Motions as set forth below.

Brooks, Pierce, McLendon, Humphrey, & Leonard, by Robert J. King, Charles E. Coble, Benjamin R. Norman, Andrew L. Rodenbough, Bryan Starrett, and Jeffrey E. Oleynik, and Keogh, Cox & Wilson, Ltd., by John P. Wolff, III, Richard W. Wolff, and Virginia Jordan McLin, for Plaintiffs Window World of Baton Rouge, LLC, Window World of Dallas, LLC, Window World of Tri State Area LLC, James W. Roland, Window World of St. Louis, Inc., Window World of Kansas City, Inc., Window World of Springfield/Peoria, Inc., James T. Lomax III, Jonathan Gillette, B&E Investors, Inc., Window World of North Atlanta, Inc., Window World of Central Alabama, Inc., Michael Edwards, Melissa Edwards, Window World of Central PA, LLC, Angell P. Wesner-Ford, Kenneth R. Ford, Jr., World of Windows of Denver, LLC, Rick D. Rose, Christina M. Rose, Window World of Rockford, Inc., Window World of Joliet, Inc., Scott A. Williamson, Jennifer L. Williamson, Brian C. Hopkins, Window World of Lexington, Inc., Tommy R. Jones, Jeremy T. Shumate, Window World of Phoenix LLC, James Ballard, and Toni Ballard.

Fox Rothschild LLP, by Matthew N. Leerberg, Kip D. Nelson, Troy D. Shelton, and Elizabeth S. Hedrick, and Manning, Fulton & Skinner, P.A., by Michael T. Medford, Judson A. Welborn, Natalie M. Rice, and Jessica B. Vickers, for Defendants Window World, Inc. and Window World International, LLC.

Bell, Davis & Pitt, P.A., by Alan M. Ruley and Andrew A. Freeman, for Defendant Tammy Whitworth.

Bledsoe, Chief Judge.

I.

FACTUAL AND PROCEDURAL BACKGROUND

3. While the Court does not make findings of fact on a motion for summary judgment, "it is helpful to the parties and the courts for the trial judge to articulate a

summary of the material facts which he considers are not at issue and which justify entry of judgment." *Collier v. Collier*, 204 N.C. App. 160, 161–62 (2010) (citation and quotation marks omitted). Accordingly, the following background, drawn from the undisputed evidence submitted by the parties, is intended only to provide context for the Court's analysis and ruling and not to resolve issues of material fact.

4. Defendant Window World, Inc. ("Window World") is a replacement window and exterior remodeling company incorporated in North Carolina and headquartered in Wilkes County.[6] Through a network of independently owned and operated stores, Window World "sell[s] and install[s] vinyl replacement windows, doors and siding, and related accessories to the public."[7] Defendant Window World International, LLC ("WWI") is a Delaware limited liability company with its principal place of business in Wilkes County, North Carolina.[8] WWI is a holding company whose primary purpose is to own and manage the Window World trademarks.[9] Defendant Tammy

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[6] (15-CVS-1 Third Am. Compl. ¶ 15, ECF No. 252 (sealed), 257 (redacted); 15-CVS-2 Third Am. Compl. ¶ 50, ECF No. 275 (sealed), 280 (redacted); *see also, e.g.*, Defs.' Mot. Ex. 2, 2.App.16425 (Window World of Phoenix, AZ – May 2006 Licensing Agreement) [hereinafter "Defs.' 2d App."], ECF No. 973.2 (sealed).) Pinpoint citations to Defendants' appendices will be to the page number listed on the appendices themselves. (*See* Defs.' Mot. Exs. 1–3, ECF Nos. 973.1–.3 (sealed).).

[7] (15-CVS-1 Third Am. Compl. ¶ 18; 15-CVS-2 Third Am. Compl. ¶ 53; *see also, e.g.*, Defs.' 2d App. 2.App.16425 (Window World of Phoenix, AZ – May 2006 Licensing Agreement).)

[8] (15-CVS-1 Third Am. Compl. ¶ 16; 15-CVS-2 Third Am. Compl. ¶ 51; *see also, e.g.*, Defs.' 2d App. 2.App.17705 (Corrected Rebuttal Report of Terence E. Rodgers, PhD).)

[9] (*See e.g.*, 15-CVS-1 Third Am. Compl. ¶¶ 77, 288–89; 15-CVS-2 Third Am. Compl. ¶¶ 299–300; *see also* Defs.' Mot. Ex. 1, 1.App.16157 (Zachary Luffman) [hereinafter "Defs.' 1st App."], ECF No. 973.1 (sealed).) Defendants' first appendix is a compilation of depositions taken during the course of discovery. For ease of reference, the Court will cite to appendix pages and state to whom the deposition excerpt is attributed.

Whitworth ("Ms. Whitworth") is Window World's CEO and the sole owner of both Window World and WWI.[10]

5. Plaintiffs are current franchisees of Window World.[11] They purchase "products (including vinyl replacement windows, doors and siding, and related accessories) at wholesale [from Window World-designated suppliers] and then sell and install them at retail under the 'Window World' name."[12] Window World "licenses use of the 'Window World' trademark and other associated trademarks to [ ] franchisees."[13]

6. For purposes of these Motions, Plaintiffs are organized into eight groups based on franchise ownership and location: (i) Window World of Baton Rouge, LLC, Window World of Dallas, LLC, Window World of Tri State Area, LLC, and James W. Roland (the "Roland Plaintiffs"); (ii) Window World of St. Louis, Inc., Window World of Kansas City, Inc., Window World of Springfield/Peoria, Inc., James T. Lomax, III, and Jonathan Gillette (the "Lomax/Gillette Plaintiffs"; together with the Roland Plaintiffs, the "Tolling Plaintiffs"); (iii) B&E Investors, Inc., Window World of North Atlanta, Inc., Window World of Central Alabama, Inc., Michael Edwards, and Melissa Edwards (the "Edwards Plaintiffs"); (iv) Window World of Central PA, LLC, Angell

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[10] (15-CVS-1 Third Am. Compl. ¶ 199; Volume Two Pls.' Dep. Excerpts, Ex. XX, Zachary Luffman 2018 Dep. 84:14–15, ECF No. 985.24 (sealed); 15-CVS-2 Third Am. Compl. Ex. C, ECF No. 275.1 (sealed), 280.1 (redacted); 15-CVS-2 Third Am. Compl. ¶ 298.)

[11] (15-CVS-1 Third Am. Compl. ¶ 2; 15-CVS-2 Third Am. Compl. ¶ 2; *see also* Defs.' 2d App. 2.App.16425–16913 (Licensing Agreements).)

[12] (15-CVS-1 Third Am. Compl. ¶ 20; 15-CVS-2 Third Am. Compl. ¶ 55.)

[13] (15-CVS-1 Third Am. Compl. ¶ 20; 15-CVS-2 Third Am. Compl. ¶ 55.)

P. Wesner-Ford, and Kenneth R. Ford, Jr. (the "Ford Plaintiffs"); (v) World of Windows of Denver, LLC, Rick D. Rose, and Christina M. Rose (the "Rose Plaintiffs"); (vi) Window World of Rockford, Inc., Window World of Joliet, Inc., Scott A. Williamson, Jennifer L. Williamson, and Brian C. Hopkins (the "Williamson/Hopkins Plaintiffs"); (vii) Window World of Lexington, Inc., Tommy R. Jones, and Jeremy T. Shumate (the "Jones/Shumate Plaintiffs"); and (viii) Window World of Phoenix, LLC, James Ballard, and Toni Ballard (the "Ballard Plaintiffs"; together with the Edwards, Ford, Rose, Williamson/Hopkins, and Jones/Shumate Plaintiffs, the "Non-Tolling Plaintiffs").

7. Window World was founded by Leon Whitworth in 1995 as a single store.[14] By 1998, however, Window World started licensing use of its trademarks to enable independent storeowners to operate Window World stores in exclusive territories.[15]

8. To open a Window World store, storeowners were required to pay Window World an initial licensing fee or, alternatively, a prior storeowner's debt in lieu of the licensing fee.[16] In addition to the licensing fees, Window World generated revenue through supplier rebates on windows and [redacted] sold to the storeowners.[17]

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[14] (Defs.' 2d App. 2.App.17452 (Affidavit of Ruben Leon Whitworth).)

[15] (Defs.' 2d App. 2.App.17454 (Affidavit of Ruben Leon Whitworth).)

[16] (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 69, ECF No. 1007 (sealed), 1021 (redacted); *see also* Volume Four Pls.' Exs. Ex. 95, ECF No. 980.5 (sealed); Volume Five Pls.' Exs. Ex. 147A 4–5, ECF No. 981.29 (sealed); Volume One Pls.' Dep. Excerpts, Ex. F, Dana Deem 2023 Dep. 49:11–50:25, ECF No. 984.6 (sealed).)

[17] (S*ee, e.g.*, Defs.' 1st App. 1.App.10020, 10364, 10446 (Howard Blair Ingle); 1.App.10987–10991 (Tammy Whitworth).)

Storeowners, such as Plaintiffs, would purchase windows and [redacted] from designated vendors and these vendors, in turn, would pay "rebates" to Window World on items storeowners purchased. The designated vendors would integrate the rebate amounts paid to Window World into the prices charged to storeowners.[18]

9. Between 2001 and 2011, Plaintiffs began operating Window World locations.[19] Plaintiffs state that Leon Whitworth, and later Todd Whitworth, Window World's CEO from 2007 to 2010, recruited them to become licensees of the Window World brand through in-person sales pitches and individual conversations with Plaintiffs.[20] Plaintiffs allege that the Whitworths induced them "to become Window World dealers [by telling them Window World] would secure the *best price* on the windows through [Window World's] collective buying power" (emphasis added).[21] More specifically, Plaintiffs contend they "were told that by joining [Window World] they would gain access to best pricing, better than could be obtained outside of the Window World system."[22] Plaintiffs further allege that they were informed they

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[18] (*See, e.g.*, Defs.' 1st App. 1.App.10447–10450 (Howard Blair Ingle).) [redacted] (*see, e.g.*, Defs.' 1st App. 1.App.1199 (James Lomax, III); 1.App.2587 (Jonathan Gillette); 1.App.8174 (Tommy Jones); 1.App.8356 (Jeremy Shumate).).

[19] (*See* Pls.' Br. Opp'n Defs.' Mot. Summ. J. Ex. 3, ECF No. 1008.3.)

[20] (*See, e.g.*, Defs.' 1st App. 1.App.7847 (Scott Williamson); 1.App.8153 (Tommy Jones).)

[21] (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 9; *see also* Volume One Pls.' Exs. Ex. 13, ECF No. 977.14 (sealed).)

[22] (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 9; *see also* Volume One Pls.' Exs. Ex. 14, ECF No. 977.15 (sealed).) Window World refers to this base-level "best pricing" available to all storeowners as "A pricing." (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 9; *see also* Defs.' 1st App. 1.App.14146 (Mark Bumgarner).)

would gain access to even lower pricing if they "met a volume benchmark" set by Window World.[23]

10. While Plaintiffs acknowledge Window World informed them that the company made money through supplier rebates on products sold to the storeowners, Plaintiffs contend Window World represented to Plaintiffs that "they would pay *no more than $10 per window* to [Window World] and that these 'rebates' would be collected and remitted as part of Plaintiffs' window purchases" (emphasis added).[24]

11. Although some Plaintiffs signed a written "Licensing Agreement" or "Franchise Agreement" with Window World immediately upon beginning operations at a Window World location, other Plaintiffs operated their Window World location for months before signing a written agreement.[25] Similarly, many Plaintiffs operated

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[23] (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 9; *see also* Volume One Pls.' Exs. Ex. 13.) Window World refers to this pricing available to storeowners who meet certain volume benchmarks as "B pricing." (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 9; *see also* Defs.' 1st App. 1.App.14146 (Mark Bumgarner).)

[24] (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 10–11; *see also* Volume One Pls.' Exs. Ex. 19-1 ¶ 7 (Affidavit of James Ballard), ECF No. 977.20, Ex. 19-4 ¶ 7 (Affidavit of Tommy Jones), ECF No. 977.20, Ex. 20, ECF No. 977.21 (sealed).) Window World, however, contends the company did not agree in the written contracts executed with Plaintiffs to limit rebate amounts and the company was thus "contractually free to change the rebate amounts at any time and without notice." (Defs.' Resp. Pls.' Mot. Summ. J. 43, ECF No. 1010 (sealed), 1020 (redacted).)

[25] (*See* Pls.' Br. Opp'n Defs.' Mot. Summ. J. Ex. 3.) For instance, though the Jones Plaintiffs acquired their Lexington, Kentucky store in August or September 2001, they did not sign a written "Licensing Agreement" until 28 February 2002. (Pls.' Br. Opp'n Defs.' Mot. Summ. J. Ex. 3.) The fact that some Plaintiffs began operations before the written agreements were signed is important because the parties dispute whether the written agreements or the parties' oral agreements and course of dealing govern the nature of the parties' relationship.

their stores for months, or even years, in the absence of a written agreement after the end of the initial "Licensing" or "Franchise" Agreement's term.[26]

12. The written agreements initially signed by Plaintiffs generally classified Plaintiffs as "Licensees" and Window World as a "Licensor."[27] Although some of the initial agreements purported to grant a franchise, the agreements did not include any franchise-related disclosures.[28] In fact, the written agreements signed by most Plaintiffs between 2008 and 2011 specifically provided the agreements did not create a franchise relationship:

> Nothing in this Licensing Agreement shall be deemed to create any type of partnership, employment, agency, franchise, or other business relationship other than LICENSOR and LICENSEE. The parties acknowledge and agree that, to the extent the state in which the LICENSEE is granted its license has enacted statutes, codes, or regulations which govern franchises, the LICENSEE and LICENSOR are not subject to such laws and regulations and the LICENSOR shall not be required to provide any disclosures to LICENSEE other than those previously made to LICENSEE or made herein. The LICENSEE agrees that the terms of the Licensing Agreement and the LICENSOR/LICENSEE relationship created hereunder shall be determinative of the rights and interests between the parties notwithstanding any statutes, rules, or regulations governing franchises in the state where the LICENSEE does business.[29]

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[26] (*See* Pls.' Br. Opp'n Defs.' Mot. Summ. J. Ex. 3.)

[27] (S*ee* Defs.' 2d App. 2.App.16425–16883 (Licensing Agreements).)

[28] (*See, e.g.,* Defs.' 2d App. 2.App.16440 (Window World of Baton Rouge – January 2002 Licensing Agreement) ("[A]s an inducement for WINDOW WORLD, INC., to enter this Licensing Agreement and *grant this franchise*. . .") (emphasis added); Volume One Pls.' Exs. Ex. 12 40–42, ECF No. 977.13.)

[29] (*See, e.g.,* Defs.' 2d App. 2.App.16473 (Window World of Baton Rouge, LA – July 2010 Licensing Agreement); 2.App.16663 (Window World of Peoria, IL – April 2011 Licensing Agreement); 2.App.16754 (Window World of Huntsville, AL – September 2008 Licensing Agreement); 2.App.16765 (Window World of North Atlanta, GA – July 2009 Licensing Agreement).)

13. Beginning in the early 2000s, Window World sought to "professionalize."[30] To that end, Window World made several changes to its corporate structure and governance:

a. Window World hired Howard Blair Ingle ("Mr. Ingle") as its CFO in September 2007[31] and later promoted him to President of the company in 2009;[32]

b. around early 2010, Window World, at the direction of Mr. Ingle, hired Beth Vannoy ("Ms. Vannoy") as outside counsel purportedly to "look into the possibility of Window World becoming a franchise system, for business reasons."[33] Later the same year, Window World hired Ms. Vannoy as in-house counsel, where she testified she continued to "gather information for a possible move to a franchise system";[34]

c. in June 2010, WWI was formed[35] and Window World transferred all of its intellectual property assets (the "2010 Transfer"), including but not limited

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[30] (Defs.' Br. Supp. Mot. Summ. J. 7, ECF No. 974 (sealed), 1001 (redacted); Defs.' 1st App. 1.App.10389 (Howard Blair Ingle).)

[31] (Defs.' Br. Supp. Mot. Summ. J. 7; Defs.' 1st App. 1.App.10018 (Howard Blair Ingle).)

[32] (Defs.' Br. Supp. Mot. Summ. J. 7; Defs.' 1st App. 1.App.10029 (Howard Blair Ingle).) Mr. Ingle was terminated from Window World in 2011. (Defs.' Br. Supp. Mot. Summ. J. 9; *see also* Defs.' 1st App. 1.App.10298 (Howard Blair Ingle).)

[33] (Defs.' Br. Supp. Mot. Summ. J. 8; Defs.' 1st App. 1.App.10056, 10067, 10070–71, 10137–38 (Howard Blair Ingle); 1.App.12271, 12274, 12338–39, 12353–55, 12358, 12385–87, 12449 (Beth Vannoy).)

[34] (Defs.' 1st App. 1.App.12342, 12368, 12393, 12401–03, 12518 (Beth Vannoy).)

[35] (*See, e.g.*, Defs.' 1st App. 1.App.10674 (Howard Blair Ingle); 1.App.16104 (Zachary Luffman).)

to the Window World trademarks (the "Transferred Assets"), to the newly formed entity;[36] and

d. in February 2011, Ms. Whitworth, who followed Todd Whitworth as Window World's CEO after Todd's 2010 death, re-constituted Window World's Board of Directors.[37]

14. After Ms. Vannoy consulted with outside counsel and outside counsel consulted with regulators in several states in which Window World had stores regarding whether Window World's business structure was subject to federal and state franchising laws, the Window World board voted to "move forward with becoming a franchise system" on 9 August 2011.[38]

15. To facilitate its purported transition to a franchise system, Window World "issued a form rescission letter [accompanied by franchise disclosure documents] to all store owners in October 2011 . . . [stating] that some states and the FTC would consider [Window World] to have violated franchise laws . . . [and giving] owners the option to rescind their licensing agreements [(the "Licensing Agreements")] or to

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[36] (Volume Seven Pls.' Exs. Ex. 189, ECF No. 983.9 (sealed).)

[37] (Defs.' 1st App. 1.App.15686 (Zachary Luffman); Defs.' 2d App. 2.App.17411–17420 (Bylaws of Window World, Inc.).) Todd Whitworth, who was then serving as Window World's CEO, dissolved the Window World board in August 2009. (Defs.' 2d App. 2.App.17111 (Minutes of Window World, Inc.).)

[38] (Defs.' Br. Supp. Mot. Summ. J. 10; Defs.' Mot. Ex. 3, 3.App.20867–70 (Window World Board Meeting Minutes – August 9, 2011) [hereinafter "Defs.' 3d App."], ECF No. 973.3 (sealed); Defs.' 1st App. 1.App.11148 (Tammy Whitworth); 1.App.15848–50 (Howard Blair Ingle).)

remain part of the [Window World] franchise system."[39] No operating storeowners, including Plaintiffs, elected to rescind their Licensing Agreements with Window World.[40]

16. Through the issuance of the recission letters and franchise disclosure documents (the "FDDs"), Plaintiffs allege they "learned that Defendants . . . withheld information from them that they were entitled to receive under federal law" and "that the very foundation on which their relationship with Defendants was formed – that by becoming a licensee of the 'Window World' marks they would gain access [to] the best available wholesale prices for the windows they sold and installed – rested on misrepresentation and deception by Defendants."[41]

17. Additionally, upon issuance of the recission letters and FDDs, Plaintiffs expressed concern that the executed written licensing agreements no longer reflected the oral agreements to which they had initially agreed or the "manner in which the parties had done business with each other for years."[42]

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[39] (Defs.' Br. Supp. Mot. Summ. J. 11; Volume Five Pls.' Exs. Ex. 129, ECF No. 981.9 (sealed), Ex. 133, ECF No. 981.14 (sealed); Defs.' 3d App. 3.App.17943–46 (Form Recission Letter – Michael Edwards).)

[40] (Defs.' Br. Supp. Mot. Summ. J. 11; *see also, e.g.*, Defs.' 1st App. 1.App.2074 (James Lomax, III); 1.App.4510–11 (Kenneth Ford, Jr.); 1.App.15799–800 (Window World).)

[41] (15-CVS-1 Third Am. Compl. ¶ 3; 15-CVS-2 Third Am. Compl. ¶ 3.)

[42] (15-CVS-1 Third Am. Compl. ¶¶ 4–5; 15-CVS-2 Third Am. Compl. ¶¶ 4–5; *see also, e.g.*, Defs.' 1st App. 1.App.4672–73 (Michael Edwards); 1.App.6947–48 (Brian Hopkins).)

18. Due to these concerns, in 2012, the Roland Plaintiffs and the Lomax/Gillette Plaintiffs approached Window World to attempt to resolve their grievances.[43] The Roland and Lomax/Gillette Plaintiffs thereafter engaged in negotiations with Window World and, on 23 April 2013, entered into a separate agreement tolling many of their legal claims raised in this action (the "Tolling Agreement").[44]

19. After settlement negotiations proved unsuccessful, the Roland and Lomax/Gillette Plaintiffs, joined by the Non-Tolling Plaintiffs, brought the actions currently before this Court.[45]

20. On 2 January 2015, Plaintiffs filed the two above-captioned lawsuits, *Window World of Baton Rouge, LLC v. Window World, Inc.*, 15-CVS-1 (the "Baton Rouge Action") and *Window World of St. Louis, Inc. v. Window World, Inc.*, 15-CVS-2 (the "St. Louis Action") in Wilkes County Superior Court. These cases were thereafter designated mandatory complex business cases and assigned to the undersigned.[46] The Court later consolidated the two cases for purposes of discovery.[47]

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[43] (15-CVS-1 Third Am. Compl. ¶¶ 5–6; 15-CVS-2 Third Am. Compl. ¶¶ 5–6; *see also* Defs.' 1st App. 1.App.2696, 3139–43 (James Roland); 1.App.1283, 1292–93, 1300–03 (James Lomax, III).)

[44] (Defs.' 2d App. 2.App.17424–38 (April 2013 Tolling Agreement).)

[45] (15-CVS-1 Third Am. Compl. ¶¶ 8–9; 15-CVS-2 Third Am. Compl. ¶¶ 8–10.)

[46] (15-CVS-1 Designation Order, ECF No. 5; 15-CVS-1 Assignment Order, ECF No. 6; 15-CVS-2 Designation Order, ECF No. 5; 15-CVS-2 Assignment Order, ECF No. 6.)

[47] (Case Management Order 4, ECF No. 50.)

21. In their Third Amended Complaints filed in these lawsuits on 11 January 2017, Plaintiffs asserted claims for declaratory judgment[48], reformation and injunction[49], breach of contract[50], breach of the implied covenant of good faith and fair dealing[51], fraud[52], negligent misrepresentation[53], violation of North Carolina General Statute ("N.C.G.S.") § 75-1.1[54], unjust enrichment[55], fraudulent transfer[56], and piercing the corporate veil, mere instrumentality, and alter ego[57], which remain pending in the current actions.[58] For their relief, Plaintiffs seek nullification and/or

[48] (15-CVS-1 Third Am. Compl. ¶¶ 222–37; 15-CVS-2 Third Am. Compl. ¶¶ 321–39.)

[49] (15-CVS-1 Third Am. Compl. ¶¶ 238–44; 15-CVS-2 Third Am. Compl. ¶¶ 340–48.)

[50] (15-CVS-1 Third Am. Compl. ¶¶ 245–51; 15-CVS-2 Third Am. Compl. ¶¶ 349–55.)

[51] (15-CVS-1 Third Am. Compl. ¶¶ 252–59; 15-CVS-2 Third Am. Compl. ¶¶ 356–63.)

[52] (15-CVS-1 Third Am. Compl. ¶¶ 260–68; 15-CVS-2 Third Am. Compl. ¶¶ 364–72.)

[53] (15-CVS-1 Third Am. Compl. ¶¶ 269–74; 15-CVS-2 Third Am. Compl. ¶¶ 373–78.)

[54] (15-CVS-1 Third Am. Compl. ¶¶ 275–79; 15-CVS-2 Third Am. Compl. ¶¶ 379–83.)

[55] (15-CVS-1 Third Am. Compl. ¶¶ 280–85; 15-CVS-2 Third Am. Compl. ¶¶ 384–90.)

[56] (15-CVS-1 Third Am. Compl. ¶¶ 286–300; 15-CVS-2 Third Am. Compl. ¶¶ 391–405.)

[57] (15-CVS-1 Third Am. Compl. ¶¶ 162–221; 15-CVS-2 Third Am. Compl. ¶¶ 261–320.)

[58] The Lomax/Gillette Plaintiffs also brought claims for declaratory judgment and injunction in the St. Louis Action, which the Court dismissed by order dated 10 August 2015. (*See* Order and Op. Defs.' Mot. Dismiss and Pls.' Mot. Leave File Second Am. Compl., 15-CVS-2 ECF No. 91.) The Court also dismissed the ninth cause of action in the Baton Rouge Action and the eleventh cause of action in the St. Louis Action for violation of N.C.G.S. § 75-1 by order dated 25 October 2016. (*See* Order and Op. Defs.' Mot. Dismiss and Second Mot. J. Pleadings, 15-CVS-2 ECF No. 258.) Finally, the Court dismissed the eleventh cause of action in the Baton Rouge Action and the thirteenth cause of action in the St. Louis Action for fraudulent transfer as it relates to the Non-Tolling Plaintiffs' claims against WWI under N.C.G.S. § 39-23.4(a)(2) by order dated 11 February 2019. *See generally Window World of Baton Rouge, LLC v.*

reformation of Plaintiffs' current written agreements with Window World, compensatory and punitive damages, avoidance of the 2010 Transfer, and attorneys' fees.

22. On 13 and 14 February 2017, Window World and WWI filed an Answer and Counterclaim to Plaintiffs' Third Amended Complaint in each action, in which they asserted various claims for declaratory judgment.[59] Window World and WWI asserted additional claims for declaratory judgment and breach of contract in the Baton Rouge Action in their Amended Answer and Counterclaims to Plaintiffs' Third Amended Complaint filed on 10 March 2017.[60] On 27 July 2017, Ms. Whitworth filed an Answer and Alternative Counterclaim in both the Baton Rouge and St. Louis Actions, in which she asserted various claims for declaratory judgment and breach of contract.[61]

23. WWI's Motion, through which WWI seeks summary judgment on all remaining North Carolina Uniform Avoidable Transfers Act ("NCUVTA") claims

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Window World, Inc., 2019 NCBC LEXIS 11 (N.C. Super. Ct. Feb. 11, 2019); (*See* Order and Op. Def. Window World International, LLC's Mot. J. Pleadings, 15-CVS-2 ECF No. 726.)

[59] (15-CVS-1 Answer & Countercl. of Window World and WWI to Third Am. Compl. [hereinafter "Baton Rouge Answer" or "Baton Rouge Countercls."], ECF No. 265 (sealed), 269 (redacted); 15-CVS-2 Answer & Countercl. of Window World and WWI to Third Am. Compl. [hereinafter "St. Louis Answer" or "St. Louis Countercls."], ECF No. 287 (sealed), 292 (redacted).)

[60] (15-CVS-1 Am. Answer & Countercl. of Window World and WWI to Third Am. Compl., ECF No. 283.)

[61] (Answer & Alt. Countercl. of Tammy Whitworth, 15-CVS-1 ECF No. 327 (sealed), 15-CVS-1 ECF No. 331 (redacted), 15-CVS-2 ECF No. 345 (sealed), ECF No. 349 (redacted).)

asserted by the Non-Tolling Plaintiffs, was initially filed on 16 April 2019.[62] Whitworth's Motion, which seeks dismissal of Plaintiffs' Chapter 75 claims against her, was initially filed on 16 May 2019.[63] The Court stayed consideration of these two motions[64] pending the completion of discovery and, once discovery was completed, set a briefing schedule for dispositive motions practice, including final briefing on these motions.[65]

24. Pursuant to this schedule, the parties timely filed the Cross-Motions on 18 October 2023. In the Cross-Motions, Plaintiffs move for summary judgment on their claims for fraud, declaratory judgment, violation of N.C.G.S. § 75-1.1, negligent misrepresentation, fraudulent transfer, and piercing the corporate veil. Plaintiffs further move for summary judgment on Defendants' counterclaims[66], subparagraph (d) of Window World's Fifth Additional Defense[67], Window World's Sixth Additional

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[62] (WWI's Mot.)

[63] (Whitworth's Mot.)

[64] (Order Staying Certain Activity Pending Appeal and Notice Hearing, ECF No. 733.)

[65] (Sixth Am. Case Management Order, ECF No. 945.)

[66] (Baton Rouge Answer ¶¶ 41–75; St. Louis Answer ¶¶ 51–95.) Plaintiffs' Motion excludes the "Alternative Counterclaim" asserted by Ms. Whitworth in the Answer filed on 27 July 2017. (Answer & Alt. Countercl. of Tammy Whitworth.)

[67] Subparagraph (d) of Window World's Fifth Additional Defense, asserted in the Answer and Counterclaims filed in 15-CVS-2 (the St. Louis Action) on 14 February 2017, states as follows:

> Plaintiffs' claims are barred by all applicable statutes of limitations, statutes of repose, and borrowing statutes as follows: . . . (d) The Tolling Agreement between Window World and the Lomax Plaintiffs should be disregarded for purposes of the statute of limitations to the extent, if any, that Lomax Plaintiffs are precluded from enforcing the Tolling Agreement by their own breach of the

Defense[68], subparagraph 5 of Tammy Whitworth's Seventh Additional Defense[69], and Tammy Whitworth's Eighth Additional Defense.[70] Defendants have denied all liability and seek summary judgment on all of Plaintiffs' claims.[71]

25. After full briefing, the Court convened a two-day hearing on the Motions on 10 and 11 January 2024, at which all parties were represented by counsel.[72] The Motions are now ripe for resolution.

> Tolling Agreement. Upon information and belief, the Lomax Plaintiffs violated the confidentiality provisions of the Tolling Agreement. (St. Louis Answer.)

[68] Window World's Sixth Additional Defense, asserted in the Answer and Counterclaims filed in 15-CVS-2 on 14 February 2017 (St. Louis Answer) and 15-CVS-1 on 13 February 2017 (Baton Rouge Answer), states that "Plaintiffs' claims for breach of contract are barred to the extent they have committed their own antecedent breaches of the contracts between the parties."

[69] Subparagraph 5 of Tammy Whitworth's Seventh Additional Defense, asserted in the Answer and Alternative Counterclaim filed in 15-CVS-2 on 27 July 2017, states as follows:

> Plaintiffs' claims are barred by all applicable statutes of limitations, statutes of repose, and borrowing statutes for numerous reasons, including the following non-exclusive reasons: . . . (5) The Tolling Agreement should be disregarded for purposes of the statute of limitations and/or repose to the extent, if any, that Plaintiffs are precluded from enforcing the Tolling Agreement by their own breach of the Tolling Agreement. Upon information and belief, Plaintiffs violated the confidentiality provisions of the Tolling Agreement. (15-CVS-2 Answer & Alt. Countercl. of Tammy Whitworth.)

Tammy Whitworth asserts the same additional defense in subparagraph (d) of her Seventh Additional Defense in the Answer and Alternative Counterclaim filed in 15-CVS-1 on 27 July 2017. (15-CVS-1 Answer & Alt. Countercl. of Tammy Whitworth.)

[70] Tammy Whitworth's Eighth Additional Defense, asserted in the Answer and Alternative Counterclaim filed in both 15-CVS-1 and 15-CVS-2 on 27 July 2017, alleges that "Plaintiffs' claims for breach of contract are barred to the extent they have committed their own antecedent breaches of the contracts." (15-CVS-1 Answer & Alt. Countercl. of Tammy Whitworth; 15-CVS-2 Answer & Alt. Countercl. of Tammy Whitworth; *see also* Pls.' Mot.)

[71] (Defs.' Mot.)

[72] (Am. Notice Hearing, ECF No. 1016.)

II.

CHOICE OF LAW

26. A "choice of law" contract clause provides "that the substantive laws of a particular state [shall] govern the construction and validity of the contract." *Cable Tel Servs., Inc. v. Overland Contracting, Inc.*, 154 N.C. App. 639, 641 (2002). The general rule in North Carolina is that "where parties to a contract have agreed that a given jurisdiction's substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect." *Tanglewood Land Co. v. Byrd*, 299 N.C. 260, 262 (1980). Our courts, however, will not enforce a choice of law provision where:

> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of applicable law in the absence of an effective choice of law by the parties.

Cable Tel Servs., Inc., 154 N.C. App. at 642–43 (citing Restatement (Second) of Conflict of Laws § 187 (1971)); *see also Bundy v. Commercial Credit Co.*, 200 N.C. 511, 516 (1931) (refusing to apply parties' choice of Delaware law because their contractual stipulation was "immaterial" in that the "record [did] not disclose that any transaction took place in Delaware or that the parties even contemplated either the making or the performance of the contract in said State.").

27. Plaintiffs in this action are foreign limited liability organizations, none of which conduct business in North Carolina. However, in their executed written

agreements, Plaintiffs consented that their licensing or franchise agreements "shall be governed and interpreted by the laws of the State of North Carolina."[73] As North Carolina has a substantial relationship to the parties—Defendant Window World is incorporated in North Carolina and headquartered in Wilkes County—and the application of North Carolina law is not, on its face, contrary to a "fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue," this Court will apply North Carolina law to the disputed issues. The parties do not dispute that North Carolina law applies to the issues presented by the Motions.

III.

LEGAL STANDARD

28. Under Rule 56(c), "[s]ummary 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.' " *Da Silva v. WakeMed*, 375 N.C. 1, 10 (2020) (quoting N.C. R. Civ. P. 56(c)). "A genuine issue of material fact is one that can be maintained by substantial evidence." *Curlee v. Johnson*, 377 N.C. 97, 101 (2021) (cleaned up). "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[.]" *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681 (2002) (cleaned up). "An issue is material if, as alleged, facts 'would

[73] (*See, e.g.*, Defs.' 2d App. 2.App.16476, 16489, 16502, 16515, 16543, 16561 (Licensing Agreements).)

constitute a legal defense, or would affect the result of the action or if its resolution would prevent the party against whom it is resolved from prevailing in the action.' " *Bartley v. City of High Point*, 381 N.C. 287, 292 (2022) (quoting *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518 (1972)). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Belmont Ass'n v. Farwig*, 381 N.C. 306, 310 (2022) (quoting *Dalton v. Camp*, 353 N.C. 647, 651 (2001)).

29. "The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579 (2002). The movant may meet this burden either (1) "by proving 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 (2) "by showing through discovery that the opposing party cannot produce evidence to support an essential element of [its] claim[.]" *Dobson v. Harris*, 352 N.C. 77, 83 (2000) (cleaned up). If the movant meets its burden, "the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating that the nonmoving party will be able to make out at least a prima facie case at trial[.]" *Cummings v. Carroll*, 379 N.C. 347, 358 (2021) (cleaned up); *see also* N.C. R. Civ. P. 56(e) ("[A]n adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.").

30. When a party requests offensive summary judgment on its own claims for relief, as Plaintiffs do here, "a greater burden must be met." *Brooks v. Mt. Airy Rainbow Farms Ctr., Inc.*, 48 N.C. App. 726, 728 (1980). The moving party "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). For that reason, it is "rarely . . . 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).

IV.

ANALYSIS

31. As a foundational matter, the parties dispute what governs the parties' business relationship—the parties' course of dealings and oral discussions or the written agreements executed by the parties. Plaintiffs allege that, between 2002 and 2011, they "entered into a regular, definite, and consistent course of dealings establishing a business relationship between themselves and franchisees owned by them . . ., on the one hand, and [Window World], on the other hand."[74] Plaintiffs contend that "[a]lthough the parties executed a number of written 'Licensing Agreements' during the relevant time period, the parties' business relationship existed independent of those written agreements, predated the execution of those written agreements, continued unabated and unaltered after the expiration of those

[74] (15-CVS-1 Third Am. Compl. ¶ 30; 15-CVS-2 Third Am. Compl. ¶ 65.)

written agreements, and was not limited by those written agreements."[75] Defendants, in contrast, contend that "Plaintiffs all signed written licensing agreements when they joined Window World" and that "[t]hose writings established the material terms of Plaintiffs' business relationship with [Window World]."[76]

32. In their initial pleadings, Plaintiffs assert several theories concerning why the executed written agreements are "null, invalid, and unenforceable against Plaintiffs" and the parties' course of dealings and oral discussions control.[77] According to Plaintiffs, the written agreements are invalid because:

(1) "the cause and/or object of the agreement[s], as intended by [Window World], was illegal";[78]

(2) "enforcement of such agreements against Plaintiffs would be against public policy . . . expressed in the Franchise Disclosure Rule's requirements applicable to franchisors";[79]

(3) the written agreements were "induced by [Window World's] fraud";[80] and

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[75] (15-CVS-1 Third Am. Compl. ¶ 30; 15-CVS-2 Third Am. Compl. ¶ 65.)

[76] (Defs.' Br. Supp. Mot. Summ. J. 1.)

[77] (15-CVS-1 Third Am. Compl. ¶ 223; 15-CVS-2 Third Am. Compl. ¶ 322.)

[78] (15-CVS-1 Third Am. Compl. ¶ 224; 15-CVS-2 Third Am. Compl. ¶ 323.)

[79] (15-CVS-1 Third Am. Compl. ¶ 226; 15-CVS-2 Third Am. Compl. ¶ 325.)

[80] (15-CVS-1 Third Am. Compl. ¶ 227; 15-CVS-2 Third Am. Compl. ¶ 326.)

(4) "the putative obligations in the prior agreements are not enforceable against Plaintiffs because they arise from adhesionary contracts."[81]

33. Defendants seek summary judgment on Plaintiffs' causes of action for (1) a declaratory judgment that any and all prior written Licensing Agreements are null, invalid, and unenforceable (First Cause of Action in the Baton Rouge Action/Third Cause of Action in the St. Louis Action); (2) a declaratory judgment that Plaintiffs have the right to continue to operate on the terms established by the parties' course of dealings, rather than the written agreements (Second Cause of Action in the Baton Rouge Action/Fourth Cause of Action in the St. Louis Action); (3) fraud (Sixth Cause of Action in the Baton Rouge Action/Eighth Cause of Action in the St. Louis Action) and (4) negligent misrepresentation (Seventh Cause of Action in the Baton Rouge Action/Ninth Cause of Action in the St. Louis Action). Plaintiffs, in their cross-motion, also seek offensive summary judgment on their negligent misrepresentation and fraud-based claims. The Court will address each of these motions for summary judgment before turning to the remaining claims at issue, beginning with the cross-motions for summary judgment on Plaintiffs' cause of action for fraud.

A. <u>Fraud</u>

34. Plaintiffs allege that Window World "failed to disclose, and in fact concealed . . . information from Plaintiffs" to induce Plaintiffs to "operate as Window World franchisees, to assume debt owed by prior franchisees to vendors such as AMI, to continue to operate as Window World franchisees, to pay substantial amounts

[81] (15-CVS-1 Third Am. Compl. ¶ 231; 15-CVS-2 Third Am. Compl. ¶ 330.)

advertising Window World trademarks, and to make purchases from various suppliers, including AMI."[82]

35. Specifically, Plaintiffs allege that Window World:

> fraudulently concealed from Plaintiffs that [Window World] is a franchise subject to franchise disclosure laws, that Plaintiffs must pay certain fees to [Window World] or affiliates of [Window World], that [Window World] or its owners have ownership interests in certain suppliers, that [Window World] derives revenue from Plaintiffs' purchase of products or supplies[,] the undisclosed kickbacks or rebates [Window World] received on Plaintiffs' purchase of products and supplies, that the prices charged Plaintiffs for products and supplies from approved suppliers were inflated to provide greater revenue to [Window World], that the undisclosed kickbacks and rebates represent all or part of the promised volume discount, that [Window World] provided undisclosed "C" pricing to certain franchisees with lower levels of sales while representing that Plaintiffs were receiving the most favorable "B" pricing, that [Window World] receives other undisclosed compensation and consideration from its approved suppliers, and that [Window World] itself was obligated to pay some or all of the debt that [Window World] required Plaintiffs to assume that was owed by prior franchisees to vendors such as AMI.[83]

36. As a result of the alleged misrepresentations and omissions listed above, Plaintiffs contend Window World "committed fraud in at least five distinct ways."[84] According to Plaintiffs, Window World:

(1) "grossly misrepresented the royalties or 'rebates' Plaintiffs would pay [through Window World-designated suppliers to Window World] to do business as Window World dealers" (the "Rebate Misrepresentation Theory");

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[82] (15-CVS-1 Third Am. Compl. ¶ 263; 15-CVS-2 Third Am. Compl. ¶ 367.)

[83] (15-CVS-1 Third Am. Compl. ¶ 262; 15-CVS-2 Third Am. Compl. ¶ 366.)

[84] (Pls.' Br. Supp. Mot. Partial Summ. J. 44, ECF No. 976 (sealed), 1000 (redacted).)

(2) "falsely promised that Plaintiffs would receive best pricing on the products they purchased from [Window World-designated] suppliers" (the "Best Pricing Theory");

(3) "knowingly concealed material facts it was duty-bound to disclose under franchise law and otherwise, despite awareness of its legal obligation to do so" (the "Fraudulent Concealment Theory");

(4) "falsely disclaimed application of franchise law in the licensing agreements it presented to Plaintiffs to sign after June 2008" (the "Franchise Disclaimer Theory"); and

(5) "in 2009, [Window World] misrepresented increases in the already-fraudulent rebates Plaintiffs paid" (the "2009 Price Increase Theory").[85]

37. Window World's fraud, Plaintiffs argue, "renders the written agreements Plaintiffs executed . . . void and unenforceable."[86]

38. Defendants move to dismiss Plaintiffs' fraud claims, contending that Defendants are not liable on any of the five grounds listed above and, relatedly, that the written agreements Plaintiffs executed are enforceable. Defendants further contend most of Plaintiffs' fraud claims should be dismissed because they were brought after the applicable statute of limitations had expired. The Court will address each ground for fraud identified by Plaintiffs, as well as Defendants' statute of limitations arguments, in turn.

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[85] (Pls.' Br. Supp. Mot. Partial Summ. J. 44–45.)

[86] (Pls.' Br. Supp. Mot. Partial Summ. J. 49.)

Elements of Fraud

39. A claim for fraud may be based on an "affirmative misrepresentation of a material fact, or [ ] a failure to disclose a material fact relating to a transaction which the parties had a duty to disclose." *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 696 (2009) (internal citation omitted). The "essential elements of actionable fraud are well established: (1) False representation or concealment of a [past or existing] material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Tillery Env't, LLC v. A & D Holdings, Inc.,* 2018 NCBC LEXIS 13, at *19–20 (N.C. Super. Ct. Feb. 9, 2019) (alteration in original) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138 (1974)).

40. For purposes of fraud, "a fact is material if, had it been known to the party, it would have influenced the party's judgment or decision in making the contract." *Shaw v. Gee*, 2016 NCBC LEXIS 103, at *11 (N.C. Super. Ct. Dec. 21, 2016) (citing *White Sewing Mach. Co. v. Bullock*, 161 N.C. 1, 7 (1912)). Further, as a general rule, a claimant's reliance on allegedly false statements must be reasonable, though the reasonableness of such reliance is typically a question for the jury. *Forbis v. Neal*, 361 N.C. 519, 527 (2007); *Johnson v. Owens*, 263 N.C. 754, 758 (1965) ("[W]here reliance ceases to be reasonable and becomes such negligence and inattention that it will, as a matter of law, bar recovery for fraud is frequently very difficult to determine.").

41. In alleging fraud by concealment or omission, Plaintiffs must additionally show that Defendants "had a duty to disclose material information to them, as silence is fraudulent only when there is a duty to speak." *Lawrence v. UMLIC-Five Corp.*, 2007 NCBC LEXIS 20, *8 (N.C. Super. Ct. June 18, 2007) (citing *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 198 (1976)). When two parties are engaged in an arm's-length transaction, two different scenarios will create a duty to disclose. The first is when one party takes an affirmative step to conceal a material fact from the other. *Hardin*, 199 N.C. App. at 696; *see also Ragsdale*, 286 N.C. at 138–40. A concealed fact is considered material when it would have influenced the decision or judgment of another party, if known. *White Sewing Mach. Co.*, 161 N.C. at 7; *see also Godfrey v. Res-Care, Inc.*, 165 N.C. App. 68, 75–76 (2004). The second is when "one party has knowledge of a latent defect in the subject matter of the negotiations about which the other party is both ignorant and unable to discover through reasonable diligence." *Hardin*, 199 N.C. App. at 696 (quoting *Sidden v. Mailman*, 137 N.C. App. 669, 675 (2000)).

42. In addition to these situations, even when no duty to disclose exists, a party who chooses to speak has a duty to make a full and fair disclosure of facts concerning the matters on which he chooses to speak. *Ragsdale*, 286 N.C. at 139 (citing *Low v. Wheeler*, 207 Cal. App. 2d 477, 484 (Ct. App. 1962) ("Even where there is no duty to make a disclosure, when one does undertake to inform, he must speak the whole truth.")).

<u>Ground 1: Rebate Misrepresentation Theory</u>

43. Plaintiffs first contend that Window World "committed fraud by knowingly misrepresenting the most basic financial element of the parties' relationships: what Plaintiffs paid [Window World] for the right to do business under the Window World name."[87] Plaintiffs assert that Window World's "rebate promises were central to their decision to become dealers, that they trusted the promises [Window World] made, and that those promises led them to invest in the Window World brand."[88]

44. Specifically, Plaintiffs argue that Window World committed fraud by misrepresenting the rebate amounts Plaintiffs would pay to Window World on windows and [redacted].[89] According to Plaintiffs, "[t]he record is undisputed that [Window World] promised Plaintiffs that they would not pay more than $10 a window in rebates."[90] Despite promises made to Plaintiffs, Window World allegedly "had no intention of honoring these promises, and it did not do so."[91] Window World's fraudulent conduct, Plaintiffs allege, is evidenced by the fact that Window World "was *already* collecting rebates far in excess of the represented amounts when Plaintiffs began operating[.]"[92]

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[87] (Pls.' Br. Supp. Mot. Partial Summ. J. 46.)

[88] (Pls.' Reply Br. Supp. Pls.' Mot. Partial Summ. J. 23 [hereinafter "Pls.' Reply Br."], ECF No. 1025 (sealed), 1039 (redacted).)

[89] (Pls.' Br. Supp. Mot. Partial Summ. J. 46–49.)

[90] (Pls.' Br. Supp. Mot. Partial Summ. J. 46.)

[91] (Pls.' Br. Supp. Mot. Partial Summ. J. 46.)

[92] (Pls.' Br. Supp. Mot. Partial Summ. J. 46.)

45. Furthermore, Plaintiffs contend that Window World's rebate promises "were material to each Plaintiff's decision to become a [Window World] dealer,"[93] Plaintiffs' reliance on Window World's rebate misrepresentations was reasonable, and "Plaintiffs were damaged [by Window World's misrepresentations] in an amount equal to the difference between the rebates they were fraudulently promised and the rebates they actually paid."[94]

46. Defendants seek to dismiss Plaintiffs' fraud claim based on the alleged rebate misrepresentation, arguing that "Plaintiffs cannot establish any element [of fraud], much less run the table, for their rebate-fraud theory."[95] Specifically, Defendants contend that no Plaintiff group can establish the first element—that Window World made a false misrepresentation of a material fact—as:

a. "most Plaintiffs did not testify that [Window World] promised that Plaintiffs' rebate amounts would never exceed $10 per window";[96]

b. "[s]ome Plaintiffs admitted that there was no discussion of rebate amounts until *after* signing a licensing agreement . . . [meaning that] these Plaintiffs

[93] (Pls.' Reply Br. 22; *see also* Pls.' Reply Br. Ex. 3.1, ECF No. 1026.3 (sealed), Ex. 3.3, ECF No. 1026.5 (sealed), Ex. 3.4, ECF No. 1026.6 (sealed), Ex. 3.8, ECF No. 1026.10 (sealed).)

[94] (Pls.' Br. Supp. Mot. Partial Summ. J. 48–49.)

[95] (Defs.' Resp. Pls.' Mot. Summ. J. 37.)

[96] (Defs.' Resp. Pls.' Mot. Summ. J. 38.)

could not have been induced by any 'rebate fraud' into signing their agreements";[97]

c. "it appears that the rebate amount for [redacted][98]

d. the amount of the rebate could not have been relevant to Plaintiffs' decision to join the Window World system because, "once a dealer knows the cost of windows and the price at which he can sell them, . . . other data points aren't germane";[99] and

e. "[n]o Plaintiff sought to limit [Window World's] right to set or change rebate amounts [in the written agreements] . . . [t]hus, this information couldn't have been material."[100]

47. Defendants further argue that there is "no evidence [Window World] sought to induce Plaintiffs' reliance on the rebate amounts,"[101] "Plaintiffs couldn't reasonably rely on rebate representations that didn't form part of the deal, nor could they

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[97] (Defs.' Resp. Pls.' Mot. Summ. J. 39; *see, e.g.*, Defs.' 1st App. 1.App.1888 (James Lomax, III); 1.App.5354–55 (Melissa Edwards); 1.App.8763 (Tommy Jones).)

[98] (Defs.' Resp. Pls.' Mot. Summ. J. 39; *see, e.g.,* Defs.' 1st App. 1.App.1922 (James Lomax, III); 1.App.4680–81 (Michael Edwards); 1.App.15892–96 (Zachary Luffman).)

[99] (Defs.' Resp. Pls.' Mot. Summ. J. 40; *see also* Defs.' Reply Br. Supp. Mot. Summ. J. 28 ("Plaintiffs claim the rebate amount was material, but they never say why. Pls.' Resp. at 62. Plaintiffs say 'no rational actor would enter into a business relationship without understanding the associated costs.' Pls.' Resp. at 62. But Plaintiffs did know the costs: the prices they would pay for windows. WW's Resp. at 39–42; 2.App.17455, ¶ 12. The rebate amount was immaterial."), ECF No. 1031 (sealed), 1037 (redacted).)

[100] (Defs.' Resp. Pls.' Mot. Summ. J. 42.)

[101] (Defs.' Resp. Pls.' Mot. Summ. J. 42.)

reasonably assume that the rebate amounts would stay at the same level forever,"[102] and "Plaintiffs have not shown any damages associated with the alleged rebate fraud."[103]

48. To be successful in their motion for summary judgment, Defendants must demonstrate either (1) an "essential element of [Plaintiffs' fraud] claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense" or (2) Plaintiffs "cannot produce evidence to support an essential element of [their fraud] claim[.]" *Dobson*, 352 N.C. at 83.

49. Since Plaintiffs are moving for offensive summary judgment on their fraud claims, they bear a much greater burden. As stated above, to succeed, Plaintiffs must show "that there are no gaps in [their] proof, that no inferences inconsistent with [their] recovery arise from the evidence, and that there is no standard that must be applied to the facts by the jury." *Ford v. Jurgens*, 2021 NCBC LEXIS 10, *3 (N.C. Super. Ct. Feb. 2, 2021) (citing *Parks Chevrolet, Inc. v. Watkins*, 74 N.C. App. 719, 721 (1985)). As with all motions for summary judgment, the Court must view "the evidence 'in the light most favorable to' [the non-moving party], taking their evidence as true and drawing inferences in their favor." *Id.* (citing *Furr v. K-Mart Corp.*, 142 N.C. App. 325, 327 (2001)).

50. Based on a careful review of the evidence advanced by the parties, the Court first concludes that Defendants' Motion for summary judgment on Plaintiffs' fraud

[102] (Defs.' Resp. Pls.' Mot. Summ. J. 43.)

[103] (Defs.' Resp. Pls.' Mot. Summ. J. 45.)

claim based on rebate misrepresentation should be granted as it applies to the Ballard Plaintiffs, the Ford Plaintiffs, the Jones/Shumate Plaintiffs, the Rose Plaintiffs, and these Plaintiffs' related entities. The foregoing Plaintiffs have not met their burden at the summary judgment stage of providing substantial evidence to support a conclusion that Window World misrepresented the rebate amounts Plaintiffs would pay to Window World.

51. In his deposition, James Ballard testified that Leon Whitworth did not make *any* specific representations to him regarding rebate amounts prior to his becoming a Window World storeowner:

> Q: Did Leon Whitworth disclose to you the amount of the rebate that Window World was to receive on purchases of approved products?
>
> A: He just said a small margin, you know, a few dollars of windows is what he said. He didn't give me no specific amounts, no."[104]

52. The Ford, Rose, Jones, and Shumate Plaintiffs similarly testified that neither Leon Whitworth, nor any other Window World representative, made specific representations to them regarding rebate amounts prior to them becoming Window World storeowners.[105]

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[104] (Defs.' 1st App. 1.App.145 (James Ballard).) Toni Ballard also testified she did not have any discussions with Window World regarding rebates or rebate amounts. (Defs.' 1st App. 1.App.573 (Toni Ballard).)

[105] (Defs.' 1st App. 1.App.3846–47 ("The original agreement, Leon, with – with who I trusted, said [the rebate] would be a couple of bucks per window."), 3973, 3979, 4505–06 (Kenneth Ford, Jr.); 1.App.4173 ("Rick Collins had mentioned that Window World gets something from the manufacturer. He didn't say how much."), 4177 (Angell Wesner-Ford); 1.App.6201 ("I did not know what the rebate was . . . I don't remember Leon saying a number."), 6217–19, 6695 (Rick Rose); 1.App.6655, 6694 (Christina Rose); 1.App.8088–90 ("Q: So you don't recall any particular amount of money that – A: One, that was 18 years ago. That five or ten dollar comment for some reason sounds familiar, but again, that was 18 years ago."), 8794 (Tommy

53. Since the foregoing Plaintiffs failed to provide substantial evidence to demonstrate that the first element of a claim for fraud—that there was a false representation of a material fact—existed or could be proven at trial, the Court need not consider whether these Plaintiffs have met their summary judgment burden regarding the remaining elements.

54. Regarding the remaining Plaintiffs—the Edwards, Lomax/Gillette, Roland, and Williamson/Hopkins Plaintiffs—the Court finds that these Plaintiffs have met their burden at the summary judgment stage of providing substantial evidence to support a conclusion that Window World misrepresented the rebate amounts these Plaintiffs would pay to Window World. The remaining Plaintiffs provided evidence that (1) prior to their signing written agreements with Window World, Window World represented to them that they would not pay more than ten dollars in rebates per window and (2) Plaintiffs paid [redacted].[106]

Jones); 1.App.8763 ("Q: Did you ever ask [Leon Whitworth] how big those rebates were? A: No. He just always said that with our buying power together that no one could buy cheaper than we do.") (Jeremy Shumate).)

[106] (Defs.' 1st App. 1.App.2708–09 ("Leon had, in our initial meetings, told me that, when he explained the whole Window World system, that in exchange for providing the best pricing, that they took a little, they were able to negotiate great prices because they used the buying power of all of the Window World stores out there, and that they would take a little off the top. And that little, he explained to me, was $10 . . . per window."), 2823, 3428 (James Roland); 1.App.1183 ("I've seen the price list from 2001, or the rebate list that showed the [redacted] . . . .[Leon Whitworth's] exact words were something to the effect of, you know, we weren't trying to get rich. We were going to make five or ten bucks a window."), 1221–23, 1249, 1888 (James Lomax, III); 1.App.7847–50 ("Q: So is it fair to say that your understanding is that Window World would never be able to receive a rebate on any product other than windows? Is that your understanding? A: That was what Leon told me. I mean, my understanding is just what Leon told me. Leon said, you know, "I make ten bucks a

Furthermore, the Court finds that these Plaintiffs have provided substantial evidence to support a conclusion that the rebate amounts were material to Plaintiffs. In their depositions, these Plaintiffs testified that representations surrounding pricing and rebates formed the foundation of their relationship with Window World and the rebate amounts induced Plaintiffs, at least in part, to contract with Window World.[107]

55. The Edwards, Lomax/Gillette, Roland, and Williamson/Hopkins Plaintiffs have similarly put forth substantial evidence to support the remaining scienter, reliance, and injury elements of a prima facie case for fraud. In a claim for fraud,

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window and you guys sell a bunch of windows," and that's how it works.") (Scott Williamson).) Although Mr. Gillette and Mr. Hopkins testified that they learned about the rebate amounts from their business partners (Mr. Lomax and Mr. Williamson, respectively), rather than through Window World, (*see* Defs.' 1st App. 1.App.2281–82 (Jonathan Gillette); 1.App.7080–81 (Brian Hopkins)), the Court finds Window World's alleged misrepresentations to these Plaintiffs' business partners sufficient to create a fact issue for these Plaintiffs as to this element. Similarly, although Melissa Edwards testified that she and Michael Edwards were already selling Window World products at the time Mr. Whitworth told them Window World would be taking $5 a window, (*see* Defs.' 1st App. 1.App.5355 (Melissa Edwards)), Michael Edwards testified that the rebate misrepresentations were made before he and his wife began selling Window World products, which the Court finds sufficient to create an issue of fact as to this element of these Plaintiffs' fraud-rebate claim. (Defs.' 1st App. 1.App.4666 ("I was told by Todd [Whitworth] when I started it was five to ten dollars a window, and that was it. Nothing else. Nothing ever got told to me anything otherwise."), 5120–22, 5755 ("Q: So you knew at the start, prior to your signing the first Huntsville agreement, that Window World was paid rebates, correct? A: $5 to $10, at the most . . . Q: Did you have any sense that that could change? A: No. Q: Did you ever talk to [Todd Whitworth] about the rebate structure changing? A: No. I went to work.") (Michael Edwards).)

[107] (*See* Volume One Pls.' Exs. Ex. 20; Pls.' Reply Br. Exs. 3.3, 3.4; *see also* Defs.' 1st App. 1.App.15801 (Window World).) For instance, Mr. Roland testified "if Window World would have done what it was supposed to do as a franchise and give full – reveal fully – the price of doing business with them, in other words, if I would have known the amount of rebates that were being charged from the beginning, I wouldn't be here today." (Defs.' 1st App. 1.App.2717–18 (James Roland).) Similarly, Mr. Lomax testified "[b]y the amount of rebate they were collecting, the fact that I wasn't getting the best price, the fact that even though Leon told me that it was automatic renewal, as long as I didn't do anything wrong and I kept paying my bills, that we're going to change that in the future, there's no way I would have invested the type of time, energy, and money that it took to build what we have today." (Defs.' 1st App. 1.App.1925 (James Lomax, III).)

"[t]he required scienter for fraud is not present without both knowledge and an intent to deceive, manipulate, or defraud." *RD&J Props. v. Lauralea-Dilton Enters., LLC*, 165 N.C. App. 737, 745 (2004) (citing *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568 (1988)). Furthermore, in a claim for fraud, "a defendant cannot be liable for misrepresenting a fact that it has no knowledge is false." *Id.* (citing *Taylor v. Gore*, 161 N.C. App. 300, 303 (2003)). Fraudulent intent "generally is proven by circumstances" and "can be shown by presenting evidence of some motive on the part of the perpetrator." *Latta v. Rainey*, 202 N.C. App. 587, 600 (2010) (cleaned up).

56. Here, the remaining Plaintiffs provided evidence from which a reasonable factfinder could conclude that Window World knew its alleged representations regarding rebate amounts were false and took steps to prevent Plaintiffs from learning the actual amount paid to Window World in the form of rebates.[108]

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[108] (*See* Pls.' Br. Supp. Mot. Partial Summ. J. 12; Volume One Pls.' Dep. Excerpts, Ex. P, Window World Dep. 310:3–312:4, ECF No. 984.16 (sealed).) Additionally, Plaintiffs provide evidence of Window World's fraudulent intent as related to rebate misrepresentations. "After [Window World] discovered that Roland learned the actual amount of the rebates, then-[Window World] President Dana Deem wrote to [Window World's] board that he called AMI and 'shared [his] anger':

> As you can clearly see on the attached spreadsheet, [Roland] has our exact rebate structure by item thanks to AMI. [AMI officer Dave King] stated that [Roland] kept asking for more details and that is how the tab expanded, but that is no excuse . . . [King] knew that we did not want [Roland] to have the exact details of our rebate."

(Pls.' Br. Supp. Mot. Partial Summ. J. 13; *See also* Volume One Pls.' Exs.' Ex. 30, ECF No. 977.31 (sealed).)

57. In addition, these Plaintiffs provide substantial evidence to rebut Defendants' assertion that their reliance on Defendants' oral representations as to rebate amounts was "unreasonable as a matter of law" as "[t]he parties chose *not* to limit rebates in their [written, executed, and fully-integrated] contracts."[109] For example, Plaintiffs point out that the majority of the written agreements executed by the parties do not address rebates at all,[110] the "parties' oral agreements provide the only source of *any* agreement on rebates—including that Plaintiffs would pay them,"[111] and Defendants frequently downplayed the importance of the written agreements in governing the parties' relationship, often referring to the written agreements as "just paperwork."[112] Based on the proffered evidence, a jury could

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[109] (Defs.' Resp. Pls.' Mot. Summ. J. 43.)

[110] (*See* Defs.' 2d. App. 2.App.16425–16914.) It is undisputed that the existence of rebates was not mentioned in the executed written agreements until the Franchise Agreements signed by some Plaintiffs in 2013 were created (*see, e.g.*, Defs.' 2d. App. 2.App.16891 (Williamson Franchise Agreement executed 22 March 2013); 2.App.16933 (Edwards Franchise Agreement executed 10 June 2013).) The Franchise Agreements contain the following language, which does not refer to rebate amounts:

> "FRANCHISEE understands and agrees FRANCHISOR will receive rebates and other compensation from vendors and that such compensation is for services rendered to the vendors and such compensation is reasonable. FRANCHISEE agrees all rebates received by FRANCHISOR are FRANCHISOR'S exclusive property and FRANCHISOR has no obligation to spend any portion of the rebates on FRANCHISEE'S behalf."

(2.App.16891, 16933.)

[111] (Pls.' Reply Br. 25.)

[112] (*See, e.g.*, Pls.' Br. Opp'n Defs.' Mot. Summ. J. Ex. 2, ECF No. 1008.2 (sealed); Defs.' 1st App. 1.App.1325–26 (James Lomax, III); 1.App.3135, 3538–39 (James Roland); 1.App.4783, 5817 (Michael Edwards); 1.App.5349, 5409–10 (Melissa Edwards); 1.App.7325, 7800 (Scott Williamson).)

rationally conclude that Plaintiffs were reasonable in their reliance on Defendants' oral representations concerning rebate amounts. *See Little v. Stogner*, 162 N.C. App. 25, 30 (2004) ("The reasonableness of a party's reliance is a question for the jury, unless the facts are so clear that they support only one conclusion." (quoting *State Props., LLC v. Ray*, 155 N.C. App. 65, 73 (2002))).

58. Last, Plaintiffs provide sufficient evidence at the summary judgment stage to permit a reasonable factfinder to conclude Plaintiffs were harmed in an amount equal to the difference between "the rebates they were fraudulently promised and the rebates they actually paid."[113]

59. Based on the above, the Court concludes that Defendants' Motion should be denied as to the Edwards, Lomax/Gillette, Roland, and Williamson/Hopkins Plaintiffs' (and their related entities') fraud claim based on the Rebate Misrepresentation Theory. The Court further concludes that these Plaintiffs' offensive summary judgment motion on this claim should similarly be denied as Plaintiffs have failed to meet their high burden of "show[ing] that there are no genuine issues of fact, that there are no gaps in [their] proof, that no inferences

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[113] (Pls.' Br. Supp. Mot. Partial Summ. J. 49; *see also* Volume Seven Pls.' Exs. Ex. 216 [hereinafter "Bersin Report"], ECF No. 983.36 (sealed); Volume Seven Pls.' Exs. Ex. 218, Aff. Brent K. Bersin, dated Apr. 7, 2017, at ¶ 6 [hereinafter "Bersin Aff."], ECF No. 983.38 (sealed).) Plaintiffs have also provided evidence that, if not for the requirement to pay rebates through select vendors to Window World, they could purchase the same windows much cheaper from suppliers, such as AMI. (*See, e.g.*, Defs.' 1st App. 1.App.5634–35 ("Q: And Mr. Straus [of AMI] responded by telling you that if you were not a Window World store owner paying the Window World rebate, he would be able to sell you the same windows much cheaper. Is that what you told me? A: He just said if it wasn't for Window World, I could get it for cheaper, yes.") (Melissa Edwards).)

inconsistent with [Plaintiffs'] recovery arise from the evidence, and that there is no standard that must be applied to the facts by the jury." *Parks Chevrolet, Inc.*, 74 N.C. App. at 721.[114]

60. In particular, genuine issues of material fact remain on the Rebate Misrepresentation Theory at least as to: whether Window World falsely represented rebate amounts; whether the rebate amounts were material; whether Window World intended to deceive Plaintiffs; whether Plaintiffs reasonably relied on Window World's alleged oral representations; and whether Plaintiffs were harmed by Window World's alleged misrepresentations. The foregoing are all questions of fact which must be resolved by a jury. *Head v. Gould Killian CPA Grp., P.A.*, 371 N.C. 2, 9 (2018) ("Whether each of the elements of actual fraud and reasonable reliance are met are ordinarily questions for the jury 'unless the facts are so clear that they support only one conclusion.' ") (citing *Forbis*, 361 N.C. at 527).

61. Defendants additionally contend that Window World is entitled to summary judgment on Plaintiffs' fraud claims due to North Carolina's three-year statute of limitations for fraud claims.[115] Defendants argue that the period for Plaintiffs to bring their fraud claims began to run "when they joined [Window World], and certainly no later than October 2011 when they received rescission letters and

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[114] It is "rarely . . . 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).

[115] (Defs.' Br. Supp. Mot. Summ. J. 2, 47–51.)

[franchise disclosure documents]."[116] Since more than three years passed between October 2011 and the filing of these lawsuits on 2 January 2015, Defendants maintain that the "three-year statute of limitations dooms the [fraud] claims for most Plaintiffs."[117]

62. N.C.G.S. § 1-52(9) provides that, for relief on the ground of fraud or mistake, "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." Thus, the limitations period for a fraud claim "begins to run when the plaintiff first becomes aware of facts and circumstances that would enable him to discover the defendant's wrongdoing in the exercise of due diligence." *Doe v. Roman Catholic Diocese of Charlotte*, 242 N.C. App. 538, 543 (2015).

63. Though Defendants contend Plaintiffs' cause of action for fraud accrued in October 2011 at the latest, Plaintiffs provide substantial evidence that Plaintiffs did not discover the facts constituting fraud as it relates to the rebate misrepresentations until 2013. In his deposition, Mr. Roland testified, "I don't believe that I knew what the rebates were until – I have a billing practice with AMI that was authorized by – by Window World sometime in 2013, the spring of 2013, where Win – AMI gives me – separates the rebates from the invoices that they – they send to me. And I don't think until then that I knew exactly what the rebates were."[118] Mr. Roland further

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[116] (Defs.' Br. Supp. Mot. Summ. J. 2.)

[117] (Defs.' Br. Supp. Mot. Summ. J. 2.)

[118] (Defs.' 1st App. 1.App.2707 (James Roland).)

testified that "Window World of Baton Rouge and [his] other companies did not know the rebate structure when Window World issued its FDD to [them] in October of 2011."[119]

64. Mr. Roland's testimony that neither he nor the other storeowners knew the exact rebate amounts until 2013 is further supported by a 12 August 2013 email from Dana Deem, Window World's then President, to Ms. Whitworth and other Window World representatives stating:

> "[a]s you can clearly see on the attached spreadsheet, [Roland] has our exact rebate structure by item thanks to AMI. [AMI officer Dave King] stated that [Roland] kept asking for more details and that is how the tab expanded, but that is no excuse…. [King] knew that we did not want [Roland] to have the exact details of our rebate."[120]

65. Plaintiffs' evidence creates a genuine issue of material fact as to when Plaintiffs' cause of action for fraud based on the Rebate Misrepresentation Theory accrued. Thus, the Court concludes that Plaintiffs' fraud claim based on rebate misrepresentation is not barred by N.C.G.S. § 1-52(9)'s three-year statute of limitations period at the summary judgment stage.

Ground 2: Best Pricing Theory

66. Plaintiffs next contend that Window World "committed fraud by making misrepresentations regarding C pricing and 'best pricing' with fraudulent intent."[121] Plaintiffs contend that to induce them to join the Window World system, Window

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[119] (Defs.' 1st App. 1.App.2707–08 (James Roland).)

[120] (Volume One Pls.' Exs.' Ex. 30.)

[121] (Pls.' Br. Supp. Mot. Partial Summ. J. 49.)

World promised Plaintiffs not only the best *external* price (a better price than non-Window World dealers in their sales area), but also the "best pricing *period* (in the system or elsewhere)."[122]

67. Plaintiffs argue that Window World's promise that Plaintiffs would obtain better pricing on windows as a participant in the Window World system than they could obtain on their own was "*the* key inducement to joining the system."[123] Furthermore, Plaintiffs argue that, by promising "every Plaintiff a two-tiered pricing system"[124] of "A" pricing (the best pricing relative to non-Window World dealers) and "B" pricing (better pricing available to Window World dealers if they met a certain volume threshold),[125] Window World promised Plaintiffs a uniform pricing

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[122] (Pls.' Reply Br. 28.)

[123] (Pls.' Br. Supp. Mot. Partial Summ. J. 49; *see also, e.g.*, Defs.' 1st App. 1.App.133 ("[Leon] was saying that we'd be given the best prices, you know. He said there's nobody – his words was nobody's going to out beat you in prices. He said we're the Walmart of the window company and – nobody's going to be able to compete against you.") (James Ballard); 1.App.1891 ("[Leon] said that the buying power of Window World would provide me the best price possible.") (James Lomax, III); 1.App.2411 ("Every meeting I went to, they preached how we had the best prices in the market.") (Jonathan Gillette); 1.App.2726 ("Q: So—so what was, when Leon used the phrase you were going [to] get the best price, what was he referring to? A: He was referring to the best price – it was a better price than I would be able to get on my own, is the exact phrase.") (James Roland); 1.App.3870 ("the only mention of prices with Rick Collins and with Todd Whitworth were – they used to use the analogy they're the Walmart of the window business; that we get the best prices for dealers than anybody else can get in the country.") (Kenneth Ford, Jr.); 1.App.4770 ("Todd told me he would get me the best price, and it would be better than what I could get on my own.") (Michael Edwards).)

[124] (Pls.' Reply Br. 28.)

[125] (*See, e.g.*, Pls.' Br. Supp. Mot. Partial Summ. J. 9; 15-CVS-1 Third Am. Compl. ¶ 132; 15-CVS-2 Third Am. Compl. ¶¶ 208–09, 368, 382(c).)

structure.[126] Through this pricing structure, Plaintiffs contend, Window World represented "B" pricing was the best pricing available to anyone.[127]

68. Defendants seek summary judgment on Plaintiffs' fraud claim based on the Best Pricing Theory, arguing that:

(1) Window World's "statements about best price were not fraudulent" as there is "no reliable evidence that Plaintiffs *could have* obtained better pricing on their own . . . [n]or is there evidence that [Window World] *knew*, when it made its best-price statements, that Plaintiffs could get better prices on their own";[128]

(2) Plaintiffs' reliance on Defendants' allegedly false best pricing statements was not reasonable as "Plaintiffs had a duty to conduct diligence before joining the [Window World] system";[129]

(3) Window World's "pricing representations aren't actionable" as the "language included in the written license agreements [only stated Window World] would 'endeavor to arrange for the supply of the items to LICENSEE at prices which

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[126] (Pls.' Reply Br. 28.)

[127] (15-CVS-1 Third Am. Compl. ¶ 132; 15-CVS-2 Third Am. Compl. ¶ 224.) ("[Window World" not only misrepresented to Window World franchisees, including Plaintiffs, the levels of pricing available, but also took affirmative steps to hide the existence of "C" pricing from Window World franchisees, including Plaintiffs. They did so to perpetuate the reasonable but mistaken belief of Plaintiffs and other Window World franchisees that they were securing the best available pricing when they hit the specified performance benchmarks.")

[128] (Defs.' Resp. Pls.' Mot. Summ. J. 50.)

[129] (Defs.' Resp. Pls.' Mot. Summ. J. 50.)

are less than those changed [sic] to non-licensees within the trade area herein defined.' ";[130]

(4) "the contractual promise is for [Window World] to help each dealer get better window prices than 'non-licensee' competitors are getting in their respective markets . . . [t]he price comparison is *not* between each Plaintiff and any other [Window World] dealer" and Window World "did not make representations about uniform pricing";[131]

(5) "[t]he existence of non-uniform pricing . . . couldn't have been material to Plaintiffs' decision to join [Window World] or take any other action";[132] and

(6) Plaintiffs cannot show Defendants' allegedly false representations about best pricing injured Plaintiffs.[133]

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[130] (Defs.' Resp. Pls.' Mot. Summ. J. 51; *see* Defs.' 2d App. 2.App.16437 (Roland – January 2002 Licensing Agreement – Baton Rouge); 2.App.16448 (Roland – August 2002 Licensing Agreement – New Orleans); 2.App.16458 (Roland – April 2005 Licensing Agreement – South Houston, TX); 2.App.16585 (Lomax/Gillette – October 2002 Licensing Agreement – St. Louis); 2.App.16595 (Lomax/Gillette – September 2004 Licensing Agreement – Kansas City); 2.App.16605 (Lomax/Gillette – October 2005 Licensing Agreement – Central Missouri); 2.App.16730 (Edwards – May 2002 Licensing Agreement – Huntsville, AL); 2.App.16740 (Edwards – November 2005 Licensing Agreement – Florence, AL); 2.App.16788 (Ford – October 2002 Licensing Agreement – York, PA); 2.App.16824 (Rose – November 2005 Licensing Agreement – Denver, CO); 2.App.16834 (Williamson – November 2005 Licensing Agreement – Rockford, IL); 2.App.16861 (Jones – February 2002 Licensing Agreement – Lexington).) However, the Ballard Plaintiffs' 2006 Licensing Agreement for the Window World of Phoenix, AZ store does not include this language and is silent regarding a pricing guarantee. In their summary judgment briefing, Defendants acknowledge that the "endeavor" promise only appeared in some earlier written agreements. (Defs.' Br. Supp. Mot. Summ. J. 32.)

[131] (Defs.' Resp. Pls.' Mot. Summ. J. 53–55.)

[132] (Defs.' Resp. Pls.' Mot. Summ. J. 57.)

[133] (Defs.' Resp. Pls.' Mot. Summ. J. 59–66.)

69. As noted above, to survive a motion for summary judgment, Plaintiffs must "produce a forecast of evidence demonstrating that the nonmoving party will be able to make out at least a prima facie case at trial[.]" *Cummings*, 379 N.C. at 358 (cleaned up). To sustain their Best Pricing Theory, Plaintiffs must be able to "produce a forecast of evidence demonstrating" that (1) Window World represented to Plaintiffs that, by joining the Window World system, they would receive "best pricing"; (2) this representation was false; (3) Window World's "best pricing" representation influenced Plaintiffs' decision to join or remain a part of the Window World system; (4) Window World knew its "best pricing" representation was false and that its representation would induce Plaintiffs to join Window World; (5) Plaintiffs' reliance on Window World's false "best pricing" representation was reasonable; and (6) Plaintiffs suffered harm. *See Tillery Env't, LLC,* 2018 NCBC LEXIS 13, at *19–20.

70. As an initial matter, Plaintiffs and Defendants disagree as to the scope of Window World's "best pricing" representation. Defendants maintain "[w]hat [Window World] promised was *helping* its dealers get better prices so they could *beat competitors in their respective markets*," but Window World "didn't promise uniform pricing"[134] (emphasis added). While the Jones/Shumate Plaintiffs testified that they understood Window World's "best pricing" representation to relate to their competitors, i.e., non-licensees within their trade area,[135] the Roland, Lomax/Gillette,

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[134] (Defs.' Resp. Pls.' Mot. Summ. J. 55.)

[135] (*See* Defs.' 1st App. 1.App.8450 ("Q: But you told me a moment ago that you could buy them cheaper than everybody else, which would include other Window World owners; right? A: Well, the competitors. Q: So you thought that you were to get the best prices and the

Edwards, Ford, Rose, Williamson/Hopkins and Ballard Plaintiffs testified that they understood Window World's "best pricing" representation to extend to other Window World dealers as well.[136]

71. Based on a careful review of the evidence advanced by the parties, the Court concludes that Defendants' Motion for summary judgment on Plaintiffs' fraud claim

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lowest prices among any of your competitors? A: Among any of our competitors, yes. Q: But not, for example, Mr. Roland in Baton Rouge? You weren't expecting to get a better price than Mr. Roland? A: No.") (Jeremy Shumate); 1.App. 8154–55 (Tommy Jones).)

[136] (*See* Defs.' 1st. App. 1.App.2726, 2859, 2885–86 ("I mean, I was supposed to be receiving the best price and I wasn't even receiving the best price within the – within the Window World system."), 2903–04 (James Roland); 1.App.1375 ("Q: And the agreement was to provide you with the best pricing available in the market? A: I don't – there was nothing discussed ever with the market. Q: It was just the best pricing in general? A: Yes. Q: Meaning you could not go find a better price for the windows you were buying anywhere in the world? A: Correct.") (James Lomax, III); 1.App.2644 ("Q: What does that – what does the best price mean to you? A: What I've always understood it as is Window World used the buying power of all of our stores combined to give us the best possible price in the marketplace because we can sell over one million windows per year. Q: Is that the best price you're referring to the best price among your competitors in your market area? A: I don't believe it was defined like that. Q: What did you understand it to be? A: The best price available for a window. Q: Not limited to your market area but just in general? A: Yes. Q: Including any other Window World franchisee or store owner? A: Yes.") (Jonathan Gillette); 1.App.5853 ("Q: Best price compared to what? A: That we could get in – out there anywhere. Any manufacturer, anywhere. Q: Against any competitor? A: Yes. Q: In any geography? A: Just the best price anywhere.") (Michael Edwards); 1.App.5590 (Melissa Edwards); 1.App.3880 ("Well, you're using the term 'in my market.' And that term was never used in my original agreement with Leon Whitworth. He mentioned specifically, 'You're going to get the best price in the industry.' ") (Kenneth Ford, Jr.); 1.App.4179 ("Q: So you viewed best pricing as in relation to other Window World dealers? A: In relation to other Window World dealers, and that we had the edge on the market too.") (Angell Wesner-Ford); 1.App.6271 ("It's not the – it's not what the deal was with Leon and Todd. They were negotiating flat, all over, for the best price."); 1.App.6458 (Christina Rose); 1.App.7242 ("And [Leon Whitworth] said, 'It's real simple. We buy more windows than anybody, and we get the bust pricing. And if you join Window World, you'll get better pricing than any window dealer out there, period.' ") (Scott Williamson); 1.App.7047 ("My understanding was simply that we got the best price available to buy these windows, period.") (Brian Hopkins); 1.App.40 ("Now, we was guaranteed the lowest price. The best price. And when we signed on, we was told there was A and B pricing, and come to find out there is C pricing, which means they wasn't paying [redacted]. Then if I'm paying A pricing or B pricing, I'm not getting the best price."), 94 (James Ballard); 1.App.717–18 (Toni Ballard).)

based on the Best Pricing Theory should be granted as to the Jones/Shumate Plaintiffs. These Plaintiffs failed to produce substantial evidence demonstrating Defendants made a false representation concerning best pricing. In their depositions, the Jones/Shumate Plaintiffs testified they understood Window World's "best pricing" representation to relate to their competitors, i.e., non-licensees within their trade area. However, these Plaintiffs were unable to provide evidence demonstrating the falsity of Window World's representations to them.[137] Since the Jones/Shumate Plaintiffs failed to provide substantial evidence that Window World made a false representation of a material fact to them, the Court grants Defendants' motion for summary judgment on Plaintiffs' fraud claim regarding best pricing in relation to these Plaintiffs.

72. The remaining Plaintiffs, however, have provided evidence from which a reasonable jury could find that Window World's alleged "best price" representations were false. Specifically, the Edwards Plaintiffs provided evidence both that a non-licensee competitor was able to access better prices and that they could access better prices by contracting with [redacted], directly, rather

[137] (Defs.' 1st App. 1.App.8744 ("Q: And are you aware of any nonlicensees within the trade area that you had under Exhibit 600 who got a better price than you did? A: Not to my knowledge. I don't have the access to my competitor's purchasing prices.") (Tommy Jones); 1.App.8473, 8475–77 ("Q: So you don't know whether any other Window World store gets a better price and you don't know whether any of Window World Lexington's competitors are getting a better price. Is that fair? A: Yeah, I mean for me personally, no.") (Jeremy Shumate).)

than through Window World.[138] Similarly, the Lomax/Gillette Plaintiffs provided evidence that a non-licensee competitor was able to access better prices, and the Roland Plaintiffs provided evidence another distributor could offer better prices than AMI for the same product.[139]

73. The remaining Plaintiffs also have provided evidence that Window World's alleged "best price" representations, as they understood them, were false by producing evidence of Window World's undisclosed "C" pricing level.[140] Furthermore, these Plaintiffs produced substantial evidence that Window World intentionally

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[138] (Volume One Pls.' Dep. Excerpts, Ex. R, Melissa Edwards Dep. 129:11–20 ("Literally, right before we joined the lawsuit, we came to our knowledge that an installer had put windows in for one of our homeowners. And when we went to him to talk to him about that, he had purchased the windows from an AMI distributor directly and had installed the window. And when we asked him why he did not purchase the window through us . . . he said we couldn't match the price that he got."), 133:12–14 ("And [Mr. Strauss from AMI] kind of threw off at me, 'If I didn't have to pay so much to Window World corporate, I could get it for you a lot cheaper.' "), ECF No. 984.18 (sealed); Volume One Pls.' Dep. Excerpts, Ex. S, Michael Edwards Dep. 78:5–11 ("There was occasions Brian Strauss [of AMI] said that we – if we weren't with Window World, we would get it for a lower price. I've had installers work for me that get better pricing than we do on coil, caulk…[a]nd windows, too."), ECF. No. 984.19.)

[139] (Volume One Pls.' Dep. Excerpts, Ex. H, James Lomax, III Dep. 94:18–20 ("I also saw proof of an invoice that was inadvertently mailed to me that was way less than I was paying."), ECF No. 984.8; Volume One Pls.' Dep. Excerpts, Ex. Q, James Roland Dep. 243:13–19 ("Q: And ultimately Wincore was not able to provide you the pricing you were looking for; is that right? A: No, I think they gave very good pricing. I think it was – it was considerably less than what I was paying AMI for the same product."), ECF. No. 984.17; *see also* Volume One Pls.' Dep. Excerpts, Ex. L, David King – AMI Dep. 106:14–23 (referring to an invoice to an unnamed supply center customer showing a lower pricing than Window World's "A" pricing), ECF No. 984.12 (sealed); Volume Two Pls.' Exs. Ex. 32, ECF No. 978.2 (emails between Jonathan Gillette, James Lomax, III, and Dana Deem regarding a company receiving lower prices on windows from AMI).)

[140] The existence of "C" pricing is not disputed by the parties. Indeed, Defendants acknowledge that it was a more favorable pricing level than the disclosed "A" and "B" pricing levels. Defendants argue, however, that "C" pricing ended in 2011. (*See* Defs.' Br. Supp. Mot. Summ. J. 94.)

concealed or denied the existence of "C" pricing.[141] Since "[w]hether the defendant acts with the requisite scienter for fraud is generally a question of fact for the jury," and because Plaintiffs have provided substantial evidence that Defendants were aware of the falsity of their "best price" representations, the Court concludes that the remaining Plaintiffs have satisfied their burden at the summary judgment stage of showing Defendants' fraudulent intent. *Latta*, 202 N.C. App. at 600 (citing *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 468 (1986)).

74. In addition, Plaintiffs provide substantial evidence to rebut Defendants' assertion that Plaintiffs' reliance on Defendants' alleged oral representations as to best pricing was unreasonable since the contractual promise, as memorialized in the parties' written agreements, was for Window World "to help each dealer get better window prices than 'non-licensee' competitors are getting in their respective markets."[142] For example, Plaintiffs point to evidence from which a reasonable jury could conclude that Defendants frequently downplayed the importance of the written agreements in governing the parties' relationship, referring to the agreements as "just paperwork," and that the parties operated for months or years in the absence of

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[141] (*See, e.g.*, Defs.' 1st App. 1.App.2046 ("I don't know what Mr. [Todd] Whitworth did other than deny the existence of anything other than A or B.") (James Lomax, III); 1.App.5908–10 (Michael Edwards); Volume Three Pls.' Exs. Ex. 61, ECF No. 979.1 (sealed), Ex. 62, ECF No. 979.2 (sealed), Ex. 63, ECF No. 979.3 (sealed), Ex. 64, ECF No. 979.4 (sealed), Ex. 65, ECF No. 979.5 (emails in which Window World represents that B pricing was "preferred pricing.") (sealed).)

[142] (Defs.' Resp. Pls.' Mot. Summ. J. 53–55.)

an executed written agreement.[143] Based on the proffered evidence, a jury could rationally conclude that Plaintiffs were reasonable in their reliance on Defendants' oral representations concerning best pricing, even if these representations were different from those memorialized in the executed written agreements.

75. Last, Plaintiffs have offered sufficient evidence at the summary judgment stage to permit a reasonable factfinder to conclude Plaintiffs were harmed in an amount equal to the difference between "what they were promised—best pricing—and what they actually received."[144]

76. Based on the above, the Court finds genuine issues of material fact remain as to the breadth of Window World's best pricing promise to the Roland, Lomax/Gillette, Edwards, Ford, Rose, Williamson/Hopkins and Ballard Plaintiffs, the materiality of Window World's best pricing promise to these Plaintiffs' decisions to

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[143] (*See, e.g.*, Pls.' Br. Opp'n Defs.' Mot. Summ. J. Ex. 2; Defs.' 1st App. 1.App.1325–26 (James Lomax, III); 1.App.3135, 3538–39 (James Roland); 1.App.4783, 5817 (Michael Edwards); 1.App.5349, 5409–10 (Melissa Edwards); 1.App.7325, 7800 (Scott Williamson); 1.App.6335 ("I didn't look at these things [written agreements] as being – I mean, I – I really looked at what me, Todd and Leon discussed as what the deal was. And again, it was – best pricing was one of those things.") (Rick Rose); 1.App.1976–78 ("That Leon's going to make sure I pay the best price in my market. That's not what we – he explained to me orally . . . I do have belief that that's not what we agreed to . . . [The written agreement] does not memorialize that agreement properly that I had with Leon . . . I trusted what he was telling me, that [the written agreement's] just paperwork.") (James Lomax, III); 1.App.2903–04 ("What – what Window World – what Todd – I mean, what Todd and Leon had represented to me was is that I was going to be getting the very best prices that were available, prices better than what I could get on my own . . . I mean, we operated after this [written agreement] expired, I didn't give them notice, they didn't give me notice, and it – we operated without any kind of a contract for three years. So I don't believe that this was the – the doc – I don't think this document accurately or completely reflects the arrange – business arrangement we had.") (James Roland).)

[144] (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 72; *see also* Bersin Report; Volume Seven Pls.' Exs. Ex. 217 [hereinafter "Bersin Schedules"], ECF No. 983.37 (sealed); Bersin Aff.)

join or remain in the Window World system, whether Window World's representations concerning best pricing were false, whether the remaining Plaintiffs' reliance on Window World's best pricing promise was reasonable, whether these Plaintiffs were harmed by Defendants' pricing representations, and whether Window World acted with the requisite scienter. The Court will accordingly deny the Cross-Motions as they relate to these Plaintiffs to the extent the parties seek summary judgment on Plaintiffs' fraud claim based on the Best Pricing Theory.[145]

77. Regarding Defendants' statute of limitations argument under N.C.G.S. § 1-52(9), the Court again concludes that the remaining Plaintiffs' fraud claim—this time based on best pricing—is not barred by the limitations period at the summary judgment stage. Plaintiffs have provided substantial evidence that most of these Plaintiffs did not discover the facts constituting fraud as it relates to best pricing until "after this lawsuit was filed."[146]

78. In their depositions, the Ford, Rose, Williamson/Hopkins, and Ballard Plaintiffs testified they did not discover the existence of C pricing until 2015.[147] While

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[145] As discussed previously, the Court will grant Defendants' motion for summary judgment on the Jones/Shumate Plaintiffs' fraud claim based on the Best Pricing Theory.

[146] (Pls.' Br. Supp. Mot. Partial Summ. J. 16; *see infra* note 147.)

[147] (*See, e.g.*, Volume One Pls.' Dep. Excerpts, Ex. Z, Rick Rose Dep. 149:25–150:2 ("In 2015, in Baton Rouge at my attorney's office, I also became privy to what C pricing actually was, and I never was able to get C pricing."), ECF No. 984.26; Volume Two Pls.' Dep. Excerpts, Ex. AA, Scott Williamson Dep. 207:25–208:4 ("Q: The whole issue of C pricing is something you found out first after the lawsuit? A: Yes."), ECF No. 985.1 (sealed); Volume Two Pls.' Dep. Excerpts, Ex. BB, Brian Hopkins Dep. 168:12–16 ("Q: [W]ould I be correct in understanding…that you didn't know anything about C pricing until after this lawsuit was filed? A: Correct"), ECF No. 985.2; Volume Two Pls.' Dep. Excerpts, Ex. DD, Angell Wesner-Ford Dep. 198:15–18 ("Well, from the disclosure documents within the lawsuit, we found out

the Roland and Lomax/Gillette Plaintiffs acknowledge that they learned about the existence of C pricing in May 2011,[148] the Tolling Agreement entered into by these Plaintiffs preserves their fraud claims.[149] Similarly, the Edwards Plaintiffs, who also acknowledge they learned about C pricing in May 2011 but did not sign a tolling agreement, partially base their fraud claim upon evidence of better pricing they learned of "right before [they] joined the lawsuit."[150] Since Plaintiffs provided evidence that creates a genuine issue of material fact as to when Plaintiffs' cause of action for fraud based on best pricing accrued, the Court declines to grant summary judgment based on the statute of limitations in N.C.G.S. § 1-52(9). However, the Court will grant Defendants' Motion for summary judgment as it relates to the

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about the C pricing. So they weren't being honest about that because they said B pricing was the best price."), ECF No. 985.4; Defs.' 1st App. 1.App.149 ("Well, the C pricing they hid. That's something we wasn't aware of until after the lawsuit.") (James Ballard).)

[148] (Pls.' Br. Supp. Mot. Partial Summ. J. 16; *see also* Volume One Pls.' Dep. Excerpts, Ex. X, James Lomax, III Dep. 106:1–4 ("[Mr. Whitworth] told me in the beginning five or ten bucks a window, which was a lie, and continued that lie until we found out in 2011 about C pricing."), ECF No. 984.24 (sealed); Volume One Pls.' Dep. Excerpts, Ex. Q, James Roland Dep. 20:2–4 (Q: And did [Dana Deem] tell you about [C pricing] at a meeting in Houston in May of 2011? A: He did.").)

[149] Additionally, the Lomax/Gillette Plaintiffs received the invoices upon which they partially base their fraud claim in June 2012, within the three-year statute of limitations. (Volume Two Pls.' Exs. Ex. 32.)

[150] (Defs.' 1st App. 1.App.4771 (Q: Didn't – didn't you learn from Dana Deem that Window World had C pricing in 2011? A: We were in Houston, and Dana said there was a C pricing, and there was no more.") (Michael Edwards); Volume One Pls.' Dep. Excerpts, Ex. R, Melissa Edwards Dep. 129:11–20 ("Literally, right before we joined the lawsuit, we came to our knowledge that an installer had put windows in for one of our homeowners. And when we went to him to talk to him about that, he had purchased the windows from an AMI distributor directly and had installed the window. And when we asked him why he did not purchase the window through us…he said we couldn't match the price that he got.").)

Edwards Plaintiffs' fraud claims under the Best Pricing Theory based on C pricing, which they admit they learned about more than three years before they filed their claims.[151]

Ground 3: Fraudulent Concealment Theory

79. Third, Plaintiffs argue that Window World committed fraud or fraudulent concealment by "[withholding] material information from Plaintiffs when presenting them with licensing agreements to sign."[152] Plaintiffs contend that, by withholding such material information, Defendants failed to make franchise disclosures as required under 16 Code of Federal Regulations ("C.F.R.") § 436.1, *et seq*. (the "Franchise Rule" or the "Franchise Disclosure Rule").[153]

80. Fraud by omission arises when a defendant "had a duty to disclose material information to [the plaintiff], as silence is fraudulent only when there is a duty to speak." *Lawrence*, 2007 NCBC LEXIS 20, at *8. This Court has previously identified the following as elements a plaintiff must prove to succeed on a claim for fraud by omission:

> (1) the relationship [between plaintiff and defendant] giving rise to the duty to speak; (2) the event or events triggering the duty to speak and/or

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[151] The Edwards Plaintiffs' fraud claims under the Best Pricing Theory based on pricing external to the Window World system shall survive Defendants' Motion under Rule 56.

[152] (Pls.' Br. Supp. Mot. Partial Summ. J. 51.)

[153] (Pls.' Br. Supp. Mot. Partial Summ. J. 51–52.) Plaintiffs argue that Window World concedes it owed franchise disclosures to each Plaintiff each time it presented a licensing agreement to sign, (Volume One Pls.' Exs. Ex. 10, ECF No. 977.10; Pls.' Br. Opp'n Defs.' Mot. Summ. J. Ex. 2; Volume Seven Pls.' Exs. Ex. 188 (material changes), ECF No. 983.8 (sealed)), but made no franchise disclosures to Plaintiffs when they signed them (Volume Seven Pls.' Exs. Ex. 188; Volume One Pls.' Exs. Ex. 12 40–42.).

> the general time period over which the relationship arose and the fraudulent conduct occurred; (3) the general content of the information that was withheld and the reason for its materiality; (4) the identity of those under a duty who failed to make such disclosures; (5) what [the defendant] gained by withholding information; (6) why plaintiff's reliance on the omission was both reasonable and detrimental; and (7) the damages proximately flowing from such reliance.

Id. at *9 (quoting *Breeden v. Richmond Comm. Coll.*, 171 F.R.D. 189, 195 (M.D.N.C. 1997)). Our appellate courts have further held that a duty to disclose arises where:

> (1) 'a fiduciary relationship exists between the parties to the transaction'; (2) there is no fiduciary relationship and 'a party has taken affirmative steps to conceal material facts from the other'; and (3) there is no fiduciary relationship and 'one party has knowledge of a latent defect in the subject matter of the negotiations about which the other party is both ignorant and unable to discover through reasonable diligence.'

Hardin, 199 N.C. App. at 696 (quoting *Sidden*, 137 N.C. App. at 675).

81. In a commercial transaction, "[a] duty to disclose material facts arises '[w]here material facts are accessible to the vendor only, and he knows them not to be within the reach of the diligent attention, observation and judgment of the purchaser." *Everts v. Parkinson*, 147 N.C. App. 315, 325 (2001) (emphasis removed). A duty to disclose may also be imposed by operation of law. *See, e.g.*, *Williams v. E. Coast Sales, Inc.*, 59 N.C. App. 700, 703 (1982).[154]

82. Following the above-cited case law and the requirements enumerated by the Franchise Rule, Plaintiffs argue that Window World (1) had a duty to disclose

[154] Plaintiffs argue that this Court has previously determined that the Franchise Rule creates a duty to disclose material facts for purposes of a fraud claim in *Haigh v. Superior Ins. Mgmt. Grp.*, 2017 NCBC LEXIS 100, at *10–11 (N.C. Super. Ct. Oct. 24, 2017). (Pls.' Br. Supp. Mot. Partial Summ. J. 51–52.) However, *Haigh* interpreted the obligation to disclose information under the Franchise Rule in the context of N.C.G.S. § 75-1.1.

financial information (including about rebates) to Plaintiffs[155]; (2) "was fully aware of [or, at a minimum, recklessly indifferent to] its legal obligation to make franchise disclosures"[156]; and (3) willfully concealed material information they were required by law to disclose, including "critical, material information about the financial terms of the parties' relationship."[157] Plaintiffs further argue that Window World's "concealment of material facts" harmed Plaintiffs because "[Window World's] consciously false statements and noncompliance with franchise law allowed [Window World] to maintain its economic fraud."[158] Additionally, as Defendants' concealment of material facts fraudulently induced Plaintiffs to join and remain a part of the Window World system, Plaintiffs contend that Window World's "fraud also renders the written agreements . . . void and unenforceable as a matter of law."[159]

83. Window World argues, as a threshold matter, that any fraud claims based on the Franchise Rule are time-barred by the applicable statutes of limitations.[160] Plaintiffs' Franchise Rule claims, Defendants maintain, "accrued when Plaintiffs received copies of licensing agreements for signature."[161] Defendants further argue

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[155] (Pls.' Br. Supp. Mot. Partial Summ. J. 52.)

[156] (Pls.' Br. Supp. Mot. Partial Summ. J. 53–54.)

[157] (Pls.' Br. Supp. Mot. Partial Summ. J. 55.)

[158] (Pls.' Br. Supp. Mot. Partial Summ. J. 56.)

[159] (Pls.' Br. Supp. Mot. Partial Summ. J. 56.)

[160] (Defs.' Br. Supp. Mot. Summ. J. 41.)

[161] (Defs.' Br. Supp. Mot. Summ. J. 41.)

that the discovery rule does not toll this period as Plaintiffs "knew facts from which they could determine a violation of the Franchise Rule when they signed their initial licensing agreements."[162]

84. Under the discovery rule, a plaintiff need only know the "facts" that "would enable him to discover the defendant's wrongdoing in the exercise of due diligence." *Doe*, 242 N.C. App. at 543. Ignorance of the law does not toll the statute of limitations. *Lerch Bros. v. McKinne Bros.*, 187 N.C. 419, 420 (1924) ("Ignorance of a material fact may excuse a party, but ignorance of the law does not excuse him from the legal

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[162] (Defs.' Br. Supp. Mot. Summ. J. 43.) "Franchise" is defined by the Federal Trade Commission as

> any continuing commercial relationship or engagement, whatever it may be called, in which the terms of the offer or contract specify, or the franchise seller promises or represents, orally or in writing, that:
>
> (1) The franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark;
>
> (2) The franchisor will exert or has the authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation; and
>
> (3) As a condition of obtaining or commencing operation of the franchise, the franchisee makes a required payment or commits to make a required payment to the franchisor or its affiliate.

16 C.F.R. § 436.1(h). Since the Licensing Agreements covered operation of the Plaintiffs' businesses with Window World's trademarks (*see, e.g.*, Defs.' 2d App. 2.App.16435 § 1), the level of control Window World would have over the Plaintiffs' businesses (*see, e.g.*, Defs.' 2d App. 2.App.16436–37 § 4.), the assistance Window World would provide Plaintiffs in setting up their businesses (s*ee, e.g.*, Defs.' 2d App. 2.App.16437 § 5), and the fees Plaintiffs would pay as a condition of operating their businesses (*see, e.g.*, Defs.' 2d App. 2.App.16435–45), Defendants contend Plaintiffs possessed the information necessary to determine if their relationship with Window World was a franchise relationship at the time they received the Licensing Agreements. (*See* Defs.' Br. Supp. Mot. Summ. J. 43.)

consequences of his conduct."); *see also In re Lowe's Cos.*, 517 F. Supp. 3d 484, 502 (W.D.N.C. 2021) ("The running of a period of limitations is delayed by the discovery rule while the facts of the wrong remain unknown, but the statute of limitations is not tolled if only the legal theory is not yet understood.").

85. Plaintiffs, in response, argue that their Franchise Rule claims did not accrue when Plaintiffs received copies of the Licensing Agreements for signature because of Window World's "years-long efforts to *cover up* its franchisor status and its knowing violations of franchise law."[163] The wording and contents of the Licensing Agreements, Plaintiffs contend, was a continuation of Window World's efforts to conceal its franchisor status. Plaintiffs further argue that holding Plaintiffs' Franchise Rule claims to have accrued when copies of Licensing Agreements were received for signature would result in their fraud claim being time-barred "even though [Window World] has consistently claimed, in the face of all evidence to the contrary, that [Window World] itself didn't and couldn't know it was a franchisor until August 2011."[164]

86. The Court declines to find, as a matter of law, that the statute of limitations on this aspect of Plaintiffs' fraud claim began to accrue at the time the Licensing Agreements were signed. A cause of action for fraud does not accrue until the injured party discovers "the facts constituting the fraud." N.C.G.S. § 1-52(9). Our State's Supreme Court "has held in numerous cases that in an action grounded on fraud, the

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[163] (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 51.)

[164] (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 50.)

statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of *reasonable* diligence." *Calhoun v. Calhoun*, 18 N.C. App. 429, 432 (1973) (emphasis added) (referencing *Wimberly v. Washington Furniture Stores, Inc.*, 216 N.C. 732 (1940); *Brooks v. Ervin Constr. Co.*, 253 N.C. 214 (1960); *B-W Acceptance Corp. v. Spencer*, 268 N.C. 1 (1966)). It would be unreasonable for this Court to hold that Plaintiffs failed to exercise reasonable diligence and should have discovered that Window World was a franchisor at the time Plaintiffs received copies of the Licensing Agreements when Defendants testified that they "didn't and couldn't know [Window World] was a franchisor until August 2011."[165] Thus, for the purposes of this Order and Opinion, the Court will treat Plaintiffs' claim as having accrued at the time Window World made its franchise disclosures to Plaintiffs on 11 October 2011.

87. As Defendants rightly point out, the three-year statute of limitations would ordinarily "doom" the Non-Tolling Plaintiffs' fraud claims even when assuming the accrual date to be 11 October 2011.[166] These Plaintiffs contend, however, that they "have not delayed unreasonably in seeking relief against [Window World]," arguing that Window World "is barred from relying on any statute of limitations defense against Plaintiffs in light of the continuing wrong doctrine."[167] The Court agrees.

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[165] (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 50.)

[166] (Defs.' Br. Supp. Mot. Summ. J. 2.)

[167] (15-CVS-1 Third Am. Compl. ¶¶ 156, 161; 15-CVS-2 Third Am. Compl. ¶¶ 255, 260.)

88. Our Supreme Court has held that the continuing wrong doctrine "provide[s] that the applicable limitations period starts anew in the event that an allegedly unlawful act is repeated." *Quality Built Homes Inc. v. Town of Carthage*, 371 N.C. 60, 70 (2018). When determining whether the continuing wrong doctrine applies, "the reviewing court 'must examine the wrong alleged by [the plaintiff] to determine if the purported violation is the result of 'continual unlawful acts,' each of which restarts the running of the statute of limitations, or if the alleged wrong is instead merely the 'continual ill effects from an original violation.' " *Id.* (citing *Williams v. Blue Cross Blue Shield*, 357 N.C. 170, 179 (2003)).

89. In the Court's Order and Opinion on Defendant Tammy Whitworth's Motion to Dismiss, this Court found that "Plaintiffs have alleged facts that, when taken as true, show that [Window World] engaged in the allegedly wrongful conduct that gave rise to each claim up to the time the original complaints were filed in these actions on January 2, 2015." *Window World of Baton Rouge, LLC v. Window World, Inc.*, 2017 NCBC LEXIS 60, at *24 (N.C. Super. Ct. July 12, 2017). Thus, this Court held that Plaintiffs had alleged sufficient facts to survive the applicable statute of limitations under the continuing wrong doctrine at the motion to dismiss stage of this litigation. *Id.* The Court does not conclude differently at the summary judgment stage—as described earlier in this opinion, Plaintiffs have provided substantial evidence to support a finding that "many of [Window World's] wrongful acts are

demonstrably continued wrongs, most particularly [Window World's] repeated breaches of its pricing and rebate promises."[168]

90. As to the merits of Plaintiffs' claim for fraud based on Window World's alleged withholding of "material information from Plaintiffs . . . that franchise law obligated [Window World] to disclose in an FDD,"[169] the Court's inquiry under Rule 56 hinges on whether Window World possessed a duty to disclose this information at the beginning of the parties' relationship.

91. Plaintiffs allege Window World had a duty to disclose financial information, including information about C pricing and the rebates Plaintiffs paid, for three reasons: (1) the Franchise Rule "imposed on [Window World] a duty to disclose voluminous information to Plaintiffs, including detailed financial information about what payments Plaintiffs were obligated to make and how much [Window World] earned from the parties' relationship"[170]; (2) Window World "voluntarily made incomplete and inaccurate disclosures about the rebates Plaintiffs would pay to induce them to become dealers"[171]; and (3) Window World "took affirmative steps to conceal material facts about the rebates Plaintiffs paid, including by instructing its

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[168] (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 53; s*ee supra* notes 117–20, 146 and accompanying text.) Plaintiffs additionally argue that equitable estoppel bars Window World from relying on statute of limitations defenses. (*See, e.g.*, Pls.' Br. Opp'n Defs.' Mot. Summ. J. 53.) Since the Court finds this aspect of Plaintiffs' fraud claims survives Defendants' statute of limitations argument due to the continuing wrong doctrine, the Court declines to address Plaintiffs' equitable tolling argument.

[169] (Pls.' Br. Supp. Mot. Partial Summ. J. 51.)

[170] (Pls.' Br. Supp. Mot. Partial Summ. J. 52.)

[171] (Pls.' Br. Supp. Mot. Partial Summ. J. 52.)

employees and vendors to keep [Window World's] rebate structure (including C pricing) secret from Plaintiffs, which also created a duty to disclose."[172] Defendants, in contrast, maintain Plaintiffs' omission theory fails because the "Franchise Rule doesn't create a state-law duty to disclose" and "the common law didn't create any disclosure duties either . . . [because] there is never a duty to disclose information unless it is *material*."[173]

92. As evidenced by the case law cited in the parties' briefs, courts dispute whether the federal Franchise Rule creates a disclosure duty under North Carolina law for omission-based fraud claims.[174] However, this Court need not consider whether the Franchise Rule creates a disclosure duty because Plaintiffs have provided substantial evidence to support a finding that a duty to disclose arose under the common law. As described in earlier sections of this opinion, Plaintiffs have provided substantial evidence that Window World made incomplete and inaccurate disclosures about the rebates Plaintiffs would pay.[175] As this State's Supreme Court stated in *Ragsdale*, even when no duty to disclose exists, a party who chooses to speak has a duty to make a full and fair disclosure of facts concerning the matters on which he chooses to speak. *Ragsdale*, 286 N.C. at 139 (citing *Low*, 207 Cal. App. 2d at 484.

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[172] (Pls.' Br. Supp. Mot. Partial Summ. J. 52.)

[173] (Defs.' Reply Br. Supp. Mot. Summ. J. 27–28.)

[174] (*See, e.g.*, Defs.' Br. Supp. Mot. Summ. J. 51–54; Pls.' Br. Opp'n Defs.' Mot. Summ. J. 55–59.)

[175] (*See supra* ¶¶ 43–60 and related notes.)

Furthermore, as previously discussed, Plaintiffs have provided substantial evidence to permit a finding that Window World "took affirmative steps to conceal material facts about the rebates Plaintiffs paid [and C pricing]."[176] In North Carolina, "[a] duty to disclose arises where . . . (2) there is no fiduciary relationship and 'a party has taken affirmative steps to conceal material facts from the other[.]' " *Hardin*, 199 N.C. App. at 696.

93. Also as discussed earlier in this opinion, and based on a careful review of the evidence advanced by the parties, the Court finds that Plaintiffs have provided substantial evidence to permit a reasonable jury to conclude that (1) information concerning pricing and rebates was material to Plaintiffs, inducing them, at least in part, to join or remain a part of the Window World system; (2) Plaintiffs' reliance on the omission (or misrepresentation) was reasonable; (3) Window World possessed the requisite scienter when misrepresenting or concealing information about pricing and rebates; and (4) Plaintiffs were harmed by Window World's omissions.[177] However, as also stated earlier in this opinion, genuine issues of material fact remain as to: the materiality of Window World's pricing and rebate representations; whether Window World intended to deceive Plaintiffs; whether Plaintiffs reasonably relied on Window World's pricing and rebate representations or omissions;[178] and whether Plaintiffs

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[176] (Pls.' Br. Supp. Mot. Partial Summ. J. 52; *see supra* ¶¶ 54–56, 59–60, 72–73, 76 and related notes.)

[177] (*See supra* ¶¶ 43–76 and related notes.)

[178] For instance, many Plaintiffs admit in their depositions they did not read or simply skimmed the Licensing Agreements and FDDs when they received them. (*E.g.*, Defs.' 1st

were harmed by Window World's alleged misrepresentations or omissions.[179] The foregoing are all questions of fact that must be resolved by a jury. *Head*, 371 N.C. at 9. Accordingly, the Court will deny the Cross-Motions to the extent they seek summary judgment on Plaintiffs' fraud claim based on the Fraudulent Concealment Theory.

Ground 4: Franchise Disclaimer Theory

94. Plaintiffs next argue that Window World "committed fraud by including the franchise disclaimer in the Licensing Agreements Plaintiffs signed,"[180] misrepresenting to Plaintiffs that Window World was not a franchisor and that Plaintiffs were not franchisees.[181] Plaintiffs allege that (1) "no dispute exists that

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App. 1.App.4873, 5915 (Michael Edwards); 1.App.7820 (Scott Williamson); 1.App.6857 (Rick Rose); 1.App.6593 (Christina Rose); 1.App.1474 (James Lomax, III); 1.App.2623 (Jonathan Gillette); 1.App.3576 (James Roland); 1.App.3904–05 (Kenneth Ford, Jr.); 1.App.37 (James Ballard); 1.App.8442–43 (Jeremy Shumate).) Thus, it is unclear whether Plaintiffs would have relied upon the omitted rebate or pricing information had it been timely disclosed.

[179] (*See supra* ¶¶ 43–76.)

[180] (Pls.' Br. Supp. Mot. Partial Summ. J. 56.)

[181] (Pls.' Br. Supp. Mot. Partial Summ. J. 56.) Between 2008 and 2011, Plaintiffs' executed Licensing Agreements contained the following franchise disclaimer language:

> Nothing in this Licensing Agreement shall be deemed to create any type of . . . franchise, or other business relationship other than LICENSOR and LICENSEE. The parties acknowledge and agree that, to the extent the state in which the LICENSEE is granted its license has enacted statutes, codes, or regulations which govern franchises, the LICENSEE and LICENSOR are not subject to such laws and regulations and the LICENSOR shall not be required to provide any disclosures to LICENSEE other than those previously made to LICENSEE or made herein. The LICENSEE agrees that the terms of the Licensing Agreement and the LICENSOR/LICENSEE relationship created hereunder shall be determinative of the rights and interests between the parties notwithstanding any statutes, rules, or regulations governing franchises in the state where the LICENSEE does business.

[Window World's] disclaimer of franchise law was false"; (2) Defendants knew the franchise disclaimer was false; (3) Defendants possessed fraudulent intent in making the franchise disclaimer; (4) Plaintiffs reasonably relied on Window World's false disclaimer of franchise law; and (5) Plaintiffs were harmed because Window World "employed the franchise disclaimer to hide the truth about its rebates and pricing."[182]

95. Defendants counter that Plaintiffs' franchise-stipulation theory fails because the franchise disclaimer is not a misrepresentation of *fact*—which they define as a detail subject to objective verification. *See Forbis*, 361 N.C. at 526–27 (stating that fraudulent or negligent misrepresentation requires "[f]alse representation or concealment of a material fact"); *Wilson v. Kellogg Brown*, 525 F.3d 370, 377 (4th Cir.

(Defs.' 2d App. 2.App.16473–74 (Window World of Baton Rouge, LA – July 2010 Licensing Agreement); 2.App.16486–87 (Window World of Lafayette, LA – July 2010 Licensing Agreement); 2.App.16499–16500 (Window World of Tampa, FL – July 2010 Licensing Agreement); 2.App.16512–13 (Window World of New Orleans, LA – July 2010 Licensing Agreement); 2.App.16525–26 (Window World of Houston, TX – July 2010 Licensing Agreement); 2.App.16540 (Window World of Dallas, TX – March 2011 Licensing Agreement); 2.App.16558 (Window World of Fort Worth, TX – March 2011 Licensing Agreement); 2.App.16576 (Window World of Tri State Area – April 2011 Licensing Agreement); 2.App.16630–31 (Window World of St. Louis – May 2010 Licensing Agreement); 2.App.16645 (Window World of Columbia, MO – April 2011 Licensing Agreement); 2.App.16663 (Window World of Peoria, IL – April 2011 Licensing Agreement); 2.App.16681 (Window World of Springfield, IL – April 2011 Licensing Agreement); 2.App.16699–16700 (Window World of St. Louis, MO – April 2011 Licensing Agreement); 2.App.16718 (Window World of Kansas City, MO – April 2011 Licensing Agreement); 2.App.16754 (Window World of Huntsville, AL – September 2008 Licensing Agreement); 2.App.16765–66 (Window World of North Atlanta, GA – July 2009 Licensing Agreement); 2.App.16779–80 (Window World of North Atlanta, GA – February 2010 Licensing Agreement); 2.App.16803–04 (Window World of Central, PA – June 2010 Licensing Agreement); 2.App.16851 (Window World of Joliet, IL – May 2011 Licensing Agreement); 2.App.16878 (Window World of Lexington, KY – March 2011 Licensing Agreement).)

[182] (Pls.' Br. Supp. Mot. Partial Summ. J. 56–59.)

2008) ("[F]raud may only be found in expressions of fact which (1) admit of being adjudged true or false in a way that (2) admit of empirical verification."). Rather, Defendants maintain that the disclaimer in the Licensing Agreements was "at most a non-actionable representation of a legal opinion"[183] as to the relationship between the parties, and both Plaintiffs and Defendants were in an equally good position to judge the nature of that relationship.[184] *See Dalton v. Dalton*, 164 N.C. App. 584, 586–87 (2004) ("Generally speaking, a party cannot attack the making of a contract on the basis of fraud where the proof regarding the misrepresentation or misstatement relates to a matter of law.").

96. Defendants further argue that there was "no actual or reasonable reliance [on the disclaimer]"[185] and, therefore, that Plaintiffs have failed to "produce evidence to support an essential element of [their] claim[.]" *Dobson*, 352 N.C. at 83. According to Defendants, "Plaintiffs can't prove that they actually relied on the stipulation . . . [because] [o]nly one Plaintiff recalled reading the no-franchise stipulation, but he did not understand its significance or seek further information."[186] Defendants argue, in addition, that, "[e]ven if Plaintiffs had proffered evidence that they read the no-franchise stipulations and understood what they meant, they still

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[183] (Defs.' Resp. Pls.' Mot. Summ. J. 71.)

[184] (Defs.' Br. Supp. Mot. Summ. J. 62–63.)

[185] (Defs.' Reply Br. Supp. Mot. Summ. J. 30.)

[186] (Defs.' Resp. Pls.' Mot. Summ. J. 71; *see also* Defs.' 1st App. 1.App.7001–03 (Brian Hopkins).)

didn't *reasonably* rely on them . . . [because] [a]s Plaintiffs admit, such stipulations have no legal effect."[187]

97. Based on its careful review of the proffered evidence, the Court agrees with Defendants that Plaintiffs have not produced sufficient evidence to support the reliance element of their fraud claim based on the franchise disclaimer. "Justifiable reliance is an essential element of both fraud and negligent misrepresentation." *Helms v. Holland,* 124 N.C. App. 629, 635 (1996); *see, e.g.*, *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 224 (1999) (noting that fraud and negligent misrepresentation require analogous showings of reasonable or justifiable reliance, respectively). The question of reliance is normally "a question for the jury, unless the facts are so clear that they support only one conclusion." *Forbis*, 361 N.C. at 527.

98. Here, as Defendants suggest, to show actual reliance regarding the franchise disclaimer, Plaintiffs, at a minimum, must produce evidence that they read the franchise disclaimer or knew of its existence prior to signing the Licensing Agreements. The Lomax/Gillette, Edwards, Ford, Rose, Jones/Shumate, Ballard, Williamson/Hopkins, and Roland Plaintiffs, however, have all conceded that they did not actually read the Licensing Agreements, have no memory of reading the Licensing Agreements,[188] put no stock in their written contracts as they were "just

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[187] (Defs.' Reply Br. Supp. Mot. Summ. J. 30.)

[188] The Lomax/Gillette, Ford, Rose, and Shumate Plaintiffs testified that they did not read the Licensing Agreements or seek legal advice before signing them. (Defs.' 1st App. 1.App.1235–36 ("Q: Did you tell Window World that when you signed the [licensing] agreement at Exhibit 680? A: I never read the agreement . . . Q: When is the first time you read [the licensing agreement]? A: Probably after we filed suit."), 1978 ("Q: But it's fair to

paperwork,"[189] glossed over the allegedly relied-upon franchise disclaimer,[190] or testified that the franchise disclaimer did not mean anything to them as they knew nothing about franchise law.[191] Because all Plaintiffs concede that they either did

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say that you didn't read the [licensing agreement] before you signed it; right? A: Absolutely correct.") (James Lomax, III); 1.App.2410 ("Q: Did you actually read the [licensing agreement]? A: No. Q: Why not? A: I trusted them . . . Q: Did you ask Mr. Whitworth for the opportunity to have an attorney review it? A: No."), 2561 ("Q: Is it your testimony you've never read any of your agreements? A: I may have scanned over them but word for word, no. And it's mostly over my head because it's a lot of legal jargon.") (Jonathan Gillette); 1.App.3904–05 ("Q: So when I asked you a moment ago if you read the agreement, you told me it was treated just as paperwork. Does that mean you did not read it? A: That's correct. Q: Did you have an attorney review it before you signed it? A: No.") (Kenneth Ford, Jr.); 1.App.4134 ("I don't recall reading [the written agreements].") (Angell Wesner-Ford); 1.App.6336 ("No, I – as I already stated, I don't think I read [the written agreement].") (Rick Rose); 1.App.8443 ("Q: Have you read this agreement before your deposition today? A: No.") (Jeremy Shumate).)

[189] The Edwards, Roland, Rose, Ford, Williamson, and Jones Plaintiffs testified that they put no stock in the written agreements as they were "just paperwork." (Defs.' 1st App. 1.App.5860 (Q: Did you read this agreement, sir, before you signed it? A: I flipped through it. Q: You didn't read it word for word? A: No, sir. Q: Did you have a lawyer review it? A: No, sir."), 5862 ("[The written agreements are] just paperwork. It's legal stuff that had to be done for us to control the license.") (Michael Edwards); 1.App.5428 ("Q: Did the – to use your word, the paperwork, did it have any binding effect, whatsoever, on your business? A: No.") (Melissa Edwards); 1.App.2838 ("I don't know why I would have read [the written agreements], you know. I wasn't concerned with what they had to say.") (James Roland); 1.App.6340 ("It's – this was just – just paperwork that needed to be put in the file to make everything neat. It – it goes back to our agreement with Todd and Leon.") (Rick Rose); 1.App.4136 ("Q: [W]hat did you understand the purpose of the written agreement to be? . . . A: The deal was always as it was verbally and as we ran our businesses. Q: . . . [I]f you rely on the verbal agreement, why didn't you just do that, instead of signing the license agreement? A: It was just paperwork. It was a formality.") (Angell Wesner-Ford); 1.App.7889–92, 7918 ("I don't think either party viewed this [written agreement] as anything other than just paperwork, just a formality.") (Scott Williamson); 1.App.8739 ("I was told this was just paperwork that had to be done . . . We had a verbal agreement and this was just the paperwork that had to be done.") (Tommy Jones).)

[190] While the Ballard Plaintiffs testified they read the written agreements, they have not offered evidence that they relied on the written agreements or the franchise disclaimer. (*See, e.g.*, Defs.' 1st App. 1.App.114, 288, 294 (James Ballard).)

[191] The Edwards and Hopkins Plaintiffs testified that the franchise disclaimer did not mean anything to them at the time the written agreements were signed as they knew nothing about

not read the Licensing Agreements, seek legal advice, or understand what it meant to be a franchisee, the "facts are so clear that they support only one conclusion"—that the disclaimer did not factor into any Plaintiff's decision to join or remain a part of the Window World system—and no reasonable jury could find in favor of Plaintiffs concerning the reliance element of fraud. Accordingly, the Court will grant Defendants' motion for summary judgment as it pertains to Plaintiffs' fraud claim based on the Franchise Disclaimer Theory.[192] For the same reasons, the Court will also deny Plaintiffs' cross-motion for summary judgment as it pertains to this claim.

Ground 5: 2009 Price Increase Theory

99. Last, Plaintiffs argue that Window World committed fraud by "secretly increas[ing] [the] wrongful rebates [Plaintiffs paid Window World] at the expense of securing best pricing for [Window World] dealers" and "fabricat[ing] the basis of the resultant price increases to hide what it had done."[193] Plaintiffs allege that the 2009 Price Increases were in contravention of the oral promises made by Leon and Todd

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franchise law. (Defs.' 1st App. 1.App.5065 ("I'm not a franchise – I don't know what [the franchise laws] are") (Michael Edwards); 1.App.5568 ("Q: Do you understand that franchising is a regulated industry in the United States? A: I don't know anything") (Melissa Edwards); 1.App.7001–02 ("I didn't even know what [the franchise disclaimer] meant . . . Q: Did you take this agreement to an attorney to look at it and explain this franchise concept to you? A: I did not.") (Brian Hopkins).)

[192] Plaintiffs attempt to save their fraud claim based on the Franchise Disclaimer Theory by stating "Plaintiffs had no choice but to rely on [Window World's] representations because [Window World], the franchisor, had superior knowledge – a key rationale for the Franchise Rule's requirement that the franchisor disclose more information than the franchisor may otherwise do so." (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 70.) However, Plaintiffs provide no evidence that they did, in fact, rely on Defendants' franchise representations in the written agreements.

[193] (Pls.' Br. Supp. Mot. Partial Summ. J. 59.)

Whitworth as to rebate amounts and "best pricing" and that Window World misrepresented that these price increases were out of its control when, in truth, Window World benefitted the most from the price increases.[194]

100. Even assuming Plaintiffs are able to produce substantial evidence to support their fraud theory based on the 2009 Price Increases, however, Plaintiffs, as Defendants correctly state, "don't even explain what injury purportedly follows from this theory."[195] To survive a motion for summary judgment, and to establish a prima facie case for fraud, Plaintiffs must produce substantial evidence demonstrating that Defendants' false representation "result[ed] in damage to the injured party." *Tillery Env't, LLC*, 2018 NCBC LEXIS 13, at *19–20. Plaintiffs have failed to meet this burden.

101. As Defendants state in their response brief,

> Plaintiffs never explain what they would have done differently had they known how the price increases on three [window] options [redacted] versus AMI. By 2009, Plaintiffs were already dealers. Two years later, [Window World] informed Plaintiffs of the Franchise Rule violations, gave them an FDD, and offered to let all of them rescind their contracts and leave the system. Not one active dealer sought rescission. If the outcome is the same with or without the representation, the representation couldn't have been relied on and didn't impact Plaintiffs' decisional process. *See Bumpers v. Cmty. Bank of N. Va.*, 367 N.C. 81, 90 (2013) ("[A]ctual reliance requires that the plaintiff have affirmatively incorporated the alleged misrepresentation into his or her decision-making process: if it were not for the misrepresentation, the plaintiff would likely have avoided the injury altogether.").[196]

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[194] (Pls.' Br. Supp. Mot. Partial Summ. J. 59–60.)

[195] (Defs.' Resp. Pls.' Mot. Summ. J. 75–76.)

[196] (Defs.' Resp. Pls.' Mot. Summ. J. 76.)

102. Based on the above, the Court finds that Plaintiffs have failed to establish a necessary element of their claim for fraud arising out of the 2009 Price Increases. Accordingly, the Court grants this portion of Defendants' Motion and will dismiss Plaintiffs' fraud claim based on the 2009 Price Increases.[197]

B. Negligent Misrepresentation

103. Plaintiffs and Defendants each seek summary judgment on Plaintiffs' claim for negligent misrepresentation. In their Third Amended Complaints, Plaintiffs allege that: (1) Window World "owed a duty of reasonable care to Plaintiffs in providing information relating to Plaintiff's franchise relationship with [Window World], including, without limitation, by virtue of the duties and obligations placed upon [Window World] pursuant to the Franchise Disclosure Rule"; (2) Window World "breached its duty of reasonable care to Plaintiffs by providing false information concerning Plaintiff's franchise relationship with [Window World]"; (3) "Plaintiffs justifiably and actually relied to their detriment upon information prepared without reasonable care by [Window World]"; and (4) "[a]s a consequence and proximate result of [Window World's] negligent misrepresentations, Plaintiffs have been damaged."[198]

104. Defendants seek summary judgment on Plaintiffs' negligent misrepresentation claim, contending that the "*only* misrepresentation alleged in the complaint for this claim is the failure to provide information under the Franchise

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[197] For the same reason, the Court will also deny Plaintiffs' cross-motion for summary judgment as it pertains to this aspect of Plaintiffs' fraud claims.

[198] (15-CVS-1 Third Am. Compl. ¶¶ 271–74; 15-CVS-2 Third Am. Compl. ¶¶ 375–78.)

Rule," and "[a] claim for negligent misrepresentation cannot be based upon a concealment or failure to disclose."[199] The Court agrees.

105. As this Court has previously explained, "unlike fraud claims, a claim for negligent misrepresentation must be based on an *actual misrepresentation*, not merely an omission or failure to disclose information." *B&D Software Holdings, LLC v. Infobelt, Inc.*, 2024 NCBC LEXIS 103, at *35 (N.C. Super. Ct. Aug. 1, 2024); *see, e.g.*, *Aldridge v. Metro. Life Ins. Co.*, 2019 NCBC LEXIS 116, at *112–13 (N.C. Super. Ct. Dec. 31, 2019) ("[A] claim for negligent misrepresentation can only be based on affirmative misrepresentations, not on omissions.").

106. Plaintiffs base their claim for negligent misrepresentation on Window World's failure to provide information it was required to disclose pursuant to the Franchise Rule. Plaintiffs allege that Window World "owed a duty of reasonable care to Plaintiffs in providing information relating to Plaintiffs' franchise relationship, including . . . by virtue of the duties and obligations placed upon [Window World] pursuant to the Franchise Disclosure Rule."[200] In other words, Window World owed Plaintiffs a duty to disclose particular information by virtue of their relationship.

107. Plaintiffs further allege that Window World breached this duty to disclose by "providing false information concerning Plaintiffs' franchise relationship with [Window World]."[201] Plaintiffs do not clarify in this cause of action, however, what

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[199] (Defs.' Br. Supp. Mot. Summ. J. 60.)

[200] (15-CVS-1 Third Am. Compl. ¶ 271; 15-CVS-2 Third Am. Compl. ¶ 375.)

[201] (15-CVS-1 Third Am. Compl. ¶ 272; 15-CVS-2 Third Am. Compl. ¶ 376.)

false information Defendants allegedly provided to Plaintiffs, or what information Defendants are alleged to have affirmatively misrepresented, and the only evidence Plaintiffs offer is predicated on Window World's alleged failure to disclose information it otherwise had a duty to disclose.

108. Accordingly, since Plaintiffs' claim for negligent misrepresentation is based upon a failure to disclose information and not on an affirmative misrepresentation, the Court shall grant Window World's Motion, dismissing Plaintiffs' claim for negligent misrepresentation against all Plaintiffs. *See, e.g.*, *Harrold v. Dowd*, 149 N.C. App. 777, 783 (2002); *Aldridge*, 2019 NCBC LEXIS 116, at *112–13; *B&D Software Holdings, LLC*, 2024 NCBC LEXIS 103, at *35.

109. Plaintiffs attempt to preserve their claim for negligent misrepresentation by arguing in their response to Defendants' Motion that:

> [Window World] incorrectly states that the "*only* misrepresentation alleged in the complaint for this claim is the failure to provide information under the Franchise Rule." . . . On the contrary, Plaintiffs assert claims for negligent misrepresentation based on the many misrepresentations [Window World] made to Plaintiffs about the parties' relationships.[202]

110. In their brief in support of their motion for summary judgment, Plaintiffs also assert that the same five theories pleaded in their fraud claim serve as the basis for their negligent misrepresentation claim, contending:

> [a]s set out above, [Window World] made numerous misrepresentations to Plaintiffs, on which Plaintiffs relied, and made them with fraudulent intent. Those same misrepresentations establish [Window World's] liability for negligent misrepresentation regardless of [Window World's] intent. Accordingly, Plaintiffs are entitled to summary judgment for

[202] (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 63.)

> negligent misrepresentation with respect to each misrepresentation identified above.[203]

111. Defendants correctly point out in response, however, that these theories of negligent representation "aren't mentioned in the complaint or in the relevant part of Plaintiffs' brief."[204] Defendants further contend, and the Court agrees, that, "[i]f this tort were based on some misrepresentation theory besides what was pleaded, [Window World] was entitled to notice of that theory years ago. Summary-judgment briefing can't amend a complaint."[205]

112. The Supreme Court of North Carolina has also made clear that Rule 9(b) applies to claims for negligent misrepresentation just as it does to claims based on fraud. *See Value Health Sols., Inc. v. Pharm. Rsch. Assocs.*, 385 N.C. 250, 265 (2023) ("We hold that, in North Carolina, claims for negligent misrepresentation must satisfy the heightened pleading standard of North Carolina Rules of Civil Procedure Rule 9(b)."). As the Court explained:

> As in a fraud case, we require the plaintiff to identify this alleged negligent misrepresentation with particularity so that the defendant can understand the time, place, and content of the representation, the identity of the person making the representation, and how the plaintiff justifiably relied on that information. *Cf. Terry*, 302 N.C. at 85. As a federal court succinctly explained when applying Rule 9(b) to negligent misrepresentation claims, "[u]nless defendant and others share plaintiff's view of the situation, they will find it difficult to grasp plaintiff's claim." *Breeden*, 171 F.R.D. at 202.

Id. at 266.

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[203] (Pls.' Br. Supp. Mot. Partial Summ. J. 84.)

[204] (Defs.' Reply Br. Supp. Mot. Summ. J. 32.)

[205] (Defs.' Reply Br. Supp. Mot. Summ. J. 32.)

113. Plaintiffs' failure to assert their new affirmative misrepresentation theory in any of their three complaints—and to fail to do so in accordance with Rule 9(b)'s heightened pleading standard—requires dismissal of their negligent misrepresentation claim to the extent it is based on this new theory. *See, e.g., B&D Software Holdings, LLC*, 2024 NCBC LEXIS 103, at *16 (noting that "it is axiomatic that a defendant must be put on notice of what it is defending against in order to avoid being ambushed") and *17–18 (further observing that "a claimant's initial pleading must adequately inform the responding party of what it is alleged to have done wrong so that it can defend itself accordingly. This principle is undermined in cases where, as here, a party seeks to assert a new theory of recovery for the first time at the summary judgment stage."); *Bradshaw v. Maiden*, 2020 NCBC LEXIS 106 (N.C. Super. Ct. Sep. 15, 2020) (holding an amended complaint did not assert a separate negligence claim against a hedge fund administrator as it pled facts only in support of a gross negligence claim), *aff'd*, 2022 N.C. App. LEXIS 950 (N.C. Ct. App. Dec. 29, 2022); *aff'd per curiam*, 385 N.C. 642 (2024).

114. Accordingly, for the reasons set forth above, Plaintiffs' negligent misrepresentation claim, which the Court concludes is pleaded only based on a failure to disclose, must be dismissed. The Court will therefore grant Defendants' Motion and deny Plaintiffs' Motion as to this claim.

C. <u>Declaratory Judgment</u>

115. Defendants next move for summary judgment on Plaintiffs' claims for declaratory judgment (First and Second Causes of Action in the Baton Rouge

Action/Third and Fourth Causes of Action in the St. Louis Action). Plaintiffs also move for summary judgment on their First Cause of Action in the Baton Rouge Action and their Third Cause of Action in the St. Louis Action "to the extent the cause of action is premised on fraudulent inducement."[206]

116. Under the Declaratory Judgment Act, "[a]ny person interested under a . . . written contract . . . , or whose rights, status or other legal relations are affected by a . . . contract . . . , may have determined any question of construction or validity arising under the . . . contract . . . , and obtain a declaration of rights, status, or other legal relations thereunder." N.C.G.S. § 1-254. When asserting a claim for declaratory judgment, the claimant "must set forth in his pleading all facts necessary to disclose the existence of an actual controversy between the parties . . . with regard to their respective rights and duties." *Lide v. Mears*, 231 N.C. 111, 118 (1949). Summary judgment is appropriate in a declaratory judgment action where there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. *Early v. Brown*, 116 N.C. App. 206, 208 (1994).

First Declaratory Judgment Claim

117. In their Third Amended Complaints, Plaintiffs allege two claims for declaratory judgment, which the Court will address in turn. In the first, Plaintiffs "seek a declaratory judgment that any and all prior written 'Licensing Agreements' . . . executed by [Window World] and any Plaintiff, are null, invalid, and

[206] (Pls.' Mot. 3.)

unenforceable against Plaintiffs."[207] Specifically, Plaintiffs allege that the executed written agreements are null, invalid, and unenforceable because:

(1) "the cause and/or object of the agreement, as intended by [Window World], was illegal" (the "Illegality Theory");[208]

(2) "enforcement of such agreements against Plaintiffs would be against public policy . . . [as] expressed in the Franchise Disclosure Rule's requirements applicable to franchisors" (the "Public Policy Theory");[209]

(3) "the prior agreements are null, invalid, and unenforceable because they were induced by [Window World's] fraud" (the "Fraudulent Inducement Theory");[210] and

(4) "the putative obligations in the prior agreements are not enforceable against Plaintiffs because they arise from adhesionary contracts" (the "Unconscionability Theory").[211]

Illegality and Public Policy Theories

118. Plaintiffs first allege that the Licensing Agreements Plaintiffs signed are void because Window World "intentionally created franchise relationships with franchisees such as Plaintiffs and, simultaneously, in bad faith, took affirmative steps

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[207] (15-CVS-1 Third Am. Compl. ¶ 223; 15-CVS-2 Third Am. Compl. ¶ 322.)

[208] (15-CVS-1 Third Am. Compl. ¶ 224; 15-CVS-2 Third Am. Compl. ¶ 323.)

[209] (15-CVS-1 Third Am. Compl. ¶ 226; 15-CVS-2 Third Am. Compl. ¶ 325.)

[210] (15-CVS-1 Third Am. Compl. ¶ 227; 15-CVS-2 Third Am. Compl. ¶ 326.)

[211] (15-CVS-1 Third Am. Compl. ¶ 231; 15-CVS-2 Third Am. Compl. ¶ 330.)

to hide from those franchisees that [Window World] owed to them a battery of required disclosures under federal law."[212] Plaintiffs allege that "[t]he licensing agreements themselves, the way [Window World] presented them, and the fraudulent franchise-law disclaimer they contained formed a key part of [Window World's] illegal scheme to cover up its misconduct and hide its fraud."[213] Window World's "egregious conduct," Plaintiffs contend, is "incompatible with the Franchise Rule's purpose of preventing misrepresentation and nondisclosures [by franchisors]"[214] and "enforcement of such agreements against Plaintiffs would be against [this] public policy."[215]

119. Defendants contend in response that "[a] contract is not illegal just because a Franchise-Rule violation occurred before its execution."[216] Furthermore, Defendants argue, "Plaintiffs do not satisfy North Carolina's standards for illegality [because a] contract is illegal only if its *performance* requires an illegal action."[217]

120. Under North Carolina law, "[t]he general rule is that an agreement which violates a constitutional statute or municipal ordinance is illegal and void." *Marriott Fin. Servs., Inc. v. Capitol Funds, Inc.,* 288 N.C. 122, 128 (1975). Additionally, "where

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[212] (15-CVS-1 Third Am. Compl. ¶ 225; 15-CVS-2 Third Am. Compl. ¶ 324; *see also* Pls.' Br. Opp'n Defs.' Mot. Summ. J. 16.)

[213] (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 167.)

[214] (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 17.)

[215] (15-CVS-1 Third Am. Compl. ¶ 226; 15-CVS-2 Third Am. Compl. ¶ 325.)

[216] (Defs.' Br. Supp. Mot. Summ. J. 23.)

[217] (Defs.' Br. Supp. Mot. Summ. J. 25 (citing *Mid-Am. Apartments, L.P. v. Block at Church St. Owners Ass'n, Inc.*, 257 N.C. App. 83, 84 (2017)).)

certain acts are expressly made illegal, contracts based on such acts are void." *Id.* However, "there is . . . ample authority that the statutory imposition of a penalty, without more, will not invariably avoid a contract which contravenes a statute or ordinance when the agreement or contract is not immoral or criminal in itself." *Id.* Indeed, "courts will not extend the terms of a penal statute to avoid a contract unless such a result was within the intent of the legislature in enacting the statute." *Furr v. Fonville Morisey*, 130 N.C. App. 541, 545 (1998); *see also Electrova Co. v. Spring Garden Ins. Co.*, 156 N.C. 232, 235 (1911) ("Where the contract or agreement sought to be enforced has no direct connection with the illegal act, but is collateral to it, then the contract is not tainted or affected by the illegal act.").

121. The relevant inquiry regarding Plaintiffs' first claim for declaratory judgment is whether the Franchise Rule makes certain acts illegal or whether the Franchise Rule merely imposes a penalty. If the former, a contract in violation of the Franchise Rule is void for illegality, while if the latter, a contract is not necessarily void. This question necessarily implicates the intent of the Federal Trade Commission (the "FTC"), and Congress more broadly, in enacting the Franchise Rule. *See Marriott Fin. Servs., Inc.*, 288 N.C. at 129.

122. The Franchise Rule is a federal regulation, enforced by the FTC, that requires a franchisor to provide disclosures to a prospective franchisee containing information about the franchisor, the franchise being offered, how much the

franchised business may potentially earn, and other information about the franchise system.[218] In relevant part, the Franchise Rule states that:

> [I]t is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act: (a) For any franchisor to fail to furnish a prospective franchisee with a copy of the franchisor's current disclosure document . . . at least 14 calendar-days before the prospective franchisee signs a binding agreement[.]

16 C.F.R. § 436.2.

123. Section Five of the Federal Trade Commission Act (the "FTCA") in turn sets forth the procedure by which the FTC may enforce violations of the FTCA. Importantly, courts have repeatedly held that private parties are not permitted to enforce section 5 of the FTCA—only the FTC may do so. *See, e.g.*, *Halloway v. Bristol-Myers Corp.*, 485 F.2d 986, 987 (D.C. Cir. 1973); *Klein Sleep Prods. v. Hillside Bedding Co.*, No. 83-4014, 1983 U.S. Dist. LEXIS 19179 (S.D.N.Y. Feb. 17, 1983); *Vino 100, LLC v. Smoke on the Water, LLC*, 864 F. Supp. 2d 269, 281 (E.D. Pa. 2012).

124. This Court, like many courts before it, finds that permitting a franchisee to use a franchisor's alleged noncompliance with the Franchise Rule as a basis for invalidating a franchise contract would be inconsistent with the intent of the FTC and Congress. *See, e.g.*, *Palermo Gelato, LLC v. Pino Gelato, Inc.*, No. 12-CV-00931, 2013 U.S. Dist. LEXIS 9931, at *26 (W.D. Pa. Jan. 24, 2013) ("It appears that every court that has confronted the issue has determined, with persuasive reasoning, that a violation of the disclosure requirements of the Franchise Rule does not provide the basis to render a subsequent agreement void as illegal or contrary to public policy.").

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[218] *See generally* 16 C.F.R. §§ 436.1–.11.

To permit a franchisee to do so would essentially allow a plaintiff to circumvent the bar on private actions to enforce the FTCA and create a private right of action under section 5.

125. Furthermore, as Defendants state in their briefing, the Licensing Agreements themselves do not violate the Franchise Rule or FTCA, nor do the Licensing Agreements themselves require the performance of an illegal action. The conduct prohibited by the Franchise Rule is the failure to provide required disclosures *prior to* the signing of franchise agreements. A franchisor's failure to disclose is a matter for the FTC to enforce and does not impact the terms of the agreement between the franchisor and its franchisees. *See Hines v. Norcott*, 176 N.C. 123, 125 (1918) (stating that a town ordinance that rendered a lease illegal did not invalidate the lease itself because the statute concerned a "question between [the lessor] and the town authorities"). For these reasons, therefore, the Court declines to hold that the Licensing Agreements are void for illegality and will grant Defendants' Motion dismissing Plaintiffs' first declaratory judgment claim seeking a declaration to this effect.

126. Nor can the Court conclude that the fact that a franchisor violated the Franchise Rule in procuring a franchise agreement necessarily determines that the franchise agreement is void as against public policy. To the contrary, as our Supreme Court has explained:

> The reason that some contracts and agreements are declared void as against public policy is because the enforcement of them by the courts would have a direct tendency to injure the public good. The law does not consider the advantage or interests of either party to the contract, but

> acts only from considerations of the public good . . . [A] court should declare a contract void as against public policy only when the case is clear and free from doubt and the injury to the public is substantial and not theoretical or problematical.

Electrova Co., 156 N.C. at 235.

127. It does not appear that any injury—much less substantial injury—to the public will result from enforcing the Licensing Agreements in the circumstances here. Accordingly, the Court will also grant Defendants' Motion seeking summary judgment on Plaintiffs' first declaratory judgment claim to the extent it seeks a determination that the Licensing Agreements are void as against public policy.

Unconscionability Theory

128. Plaintiffs next argue that, "[i]n the further alternative, the putative obligations in the prior agreements are not enforceable against Plaintiffs because they arise from adhesionary contracts."[219]

129. Under North Carolina law, in certain cases, contracts of adhesion can be struck down if they are unconscionable. *Sears Roebuck & Co. v. Avery*, 163 N.C. App. 207, 216 (2004) ("Contracts of adhesion will not be enforced unless they are conscionable and within the reasonable expectations of the parties."). An unconscionable contract of adhesion is marked by its standard form, unchangeable terms, and lack of a realistic opportunity to bargain. *See, e.g.*, *Tillman v. Comm. Credit Loans, Inc.*, 362 N.C. 93, 102 (2008) ("An inquiry into unconscionability requires that a court consider all the facts and circumstances of a particular case, and

[219] (15-CVS-1 Third Am. Compl. ¶ 231; 15-CVS-2 Third Am. Compl. ¶ 330.)

if the provisions are then viewed as so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable." (cleaned up)).

130. To establish unconscionability under North Carolina law, Plaintiffs must show both procedural unconscionability and substantive unconscionability. *Wilner v. Cedars of Chapel Hill, LLC*, 241 N.C. App. 389, 392 (2015). "Procedural unconscionability involves 'bargaining naughtiness' in the formation of the contract, such as 'fraud, coercion, undue influence, misrepresentation, [or] inadequate disclosure.' " *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 212 (2007) (quoting *Rite Color Chemical Co. v. Velvet Textile Co.*, 105 N.C. App. 14, 20 (1992)). "Substantive unconscionability involves an 'inequality of the bargain' that is 'so manifest as to shock the judgment of a person of common sense, and . . . the terms . . . so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other." *Id.* (quoting *Brenner v. Little Red Sch. House, Ltd.*, 302 N.C. 207, 213 (1981)). "The courts of this State will only set aside contractual agreements based upon unconscionability in a very rare case." *Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 91 (2012).

131. Plaintiffs contend that the Licensing Agreements they entered are unconscionable in both process and substance and are thus invalid.[220] They argue that the circumstances here "demonstrate unfairness, lack of meaningful choice, and

[220] (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 15.)

unequal bargaining power."[221] Specifically, Plaintiffs allege that the Licensing Agreements are procedurally unconscionable because Window World "presented increasingly more onerous agreements for execution long after Plaintiffs had begun operations and made extraordinary investments in their businesses and the Window World brand, all while assuring Plaintiffs that the new forms were 'just paperwork,' didn't apply to Plaintiffs, and wouldn't change the terms of the relationship."[222] Plaintiffs further contend that Window World did so "knowing that it presented the licensing agreements without making disclosures required by franchise law and while withholding material facts under the common law," thus effectively denying "Plaintiffs information necessary to make an informed decision how to proceed."[223]

132. Plaintiffs assert that the Licensing Agreements are also substantively unconscionable because of "the harshness and one-sidedness of the terms [Window World] now seeks to enforce . . . [such as] the right to take Plaintiffs' businesses, without compensation and for no reason, on 90 days' notice; to not renew Plaintiffs' license (and thereby take their businesses) for any reason or no reason; to raise the royalties Plaintiffs pay to any amount it chooses; and to repudiate [Window World's] 'main pitch' that it would secure best pricing for Plaintiffs."[224]

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[221] (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 15.)

[222] (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 15.)

[223] (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 15.)

[224] (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 15–16.)

133. Defendants counter that the procedural circumstances surrounding the Licensing Agreements' formation were fair—contending that "Plaintiffs were given the licensing agreements to read before signing"[225] and that "Plaintiffs could and did negotiate changes to their licensing agreements."[226] Additionally, Defendants contend that "the mere fact that a contract 'actually may be unreasonable' or 'may lead to hardship on one side' does not render it substantively unconscionable."[227] Defendants assert that parties "should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain."[228] Even if this were not the case, Defendants argue, "the agreements aren't actually one-sided" and "the termination clauses weren't unconscionable either."[229]

134. As an initial matter, the Court finds that a genuine dispute of fact exists regarding whether there was procedural unconscionability in the formation of the Licensing Agreements. In their depositions, many Plaintiffs testified that, because they had already invested substantially in their Window World stores, declining to sign the written agreements and withdrawing from the Window World system was

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[225] (Defs.' Reply Br. Supp. Mot. Summ. J. 14.)

[226] (Defs.' Br. Supp. Mot. Summ. J. 26.)

[227] (Defs.' Reply Br. Supp. Mot. Summ. J. 15.)

[228] (Defs.' Reply Br. Supp. Mot. Summ. J. 15 (quoting *Westmoreland*, 218 N.C. App. at 90).)

[229] (Defs.' Reply Br. Supp. Mot. Summ. J. 15.)

not a feasible option at the time Window World presented the Licensing or Franchise Agreements for signature.[230]

135. That said, the record also shows, as Defendants contend, that "Plaintiffs could and did negotiate changes to their licensing agreements."[231] For example, the Roland Plaintiffs added a carve-out to their non-compete allowing them to continue selling a competing window product in a separate business that they owned.[232] Similarly, the Edwards, Ford, and Jones Plaintiffs made changes to their written agreements by negotiating for expanded exclusive trade areas.[233] The Court

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[230] (*See, e.g.*, Defs.' 1st App. 1.App.6966–67 ("A: I'll start with generally I was very surprised with the agreement that ended up on my desk and with how late it was in arriving to me and how far into debt I was at the time when I did receive it . . . Q: So you said you were into debt at the time that you received it? A: Significant. Q: And what was that all about? A: Starting the business."), 6988 ("As I had stated before, generally with this agreement I expressed my dissatisfaction to Scott Williamson. I expressed concern to Sean Gallagher [of Window World], and I felt I had no choice but to sign this. I had – win, lose or draw, I was going to be financially ruined if I did anything other than sign this document."), 7022 ("I could have shut the doors and incurred huge losses, declared bankruptcy, lost my house, been on the street. I could have done that. I don't think that that's a reasonable option.") (Brian Hopkins); 1.App.7316–18 ("I had millions and millions of dollars wrapped up in – in two stores. I had one store that was in some financial trouble. And I needed to sell the other store to get myself back on track. It would have been – it would have been the death of two stores. And it would have destroyed everything I had worked for. So it was not an option to walk away [and not sign the 2013 Franchise Agreement].) (Scott Williamson); 1.App.5918 ("I was under duress because they – I had to sign [the 2013 Franchise Agreement for Central Alabama] to do anything. I done – I mean, this was signed in '13. We took over July of 2012. That's almost a year, eight months, ten months, something like that that we were working. We were so far in it, we had to sign it.") (Michael Edwards).)

[231] (Defs.' Br. Supp. Mot. Summ. J. 26.)

[232] (Defs.' 1st App. 1.App.3552 (James Roland); Defs.' 2d App. 2.App.16441 (Window World of Baton Rouge – January 2002 Licensing Agreement).)

[233] (*Compare* Defs.' 2d App. 2.App.16729 & 16759, *with* 2.App.16749 & 16773 (Edwards Plaintiffs' Licensing Agreements); Defs.' 1st App. 1.App.4482 ("Q: Who made the request to make the changes in the written contract? In other words, to make sure those counties were included and to put in the right corporate name. Was it you? A: My wife and I, yes.")

concludes that these competing proofs concerning procedural unconscionability cannot be resolved on summary judgment and must be resolved by a jury.

136. The Court similarly concludes that the record presents genuine issues of material fact regarding whether the executed Licensing Agreements are substantively unconscionable. In their briefing, Plaintiffs point to provisions in the written agreements that grant Window World the right to "take Plaintiffs' businesses, without compensation and for no reason, on 90 days' notice; to not renew Plaintiffs' license[s] (and thereby take their businesses) for any reason or no reason; to raise the royalties Plaintiffs pay to any amount [Window World] chooses; and to repudiate [Window World's] 'main pitch' that it would secure best pricing for Plaintiffs."[234] A

(Kenneth Ford, Jr.); 1.App.8161 ("Q: In fact, you knew how to go to Window World and ask for something that you thought was important to Lexington for it to be included in the agreement, correct? A: I knew how to go to Window World, yes. I knew how to make a phone call. Q: Right. And you knew that you could approach Window World about including something that you wanted to have in the agreement, correct? A: Yes. Q: And one of the examples of that is when the 2002 agreement was changed to expand the territory to reflect the actual agreement that you had with the five counties added, correct? A: Yes.") (Tommy Jones).)

[234] (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 15–16; *see, e.g.*, Defs.' 2d App. 2.App.16428–30 (¶ 12. Default: The occurrence of any one or more of the following events shall constitute an event of default and grounds for termination of this Licensing Agreement by LICENSOR: (p) Upon ninety (90) days written notice to LICENSEE of LICENSOR'S intent to terminate this Licensing Agreement.) (Window World of Phoenix, AZ – May 2006 Licensing Agreement); 2.App.16936–38 (¶ 14. Default: (a) The occurrence of any one or more of the following events shall constitute an event of default and grounds for immediate termination of this Franchise Agreement by FRANCHISOR: (i) Notwithstanding any event of default, FRANCHISEE shall conduct its business and deal with customers in an ethical and moral manner so as to always promote the fine business reputation of FRANCHISOR, the Franchise System and to protect the Trademarks. FRANCHISEE shall not engage in any activity(ies) that may in any way whatsoever lessen, harm, impugn, or adversely affect the FRANCHISOR'S reputation and the Trademarks. In the event FRANCHISEE fails to comply with this provision FRANCHISOR may, in its sole discretion, terminate the Franchise Agreement upon ninety (90) days written notice to the FRANCHISEE.) (Window World of Central Alabama – June 2013 Franchise Agreement); 2.App.16933 (¶ 7. Approved Sources . . . While FRANCHISOR

reasonable jury could find provisions such as these to be "harsh, oppressive, and 'one-sided'." *See, e.g.*, *Rite Color Chemical Co.*, 105 N.C. App. at 20. However, as our courts have made clear, the bar for substantive unconscionability is high. "The inequality of the bargain . . . must be 'so manifest as to shock the judgment of a person of common sense, and . . . the terms . . . so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.' " *King v. King*, N.C. App. 454, 458 (1994) (quoting *Brenner*, 302 N.C. at 213). Whether Plaintiffs meet this high burden similarly cannot be resolved on summary judgment and instead must be resolved by a jury. Accordingly, Defendants' Motion for summary judgment on Plaintiffs' first declaratory judgment claim seeking a declaration that the Licensing Agreements are void for unconscionability shall be denied.

Fraudulent Inducement Theory

137. Plaintiffs also argue that "any and all prior written 'Licensing Agreements' . . . executed by [Window World] and any Plaintiff, are null, invalid, and unenforceable against Plaintiffs" because "they were induced by [Window World's] fraud."[235] Plaintiffs allege that Window World "made affirmative misrepresentations and material omissions to Plaintiffs with the specific intention of inducing Plaintiffs to enter into franchise relationships with [Window World], to execute 'Licensing

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will attempt to negotiate prices for the benefit of FRANCHISEE, FRANCHISOR has no obligation to do so.) (Window World of Central Alabama – June 2013 Franchise Agreement).)

[235] (15-CVS-1 Third Am. Compl. ¶ 227; 15-CVS-2 Third Am. Compl. ¶ 326.)

Agreements,' and/or to execute renewal 'Licensing Agreements.' "[236] Specifically, Plaintiffs assert that Window World's "failure to make the federally mandated franchise disclosures constituted material omissions that fraudulently induced those parties to enter into the prior 'Licensing Agreements' with [Window World]."[237]

138. Defendants contend in response that Plaintiffs' allegations regarding fraudulent inducement "do not attack the written licensing agreements at all – they target the alleged oral statements that predated the licensing agreements," and "Plaintiffs point to no authority suggesting that a fully integrated contract should be set aside in favor of enforcing earlier, fraudulent oral statements."[238]

139. As discussed above, however, this Court finds that genuine issues of material fact exist regarding whether Plaintiffs were fraudulently induced to contract with Window World by Window World's alleged rebate and best pricing misrepresentations and, relatedly, by Window World's alleged fraudulent omissions concerning the nature of the parties' relationship. Accordingly, the Court denies the parties' Cross-Motions to the extent they pertain to Plaintiffs' Fraudulent Inducement Theory as well as Defendants' Motion to the extent it pertains to Plaintiffs' Unconscionability Theory under the first claim for declaratory judgment. As noted above, however, the Court will grant Defendants' Motion to the extent it seeks summary judgment dismissing Plaintiffs' first declaratory judgment claim

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[236] (15-CVS-1 Third Am. Compl. ¶ 228; 15-CVS-2 Third Am. Compl. ¶ 327.)

[237] (15-CVS-1 Third Am. Compl. ¶ 229; 15-CVS-2 Third Am. Compl. ¶ 328.)

[238] (Defs.' Reply Br. Supp. Mot. Summ. J. 13.)

seeking a declaration that the Licensing Agreements are void based on Plaintiffs' Illegality and Public Policy Theories.

Second Declaratory Judgment Claim

140. In their second claim for declaratory judgment (Plaintiff's Second Cause of Action in the Baton Rouge Action or Fourth Cause of Action in the St. Louis Action), Plaintiffs contend that they are "entitled to a judgment declaring they have the right to continue to operate on the same terms established by the parties' course of dealings that existed independent of any prior written 'Licensing Agreements' or 'Franchise Agreements[.]' "[239] Defendants argue in opposition that, for the various reasons outlined earlier in this opinion, the "licensing agreements *are* the parties' 'true' agreements"[240] and therefore that Plaintiffs' claim should be dismissed. Since, as set forth above, the Court finds that genuine issues of material fact exist at least regarding whether the written agreements are "null, invalid, and unenforceable because they were induced by [Window World's] fraud,"[241] the Court will deny Defendants' Motion for summary judgment on this claim.

D. Reformation and Injunction

141. Defendants next move for summary judgment on Plaintiffs' claim for reformation and injunction (Third Cause of Action in the Baton Rouge Action and Fifth Cause of Action in the St. Louis Action). In the Third Amended Complaints,

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[239] (15-CVS-1 Third Am. Compl. ¶ 237; 15-CVS-2 Third Am. Compl. ¶ 339.)

[240] (Defs.' Reply Br. Supp. Mot. Summ. J. 18.)

[241] (15-CVS-1 Third Am. Compl. ¶ 227; 15-CVS-2 Third Am. Compl. ¶ 326.)

Plaintiffs allege that "[a]ll Plaintiffs are entitled to a judgment reforming the prior 'Licensing Agreements' and 'Franchise Agreements' executed by Plaintiffs to reflect the actual meeting of the minds between the parties as reflected in the parties' course of dealings[.]"[242] Additionally, Plaintiffs allege that they are entitled to an injunction:

(1) "ordering [Window World] to cease and desist from any and all unlawful attempts to seize Plaintiffs' franchise rights";[243]

(2) "prohibiting [Window World] from terminating, failing to renew, or otherwise attempting to appropriate the businesses of Plaintiffs in any manner inconsistent with the parties' agreement as reformed and as reflected in the parties' course of dealings";[244]

(3) prohibiting Window World from "interfering with Plaintiffs' use of the Window World trademarks, Plaintiffs' use of the 1-800-Next-Window telephone number . . ., Plaintiffs' use of the www.window world.com website . . ., or Plaintiffs' use of websites with domain names containing Window World trademarks";[245] and

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[242] (15-CVS-1 Third Am. Compl. ¶¶ 239–40; 15-CVS-2 Third Am. Compl. ¶ 341.)

[243] (15-CVS-1 Third Am. Compl. ¶ 241; 15-CVS-2 Third Am. Compl. ¶ 345.)

[244] (15-CVS-1 Third Am. Compl. ¶ 242; 15-CVS-2 Third Am. Compl. ¶ 346.)

[245] (15-CVS-1 Third Am. Compl. ¶ 242; 15-CVS-2 Third Am. Compl. ¶ 346.)

(4) "ordering [Window World] to cease and desist from any and all unlawful attempts to recruit and/or 'steal' their employees, for the purposes of opening Window World franchises."[246]

Plaintiffs allege that, if the injunctive relief sought by Plaintiffs is not granted, Window World "will be unjustly enriched at their expense."[247]

142. Defendants argue, however, that the written agreements are enforceable as a matter of law, the written agreements control the parties' relationship, and that Defendants are entitled to summary judgment on Plaintiffs' claim for reformation and injunction because: (1) "Plaintiffs ratified their licensing agreements"; (2) "Plaintiffs waited too long to rescind"; (3) "Plaintiffs have not offered restitution"; (4) the "licensing agreements are not illegal and do not violate public policy"; (5) the "licensing agreements are not void as 'contracts of adhesion' "; (6) "Plaintiffs were not fraudulently induced into signing their licensing agreements"; (7) the "[p]arol-evidence rule bars reference to prior oral statements"; (8) there is a "presumption against contracts lasting indefinitely"; and (9) "[t]he parties 'course of dealing' didn't change."[248]

143. In North Carolina, "[i]t is well established that courts have equitable power to grant reformation of a contract when the writing does not represent the true agreement of the parties, including situations in which the writing omits stipulated

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[246] (15-CVS-1 Third Am. Compl. ¶ 243; 15-CVS-2 Third Am. Compl. ¶ 347.)

[247] (15-CVS-1 Third Am. Compl. ¶ 244; 15-CVS-2 Third Am. Compl. ¶ 348.)

[248] (Defs.' Mot. 6–7.)

provisions." *Cleland v. Crumpler*, 68 N.C. App. 353, 355 (1984). Whether a contract is properly suited for

> reformation is subject to the same rules of law as applied to all other instruments in writing. It must be alleged and proven that the instrument sought to be corrected failed to express the real agreement or transaction because of mistake common to both parties, or because of mistake of one party and fraud or inequitable conduct of the other.

Frye Reg'l Med. Ctr., Inc. v. Blue Cross Blue Shield of N.C., Inc., 2020 NCBC LEXIS 51, at *35 (N.C. Super. Ct. Apr. 17, 2020) (quoting *Peirson v. American Hardware Mut. Ins. Co.*, 248 N.C. 215, 219 (1958)).

144. To survive summary judgment on a claim for "equitable reformation of a contract on the basis of inequitable conduct by the promisor":

> a plaintiff must show a factual basis for four essential elements: (1) the written agreement did not properly express the intent of the parties, (2) the conduct of the promisor caused the improper expression, (3) relevant, competent evidence exists outside the written documents which shows the intention of the parties, and (4) injustice will result if the contract is not rewritten."

Id. (quoting *Carter v. West Am. Ins. Co.*, 190 N.C. App. 532, 537–38 (2008)).

145. Plaintiffs contend that the "facts here establish all four elements" of a claim for reformation.[249]

146. As to the first element, Plaintiffs assert that the written agreements did "not capture the parties' true agreement" because, although the "parties agreed that [Window World] would secure best pricing for Plaintiffs and that Plaintiffs would pay [Window World] no more than $10 per window in rebates" and that "Plaintiffs'

[249] (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 20.)

licenses were perpetual in the absence of material default," "all licensing agreements omitted any reference to rebates, and all agreements from 2006 forward omitted any reference to [Window World's] best-pricing promise and allowed [Window World] to terminate or not to renew Plaintiffs' license without cause."[250]

147. Each Plaintiff testified in these actions that the written agreement that the Plaintiff executed was different from the agreement the Plaintiff understood it to be. As previously discussed, with the exception of the Ballard, Ford, Jones/Shumate, and Rose Plaintiffs, all Plaintiffs testified that their agreement with Window World was that Plaintiffs would pay Window World no more than $10 per window in rebates.[251] Similarly, although they dispute the scope of Window World's best pricing promise, all Plaintiffs testified that Window World had promised to secure Plaintiffs some form of best pricing.[252] All Plaintiffs further testified that, contrary to the terms in their written Licensing Agreements, Window World agreed that Plaintiffs' "licenses" were perpetual in the absence of a material default.[253] The Court finds this evidence

[250] (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 20.)

[251] (*See supra* note 104–06.)

[252] (*See supra* note 135–36.)

[253] (*See, e.g.*, Pls.' Br. Opp'n Defs.' Mot. Summ. J. Ex. 4.1, Lomax Dep. 110:15–22 ("And Leon tells me that as long as I don't do anything to destroy the – or hurt the brand and I keep paying the vendors, I get to automatically renew? That doesn't jive with what the actual language reads in the agreement."), ECF No. 1008.4 (sealed); Pls.' Br. Opp'n Defs.' Mot. Summ. J. Ex. 4.2, Roland Dep. 168:19–25 ("Q: And one of the understandings you had, based on eight years of experience, is that the term of your agreement would essentially be perpetual provided you didn't commit a crime of moral turpitude and paid your bills; correct? A: That's correct."), ECF No. 1008.4 (sealed).)

sufficient to create a genuine issue of material fact as to the first element of Plaintiffs' reformation claim.

148. Plaintiffs have also produced substantial evidence as to the second element—that "the conduct of the promisor caused the improper expression [of the parties' intent]." *Frye Reg'l Med. Ctr., Inc.*, 2020 NCBC LEXIS 51, at *35. For example, Plaintiffs testified that Window World frequently represented that the written agreements were "just paperwork" or a "formality," that Window World's oral promises to Plaintiffs controlled the parties' relationships, and that, as a result, Plaintiffs put little stock in the written agreements' terms.[254]

149. Similarly, Plaintiffs have produced sufficient evidence to meet their burden on summary judgment to show the third element of a reformation claim. As described above, Plaintiffs have offered relevant, competent evidence, including Plaintiffs' deposition testimony, sufficient to permit a factfinder to conclude that the parties intended their oral agreements, rather than their written Licensing Agreements, to

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[254] (*See, e.g.,* Defs.' 1st App. 1.App.114 ("Q: Has anyone at Window World Corporate ever told or otherwise communicated to Window World Phoenix that it did not intend to enforce the terms of the Licensing Agreement at Exhibit 214? A: "Todd said that it was just paperwork. Just formalities. That's all he said. Q: Did he tell you that he would not enforce its terms? A: He just told me it was paperwork. It was just a formality is all he said. Said don't worry about it, just sign it. You have nothing to worry about is what he said.") (James Ballard); 1.App.5864 ("Q: Would you agree that this is language you signed off on when you signed this license agreement on September 24th of '08? A: I signed this based on Todd saying it's just formality paperwork to get Gadsden pulled in with Huntsville.") (Michael Edwards); 1.App.6973 ("Q: Now, as distinct from Mr. Williamson, did you talk to anybody from Window World Corporate about your concern that you just expressed about these – these provisions? A: I think I said before, I believe I raised concerns to Sean Gallagher and was told that these were just formalities, to just make these changes. Nothing is going to change. It will be fine.") (Brian Hopkins); Pls.' Br. Opp'n Defs.' Mot. Summ. J. Ex. 2; *see also supra* notes 143, 189.)

control their relationship with Window World. *See, e.g.*, *State v. Jackson*, 2024 N.C. App. LEXIS 766, at *8 (Oct. 1, 2024) (noting that "[c]ompetent evidence is evidence that a reasonable mind might accept as adequate to support the finding" and that "the competent-evidence standard is a low bar" (cleaned up)).

150. Defendants challenge Plaintiffs' evidentiary showing, contending that the "licensing agreements are fully integrated contracts with a merger clause" and that "[t]he parol-evidence rule bars [reference to] pre-contractual negotiations."[255] The Court finds Defendants' parol evidence argument without merit on the summary judgment record here.

151. Generally, "affidavits or other material offered which set forth inadmissible facts should not be considered for summary judgment." *Briley v. Farabow*, 348 N.C. 537, 544 (1998). *See also Strickland v. Doe*, 156 N.C. App. 292 (2003) (in ruling on a motion for summary judgment, the trial court should disregard portions of affidavits containing hearsay, legal conclusions, or inadmissible evidence). However, here, as discussed at length above, Plaintiffs have offered evidence from which a reasonable jury could conclude that the written agreements were procured by Window World's fraud. North Carolina law is clear that "[t]he parol evidence rule does not apply when it is alleged and shown that the execution of a written instrument was procured by fraud." *Fox v. Southern Appliances, Inc.*, 264 N.C. 267, 274 (1965).

152. In addition, parol evidence may supplement a writing where it is silent. *See* 11 Williston § 33:21 ("If the parties never adopted the writing as a statement of the

[255] (Defs.' Br. Supp. Mot. Summ. J. 32.)

whole agreement, the rule does not exclude parol evidence of additional promises."). Because Plaintiffs provide substantial evidence to support their allegations that (1) the written Licensing Agreements were induced by Window World's fraud and (2) the written Licensing Agreements are silent on topics that both parties agree were within the scope of their agreement, such as rebates, the Court finds that Plaintiffs have offered sufficient evidence to establish the third element of Plaintiffs' reformation claim at the summary judgment stage.

153. Last, Plaintiffs have provided sufficient evidence to demonstrate that an injustice will result if the contract is not rewritten. As discussed at length above, Plaintiffs have represented that they were induced to contract with Window World by Window World's alleged promises concerning best pricing, rebates, and the perpetual nature of Plaintiffs' licenses.[256] A reasonable factfinder could conclude that injustice would result if Window World could avoid these promises through enforcement of the written agreements omitting these terms.

154. Since Plaintiffs have offered sufficient evidence to show at least a genuine issue of material fact as to each element of their claim for reformation and injunction, the Court will deny Defendants' Motion for summary judgment on these claims.

E. Breach of Contract

155. Plaintiffs allege in their Third Amended Complaint that "[t]he parties' agreements, *as reflected in their course of dealings*, included [Window World's] promise to secure for Window World franchisees, including Plaintiffs, superior

[256] (*See supra* notes 107, 123.)

wholesale pricing for the products Plaintiffs purchased, sold, and installed as Window World franchisees" (emphasis added).[257] Plaintiffs allege that Window World breached this promise by "failing to secure superior wholesale pricing from suppliers, requiring that Plaintiffs purchase products and supplies at inflated prices from suppliers selected by [Window World], receiving undisclosed kickbacks or rebates on products and supplies purchased by franchisees from designated suppliers, providing undisclosed 'C' pricing to certain franchisees with lower levels of sales, requiring certain Plaintiffs to take on debt obligations owed to AMI by former franchisees in a manner not required of similarly situated franchisees, and failing to make franchise disclosures required by applicable law."[258]

156. Defendants move for summary judgment on Plaintiffs' breach of contract claim, contending generally that (1) the written Licensing Agreements control; (2) there is no evidence that the written agreements were breached; (3) there is no evidence that Defendants made or breached any alleged oral "superior wholesale price" promise; and (4) the parol evidence rule bars pre-contractual negotiations.[259]

157. To maintain an action for breach of contract, a party must show "(1) the existence of a valid contract; and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26 (2000).

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[257] (15-CVS-1 Third Am. Compl. ¶ 247; 15-CVS-2 Third Am. Compl. ¶ 351.)

[258] (15-CVS-1 Third Am. Compl. ¶ 249; 15-CVS-2 Third Am. Compl. ¶ 353.)

[259] (Defs.' Mot. 7; Defs.' Br. Supp. Mot. Summ. J. 30.)

158. As discussed at length above, the parties dispute whether the written agreements or the parties' oral agreements and course of dealings form the contract between the parties, and the Court has found that each side has offered sufficient evidence to put this issue to a jury for determination. In addition, and also as discussed above, the Court has found that Plaintiffs have provided substantial evidence that Defendants breached their contractual "best pricing" promise by "providing undisclosed 'C' pricing to certain franchisees" and by "failing to secure superior wholesale pricing from suppliers,"[260] evidence sufficient to also put these issues to a jury.

159. Accordingly, the Court will deny Defendants' Motion for summary judgment on Plaintiffs' claims for breach of contract, except those claims advanced by the Jones/Shumate Plaintiffs. As discussed previously, the Jones/Shumate Plaintiffs testified that Window World's "best pricing" representation concerned non-licensees within their trade area and were unable to produce evidence that Window World breached this alleged best pricing promise.[261] The Court therefore will grant summary judgment for Defendants on the Jones/Shumate Plaintiffs' breach of contract claim based on Window World's alleged best pricing promise.

F. <u>Breach of Covenant of Good Faith and Fair Dealing</u>

160. Defendants next seek summary judgment on Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing. North Carolina law has long

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[260] (15-CVS-1 Third Am. Compl. ¶ 249; 15-CVS-2 Third Am. Compl. ¶ 353; *see also supra* ¶¶ 66–78 and related notes.)

[261] (*See supra* ¶ 71 and note 137.)

recognized that there is in every contract 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." *Governor's Club Inc. v. Governor's Club Ltd. P'ship*, 152 N.C. App. 240, 251 (2002). Similarly, our courts have recognized that "[a] contract . . . encompasses not only its express provisions but also all such implied provisions as are necessary to effect the intention of the parties unless express terms prevent such inclusion." *Lane v. Scarborough*, 284 N.C. 407, 410 (1973).

161. To state a valid claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must "plead that the party charged took action 'which injure[d] the right of the other to receive the benefits of the agreement,' thus 'depriv[ing] the other of the fruits of [the] bargain.' " *Conleys Creek Ltd. P'ship v. Smoky Mt. Country Club Prop. Owners Ass'n,* 255 N.C. App. 236, 253 (2017) (quoting *Bicycle Transit Auth. v. Bell*, 314 N.C. 219, 228–29 (1985)). "Evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance" may each constitute a breach of the implied covenant of good faith and fair dealing. *Intersal, Inc. v. Wilson*, 2023 NCBC LEXIS 29, at *67 (N.C. Super. Ct. Feb. 23, 2023) (quoting *Restatement 2d of Contracts* § 205 cmt. d (1981)).

162. Plaintiffs' implied covenant claim rests on the same grievances as their breach of contract claim; specifically, that Window World breached the implied covenant by:

> fail[ing] to secure superior wholesale pricing from suppliers, requir[ing] that Plaintiffs purchase products and supplies at inflated prices from

> suppliers selected by [Window World], receiv[ing] undisclosed kickbacks or rebates on purchases of products and supplies made by Plaintiffs, fail[ing] to disclose the kickbacks and rebates, fail[ing] to disclose [Window World] ownership interests in various suppliers, provid[ing] undisclosed 'C' pricing to certain franchisees with lower levels of sales, while representing that Plaintiffs were receiving the most favorable 'B' pricing, requir[ing] certain Plaintiffs to take on debt obligations owed to AMI by former franchisees in a manner not required of similarly situated franchisees, and fail[ing] to make franchise disclosures required by applicable law.[262]

163. Under North Carolina law, "where a party's claim for breach of the implied covenant of good faith and fair dealing is based on the same acts as its claim for breach of contract, we treat the former as part and parcel of the latter." *Cordaro v. Harrington Bank, FSB*, 260 N.C. App. 26, 38–39 (2018); *see also Se. Anesthesiology Consultants, PLLC v. Rose*, 2019 NCBC LEXIS 52, at *23 (N.C. Super. Ct. Aug. 20, 2019) ("[G]ood faith and fair dealing claims that are 'part and parcel' of breach of contract claims . . . merely stand or fall together."). Accordingly, the Court will deny Defendants' Motion on Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing in the same manner and to the same extent as the Court has denied Defendants' Motion on Plaintiffs' breach of contract claim. Thus, the Court will likewise enter summary judgment against the Jones/Shumate Plaintiffs on their good faith and fair dealing claim as it did on those Plaintiffs' breach of contract claim.

G. <u>Unjust Enrichment</u>

164. Plaintiffs plead, in the alternative to their claims for breach of contract and breach of the implied covenant of good faith and fair dealing, that "Defendants have

[262] (15-CVS-1 Third Am. Compl. ¶ 256; 15-CVS-2 Third Am. Compl. ¶ 360.)

been unjustly enriched at Plaintiffs' expense."[263] Plaintiffs specifically allege that Window World "engaged in a wide range of misconduct that was intended to harm Plaintiffs' interests and to further the interests of [Window World]"[264] and that "[i]t would be inequitable and unjust" for Window World "to retain the benefits of its franchise relationships with Plaintiffs, including the income it received as a result of those relationships."[265] Defendants contend that they are entitled to summary judgment on Plaintiffs' claim for unjust enrichment because "the claim cannot lie where there is an express contract."[266]

165. Under North Carolina law, "the mere fact that one party was enriched, even at the expense of the other, does not bring the doctrine of unjust enrichment into play." *Butler v. Butler*, 239 N.C. App. 1, 7 (2015). To survive a motion for summary judgment, and to establish a prima facie case for unjust enrichment, Plaintiffs must provide evidence of the following elements:

> First, one party must confer a benefit upon the other party. Second, the benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. Third, the benefit must not be gratuitous. Fourth, the benefit must be measurable. Last, the defendant must have consciously accepted the benefit.

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[263] (15-CVS-1 Third Am. Compl. ¶ 281; 15-CVS-2 Third Am. Compl. ¶ 36.)

[264] (15-CVS-1 Third Am. Compl. ¶ 283; 15-CVS-2 Third Am. Compl. ¶ 388.)

[265] (15-CVS-1 Third Am. Compl. ¶ 284; 15-CVS-2 Third Am. Compl. ¶ 389.)

[266] (Defs.' Br. Supp. Mot. Summ. J. 12, note 4 (citing *Booe v. Shadrick*, 322 N.C. 567, 570 (1988)).)

JPMorgan Chase Bank, Nat'l Ass'n v. Browning, 230 N.C. App. 537, 541–42 (2013) (cleaned up). Thus, "to prevail on a claim of unjust enrichment, a plaintiff must show that property or benefits were conferred on a defendant under circumstances which give rise to a legal or equitable obligation on the part of the defendant to account for the benefits received." *Butler*, 239 N.C. App. at 7 (citing *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 417 (2000)) (cleaned up).

166. Furthermore, a claim for unjust enrichment cannot survive where a contract exists between two parties because the "doctrine of unjust enrichment is based on quasi-contract' or contract 'implied in law[.]' " *Atl. & E. Carolina Ry. Co. v. Wheatly Oil Co.*, 163 N.C. App. 748, 753 (2004); *see also Butler*, 239 N.C. App. at 7; *Booe v. Shadrick*, 322 N.C. 567, 570 (1988); *Delta Envtl. Consultants, Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 165 (1999) ("It is well established that if there is a contract between the parties, the contract governs the claim and the law will not imply a contract . . . [in such cases] an action for breach of contract, rather than unjust enrichment, is the proper cause of action." (internal citation and quotation marks omitted)). Thus, a claim for unjust enrichment necessarily fails whenever a written or oral contract was in effect between the parties.

167. Based on the above, the Court will deny Defendants' Motion as to Plaintiffs' unjust enrichment claim at the summary judgment stage. All Plaintiffs have provided substantial evidence to permit a factfinder to conclude that the written Licensing Agreements were induced by Window World's fraud and that this fraud rendered the written agreements Plaintiffs executed void and unenforceable.

Genuine issues of material fact remain concerning whether a valid contract, whether it be oral or written, was in effect between the parties. Whether a valid, enforceable contract existed between Plaintiffs and Window World is a question for the jury, and thus, a factual issue that cannot be resolved at the summary judgment stage.

H. Violation of N.C.G.S. § 75-1.1

168. Plaintiffs also contend that they are "entitled to recover from Defendants for unfair or deceptive acts or practices."[267] Specifically, Plaintiffs allege that the following unfair or deceptive acts or practices taken by Window World violated North Carolina's Unfair and Deceptive Trade Practices Act, N.C.G.S. § 75-1.1 (the "UDTPA"):

a. "fail[ing] to make disclosures required by franchise disclosure laws";

b. "repeatedly misrepresent[ing] that [Window World] would secure for Plaintiffs wholesale prices from suppliers at levels that fell below what retail establishments could otherwise obtain in the respective franchise territory and that [Window World's] buying power allowed it to secure the best prices available for Plaintiffs";

c. "repeatedly misrepresent[ing] that [Window World] had two tiers of dealer pricing ('A' and 'B' pricing) for window purchases from AMI";

d. "repeatedly misrepresent[ing] that Plaintiffs were entitled to receive, and in fact would receive and were receiving the best available pricing on

[267] (15-CVS-1 Third Am. Compl. ¶ 276; 15-CVS-2 Third Am. Compl. ¶ 380.)

products and supplies if they achieved a certain volume of unit sales in a month";

e. "provid[ing] undisclosed 'C' pricing to certain franchisees with lower levels of sales while representing Plaintiffs were receiving the most favorable 'B' pricing";

f. "receiv[ing] undisclosed kickbacks or rebates on Plaintiffs' purchases . . . from [Window World] required suppliers";

g. "hid[ing] from Plaintiffs the undisclosed kickbacks or rebates that [it] receives on Plaintiffs' purchases . . . from [Window World]-designated suppliers and all information about the amount of such rebates, the way such rebates were negotiated, calculated, and applied, the portions of the prices paid by Plaintiffs that constituted such rebates, and the impact of the rebates on the cost of goods sold by Plaintiffs";

h. "requir[ing] Plaintiffs to assume debt owed by prior franchisees to vendors . . . by former franchisees in a manner not required of similarly situated franchisees";

i. "fail[ing] to disclose that [it] was obligated to pay some or all of the debt that [Window World] required Plaintiffs to assume"; and

j. with certain designated suppliers, "agree[ing] to charge Plaintiffs inflated prices for products and supplies to provide greater revenue to [Window World]."[268]

[268] (15-CVS-1 Third Am. Compl. ¶ 278; 15-CVS-2 Third Am. Compl. ¶ 382.)

169. To maintain a private cause of action under the UDTPA, a plaintiff must show that "(1) the defendant committed an unfair or deceptive act, (2) the act in question was in or affecting commerce, and (3) the act was the proximate cause of the plaintiff's injuries." *Dalton v. Camp*, 353 N.C. at 656. "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548 (1981)). "A deceptive practice is one which has the 'capacity or tendency to deceive;' proof of actual deception is not necessary." *Lincoln v. Bueche*, 166 N.C. App. 150, 158 (2004) (quoting *Abernathy v. Ralph Squires Realty Co.*, 55 N.C. App. 354, 357 (1982)).

170. Plaintiffs contend that they are entitled to summary judgment on their UDTPA claim as "there are no genuine issues of material fact," and they are entitled to judgment as a matter of law.[269]

171. Defendants likewise seek summary judgment on Plaintiffs' claim, arguing that "(1) [t]he Franchise Rule cannot be privately enforced; (2) [i]ncorporation of the Franchise Rule would contradict the North Carolina Business Opportunity Sales Act; (3) [p]ervasive regulation of franchise relationships precludes application of section 75-1.1; (4) [c]hoice-of-law principles foreclose application of section 75-1.1 to foreign Plaintiffs; and (5) [s]ection 75-1.1 does not apply extraterritorially to claims by foreign plaintiffs against in-state defendants complaining of foreign injuries."[270] Defendants

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[269] (Pls.' Mot. 3–4.)

[270] (Defs.' Mot. 12–13.)

further contend that "[a]ll grounds [for summary judgment] that apply to the fraud claims also apply to the section 75-1.1 claims as well."[271]

172. Ms. Whitworth, in her individual capacity, also seeks summary judgment on Plaintiffs' UDTPA claim,[272] contending that "there is no genuine issue of material fact that the Chapter 75 claim fails and cannot mature into liability that could be imposed on [Ms. Whitworth] due to Plaintiffs' lack of in-state injury."[273] Specifically, Ms. Whitworth argues:

> Plaintiffs do not seek damages for physical injuries sustained in North Carolina, damage to or loss of property in North Carolina, loss of business opportunities in North Carolina, or any other compensable injury allegedly sustained in North Carolina. Because Plaintiffs' alleged injuries were not suffered in North Carolina, Plaintiffs do not have and cannot prevail on a Chapter 75 claim. Accordingly, Plaintiffs' Chapter 75 claim – including the demand for treble damages – cannot create

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[271] As with their motion for summary judgment on Plaintiffs' fraud claims, Defendants argue that summary judgment on Plaintiffs' UDTPA claim is warranted because "(6) [c]laims based on the Franchise Rule are time-barred because Plaintiffs had all necessary facts when they received their Licensing Agreements; (7) [c]laims based on the Franchise Rule are time-barred because the continuing-wrong doctrine does not apply; (8) [t]he Franchise Rule does not provide a disclosure duty; (9) [o]mission claim fails because Defendants had no duty to disclose; (10) [o]mission claim fails because Plaintiffs did not reasonably rely on any omission; (11) [o]mission claim fails because allegedly omitted information was not material and Plaintiffs did not actually rely on any omission; (12) [e]xpress misrepresentation claim fails because there was no misrepresentation of fact; (13) [e]xpress misrepresentation claim fails because Plaintiffs did not reasonably rely on any misrepresentation; (14) [e]xpress misrepresentation claim fails because Plaintiffs did not actually rely on any misrepresentation; (15) [c]laim based on C-pricing theory fails because there is no evidence that Plaintiffs were promised the absence thereof; (16) [c]laim based on C-pricing theory fails because there is no injury caused by non-competitors receiving different pricing; (17) [c]laim based on assumed-debt theory fails because Plaintiffs voluntarily entered into contracts in new territories; [and] (18) [p]arol-evidence rule bars reference to prior oral statements." (Defs.' Mot. 13–14.)

[272] (Whitworth's Mot.)

[273] (Whitworth's Mot. 1.)

> liability that may be imposed on [Ms. Whitworth] and should be dismissed.[274]

173. Historically, N.C.G.S. § 75-1.1 was "specifically limited to dealings within [North Carolina]." *The 'In' Porters, S.A. v. Hanes Printables, Inc.*, 663 F. Supp. 494, 501 (M.D.N.C. 1987). However, in 1977, the General Assembly deleted this geographical limitation. *Id.* To determine where a UDTPA action arises, the North Carolina appellate courts have not firmly determined whether to apply the "most significant relationship" test or the *lex loci* test. *See, e.g., Izzy Air, LLC v. Triad Aviation, Inc.*, 284 N.C. App. 655, 659 (2022). Under the most significant relationship test, a court must look to "the law of the state having the most significant relationship to the occurrence giving rise to the action." *Id.* (quoting *Andrew Jackson Sales v. Bi-Lo Stores, Inc.*, 68 N.C. App. 222, 225 (1984)). Under the *lex loci* test, however, "[t]he law of the State where the last act occurred giving rise to [the] injury governs [the] Sec. 75-1.1 action." *Id.* (alterations in original) (quoting *United Va. Bank v. Air-Lift Assocs.*, 79 N.C. App. 315, 321 (1986)). This Court previously opined in this case that "the Supreme Court of North Carolina will likely apply the *lex loci* rule to section 75-1.1 claims based on its rejection of the modern trend towards the 'most significant relationship' test in the court's *Boudreau* decision and has applied the *lex loci* rule to such claims." *Window World of Baton Rouge, LLC v. Window World, Inc.*, 2018 NCBC LEXIS 60, at *25–26 (N.C. Super. Ct. July 12, 2017); *Boudreau v. Baughman*, 322

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[274] (Br. Supp. Tammy Whitworth's Mot. Partial Summ. J. on Pls.' Attempt to Impose Liability Arising Out of N.C. Gen. Stat. § 75-1.1 Due to Lack of In-State Injury 2 [hereinafter "Whitworth's Br."], ECF No. 712 (sealed), 715 (redacted).)

N.C. 331, 335–36 (1988). This Court has not changed its view and therefore will apply the *lex loci* test to Plaintiffs' section 75-1.1 claims.[275]

174. Applying the *lex loci* test here, the Court finds that the undisputed evidence shows that the last act giving rise to Plaintiffs' injuries—indeed, all of the events and circumstances giving rise to Plaintiffs' UDTPA claims—occurred outside North Carolina. It is undisputed that all Plaintiffs are located outside North Carolina, all of their business operations are outside North Carolina, Window World's alleged unfair or deceptive trade practices occurred outside North Carolina, Plaintiffs' lost sales and revenue occurred outside North Carolina, and Plaintiffs' allegedly excessive payments to Window World were made from outside North Carolina.

175. Defendants contend that lost profits and overpayment injuries are deemed to have occurred "where the plaintiff feels the pain," which usually "will be in the

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[275] The Court finds further, recent support for its conclusion in the Supreme Court of North Carolina's decision in *SciGrip, Inc. v. Osae*, 373 N.C. 409 (2020). In that case, which was decided three years after this Court's 2017 opinion quoted above, the Supreme Court elected to apply the *lex loci* test to a claim for misappropriation of trade secrets, stating "this Court's jurisprudence favors the use of the *lex loci* test in cases involving tort or tort-like claims." *Id.* at 420. The Supreme Court explained:

> [a]lthough we cannot disagree with SciGrip's contention that use of the most significant relationship test would provide North Carolina courts with greater flexibility in identifying the state whose law should apply in any particular instance, that increased flexibility is achieved at the cost of introducing significant uncertainties into the process of identifying the state whose law should apply, which we do not believe would be beneficial. Moreover, while the application of the *lex loci* test can be difficult in some circumstances, including cases involving events that occur in and entities associated with multiple jurisdictions, those difficulties pale in comparison with the lack of certainty inherent in the application of a totality of the circumstances test such as the most significant relationship test.

Id. at 421–22.

state of the *plaintiff's* principal place of business."[276] *See, e.g.*, *Clifford v. Am. Int'l Specialty Lines Ins. Co.*, 2005 WL 2313907, No. 1:04CV486, at *8 (M.D.N.C. Sep. 21, 2005) ("In determining where the injury occurred in a case involving commercial or financial injury rather than physical injury, courts often look at the location where the economic loss was felt."). Plaintiffs counter that the federal cases on which Defendants rely are not binding on this Court and that "the law of the state where the wrongful conduct occurred – not the state where plaintiffs felt economic loss in their 'pocketbook' " should govern – in this case, North Carolina.[277]

176. While Plaintiffs are correct that the North Carolina appellate courts have not yet adopted the "pocketbook rule," the majority of federal courts in North Carolina have followed this approach in the absence of controlling authority from North Carolina's appellate courts. *See The 'In' Porters, S.A.*, 663 F.Supp. at 501–02 (finding that "section 1-75.4(4), as applied to defining the reach of 75-1.1, requires an in-state injury to plaintiff before plaintiff can state a valid unfair trade [practice] claim" and "section 75-1.1 applies only if the plaintiff alleges an in-state, injurious effect on his business operations in North Carolina."); *Bendfeldt v. Window World, Inc.*, No. 5:17CV39-GCM, 2018 U.S. Dist. LEXIS 243830, at *3 (W.D.N.C. June 22, 2018) ("The majority of federal courts within North Carolina hold that a business must have both suffered an injury in North Carolina *and* have an operational presence within the state in order to have a claim under N.C.G.S. § 75-1.1." (emphasis in original)); *Dixie*

[276] (Defs.' Br. Supp. Mot. Summ. J. 79.)

[277] (Pls.' Br. Opp'n Defs.' Mot. Summ. J. 80 (citing *SciGrip, Inc.*, 373 N.C. at 422–23).)

Yarns, Inc. v. Plantation Knits, Inc., No. 3:93CV301-P, 1994 U.S. Dist. LEXIS 21725, at *6 (W.D.N.C. July 12, 1994) ("First, the claim must involve 'an in-state injurious effect on [plaintiff's] business operations in North Carolina.' " (alteration in original) (quoting *The 'In' Porters, S.A.*, 663 F. Supp. at 501–02)); *see also US LEC Commc'ns, Inc. v. Qwest Commc'ns Corp.*, No. 3:05CV11, 2006 U.S. Dist. LEXIS 33705, at *3 (W.D.N.C. May 15, 2006) ("[T]he claim must involve an in-state injurious effect on plaintiff's business operations in North Carolina, and the claim must implicate an effect that is substantial . . . on a plaintiff's in-state business." (cleaned up)).

177. Although these federal cases are not binding, the Court finds them persuasive and concludes that the Supreme Court of North Carolina would apply their holdings should it be presented with the issue now before the Court. Accordingly, since Plaintiffs can point to neither an in-state injury nor any in-state business operations, the Court will grant summary judgment for Ms. Whitworth and Defendants, and deny summary judgment for Plaintiffs, on Plaintiffs' section 75-1.1 claim.

I. Fraudulent Transfer

178. Plaintiffs allege in their Third Amended Complaints that "[o]n June 23, 2010, [Window World] transferred all its intellectual property assets, including but not limited to Window World trademarks, to an insider, WWI, with the intent to hinder, delay or defraud Plaintiffs, and other current or future creditors."[278] As a

[278] (15-CVS-1 Third Am. Compl. ¶ 289; 15-CVS-2 Third Am. Compl. ¶ 394.)

result, Plaintiffs claim that they "are entitled to avoidance of [Window World's] transfers to WWI to the extent necessary to satisfy Plaintiff's claims."[279]

179. Plaintiffs bring their fraudulent transfer claims under N.C.G.S. §§ 39-23.4(a)(1) and 39-23.4(a)(2) of the North Carolina Uniform Voidable Transactions Act (the "NCUVTA", N.C.G.S. §§ 39-23.1–.12).[280] Sections 39-23.4(a)(1) and (2) provide as follows:

> (a) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) With intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> a. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> b. Intended to incur, or believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

180. Plaintiffs move for summary judgment on their fraudulent transfer claims, contending there are no genuine issues of material fact that (1) "Plaintiffs are 'creditors' for purposes of a fraudulent transfer claim" and (2) Window World fraudulently transferred its marks to WWI.[281]

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[279] (15-CVS-1 Third Am. Compl. ¶ 300; 15-CVS-2 Third Am. Compl. ¶ 405.)

[280] The Court has previously dismissed the Non-Tolling Plaintiffs' claim under N.C.G.S. §§ 39-23.4(a)(2). *See Window World of Baton Rouge, LLC*, 2019 NCBC LEXIS 11, at *34–35. Thus, the Court will only consider the Non-Tolling Plaintiffs' claim under N.C.G.S. § 39-23.4(a)(1) and the Tolling Plaintiffs' claims under both N.C.G.S. §§ 39-23.4(a)(1) and (2).

[281] (Pls.' Br. Supp. Mot. Partial Summ. J. 86–88.)

181. Defendants also move for summary judgment on Plaintiffs' fraudulent transfer claims, arguing that (1) "[t]he Non-Tolling-Agreement Plaintiffs' [remaining] claims under section 39.23.4(a)(1) are barred by the statute of repose"; (2) "[t]he Tolling-Agreement Plaintiffs' claims are barred by the statute of repose because [WWI] was not a party to the Tolling Agreement and there is no evidence to support piercing the [Window World] corporate veil to reach [Ms. Whitworth], and no evidence to then support reaching [WWI] via an alter ego or other theory"; and (3) "[t]he Tolling-Agreement Plaintiffs' claims are barred on their merits because there is no evidence to show that [Window World] created [WWI] to hinder, delay, or defraud any creditor."[282] Defendant WWI also seeks summary judgment on the Non-Tolling Plaintiffs' fraudulent transfer claims, contending that these Plaintiffs' "existing NCUVTA claims are barred by the statute of repose."[283]

182. As a threshold matter, section 39-23.9 provides a statute of repose that any "claim for relief with respect to a voidable transfer or obligation" arising under section 39-23.4(a)(1) must be brought "not later than four years after the transfer was made or the obligation was incurred, or, if later, not later than one year after the transfer or obligation was or could reasonably have been discovered by the claimant." Similarly, section 39-23.9 provides that a claim arising under section 39-23.4(a)(2)

[282] (Defs.' Mot. 15–16.)

[283] (WWI's Mot.)

must be brought "not later than four years after the transfer was made or the obligation was incurred."[284]

183. Defendants first contend that the Non-Tolling Plaintiffs' section 39-23.4(a)(1) claims are "barred because the June 23, 2010 transfer 'was or could reasonably have been discovered by the claimant' by 2014 – one year before they sued."[285] Defendants contend that Plaintiffs reasonably could have discovered the transfer by this time because:

(1) "[t]he assignment of the marks [to WWI] was recorded and publicly available on the [United States Patent & Trademark Office ("USPTO")] website as of *June 23, 2010*";[286]

(2) "[e]ach Plaintiff received [Window World's] initial FDD in *October of 2011*, which expressly disclosed [WWI's] ownership and licensing of the marks to [Window World] on pages 1 and 20";[287]

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[284] (N.C.G.S. § 39-23.9(1), (2); *See also* Pls.' Resp. Opp'n Defs.' Mot. Partial Summ. J. Seeking Dismissal Certain Pls.' Claims Under the NCUVTA 2 [hereinafter "Pls.' NCUVTA Resp."], 15-CVS-2 ECF No. 1067 (sealed), 1084 (redacted); *KB Aircraft Acquisition, LLC v. Berry*, 249 N.C. App. 74, 83–85 (2016).)

[285] (Defs.' Br. Supp. Mot. Summ. J. 84.)

[286] (Defs.' Br. Supp. Mot. Summ. J. 84 (emphasis in original); *see also* Aff. Donna Cottelli [hereinafter "Cottelli Aff."], dated Apr. 10, 2019, at ¶ 3, 15-CVS-2 ECF No. 748.)

[287] (Defs.' Br. Supp. Mot. Summ. J. 85 (emphasis in original); *see also* Defs.' 1st App. 1.App.1472–73, 2076 (James Lomax, III); 1.App.6844–45 (Rick Rose); 1.App.3835–37 (Kenneth Ford, Jr.).)

(3) "[m]any Plaintiffs reviewed and discussed the October 2011 FDD with others, including attorneys";[288]

(4) "[t]he marks were discussed at numerous owner's forums in 2011, 2012 and 2013, attended by numerous Plaintiffs";[289]

(5) "[a]ll Plaintiffs received draft agreements with [Window World] that referred to USPTO filings and registration numbers for the trademarks owned by [WWI], which many Plaintiffs signed";[290] and

(6) "[Plaintiffs] allege that the transfer to [WWI] was actually known by certain Plaintiffs prior to April in 2011."[291]

184. In their response to WWI's Motion, the Non-Tolling Plaintiffs "concede that their fraudulent transfer claim premised on the 2010 transaction by which [Window World] transferred its trademarks to WWI for no consideration are, due to the interpretive decision in *KB Aircraft Acquisition, LLC v. Berry*, 249 N.C. App. 74 (2016), barred by the statute of repose."[292] The Court agrees and therefore will grant

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[288] (Defs.' Br. Supp. Mot. Summ. J. 85.)

[289] (Defs.' Br. Supp. Mot. Summ. J. 85; *see also* Aff. Steven Kamody, dated Apr. 10, 2019, at ¶¶ 7–14, 15-CVS-2 ECF No. 753 (sealed).)

[290] (Defs.' Br. Supp. Mot. Summ. J. 85; *see also* Defs.' 3d App. 3.App.21526–631; Aff. Jacolyn Barlow, dated Apr. 10, 2019, at ¶ 19, 15-CVS-2 ECF No. 752 (sealed).)

[291] (Defs.' Br. Supp. Mot. Summ. J. 85; 15-CVS-2 Third Am. Compl. ¶ 397 ("[Window World's] intent in this regard was confirmed in statements made to Mr. Lomax and to James W. Roland prior to April 2011 by upper management of [Window World] about the purpose of the June 23, 2010 transfers.").)

[292] (Pls.' NCUVTA Resp. 2.) In *KB Aircraft Acquisition, LLC*, 249 N.C. App. at 81, the Court of Appeals stated "[i]n conformity with the plain meaning of the statute, we hold that the term 'transfer' within N.C.G.S. § 39-23.9 refers to the date that the transfer actually

Defendants' and Defendant WWI's separate Motions for summary judgment on the Non-Tolling Plaintiffs' claims under section 39-23.4(a)(1).

185. The Non-Tolling Plaintiffs attempt to save their fraudulent transfer claim by arguing that "discovery has revealed another basis for the Non-Tolling Plaintiffs' fraudulent transfer claim: distributions paid by [Window World] to Tammy Whitworth while [Window World] was insolvent."[293] These Plaintiffs argue that "[b]ecause a claim based on those distributions is not barred by the statute of repose, Defendants' Motion should be denied."[294] But as WWI correctly contends: "[f]or nine years (2015 to 2023), [Window World's] transfer of the marks to [WWI] has been the sole basis for Plaintiffs' fraudulent transfer claims. Plaintiffs never, until their summary judgment brief filed in late 2023, asserted a fraudulent transfer claim based on distributions to [Ms. Whitworth]."[295]

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occurred, and not the date that the fraudulent nature of the transfer became apparent." Thus, the court held that N.C.G.S. § 39-23.9 barred plaintiff creditor's claims under sections 39-23.4(a)(1) and 39-23.5(a) because they arose from a transfer over four years before suit was filed, and plaintiff had notice of the transfer over one year before suing, as due diligence would have given inquiry notice. *Id.* at 89–90.

[293] (Pls.' NCUVTA Resp. 2.)

[294] (Pls.' NCUVTA Resp. 2.) The Non-Tolling Plaintiffs contend that Window World's transfers to Ms. Whitworth are in violation of N.C.G.S. § 39-23.5(a), which provides: "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." (*See* Pls.' NCUVTA Resp. 3.)

[295] (Reply Br. Window World International, LLC Supp. Mot. Partial Summ. J. Seeking Dismissal Certain Pls.' Claims Under the NCUVTA 3, 15-CVS-2 ECF No. 1093 (sealed); *see, e.g.*, 15-CVS-1 Third Am. Compl. ¶¶ 286–300 ("Plaintiffs are entitled to avoidance of [Window World's] transfers to WWI"); 15-CVS-2 Third Am. Compl. ¶¶ 391–405 (same); 15-CVS-1

186. The Court will not permit the Non-Tolling Plaintiffs to raise this new theory for their fraudulent transfer claim at this late date. To do otherwise would be fundamentally unfair to Defendants. *See, e.g.*, *B&D Software Holdings, LLC*, 2024 NCBC LEXIS 103, at *17–18 (rejecting a party's effort to assert a new theory of recovery for the first time at summary judgment as unfair); *Bradshaw*, 2020 NCBC LEXIS 106, *aff'd*, 2022 N.C. App. LEXIS 950, *aff'd per curiam*, 385 N.C. 642.

187. Accordingly, the Court will deny the Non-Tolling Plaintiffs' Motion on their claims under section 39-23.4(a)(1), grant Defendants' and WWI's separate Motions on those claims, and enter summary judgment against the Non-Tolling Plaintiffs on their fraudulent transfer claims under section 39-23.4(a)(1).

188. Turning next to the Tolling Plaintiffs' fraudulent transfer claims, the Court notes that it has previously determined that the Tolling Agreement tolled the statute of repose for the Tolling Plaintiffs' claims under N.C.G.S. §§ 39-23.4(a)(1) and (a)(2).[296] As stated above, under section 39-23.4(a), a transfer is voidable as to a present or future creditor[297] if the transfer was made:

> (1) With intent to hinder, delay, or defraud any creditor of the debtor; or

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Second Am. Compl. ¶¶ 232–64, ECF. No. 151 (same); 15-CVS-2 Second Am. Compl. ¶¶ 374–88, ECF. No. 92 (same); 15-CVS-1 First Am. Compl. ¶¶ 195–209, ECF. No. 33 (same); 15-CVS-2 First Am. Compl. ¶¶ 306–17, ECF. No. 20; 15-CVS-1 Compl. ¶¶ 187–98, ECF. No. 2 (same); 15-CVS-2 Compl. ¶¶ 243–54, ECF. No. 2 (same.)

[296] *See Window World of Baton Rouge, LLC*, 2019 NCBC LEXIS 11, at *26–27.

[297] The NCUVTA defines a "creditor" as "a person that has a claim." "Claim" is then defined as a "right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." N.C.G.S. §§ 39-23.1(3), (4). The parties do not dispute that the Tolling Plaintiffs are "creditors" for purposes of the NCUVTA.

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

a. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.

189. Section 39-23.4(b) provides that "intent" may be determined by considering, among other factors, whether:

(1) The transfer or obligation was to an insider;

(2) The debtor retained possession or control of the property transferred after the transfer;

(3) The transfer or obligation was disclosed or concealed;

(4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) The transfer was of substantially all the debtor's assets;

(6) The debtor absconded;

(7) The debtor removed or concealed assets;

(8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) The transfer occurred shortly before or shortly after a substantial debt was incurred;

(11) The debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor;

(12) 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 reasonably should have believed that the debtor would incur debts beyond the debtor's ability to pay as they became due; and

> (13) The debtor transferred the assets in the course of legitimate estate or tax planning.

190. To support their claim under section 39-23.4(a)(1), the Tolling Plaintiffs contend that "[Mr.] Ingle, [Window World's] then-President, thrice testified that the assignment was intended to shield [Window World's] intellectual property from 'claims like lawsuits made by licensees or franchisees.' "[298] They argue in addition that "several of the factors listed in Section 39-23.4(b) demonstrate a fraudulent transfer – including that [Window World] was insolvent, the intellectual property assets transferred for no consideration were easily [Window World's] most valuable assets, [Window World] transferred the assets to an LLC controlled by an insider, and [Window World] retained control of the assets through its domination of WWI[.]"[299]

191. Defendants argue that the Tolling Plaintiffs' claims under section 39-23.4(a)(1) fail for lack of evidence, contending that "[WWI] was created at [Mr.] Ingle's suggestion, not to hinder, delay or defraud any creditor, but rather: (1) for multiple business reasons to protect the [Window World] IP against all outside agencies,[300] and (2) to make a potential future sale easier."[301] Defendants also

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[298] (Pls.' Br. Supp. Mot. Partial Summ. J. 87.)

[299] (Pls.' Br. Supp. Mot. Partial Summ. J. 87.)

[300] (Defs.' Br. Supp. Mot. Summ. J. 86; *see* Defs.' 1st App. 1.App.10338 ("I was the first one to suggest it"), 10674–75 (formed to protect Window World IP from any licensees, franchisees, outside agencies, without focus on Marie Whitworth) (Howard Blair Ingle).)

[301] (Defs.' Br. Supp. Mot. Summ. J. 86; *see* Defs.' 1st App. 1.App.10675 (Howard Blair Ingle).)

contend that Plaintiffs' representation that Window World "did not receive any value at all" for the transfer to WWI is incorrect, asserting that "[Window World] gained protection for its marks in the transaction by putting them in a separate entity,[302] value that Plaintiffs' expert confirmed."[303] Last, Defendants contend that "whether [Window World] was 'insolvent' on the date of and after the transfer is disputed" and, as to the section 39-23.4(b) factors, "8 of the 13 factors weigh in Defendants' favor."[304]

192. Defendants ignore, however, that the Tolling Plaintiffs have produced substantial evidence, in particular through the deposition testimony of Mr. Ingle, of Window World's intent to "hinder, delay, or defraud any creditor."[305] In addition, the Tolling Plaintiffs have produced substantial evidence that Window World was insolvent at the time of the 2010 Transfer.[306] There is also little dispute that the

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[302] (*See* Defs.' 1st App. 1.App.16109–10 (Zachary Luffman).)

[303] (Defs.' Resp. Pls.' Mot. Summ. J. 91; *see* Defs.' 1st App. 1.App.9510–11 (Charles Modell).)

[304] (Defs.' Resp. Pls.' Mot. Summ. J. 91, 93.)

[305] (*See, e.g.,* Volume Two Pls.' Dep. Excerpts, Ex. MM, Blair Ingle 7/31/14 Dep. 104:8–16, ("Q: Was [the 2010 Transfer] at least in part for the protection of the intellectual property of Window World, Inc. to protect it from the claims in this lawsuit? A: These claims would be part of those, yeah."), 105:1–18, ECF No. 985.13 (sealed); Volume Two Pls.' Dep. Excerpts, Ex. HH, Blair Ingle 11/29/17 Dep. 115:8–118:17 ("Q: And [the decision to make the 2010 Transfer] was also at a time after there had been allegations made by dealers that this was – or Window World was actually a franchise and not a license arrangement, correct? A: Those timelines are true."), ECF No. 985.8 (sealed); Volume Two Pls.' Dep. Excerpts, Ex. YY, Blair Ingle 11/30/17 Dep. 344:25–345:5 ("Q: In other words, if Window World, Inc. was attacked by a creditor, right, got a judgment, by having the marks in a separate company, the store owners would be protected from that. Correct?" A: That's correct."), ECF No. 985.25 (sealed).)

[306] (*See* Defs.' 2d App. 2.App.17036 (Window World, Inc.'s 2008-10 Consolidated Balance Sheets).) Defendants acknowledge that "whether [Window World] was 'insolvent' on the date of and after the transfer is disputed." (Defs.' Resp. Pls.' Mot. Summ. J. 91.)

intellectual property assets Window World transferred to WWI were valuable assets, that Window World transferred the assets without receiving monetary compensation, that WWI was controlled by an insider (Ms. Whitworth), or that Window World "retained control of the assets through its domination of WWI."[307]

193. Based on the above, the Court finds that the Tolling Plaintiffs have provided sufficient evidence to permit a reasonable jury to conclude that the 2010 Transfer was made "with intent to hinder, delay, or defraud any creditor of the debtor" and thus in violation of section 39-23.4(a)(1). As a result, the Court will deny Defendant Window World's Motion for summary judgment on the Tolling Plaintiffs' fraudulent transfer claims under section 39-23.4(a)(1). The Court will also deny the Tolling Plaintiffs' Motion for offensive summary judgment on their claims under section 39-23.4(a)(1) claims because questions of material fact remain as to Window World's intent in making the 2010 Transfer which must be resolved by a jury.

194. The Tolling Plaintiffs also move for offensive summary judgment on their section 39-23.4(a)(2) claims, contending that Window World "received no consideration for the [trademark] assignment" and that "the record establishes that after the transfer, [Window World's] remaining assets were unreasonably small for its business."[308] More specifically, the Tolling Plaintiffs point out that the 2010 Transfer "left [Window World] with approximately $15 million in assets against

[307] (Pls.' Br. Supp. Mot. Partial Summ. J. 87.)

[308] (Pls.' Br. Supp. Mot. Partial Summ. J. 87–88.)

nearly $60 million in liabilities,"[309] and assert that "the assignment deprived [Window World] of the intellectual property it licensed to Plaintiffs and other dealers, which directly or indirectly generated substantially all of [Window World's] revenue, and [that] WWI may terminate [Window World's] license to the marks without cause on ten days' written notice."[310]

195. Defendants contend that the Tolling Plaintiffs' section 39-23.4(a)(2) claims fail because Window World received valuable "consideration – protection of the marks, which also benefitted Plaintiffs[, and Window World's] success since 2010, shown by its financials, demonstrate that its assets were always more than sufficient for its business."[311] As discussed above, a genuine dispute of material fact remains as to whether Window World received a "reasonably equivalent value in exchange" for the 2010 Transfer and whether Window World's remaining assets were "unreasonably small" at the time of the transfer. Accordingly, the Court will deny both Window World's and the Tolling Plaintiffs' Motions for summary judgment on the Tolling Plaintiffs' fraudulent transfer claims under section 39-23.4(a)(2).

196. The Tolling Plaintiffs lodge their section 39-23.4(a)(1) and (a)(2) claims not only against Window World, but also against WWI and Ms. Whitworth. However,

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[309] (Pls.' Br. Supp. Mot. Partial Summ. J. 88; *see also* Defs.' 2d App. 2.App.17036 (Window World, Inc.'s 2008-10 Consolidated Balance Sheets).)

[310] (Pls.' Br. Supp. Mot. Partial Summ. J. 88; *see also* Volume Seven Pls.' Exs. Ex. 198 WW-022498, ECF No. 983.18 (sealed).)

[311] (Defs.' Resp. Pls.' Mot. Summ. J. 93; *see also* Defs.' 2d App. 2.App.17374–407, 2.App.17340–73, 2.App.17282–320, 2.App.17321–39, 2.App.17264–81, 2.App.17243–63, 2.App.17224–42, 2.App.17196–223, 2.App.17167–94 (audited financials 2010-22).)

neither WWI nor Ms. Whitworth are parties to the Tolling Agreement which, as stated above, preserves the Tolling Plaintiffs' section 39-23.4(a)(1) and (a)(2) claims.[312] In *Window World of Baton Rouge, LLC v. Window World, Inc.*, 2019 NCBC LEXIS 11, at *26–27 (N.C. Super. Ct. Feb. 11, 2019), this Court held that, due to the statute of repose, the Tolling Plaintiffs' claims against WWI and Ms. Whitworth could only be sustained if these Plaintiffs are able to pierce the corporate veil between Ms. Whitworth, WWI, and Window World.[313] The Court will thus turn to Plaintiffs' piercing the corporate veil and alter ego arguments.

J. <u>Piercing the Corporate Veil</u>

197. As our Supreme Court has stated, "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, 146 (2013).

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[312] (Defs.' 2d App. 2.App.17424–38 ("THIS TOLLING AGREEMENT, COVENANT NOT TO SUE AND CONFIDENTIALITY AGREEMENT (this "Agreement") is made by and between *Window World, Inc.* on the one hand and [Franchisees] on the other.") (cleaned up).)

[313] In *Window World of Baton Rouge, LLC*, 2019 NCBC LEXIS 11, at *26–27, this Court reasoned:

> Here, the Lomax and Roland Plaintiffs do not invoke the instrumentality rule to toll the statute of repose set forth in section 39-23.9 as a matter of equity. Rather, they allege that the Tolling Agreement operated to toll the statute of repose against Window World and its alter ego, WWI, as a matter of contract right. Thus, those cases holding that equitable doctrines cannot toll statutes of repose have no application on the facts pleaded here. Accordingly, the Court concludes that the Lomax and Roland Plaintiffs have pleaded sufficient facts to permit a reasonable factfinder to conclude that the Tolling Agreement tolled the four-year statute of repose in sections 39-23.9(1) and (2) on their claims under sections 39-23.4(a)(1) and (a)(2) of the NCUVTA.

198. In their Third Amended Complaints, Plaintiffs allege that they are "entitled to recover from Tammy Whitworth individually and from WWI on each of the causes of action Plaintiffs assert against [Window World] pursuant to the doctrines of piercing the corporate veil, mere instrumentality and/or alter ego."[314] Plaintiffs assert two theories of recovery. First, Plaintiffs assert Window World and WWI are alter egos.[315] Second, Plaintiffs "allege that they are entitled to pierce the corporate veil between Tammy Whitworth and [Window World]."[316] The Court will address the parties' Cross-Motions on these theories of recovery in turn.

199. To prove an alter ego relationship between corporate entities, a claimant must establish three things:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of [a] plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Glenn v. Wagner, 313 N.C. 450, 455 (1985).

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[314] (15-CVS-1 Third Am. Compl. ¶ 163; 15-CVS-2 Third Am. Compl. ¶ 262.)

[315] (Pls.' Br. Supp. Mot. Partial Summ. J. 89–90.)

[316] (Pls.' Br. Supp. Mot. Partial Summ. J. 89.)

200. "Evidence upon which [courts of this State] have relied to justify piercing the corporate veil includes inadequate capitalization, noncompliance with corporate formalities, lack of a separate corporate identity, excessive fragmentation, siphoning of funds by the dominant shareholder, nonfunctioning officers and directors, and absence of corporate records." *Green*, 367 N.C. at 145 (citing *Glenn*, 313 N.C. at 455–59). The "presence or absence of any particular factor . . . is [not] determinative." *East Mkt. St. Square, Inc. v. Tycorp Pizza IV, Inc.*, 175 N.C. App. 628, 636 (2006). "Rather, it is a combination of factors which . . . suggest that the corporate entity attacked had 'no separate mind, will or existence of its own' and was therefore the 'mere instrumentality or tool' of the dominant corporation." *Id.* "Common ownership and management, without more, do not equate to the kind of complete domination needed to show that one entity is another's puppet." *Harris v. Ten Oaks Mgmt.*, 2022 NCBC LEXIS 62, at *7 (N.C. Super. Ct. June 20, 2022).

201. Plaintiffs contend that they "are entitled to judgment as a matter of law that [Window World] and WWI are alter egos."[317] Plaintiffs argue that "the undisputed evidence establishes that WWI is a mere instrumentality that [Window World] dominates for its own benefit."[318] Plaintiffs further contend that the "control" element is satisfied as (1) WWI, like Window World, is owned entirely by Ms.

[317] (Pls.' Br. Supp. Mot. Partial Summ. J. 89.) Plaintiffs, however, do not move for summary judgment on the issue of whether they are entitled to pierce the corporate veil between Tammy Whitworth and Window World.

[318] (Pls.' Br. Supp. Mot. Partial Summ. J. 90.)

Whitworth[319]; (2) "WWI was created for the sole purpose of holding [Window World's] intellectual property," has never "been capitalized, earned any income, or received any funds except for money [Window World] provided, and "has no separate existence from [Window World] at all"; and (3) "WWI has engaged in no business activity other than [the 2010 Transfer] with [Window World].[320]

202. Additionally, Plaintiffs argue that Window World used WWI, its alleged alter ego, to defraud Plaintiffs and commit "numerous unfair and deceptive acts against them."[321] Specifically, Plaintiffs contend that Window World's "creation of WWI for the sole purpose of assigning [Window World's] most valuable asset – its intellectual property – to keep it away from Plaintiffs and other creditors reinforced [Window World's] scheme to shield itself from liability for its fraud and knowing violations of franchise-law."[322] In addition, Plaintiffs assert that Window World's "fraudulent transfer to WWI . . . significantly impaired [Window World's] ability to pay Plaintiffs' damages."[323]

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[319] (Volume Two Pls.' Dep. Excerpts, Ex. XX, Zachary Luffman 2018 Dep. 84:14–15.)

[320] (Pls.' Br. Supp. Mot. Partial Summ. J. 90; *see also* Volume Two Pls.' Dep. Excerpts, Ex. XX, Zachary Luffman 2018 Dep. 34:5–36:21 ("Q: Was that $100,000 capitalization ever paid to [WWI]? A: No."), 79:12–82:19 (establishing that WWI only has one checking account, has never paid salary or other compensation, has never had any employees, has never had any contracts with any entity other than Window World and its bank, has never distributed profits or filed individual tax returns, has only filed tax returns as part of Tammy Whitworth's personal return), 84:14–15 (establishing that Tammy Whitworth owns WWI), 87:6–11 (establishing that WWI has never had any officers).)

[321] (Pls.' Br. Supp. Mot. Partial Summ. J. 91.)

[322] (Pls.' Br. Supp. Mot. Partial Summ. J. 91; s*ee supra* ¶¶ 188–92 and related notes.)

[323] (Pls.' Br. Supp. Mot. Partial Summ. J. 91; *see supra* ¶¶ 190–95 and related notes.)

203. Defendants seek summary judgment dismissing Plaintiffs' alter ego claims, contending that "Plaintiffs fail the first and most crucial element of complete domination . . . It is undisputed that [Window World] is, and has been since February 2011, controlled by a Board of Directors [and] the [Window World] Board exercises no control over [WWI], nor does [WWI's] sole member control [Window World]."[324] Defendants further contend that Plaintiffs fail to satisfy the complete-domination element because "Plaintiffs have shown no evidence of undercapitalization of [Window World], disregard of corporate formalities by either entity, excessive fragmentation, siphoning of funds or absence of corporate records."[325] Defendants also argue that Plaintiffs have failed to satisfy the second element of their alter ego claim as "Plaintiffs fail to show that creating a separate holding company to hold IP is improper . . . [or] that [Window World] used [WWI] to defraud them."[326] Finally, Defendants contend that Plaintiffs have "cite[d] no evidence to support their statement that the transfer 'significantly impaired' [Window World's] ability to pay damages."[327]

[324] (Defs.' Resp. Pls.' Mot. Summ. J. 95–96.)

[325] (Defs.' Resp. Pls.' Mot. Summ. J. 96.)

[326] (Defs.' Resp. Pls.' Mot. Summ. J. 96–97.)

[327] (Defs.' Resp. Pls.' Mot. Summ. J. 97.)

204. To support their argument, Defendants have produced substantial evidence that (1) WWI was created to protect Window World from outside agencies[328]; (2) WWI was created to make a potential future sale easier[329]; and (3) the idea of transferring the trademarks to a separate entity "arose years earlier, during a discussion with . . . a Greensboro lawyer, regarding ways to handle Leon [Whitworth's] excess-compensation issues during an IRS audit."[330]

205. Although piercing the corporate veil "is a strong step: Like lightning, it is rare and severe," *Harris*, 2022 NCBC LEXIS 62, at *10 (quoting *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 439 (2008)), the Court finds that genuine issues of material fact remain concerning whether (1) Window World had "complete domination" of WWI, particularly at the time of the contested 2010 Transfer since Window World's Board was not in existence at this time; (2) whether such control, if it existed, was used by Window World to commit fraud or wrong; and (3) whether Plaintiffs suffered injury.

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[328] (Defs.' 1st App. 1.App.10675 ("Q: And when you say the transference of Window World, Inc.'s valuable intellectual property would protect it, would it protect it from claims like lawsuits made by licensees or franchisees? A: Yeah, protect it from any outside agencies.") (Howard Blair Ingle).)

[329] (Defs.' 1st App. 1.App.10675 ("Q: And is it correct that it ultimately was Tammy Whitworth's decision to transfer Window World, Inc.'s intellectual property to Window World International, LLC, for the purpose of protecting it against potential claimants? A: For the purpose of protecting it and then if there's any opportunity for sale down the road it would be a much easier transaction, I would say.") (Howard Blair Ingle).)

[330] (Defs.' Resp. Pls.' Mot. Summ. J. 96–97; *see also* Defs.' 1st App. 1.App.15109–10, 15200–01 (Randy Blackburn); Appendix 4 Exs. Summ. J. Mot. 4.App.24705 [hereinafter "Defs.' 4th App."], ECF No. 1009 (sealed).)

206. Accordingly, the Court will deny the parties' Cross-Motions on Plaintiffs' claim that Window World and WWI are alter egos. Furthermore, because Plaintiffs have produced sufficient evidence to sustain their claim that Window World and WWI are alter egos at the summary judgment stage, the Court will also deny the parties' Cross-Motions on the Tolling Plaintiffs' claims against WWI under sections 39-23.4(a)(1) and (a)(2).

207. Plaintiffs next contend that they are entitled to pierce the corporate veil between Tammy Whitworth and Window World, asserting that:

> [d]uring the period of Tammy Whitworth's sole ownership of [Window World's] stock, her control over [Window World] . . . permeated the entire company and extended from [Window World's] finances to its policy making and business practices. Accordingly, [Window World] and its affiliates and subsidiaries have and have had no separate mind, will, or existence of their own apart from Tammy Whitworth or from the affiliated Window World entities she likewise controls.[331]

208. Under the instrumentality test adopted by our Supreme Court, "if the plaintiff is able to pierce the corporate veil, the shareholder and the corporation are shown to be . . . 'one and the same.' " *Ridgeway Brands Mfg., LLC*, 362 N.C. at 441 (citing *Henderson v. Sec. Mortgage & Fin. Co.*, 273 N.C. 253, 260 (1968)). To apply the instrumentality rule, Plaintiffs must prove three elements: "(1) stockholders' control of the corporation amounting to 'complete domination' with respect to the transaction at issue; (2) stockholders' use of this control to commit a wrong, or to violate a statutory or other duty in contravention of the other party's rights; and (3)

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[331] (15-CVS-1 Third Am. Compl. ¶ 166; 15-CVS-2 Third Am. Compl. ¶ 265.)

this wrong or breach of duty must be the proximate cause of the injury to the other party." *Id.* (citing *Glenn*, 313 N.C. at 454–55).

209. Defendants move for summary judgment on Plaintiffs' veil-piercing claim against Ms. Whitworth, arguing that she "lacked the requisite control in general."[332] Defendants contend that Mr. Ingle largely controlled Window World from February 2010 to February 2011, offering evidence that he "handled the financials and kept them close,"[333] he "did not consult with [Ms. Whitworth] about day-to-day activities or contracts, sharing information on a 'need-to-know basis,"[334] and "the dealers went to [Mr. Ingle], not [Ms. Whitworth], for assistance."[335] During this time, Defendants

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[332] (Defs.' Br. Supp. Mot. Summ. J. 88.)

[333] (Defs.' Br. Supp. Mot. Summ. J. 88; Defs.' 1st App. 1.App.10856 ("Blair [Ingle] handled most of – of the financials and – and kept them pretty close") (Tammy Whitworth); *see also* 1.App.13931–32 ("Q: Following Todd [Whitworth's] death and before the formation of the board of directors, were all major decisions made by Tammy? A: There was a transition period where Blair had pretty much a free rein.") (Dana Deem); 1.App.12142 ("Q: And when did you have those discussions? A: I can't tell you a date. It would have been after Todd [Whitworth] died in 2010. Q: So – A: Because that's when Blair was making all the decisions.") (John Vannoy, Jr.); Defs.' 2d App. 2.App.16953–54 (Feb. 17, 2011 email chain where Mr. Ingle provides rebate information to Ms. Whitworth and Board for first time).)

[334] (Defs.' Br. Supp. Mot. Summ. J. 88; *see also* Defs.' 1st App. 1.App.10859–60 ("Q: And did Blair [Ingle] have authority to make agreements on behalf of Window World, Inc. . . . without your knowledge? A: I believe so, as far as the bylaws. There were certain things that he could do . . . Q: Did he consult with you . . . about the day-to-day activities, formation of agreements, the payment for special C pricing, things of that nature? Not – no."), 10889–90 ("After I got my kids back in school – or our kids back in school, I started going to the office, and Blair [Ingle] was – I got the feeling he didn't want me around. I felt like I got information on a need-to-know basis.") (Tammy Whitworth); 1.App.14162–63 ("Q: And then after Todd [Whitworth] passed away, who was – who ran things? A: Tammy [Whitworth] was the CEO. Blair [Ingle] was the president, and that's who I got my day-to-day direction from. Q: Who? A: Blair . . . That's who I got my day-to-day direction from.") (Mark Bumgarner).)

[335] (Defs.' Br. Supp. Mot. Summ. J. 89; *see also* Defs.' 1st App. 1.App.15440–41 ("[Blair Ingle] was the only – before he – before he left, he was the only one that we were all going to."), 15594–97 ("Q: When Blair left, did things change between the dealers and corporate? A:

assert that Ms. Whitworth "wasn't much involved in the business [as] [h]aving just lost her husband, she focused her efforts on their children while [Mr.] Ingle ran the company."[336] Following Mr. Ingle's termination, Ms. Whitworth "formed a new Board in February 2011" and, under the 2011 Bylaws, "the business and affairs of the corporation were managed by the Board."[337] Defendants offer evidence that the Board "has remained active ever since, reviewing financials, receiving management presentations, debating issues, and usually reaching consensus."[338] Defendants also

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Yes. . . . We just got used to being without Todd [Whitworth]. We had someone that had been running the company for a certain amount of years. He was being proactive with everything that was going on and running day-to-day stuff.") (Colin Justus); 1.App.2061–62 ("Q: And what was the concern? A: Well, that Todd had died and most of us felt that Blair [Ingle] was doing a pretty decent job and they had just fired him and we were worried about who was going to run the company.") (James Lomax, III).)

[336] (Defs.' Br. Supp. Mot. Summ. J. 88; Defs.' 1st App. 1.App.10744 ("Well, for the first yearish, I was not heavily involved in the business. I was a recent widow, I had our three kids, and inherited a business. So, I needed to kind of get my sea legs under me and – and figure out where we were and where – how everything worked[.]"), 10805–08 ("Q: You had control? A: No. Blair [Ingle] had control. Blair was running the company . . . I think you have to think back to when that was. I had just lost a husband, and I was raising our children, and Blair was running the company for me. So I could have had a say, but I did not have a say.") (Tammy Whitworth).)

[337] (Defs.' Br. Supp. Mot. Summ. J. 89; Defs.' 2d App. 2.App.17414 ("Section 3.7 Powers. The business and affairs of the corporation shall be managed by the Board of Directors. The Officers shall have the general power to control the day to day operations of the corporation as set forth hereinafter in Article VI.") (Bylaws of Window World, Inc., adopted 4 February 2011).)

[338] (Defs.' Br. Supp. Mot. Summ. J. 89; Defs.' 1st App. 1.App.11627 (discussing length and frequency of board meetings), 11631–34 (discussing how propositions are adopted and the Board's interactions with Ms. Whitworth) (John Vannoy, Jr.); 1.App.12689–94 ("Once again, it's a unanimous decision. Whomever – however the board decides to vote is how we move forward. There's no individual there that – that I can recall . . . including Tammy, who has said, 'This is the way it's going to be and this is the way it is.' It's discussed, the board votes. The majority wins.") (discussing the Board's interactions with Ms. Whitworth) (Bridget Mathis); 1.App.14016–17 ("We had a monthly board meeting. There was a format used where basically I would share ideas. We'd go over financial numbers, and then we'd bring in the

offer evidence that, in addition to the Board, "a succession of company Presidents managed the company and made day-to-day decisions."[339]

210. As to the 2010 Transfer in particular, Defendants offer evidence that creating WWI was Mr. Ingle's idea, that Ms. Whitworth "didn't know what the documents said and didn't have a detailed understanding of why [Window World] was doing it," and that she "merely signed off on it at Ingle's advice and request."[340] Based on this evidence, Defendants argue that Ms. Whitworth: (1) "had nothing to do with [Window World] signing or renewing the [Sole Source Agreement with AMI]"[341]; did not cause Window World "to 'continue to avoid' franchise disclosures"[342]; and "the

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rest of the management team, and everybody had a presentation, basically, would take part in the meeting . . . . Again, there was a lot of interaction, a lot of discussion. Again, even though I had disagreements with particular board members at times, I felt they were active.") (Dana Deem).)

[339] (Defs.' Br. Supp. Mot. Summ. J. 89; Defs.' 1st App. 1.App.13721–22 ("Q: How long were you president? A: If we go from April of '11 to January of '15, that's almost four years.") (Dana Deem); 1.App.14232–33 ("Q: What did they tell you your duties are? A: Lead and manage the everyday operations of the organization.") (Steve Kamody).)

[340] (Defs.' Br. Supp. Mot. Summ. J. 90; *see also* Defs.' 1st App. 1.App.10338 ("Q: It's fair to say . . . that it was your idea to form Window World International and pursue the assignment, correct? A: I was the first one to suggest it."), 10674 (Howard Blair Ingle); 1.App.11350 ("Q: What is Window World International? A: It's something Blair [Ingle] came up with."), 11437, 11119–21 ("Blair set up Window World International and asked me to sign the paper."), 10810, 10813 ("I didn't create [WWI]. I signed the document that was put before me, and I was advised to do that."), 10767, 10829–30, 11491 ("The purpose, my understanding, the purpose of Window World International – and it had been discussed before, before Todd passed away, so I didn't have a whole lot of knowledge about it. And my understanding is, that's just what businesses do as – we have a responsibility to protect our licensees and franchisees, and that is one of the ways to do that is to protect the trademark.") (Tammy Whitworth).)

[341] (Defs.' Br. Supp. Mot. Summ. J. 92.)

[342] (Defs.' Br. Supp. Mot. Summ. J. 92.)

pricing structure [including C pricing] was already in place when [Ms. Whitworth] inherited the shares."[343]

211. As noted above, veil piercing is an "extraordinary equitable remedy." *Harris*, 2022 NCBC LEXIS 62, at *6 (quoting *Charter Commc'ns Operating, LLC v. Optymyze, LLC* No.2018-0865-JTL, 2021 Del. Ch. LEXIS 4, at *73 (Del. Ch. Jan. 4, 2021). Here, Plaintiffs have failed to produce substantial evidence to show that Ms. Whitworth had "complete domination" over Window World, WWI, or the disputed transactions, including C pricing and the 2010 Transfer. At the same time, Defendants and Ms. Whitworth offered undisputed evidence that she did not have complete domination over Window World, WWI, or the disputed transactions. Accordingly, the Court will grant Defendants' Motion and dismiss Plaintiffs' veil-piercing "claim"[344] against Ms. Whitworth.

212. In addition, because Plaintiffs have failed to produce substantial evidence to support their veil-piercing claim against Ms. Whitworth, the Court further finds that the Tolling Plaintiffs' claims against Ms. Whitworth under sections 39-23.4(a)(1) and (a)(2) claims are time-barred by the applicable statute of repose. The Court will

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[343] (Defs.' Br. Supp. Mot. Summ. J. 94.)

[344] The Court notes that, although Plaintiffs bring their veil piercing contention as a claim, piercing the corporate veil is a remedy, not a separate cause of action. *See, e.g., Window World of Baton Rouge, LLC*, 2017 NCBC LEXIS 60, at *14 ("Veil piercing is an equitable remedy[.]" (citing *Ridgeway Brands Mfg., LLC*, 362 N.C. at 440)); *Insight Health Corp. v. Marquis Diagnostic Imaging of N.C., LLC*, 2018 NCBC LEXIS 56, at *23 (N.C. Super. Ct. June 5, 2018) ("Veil piercing 'is not a theory of liability' but a form of relief that provides an 'avenue to pursue legal claims against' those 'otherwise shielded by the corporate form.' " (quoting *Green*, 367 N.C. at 146)).

therefore grant Defendants' Motion on the Tolling Plaintiffs' claims against Ms. Whitworth under sections 39-23.4(a)(1) and (a)(2) and deny Plaintiffs' offensive Motion for summary judgment against Ms. Whitworth on those same claims.

K. Plaintiffs' Damages Calculations

213. Plaintiffs next contend that they are "entitled to summary judgment relating to their damages in multiple respects."[345] Specifically, Plaintiffs maintain that they are entitled to summary judgment: (1) "establishing as undisputed multiple, related damage calculations made by Plaintiffs' damages expert, Brent Bersin, including the total rebates Plaintiffs paid [Window World] on their purchases from Associated Materials, Inc. ("AMI")" and (2) "on the amount of damages they are entitled to recover for [Window World's] fraud, unfair and deceptive trade practices, and negligent misrepresentations."[346]

214. Plaintiffs argue they are entitled to summary judgment establishing the following damages amounts:

(1) A total of $40,306,114 (not including interest, trebling, or attorneys' fees) equal to the difference between the rebates WW fraudulently promised Plaintiffs they would pay, and fraudulently concealed that Plaintiffs were not paying, and the rebates Plaintiffs actually paid;[347]

(2) A total of $37,565,225 (not including interest, trebling, or attorneys' fees) equal to the amount of undisclosed rebates on [redacted] that Plaintiffs unknowingly paid because WW concealed those rebates and because WW concealed the existence of a separate pricing tier for dealers

[345] (Pls.' Br. Supp. Mot. Partial Summ. J. 92.)

[346] (Pls.' Mot. 6.)

[347] (Pls.' Mot. 6; Bersin Report at 6; *see also* Bersin Schedules; Bersin Aff. at ¶ 6.)

who did not pay rebates on [redacted], in contravention of WW's representations that Plaintiffs were receiving best pricing;[348] and

(3) A total of $10,155,554 (not including interest, trebling, or attorneys' fees) equal to the amount of excess rebates Plaintiffs paid as a result of WW's undisclosed and misrepresented 2009 rebate increases.[349]

215. Plaintiffs contend that summary judgment on their damages claims is warranted because "Defendants offer no legitimate rebuttal to these calculations . . .[,] do not identify any specific errors in Bersin's . . . calculations[,] and concede they have no basis to dispute the AMI data on which [some of] Bersin's calculations rest."[350] Further, Plaintiffs assert that Defendants do not "provide any alternative calculations that they claim more accurately reflect the amounts of rebates Plaintiffs paid above what they were promised."[351]

216. Defendants argue that Plaintiffs' Motion should be denied because "Plaintiffs ignore both the procedural posture and the burden of proof. [Window World] is not required to prove Plaintiffs' damages for them. Plaintiffs must prove their own damages."[352]

217. More granularly, Defendants argue that Plaintiffs' Motion should be denied as to Plaintiffs' calculation for alleged rebate overpayments because the calculation

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[348] (Pls.' Mot. 6; *see also* Bersin Report.)

[349] (Pls.' Mot. 6; *see also* Bersin Report.)

[350] (Pls.' Br. Supp. Mot. Partial Summ. J. 93.)

[351] (Pls.' Br. Supp. Mot. Partial Summ. J. 93.)

[352] (Defs.' Resp. Pls.' Mot. Summ. J. 47.)

"assumes a hypothetical world where Plaintiffs were all promised the same thing: a $10 window rebate for B-tier dealers, a $15 window rebate for A-tier dealers, and no rebates [redacted] [and] Plaintiffs' own evidence lays waste to that assumption."[353] The Court agrees. As discussed above, some Plaintiffs testified that Window World promised rebates of $5 or $10 per window and others testified that no representations were made regarding rebate amounts prior to them becoming Window World storeowners.[354] As such, Plaintiffs have not met their burden for offensive summary judgment to show that there are "no gaps in [their] proof [concerning rebate overpayment damages], that no inferences inconsistent with [their] recovery arise from the evidence." *Brooks,* 48 N.C. App. at 728. Accordingly, Plaintiffs' Motion for offensive summary judgment on its alleged rebate overpayment damages is denied.

218. Defendants also contend that Plaintiffs' damages calculation for alleged best pricing misrepresentations is incorrect because "Plaintiffs have not calculated damages specific to any particular Plaintiff."[355] Plaintiffs argue that their best pricing damages is "equal to the amount of undisclosed rebates on window [redacted] that Plaintiffs unknowingly paid because [Window World] concealed the existence of a separate pricing tier for dealers who did not pay rebates on window [redacted], in contravention of [Window World's] representations that Plaintiffs were receiving best

[353] (Defs.' Resp. Pls.' Mot. Summ. J. 47.)

[354] (*See supra* ¶¶ 43–60 and related notes.)

[355] (Defs.' Resp. Pls.' Mot. Summ. J. 61–62.)

pricing."[356] However, as detailed earlier in this order and opinion, Plaintiffs' testimony varies significantly concerning the rebate representations that were made and how different Plaintiffs interpreted and understood Window World's representations regarding "best pricing."[357] Thus, the Court again finds that Plaintiffs have not met their burden to demonstrate that no genuine issues of material fact remain as to the amount of best pricing damages. The Court will therefore deny Plaintiffs' Motion for offensive summary judgment on these damages as well.

219. Finally, and also as discussed earlier in this order and opinion, the Court has concluded that Plaintiffs have failed to offer substantial evidence that they were injured by the 2009 rebate increases and that Plaintiffs' claims based on those rebates should be dismissed.[358] In light of this failure of proof, the Court will likewise deny Plaintiffs' motion for summary judgment determining Plaintiffs' damages for Window World's "undisclosed and misrepresented 2009 rebate increases."[359]

220. Based on the above, the Court denies Plaintiffs' Motion for offensive summary judgment on each of Plaintiffs' requested damages determinations.

L. <u>Defendants' Counterclaims</u>

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[356] (Pls.' Mot. 7.)

[357] (*See supra* ¶¶ 43–78 and related notes.)

[358] (*See supra* ¶¶ 99–102 and related notes.)

[359] (*See supra* ¶¶ 99–102 and related notes.)

221. Plaintiffs seek summary judgment on each of Defendants' counterclaims (the "Counterclaims"),[360] which seek a declaration that the Licensing Agreements applicable to each Plaintiff group are valid, that certain terms are enforceable and should be enforced, and that any modification of the Licensing Agreements is invalid.

222. Plaintiffs contend they are entitled to summary judgment on Defendants' Counterclaims because "[e]ach such counterclaim necessarily depends on the validity and enforceability of the agreements for which [Window World] seeks declarations." Plaintiffs further assert that "[b]ecause [the Licensing Agreements] all are void due to [Window World's] fraudulent inducement, [Window World] cannot enforce any alleged rights under those documents."[361] As set forth at length above, however, the Court has found that genuine issues of material fact remain and preclude summary judgment for any party on the validity of the Licensing Agreements. Accordingly, the Court will deny Plaintiffs' Motion for summary judgment on Defendants' Counterclaims.

M. Window World's and Ms. Whitworth's Additional Defenses

223. Last, Plaintiffs seek summary judgment on: (1) subparagraph (d) of Window World's Fifth Additional Defense; (2) Window World's Sixth Additional Defense; (3) subparagraph 5 of Tammy Whitworth's Seventh Additional Defense; and (4) Tammy Whitworth's Eighth Additional Defense.[362]

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[360] (Baton Rouge Answer ¶¶ 41–75; St. Louis Answer ¶¶ 51–95.)

[361] (Pls.' Br. Supp. Mot. Partial Summ. J. 95–96.)

[362] (Pls.' Mot. 7–8.)

224. First, Plaintiffs seek summary judgment as to the portion of Window World's Fifth Additional Defense and Whitworth's Seventh Additional Defense which asserts that "[t]he Tolling Agreement should be disregarded for purposes of the statute of limitations and/or repose to the extent, if any, that Plaintiffs are precluded from enforcing the Tolling Agreement by their own breach of the Tolling Agreement."[363] Plaintiffs assert that no evidence appears of record that the Roland Plaintiffs or the Lomax/Gillette Plaintiffs breached the Tolling Agreements[364]; indeed, Plaintiffs offer evidence that Window World's 30(b)(6) designee admitted that Window World has no evidence that the Roland or Lomax/Gillette Plaintiffs breached these agreements.[365] In an apparent concession, Defendants do not respond to Plaintiffs' argument in their briefing. Based on its review, the Court concludes that

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[363] (Baton Rouge Answer ¶ 42; St. Louis Answer ¶ 68; Answer and Alternative Countercl. Tammy Whitworth ¶ 51 [hereinafter "Whitworth Baton Rouge Answer"], ECF No. 327 (sealed), 331 (redacted); Answer and Alternative Countercl. Tammy Whitworth ¶ 68 [hereinafter "Whitworth St. Louis Answer"], 15-CVS-2 ECF No. 345 (sealed), 349 (redacted).) These defenses differ in their wording, but they all assert that the Tolling Agreement should be disregarded to the extent Plaintiffs are precluded from enforcing it due to their breach.

[364] (Pls.' Br. Supp. Mot. Partial Summ. J. 96.)

[365] (Pls.' Br. Supp. Mot. Partial Summ. J. 96; Volume One Pls.' Dep. Excerpts, Ex. P, Window World Dep. 152:12–154:5 ("In preparation for this deposition, we reviewed information available to us. And at this time, Window World is not currently aware of any information. It's our understanding, when the defense was filed, we saw the filing of the secret Louisiana lawsuit as a violation of the confidentiality clause of the tolling agreement. Q: Does Window World no longer see the filing of the Louisiana lawsuit as a violation of the tolling agreement? A: No. Q: Okay. And, again, like I said, this refers to the Lomax plaintiffs. The opposite answer makes the same allegation with regard to the Roland plaintiffs. Is Window World aware of any factual information supporting the assertion that the Roland plaintiffs violated the confidentiality provisions of the tolling agreement? A: We're not currently aware of the information.").)

summary judgment should be entered for Plaintiffs on these portions of Window World's Fifth Additional Defense and Whitworth's Seventh Additional Defense.

225. Plaintiffs next seek summary judgment as to Window World's Sixth Additional Defense and Ms. Whitworth's Eighth Additional Defense, which allege, similarly, that "Plaintiffs' claims for breach of contract are barred to the extent they have committed their own antecedent breaches of the contracts between the parties."[366] These antecedent breaches were identified in Window World's 30(b)(6) deposition as the facts underlying the case captioned as *Window World International v. O'Toole*, 21 F.4th 1029 (8th Cir. 2022),[367] which include an alleged failure to provide financial reporting,[368] alleged territory infringements by certain franchisees,[369] alleged unauthorized ownership changes,[370] and alleged "efforts by Roland to 'investigate alternative vendor sources' in 2012 or 2013."[371]

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[366] (Baton Rouge Answer ¶ 42; St. Louis Answer ¶ 56; Whitworth Baton Rouge Answer ¶ 51; Whitworth St. Louis Answer ¶ 68.)

[367] (Volume One Pls.' Dep. Excerpts, Ex. P, Window World Dep. 155:4–6; Pls.' Br. Supp. Mot. Partial Summ. J. 96.)

[368] (Volume One Pls.' Dep. Excerpts, Ex. P, Window World Dep. 154:24–56:7; Pls.' Br. Supp. Mot. Partial Summ. J. 97.)

[369] (Volume One Pls.' Dep. Excerpts, Ex. P, Window World Dep. 156:8–59:7; Pls.' Br. Supp. Mot. Partial Summ. J. 97.)

[370] (Volume One Pls.' Dep. Excerpts, Ex. P, Window World Dep. 160:11–61:9.; Pls.' Br. Supp. Mot. Partial Summ. J. 97.)

[371] (Volume One Pls.' Dep. Excerpts, Ex. P, Window World Dep. 161:10–62:8; Pls.' Br. Supp. Mot. Partial Summ. J. 97.)

226. Plaintiffs assert that these defenses should be dismissed because Plaintiffs' alleged breaches either "(1) occurred after the filing of the lawsuit, or (2) do not actually breach any licensing agreement provision, or both."[372] The Court agrees.

227. The *O'Toole* litigation arose from actions occurring in 2019.[373] Neither Window World nor Ms. Whitworth has identified in the actions pending before this Court any failure to provide financial reporting prior to 2019. The evidence of record shows that any alleged territory infringements or ownership changes likewise occurred well after the filing of this action.[374] Furthermore, neither Window World nor Ms. Whitworth offers any evidence that the Roland Plaintiffs purchased products from any alternative suppliers, or explain how investigation into alternative suppliers violates the Licensing Agreements. Perhaps not surprisingly, Window World and Ms. Whitworth do not address Plaintiffs' arguments in their briefing. Accordingly, after careful review, the Court concludes that Plaintiffs are entitled to summary judgment dismissing Window World's Sixth Additional Defense and Ms. Whitworth's Eighth Additional Defense.

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[372] (Pls.' Br. Supp. Mot. Partial Summ. J. 97.)

[373] (*See Window World Int'l v. O'Toole*, 21 F. 4th 1029 (8th Cir. 2002) (dismissing appeal from 2020 WL 7041814 (E.D. Mo. Nov. 30, 2010).)

[374] (*See* Volume One Pls.' Dep. Excerpts, Ex. P, Window World Dep. 160:11–61:9; Volume One Pls.' Exs. Ex. 19-4, ¶ 10 ("I understand that [Window World] contends that a breach occurred due to the tragic passing of Jeremy Shumate. Mr. Shumate died on July 30, 2022.") (Affidavit of Tommy Jones), Ex. 19-7, ¶ 8 ("I understand that [Window World] has contended that a breach occurred due to my divorce. My divorce became final on May 25, 2022.") (Affidavit of Christina Rose), ECF No. 977.20.)

V.

CONCLUSION

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

a. Regarding Plaintiffs' Cause of Action for Fraud, Defendants' Motion is **GRANTED** as to:

i. Plaintiffs Window World of Phoenix, LLC, James Ballard, Toni Ballard, Window World of Central PA, LLC, Kenneth Ford, Jr., Angell Wesner-Ford, World of Windows of Denver, LLC, Rick Rose, Christina Rose, Window World of Lexington, Inc., Tommy Jones, and Jeremy Shumate's fraud claims based on Window World's alleged rebate misrepresentations (the Rebate Misrepresentation Theory), and these claims are hereby **DISMISSED with prejudice**.

ii. Plaintiffs Window World of Lexington, Inc., Tommy Jones, and Jeremy Shumate's fraud claims based on Window World's alleged best pricing promise (the Best Pricing Theory), and these claims are hereby **DISMISSED with prejudice**.

iii. Plaintiffs B&E Investors, Inc., Window World of North Atlanta, Inc., Window World of Central Alabama, Inc., Michael Edwards, and Melissa Edwards' fraud claims under the Best Pricing Theory

based on C pricing, and these claims are hereby **DISMISSED with prejudice**.

iv. Plaintiffs' fraud claims based on Window World's alleged misrepresentation of franchise law (the Franchise Disclaimer Theory), and these claims are hereby **DISMISSED with prejudice**.

v. Plaintiffs' fraud claims based on Window World's 2009 Price Increases, and these claims are **DISMISSED with prejudice**.

b. Defendants' Motion is **GRANTED** with respect to Plaintiffs' claims for negligent misrepresentation, and Plaintiffs' claims are hereby **DISMISSED with prejudice**.

c. Defendants' Motion is **GRANTED** with respect to Plaintiffs' claims for declaratory judgment that the Licensing Agreements are null, invalid, and unenforceable for illegality and as against public policy, and Plaintiffs' claims are hereby **DISMISSED with prejudice**.

d. Defendants' Motion is **GRANTED** with respect to Plaintiff Window World of Lexington, Inc., Tommy Jones, and Jeremy Shumate's claims for breach of contract and breach of the covenant of good faith and fair dealing based on Window World's alleged best pricing promise as to non-licensees, and these Plaintiffs' claims are hereby **DISMISSED with prejudice**.

e. Defendants' Motion and Whitworth's Motion are **GRANTED** as to Plaintiffs' unfair and deceptive trade practices claims under N.C.G.S. § 75-1.1, and Plaintiffs' claims are hereby **DISMISSED with prejudice**.

f. Defendants' Motion and Whitworth's Motion are **GRANTED** as to Plaintiffs' veil-piercing "claims" against Ms. Whitworth, and those "claims" are hereby **DISMISSED with prejudice**.

g. Defendants' Motion and WWI's Motion are **GRANTED** as to the Non-Tolling Plaintiffs' fraudulent transfer claims under the NCUVTA, and those claims are hereby **DISMISSED with prejudice**.

h. Defendants' Motion is **GRANTED** as to the Tolling Plaintiffs' fraudulent transfer claims under the NCUVTA against Ms. Whitworth, and those claims are hereby **DISMISSED with prejudice**.

i. Plaintiffs' Motion is **GRANTED** as to that portion of Window World's Fifth Additional Defense and Ms. Whitworth's Seventh Additional Defense alleging breach of the Tolling Agreement and as to Window World's Sixth Additional Defense and Tammy's Eighth Additional Defense in their entirety, and those Additional Defenses are hereby **DISMISSED with prejudice**.

j. Except as expressly granted above, the Motions are hereby **DENIED**, and all remaining claims, counterclaims, and defenses shall proceed to trial.

SO ORDERED, this the 26th day of November, 2024.[375]

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

[375] This Order and Opinion was originally filed under seal on 26 November 2024. This public version of the Order and Opinion is being filed on 6 December 2024. To avoid confusion in the event of an appeal, the Court has elected to state the filing date of the public version of the Order and Opinion as 26 November 2024.