No. COA17-151 TWENTY-FIFTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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CHRISTIAN G. PLASMAN in his individual capacity and derivatively for the benefit of, on behalf of and right of nominal party BOLIER & COMPANY, LLC Plaintiffs / Appellants v. DECCA FURNITURE (USA), INC. DECCA CONTRACT FURNITURE, LLC, RICHARD HERBST, WAI THENG TIN, TSANG C. HUNG, DECCA FURNITURE, L.T.D., DECCA HOSPITALITY FURNISHINGS, LLC, DONGGUAN DECCA FURNITURE CO., L.T.D., DARREN HUDGINS AND DECCA HOME Defendants / Appellees and nominal party defendant BOLIER & COMPANY, LLC v. CHRISTIAN J. PLASMAN A/K/A BARRETT PLASMAN Third Party Defendant/ Appellant	)	From Catawba County No. 12 CVS 2832

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DEFENDANTS-APPELLEES' BRIEF IN RESPONSE TO PLAINTIFFS-APPELLANTS' OPENING BRIEF

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The Plaintiffs-Appellants Christian G. Plasman ("Chris Plasman") and Christian J. Plasman ("Barrett Plasman," and with Chris Plasman, collectively the "Plasmans") received four separate opportunities to plead cognizable claims against Defendants before the Business Court.[1] Rather than correct the fatal errors in their prior pleadings, Chris Plasman's Second Amended Complaint (the "Complaint") and Barrett Plasman's Supplemented and Amended Third-Party Counterclaims (the "Counterclaims," collectively with the Complaint the "Claims") differ little from their prior failed pleadings.

All of the allegations center around Chris Plasman's belabored notion that he was somehow entitled to indefinite employment at Bolier when, in fact, the very contracts attached to and relied upon in the Complaint unmistakably refute this supposition. The Plasmans' unfounded disagreement regarding Decca USA's management of Bolier is not actionable under any theory advanced in the Complaint. The Business Court afforded the Plasmans multiple bites at the apple and yet the Plasmans still failed to meet the basic pleading requirements to survive a motion to dismiss.

Accordingly, the Business Court properly dismissed the Claims with prejudice because, after four opportunities, they failed to state any claims upon which relief can be granted.

[1] The Plasmans have not filed proof of service for Defendants Tsang C. Hung ("Tsang"), Decca Furniture Ltd., or Dongguan Decca Furniture Co. Ltd.

COUNTER-STATEMENT OF THE FACTS

The Complaint alleges that Plasman approached Tsang, Herbst, and Decca China about partnering to form and operate Bolier, a furniture business. (R pp 656, 660, 662.) Plasman, Decca USA, and Bolier entered into an Operating Agreement which identified Plasman and Decca USA as Bolier's sole members. (R pp 711, 38-71.) Plasman admits that he holds a minority interest and Decca USA holds the majority interest in Bolier. (R pp 661-62, 680.) Plasman alleged that despite his minority ownership and the Operating Agreement's provisions, (R p 46), the parties intended to operate Bolier as a fifty-fifty partnership. (R p 661, 680.)

Bolier's Articles of Organization filed "[a]t the direction of Plasman," (R p 656) specifically state that Bolier is to "be operated pursuant to a written operating agreement. No purported oral operating agreement among the members shall be enforceable." (R p 28.) The Operating Agreement makes clear that "all decisions or actions of the Company, the Company's 'managers' . . . or the Members shall require the approval, consent, agreement or vote of the Majority in Interest." (R p 47-48.)

By written resolution, Plasman became the initial President and CEO of Bolier. (R p 35-37.) Plasman was to remain president of Bolier "until his successor is duly chosen and qualified." (*Id.*) On September 1, 2003, Plasman also entered into an employment agreement with Bolier that stated that he could be terminated with or without cause. (R pp 73-83.)

On October 19, 2012, Herbst, as Decca USA's representative and pursuant to Plasman's Employment Agreement, terminated Plasman's employment with Bolier.

(R pp 671, 117.) Plasman refused to recognize his termination. (R p 671.) On October 24, 2012, Plasman improperly opened a bank account without Decca USA's consent purportedly on behalf of Bolier and began diverting Bolier's funds to this account. (R pp 532-50.) When Plasman continued to improperly hold himself out as the President and CEO three months after he was terminated, Decca USA changed the locks on the building, refused Plasman entry onto the property, and froze the diverted Bolier funds. (R pp 671-72, 532-50.) This litigation ensued thereafter.

STANDARD OF REVIEW

This Court reviews a motion to dismiss under Rule 12 *de novo*. *Hinson v. City of Greensboro*, 753 S.E.2d 822, 826 (N.C. Ct. App. 2014). In conducting this review under Rule 12(b)(6), "the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." *Pinewood Homes, Inc. v. Harris*, 646 S.E.2d 826, 837 (N.C. Ct. App. 2007). Allegations of fraud must be pled with particularity, pursuant to Rule 9(b). *Hudgins v. Wagoner*, 694 S.E.2d 436, 442 (N.C. Ct. App. 2010).

ARGUMENT

I. The Business Court Properly Determined that the Complaint Failed to State Any Claims Upon Which Relief Can Be Granted.[2]

After filing four pleadings and being afforded three different opportunities to amend the Complaint, the Business Court properly granted Defendants' Motion to

[2] Chris Plasman did not advance any arguments in support of his independent claim of self-dealing or his intellectual property claim. Thus, those claims have been abandoned. N.C. R. App. P. 28(b)(6).

Dismiss and that decision should be affirmed by the Court.

A. The Business Court Correctly Dismissed the Breach of Contract Claims Because the Operative Agreements Defeat the Claims.

1. The Employment Agreement expressly provided for Plasman's termination with or without cause.

The Employment Agreement and Operating Agreement demonstrate that Plasman had no right to perpetual employment at Bolier and that Decca USA possessed the authority to terminate Plasman without a meeting or vote. The Plasmans' belabored arguments are irreconcilable with the clear terms of the Employment Agreement and Operating Agreement.

The Employment Agreement specifically contemplates Chris Plasman's termination because there is a specific section dedicated to "Termination." (R pp 75-76) (Section 1.4 Termination). The Employment Agreement even provides that Plasman can be terminated with *or without* cause. (R pp 75-76 § 1.4(c)-(d)). Therefore, Plasman could not have had any expectation of perpetual employment. *Id.* The Operating Agreement also contemplates a Bolier without Chris Plasman. (*See* R p 49 § 6.4) ("Christian G. Plasman, *during the period of his employment by the Company*, shall be expected to devote his full time to such duties.") (emphasis added); (R p 55 § 8.1(b)). The Business Court correctly determined that Chris Plasman did not have a right to perpetual employment and that his termination did not breach any contract.

2. The Operating Agreement and Employment Agreement permitted Decca USA to unilaterally terminate Plasman without a vote or meeting.

The Operating Agreement vested ultimate decision making authority in Decca USA. (R pp 47-48 § 6.1(a)). Specifically, the Operating agreement provides: "[A]ll decisions or actions of the Company, the Company's 'managers' . . . or the Members shall require the approval, consent, agreement, or vote of the Majority in Interest." (R pp 47-48 § 6.1(a)); *see also* R p 50 (providing authority to appoint officers)). The Operating Agreement does not, as Plasman contends, require that any management decision include both Chris Plasman's and Decca USA's participation.[3] Rather, it specifically requires Decca USA's participation as Majority in Interest. (*See* R p 48 § 6.1(a).) The Operating Agreement provides that Plasman has the "authority to participate" in management decisions, but it does not go so far as to require that Plasman actually participate in every decision as it does with Decca USA. (*See generally* R pp 43-63.)

With regard to acts that require the written consent of the Members, Plasman and Decca USA, the Operating Agreement identified four limited acts. (R p 49 § 6.3). Notably absent from this list is any requirement pertaining to

[3] Plasman also alleges that he made a series of management decisions absent input from Decca USA. For example, Plasman alleges that he "solely" handled "all of Bolier's designs, branding, human resources, sales, marketing, customer service, shipping and operations," (R p 965) and that Plasman's position entitled him to "exclusive control over management . . . decisions[.]" (*id.*).) Thus, Plasman's own theory is contradicted by the Complaint and his prior briefing. Even if not contradicted, under Plasman's theory, he repeatedly breached the Operating Agreement by making management decisions without first obtaining Decca USA's approval. (*See* R p 48 § 6.1(a).)

employment or management decisions. Accordingly, there was no requirement to hold a meeting or take a vote on any management decisions including the decision to termination Plasman's employment.

Chris Plasman's reliance on Article XI of the Operating Agreement, positing that the provision requires meetings and unanimous consent, is unfounded. (Br. at 19-22). Article XI allows any member to call a meeting of Bolier's Members by stating the purpose of the proposed meeting and the matters proposed to be acted upon. (R p 60.) If a meeting is called under this provision, Article XI further provides that any actions on items noticed for the meeting may be taken by written consent. (R p 61.) In other words, if a meeting is called under Article XI, the Members can avoid the noticed meeting by voting on the matters contained in the notice by written consent; however, Plasman admits that no such notice was ever sent. (R p 666, ¶ 126.)

The Operating Agreement does not require meetings prior to making employment or management decisions. As a result, Plasman failed to identify any breaches of the Operating Agreement because only Decca USA's input was required.

3. The Operating Agreement provides that Plasman holds a 45% ownership interest in Bolier.

North Carolina law is clear that "[t]he articles of organization or written operating agreement may require that all agreements of the members constituting the operating agreement be in writing, in which case the term 'operating agreement' shall not include oral agreements of the members." N.C. GEN. STAT. § 57C-3-05 (2013). Consistent with the statute, Bolier's Articles of Organization specifically

require that Bolier is to "be operated pursuant to a written operating agreement." (R p 28.) "No purported oral operating agreement among the members shall be enforceable." (R p 28.) Plasman's allegations relating to the change in membership interests of the parties is an impermissible attempt to orally modify Bolier's Operating Agreement.

Such modification is also barred by estoppel by contract and the parol evidence rule. Estoppel by contract "provides that where one having the right to accept or reject a transaction or instrument takes and retains benefits thereunder, he ratifies it, and cannot avoid its obligation or effect by taking a position inconsistent with it." *Carolina Medicorp v. Bd. Of Trustees of the Teachers' and State Employees' Comprehensive Med. Plan*, 456 S.E.2d 116, 120 (N.C. Ct. App. 1995). The parol evidence rule states that "evidence of prior and contemporaneous negotiations and agreements are not admissible to vary, add to, or contradict a written instrument" where fraud is absent and the contract is final and unambiguous. *Rowe v. Rowe*, 287 S.E.2d 840, 845 (N.C. Ct. App. 1982). Plasman accepted payment and other benefits under the Operating Agreement for nearly a decade, both as a member and as an employee of Bolier, and is only now attempting to impermissibly make post hoc modifications to the clear written terms.

Plasman's reliance on *Byrd v. Tidewater* lends him no support. In *Byrd*, *Byrd v. Tide Water Power Co.*, 172 S.E. 183, 184 (N.C. 1934), the plaintiff purchased ten shares of preferred stock in a corporation with a contracted agreement that the defendant would repurchase the shares of stock at $96 per

share. *Id.* The stock certificate stated that shares were redeemable by the defendant for $110 per share, but did not mention repurchase at the request of the plaintiff. *Id.* The court held that the plaintiff was entitled to $960 and that both the oral and written agreements were enforceable, as the "oral terms are not at variance with the" written terms. *Id.* The alleged oral agreement in this case directly contradicts the Operating Agreement. Thus, *Byrd* is inapplicable. The Court should affirm dismissal.

4. Plasman failed to identify any contractual provision that requires Decca USA to provide Plasman with certain information.

The Complaint does not allege in either a direct or a derivative claim that Decca USA breached any particular provision of the Operating Agreement by failing to provide certain information. (*See* R pp 683-86.) Moreover, none of the cited provisions require that Decca USA provide Plasman with any particular information. Plasman failed to establish how any alleged failure to provide this information breached the Operating Agreement.

5. Plasman's claim for breach of the licensing agreement fails.

Plasman contends that Decca China breached the licensing and royalty agreements by paying less royalties than were required "based on misrepresentations relating to sales amounts and purported Chinese furniture quotas, taxes, and other fees that were improperly claimed to require lower royalty payments." (Br. at 26.) However, Plasman never alleged that the explanation for the purported reduction in royalties was incorrect or inconsistent with the terms of

the contract. (*See* R p 684.) In fact, Plasman failed to identify any specific terms of the licensing agreement, how royalties were to be calculated, and how the actual calculations constituted a breach. Thus, Plasman has not sufficiently alleged the terms of the licensing agreement or how it was allegedly breached.

6. Chris Plasman's claim for breach of the Contract Services Agreement fails.

A valid contract requires (1) assent, (2) mutuality of obligation, and (3) definite terms. *Schlieper v. Johnson*, 672 S.E.2d 548, 553 (N.C. Ct. App. 2009). Further, "[a]n allegation that a valid contract exists between parties is a legal conclusion," and it is not entitled to a presumption of validity at this stage. *Charlotte Motor Speedway, LLC v. Cty. of Cabarrus*, 748 S.E.2d 171, 175 (N.C. Ct. App. 2013).

Plasman failed to identify the terms of those Contract Services Agreements or how any of the services performed breached particular terms of those agreements. Rather, Plasman provides a bare legal conclusion that a contract existed and was breached. (*See* R pp 683, 664.) Absent sufficient allegations of fact to support those contentions, Plasman's breach of contract claim fails. *See Guarascio v. New Hanover Health Network, Inc.*, 592 S.E.2d 612, 614 (N.C. Ct. App. 2004) (holding that assertion that valid contract existed was a legal conclusion "not entitled to a presumption of truth") (citations and quotations omitted).

B. Chris Plasman's Claims for Breach of Fiduciary Duty, Constructive Fraud, Self-Dealing, and Misappropriation of Corporate Opportunities Were Properly Dismissed by the Business Court.

A myriad of tort claims alleged in the Complaint based upon acts that are expressly authorized by the Operating Agreement and Employment Agreement or that are covered by the business judgment rule fail to state a claim against Defendants. Plasman failed to allege any duty owed by Defendants, other than the duties owed by Decca USA (none of which were breached), and therefore the Business Court correctly dismissed those claims. Further, Plasman's reliance upon the same facts that failed to state a breach of contract claim likewise fail to state a breach of fiduciary duty claim for the reasons discussed in Sections I.A.1 through I.A.4. The claim for constructive fraud premised entirely upon the faulty fiduciary duty claims was also properly dismissed. Lastly, the licensing agreements alleged in the Complaint defeat the claims for misappropriation of corporate opportunities.

1. Plasman's alter-ego theory failed to establish that all Defendants owed fiduciary duties to Plasman or Bolier.

The Business Court correctly determined that the allegations against Defendants did not allege any fiduciary duties owed to Plasman or Bolier apart from duties owed by Decca USA.

"It is fundamental that a fiduciary relationship must exist between the parties in order for a breach of fiduciary duty to occur." *S.N.R. Management Corp. v. Danube Partners 141, LLC*, 659 S.E.2d 442, 451 (N.C. Ct. App. 2008). "[I]n North Carolina, parties to a contract do not thereby become each others' fiduciaries; they generally owe no special duty to one another beyond the terms of the contract . . ."

Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 348 (4th Cir. 1998). A fiduciary relationship exists "in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence [and] . . . in which there is confidence reposed on one side, and resulting domination and influence on the other." *Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 391 S.E.2d 831, 833 (N.C. Ct. App. 1990).

Plasman's theory is that Defendants owed a fiduciary duty to him by promising that Bolier would be run as a 50/50 partnership and that he would only be a minority member on paper. (Br. at 17) However, Plasman alleged that he was "an experienced furniture executive" (R. p 660 ¶ 35) and that Plasman approached Tsang and Herbst about developing the Bolier Brand (R. p 660 ¶ 42). There are no allegations that suggest that Tsang, Herbst, or Defendants exerted domination and control over Plasman such that any fiduciary duty would be owed. (*See generally* R. p 655-700). Furthermore, the Articles of Organization for Bolier expressly disclaimed any oral agreement between the members (R p 28) and the Operating Agreement established Plasman as a 45% owner (R p 46).

Plasman now claims in conclusory fashion that Decca China "financially held all of the cards through compete control of furniture supply" (Br. at 9). Even accepting this allegation as true, Plasman failed to point to any North Carolina law that would support such a broad imputation of a fiduciary duty when a contract governs the relationship between the parties, much less on an alter ego basis

against all Defendants. Plasman's conclusory assertion that Bolier obtained furniture from Decca China does not establish that Decca China owed fiduciary duties to Plasman or Bolier, much less the other Defendants (other than Decca USA) who are not even specifically referenced. *See Broussard*, 155 F.3d at 335, 348 (rejecting existence of fiduciary duty in a case involving a franchisee/franchisor with exclusive advertising supply requirements).

Further, Plasman's conclusory allegations regarding alter-ego liability are insufficient to support Plasman's contention that each Defendant owed fiduciary duties to Bolier (or more generally to assert that each Defendant should be liable for each claim brought against any other Defendant). *See, e.g.*, *B-W Acceptance Corp. v. Spencer*, 149 S.E.2d 570, 576 (N.C. 1966) (stating that alter-ego theory was "unsound" where counterclaim alleged "conclusions" about alter ego liability but did "not allege facts to show that [one party] had complete domination not only of the finances but of policy and business practice of" the others"); *Gauthier v. Shaw Grp., Inc.*, No. 3:12-CV-00274-GCM, 2012 WL 6043012, at *3 (W.D.N.C. Dec. 4, 2012) ("[C]onclusory, unsupported allegations alone are insufficient to support an alter ego claim.")

The Complaint failed to establish any duty owed by Defendants to Bolier or Plasman, other than duties owed by Decca USA (none of which were breached).

2. Chris Plasman's derivative claim for breach of fiduciary duty was properly dismissed.

As discussed above, only Decca USA (and no other Defendants) owed duties to Plasman and Bolier, and those duties were clearly outlined in the governing

written agreements. The heart of Plasman's derivative fiduciary duty claim centers around standard management activities that are expressly authorized by the Operating Agreement, or covered by the business judgment rule, and therefore Plasman failed to identify any breaches.

The business judgment rule is a "presumption that in making a decision the directors acted with due care (i.e., on an informed basis) and in good faith in the honest belief that their action was in the best interests of the corporation, and second, absent rebuttal of the initial presumption, a powerful substantive presumption that a decision . . . will not be overturned by a court *unless it cannot be attributed to any rational business purpose*." *Winters v. First Union Corp.*, 2001 N.C.B.C. 8, *10-11 (N.C. Bus. Ct. 2001) (granting motion to dismiss because complaint failed to allege facts to overcome the presumption of the business judgment rule) (emphasis in original).

The Operating Agreement provides that Chris Plasman is a 45% owner and Decca USA is a 55% owner of Bolier. (R p 46). The Operating Agreement clearly vested management of Bolier with Decca USA. (R pp 47-48). The allegations in the Complaint purporting to establish a breach of fiduciary duty are clearly acts that fall within Decca USA's authority to make management decisions and that are clearly covered by the business judgment rule. Specifically, the allegations include operating a furniture showroom, managing employees, implementing sales plans, overseeing orders, managing company services, and general management. (Br. at 10-13). These allegations fail to overcome the presumption of reasonableness and it

is not the place of this Court to judicially second-guess management decisions. *See Winters*, 2001 N.C.B.C. at *10.

Further, the Operating Agreement specifically contemplated that Bolier's managers would employ shared individuals and entities to provide services to Bolier. (*See* R p 48 § 6.1(c)(ii).) Plasman failed to explain what "allocating" various expenses or items means and how those acts breach fiduciary duties owed to Bolier. Rather, the Complaint is conclusory, vague, fails to adequately identify the nature of the conduct complained about, and does not overcome the presumption of the business judgment rule. Further, Plasman's claims pertaining to orders being fulfilled by other entities are not actionable because Plasman entered into licensing agreements on behalf of Bolier

As discussed above, Decca USA had the right to terminate Plasman's employment, and Plasman had no reasonable expectation of indefinite employment with Bolier. (*See* Section I.A.1-2 infra). Therefore, Plasman's termination did not breach any fiduciary duty because it was expressly contemplated by contract. Further, with respect to Plasman's allegations of redirecting furniture and finances, the alleged "redirection" occurred after Plasman's termination and during the time that Plasman improperly hijacked Bolier's operations. (R p 672.) Defendants' efforts to regain control over Bolier's finances and furniture from Plasman is not a breach of fiduciary duty to Bolier.

Plasman also alleged that "Decca Defendants caused $286,21.27 [sic] to be transferred from Bolier to Decca China" (Br. at 12); however, what Plaintiff failed to

specify is that these are the funds that the Plasmans improperly diverted from Bolier after they opened a false bank account for Bolier and re-directed customer payments. (*See* R pp 532-50, 671-72.) The Federal Court halted this improper conduct by the Plasmans and directed them to return the diverted customer payments. (R pp 933-39.)

Next, allegedly failing to provide Plasman with information or vote on the items he noticed for vote does not breach any fiduciary duties owed to Bolier or Plasman. As Plasman's brief provides, there is a duty to disclose all material facts in the context of a fiduciary relationship. *Harris v. Testar, Inc.*, 777 S.E.2d 776, 780 (N.C. Ct. App. 2015) (determining that director breached fiduciary duties by failing to disclose his personal criminal charges when the nature of the corporation's business required that it maintain accurate criminal records for all employees). However, Plasman does not explain (1) the nature of the information that Defendants allegedly failed to disclose, or (2) how that information was material to Bolier's operations. As demonstrated by the Exhibits to the Complaint, Plasman routinely sought vast categories of information from Decca USA that have no material bearing on Bolier's business.

The fiduciary duty claims hinge on actions that are expressly contemplated by the Operating Agreement and Employment Agreement and are entitled to a presumption of reasonableness under the business judgment rule. This claim was properly dismissed.

3. The Operating Agreement and licensing agreement entered into by Plasman defeat the claim for misappropriation of corporate opportunities.[4]

To determine whether a corporate opportunity has been usurped, the Court looks at: "1) the ability, financial or otherwise, of the corporation to take advantage of the opportunity; 2) whether the corporation engaged in prior negotiations for the opportunity; 3) whether the corporate director or officer was made aware of the opportunity by virtue of his or her fiduciary position; 4) whether the existence of the opportunity was disclosed to the corporation; 5) whether the corporation rejected the opportunity; and 6) whether the corporate facilities were used to acquire the opportunity." *Lowder v. All Star Mills, Inc.*, 330 S.E.2d 649, 654 (N.C. Ct. App. 1985) (citations omitted).

Plasman failed to allege any specific corporate opportunities that were diverted from Bolier. Plasman claims that other furniture was shown in Bolier's showroom and that employees supported multiple lines of business; however, this is specifically contemplated by the Operating Agreement. (R p 48 § 6.1(c)(ii)). Moreover, there are no allegations that customers purchased another line of furniture in lieu of Bolier's furniture based upon these alleged practices.

Further, Plasman admits that he entered into a licensing agreement by which Bolier was paid royalties for certain sales. (R p 666-67, ¶¶ 135-37.) Thus, it is nonsensical for Plasman to allege that Defendants usurped Bolier's corporate

[4] Plasman failed to advance any claims in support of his direct misappropriation of corporate opportunities claim, so this claim is abandoned. Further, it otherwise fails because any harm would be to Bolier, not Plasman.

opportunities by making such sales to third parties when Plasman himself agreed to the license on behalf of Bolier. Plasman provides no factual support suggesting that such royalty payments are improper or deficient, and more generally no facts alleging what other undefined "corporate opportunities" were allegedly misappropriated. Thus, Plasman's own allegations defeat this claim.

C. Chris Plasman Failed to State a Claim for Judicial Dissolution and *Meiselman Relief.*

In the alternative, Plasman seeks dissolution of Bolier pursuant to N.C. GEN. STAT. § 57C-6-02 (2013). (R p 698-99.) The statute allows a court to dissolve an LLC if a member establishes: (1) management deadlock; (2) liquidation is reasonably necessary to protect the plaintiff's rights or interests; (3) misapplication or wasting of assets; or (4) the articles of organization or a written operating agreement entitle the plaintiff to dissolve the company. N.C. GEN. STAT. § 57C-6-02(2) (2013). Plasman failed to establish a right to dissolution under any of these provisions.

First, Decca USA and Plasman are not deadlocked. Plasman alleges that Decca USA's and Herbst's refusal to vote on items Plasman noticed for vote establishes deadlock. (R p 698, ¶ 507.) However, deadlock occurs where two equal owners cannot agree on a course of action, not where the majority simply takes an action that displeases the minority. *See In re: Klingerman*, No. 07-02455-5ATS, 2008 Bankr. LEXIS 4555, at *9 (Bankr. E.D.N.C. Aug. 6, 2008) (finding a deadlock between two managers with a 50-50 ownership allocation). Because Decca USA does not need Plasman's consent to take any management actions, Bolier's members are not deadlocked.

Second, the Complaint does not sufficiently plead that liquidation is reasonably necessary for the protection of Plasman's rights or interests. "[B]efore it can be determined whether, in any given case, it has been 'established' that liquidation is 'reasonably necessary' to protect the complaining shareholder's 'rights or interests,' the particular 'rights or interests' of the complaining shareholder must be articulated." *Meiselman v. Meiselman*, 307 S.E.2d 551, 562 (N.C. 1983). Pursuant to *Meiselman*, a complaining minority shareholder must allege and prove that "he had one or more substantial reasonable expectations that were known or assumed by the other shareholders." *Royals v. Piedmont Elec. Repair Co.*, 529 S.E.2d 515, 518 (N.C. Ct. App. 2000) (analyzing *Meiselman*).

Plasman argues that Decca USA and Tsang have conflicts of interest in the ownership and management of Bolier and that Decca USA and Tsang are not managing Bolier in its best interest. (R p 698, ¶¶ 504-06, 508-09.) The statute does not provide a right to dissolution simply because the minority member feels that the majority in interest is not running the company as he would. Rather, Plasman must allege facts showing that he was deprived of a substantial reasonable expectation of a right or interest as a minority member. The Complaint makes no such allegations. Indeed, Plasman had no expectation, much less a substantial reasonable expectation, that he would be employed indefinitely as an officer of Bolier. *See* Section I.A.1. Thus, Plasman failed to sufficiently allege that liquidation is reasonably necessary for his protection.

Third, Plasman failed to allege a "specific act or conduct" on the part of the Defendants that constitutes waste or demonstrates the misapplication of the LLC's assets. Plasman pleads no facts sufficient to warrant setting aside the business judgment of Bolier's leadership. *See generally Hammonds v. Lumbee River Elec. Membership Corp.*, 631 S.E.2d 1, 13 (N.C. Ct. App. 2006). Instead, the Complaint lists various unsupported complaints and legal conclusions. (*See, e.g.*, R pp 667-68, ¶¶ 147-49; 698, ¶¶ 504-05, 508-09.) Plasman's claims fall well short of substantiating Defendants' alleged waste or misapplication of Bolier's assets. Fourth, the Articles of Organization and Operating Agreement do not entitle Plasman to dissolve Bolier. (R p 55 at §8.1.)

Plasman contends that the Business Court "utilized an improper analysis below" and that the trial court did not focus on whether Plasman has rights or interests that are in need of protection. (Br. at 31.) This is inaccurate, as the Business Court noted that Plasman "alleges that various Defendants breached other oral and other unidentified contracts ensuring that Chris Plasman would . . . always be [Bolier's] top officer. . . . Chris Plasman alleges that these contracts arose from the parties' course of dealings, *Meiselman*-type expectations, and other inexact sources." (R p 1038.) The Business Court found that these allegations contradicted the clear terms of the Operating Agreement." (R pp 1038-39.) Thus, the Business Court expressly considered whether Plasman had *Meiselman* rights in need of protection and correctly determined that he did not.

D. Chris Plasman Failed to State Claims for Fraud, Conspiracy to Defraud, and Obtaining Property Under False Pretenses.

To state a claim for fraud, a plaintiff must show: the (1) false representation or concealment of a material fact; that is (2) reasonably calculated to deceive; (3) made with intent to deceive; (4) does deceive; and (5) damages. *Ragsdale v. Kennedy*, 209 S.E.2d 494, 500 (N.C. 1974). "In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." N.C. R. Civ. P. 9(b). These circumstances include the "time, place and content of the fraudulent representation, identity of the person making the misrepresentation and what was obtained as a result of the fraudulent acts or representations." *Foster v. Wells Fargo*, N.A., No. COA13-974, 2014 N.C. App. LEXIS 803, at *6-7 (N.C. Ct. App. March 4, 2014).

Plasman makes conclusory allegations of fraud that cannot withstand scrutiny under the heightened pleading requirements of Rule 9. Indeed, Plasman does not identify the purported misrepresentation, who made any such misrepresentation, or that any alleged misrepresentations or concealment of material fact were made with the intent to deceive, reasonably calculated to deceive, or in fact did deceive him. Instead, he vaguely alleges that Defendants were "making material misrepresentations[.]" (R p 690, ¶ 421.) With regard to the time, place, or contents of any alleged misrepresentation, Plasman implies that some purportedly wrongful behavior occurred in 2003 (R p 661, ¶ 61), and fails to provide any temporal reference whatsoever for others (R p 661, ¶¶ 62- 64; R p 690, 418-19.).

Plasman also failed to allege the specific contents of how he relied on Defendants' alleged fraudulent statements. (*See id.* R pp 690-92, ¶¶ 418-38.)

Plasman cites to paragraph 335 of the Complaint, which states "[r]epresentations made by Herbst, Decca USA, Tsang and Decca China from 2009 to the present were intended to deceive by omitting material information . . . and were made with the intent to deceive Bolier and Plasman. Bolier and Plasman detrimentally relied on representations of Herbst, Decca USA, Tsang and Decca China." (R p 681, ¶ 635.) Plasman does not point to any other allegations suggesting he detrimentally relied on misrepresentations made by the other Defendants against which he asserts his fraud claim or that those Defendants intended to deceive him, such as Tin and Decca Hospitality. Further, these allegations are legal conclusions that need not be taken as true at this stage of the litigation.

Additionally, North Carolina does not recognize a standalone action for civil conspiracy. *Esposito v. Talbert & Bright, Inc.*, 641 S.E.2d 695, 698 (N.C. Ct. App. 2007). Thus, a conspiracy claim is dependent upon an underlying, actionable tort. In addition, "Plaintiff cannot . . . use the same alleged acts to form both the basis of a claim for conspiracy to commit certain torts and the basis of claims for those torts." *Jones v. Greensboro*, 277 S.E.2d 562, 571 (N.C. Ct. App. 1981), *overruled on other grounds by Fowler v. Valencourt*, 435 S.E.2d 530 (N.C. 1993). Here, the Plasman's fraud based claims fail, so Plasman's conspiracy to defraud claim necessarily fails. His claim additionally fails because Plasman has not included any

allegations distinct from the underlying tort – rather, he specifically relies on the same exact allegations for both. (R pp 690-691.)

Plasman's claim for obtaining property under false pretenses also fails. *See* N.C. GEN. STAT. Ann. § 14-100(a) (defining the crime); N.C. GEN. STAT. Ann. § 1-538.2 (allowing civil remedies). The allegations center around excluding Plasman from Bolier's premises and taking control of Bolier's financial accounts. (R p 691-92.) Decca USA had the authority to terminate Plasman's employment with Bolier. *See* Section I.A.1. Therefore, any Bolier property (including the premises and financial accounts) could properly be controlled by Decca USA. The Business Court properly dismissed this claim.

E. Chris Plasman Failed to State Claims for Tortious Interference with Contract.

The elements of tortious interference with contract are: (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) defendant knew of the contract; (3) defendant intentionally induced the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damages to the plaintiff. *Embree Constr. Group, Inc. v. Rafcor, Inc.*, 411 S.E.2d 916, 924 (N.C. 1992). "An essential element of a claim for tortious interference with a contract is that 'the defendant intentionally induces the third person not to perform the contract.'" *Griffith v. Glen Wood Co.*, 646 S.E.2d 550, 555 (N.C. Ct. App. 2007).

Plasman contends "[t]he subject contracts and potential contracts are those of customers purchasing Bolier furniture," relying on paragraphs 441 through 449 of

the Complaint. (Br. at 34.) However, Plasman never alleges that Bolier or any customers actually breached a contract to purchase furniture as a result of Defendants' alleged interference. (R p 692.) Thus, Plasman's claim fails.

Additionally, Plasman's tortious interference with contract claim should be dismissed because Decca USA is essentially a party to any alleged contract as a result of its status as a managing member of Bolier. (R p 1056.) As a party to the contract, Decca USA cannot be held liable for allegedly interfering with that contract. *See Wagoner v. Elkin City Sch.'s Bd. of Educ.*, 440 S.E.2d 119, 124 (N.C. Ct. App. 1994) (determining that trial court properly granted summary judgment on interference claim where defendants were parties to the contract).

Plasman appears to conflate Decca USA, as a party to the contract, with Decca China, Tin, Herbst, and Tsang, who are allegedly "non-outsiders" to the contract. (Br. at 34.) A party to a contract is not the same as a non-outsider to a contract. Rather, "[a] non-outsider is one who, though not a party to the terminated contract, had a legitimate business interest of his own in the subject matter." *Smith v. Ford Motor Co.*, 221 S.E.2d 282, 292 (N.C. 1976). Thus, to the extent that Plasman contends that allegations of malice would allow him to successfully plead a claim against Decca USA, those claims are without merit.

With respect to the allegations against Decca China, Tin, Herbst, and Tsang, a non-outsider to a contract can be liable for tortious interference if the non-outsider acts with "legal malice." *Varner v. Bryan*, 440 S.E.2d 295, 298 (N.C. Ct. App. 1994). "A person acts with legal malice if he does a wrongful act or exceeds his legal right

or authority in order to prevent the continuation of the contract between the parties." *Id.* Plasman has not sufficiently alleged that Decca China, Tin, Herbst, and Tsang acted with malice. *Pinewood Homes, Inc. v. Harris*, 646 S.E.2d 826, 833 (N.C. Ct. App. 2007) ("[G]eneral allegations of malice are insufficient as a matter of pleading.") This claim was properly dismissed.

F. Chris Plasman Failed to State Claims for Tortious Interference with Prospective Economic Advantage.

A plaintiff must show that the defendant "induced a third party to refrain from entering into a contract with Plaintiff without justification" in order to state a claim for tortious interference with prospective economic advantage. *DaimlerChrysler Corp. v. Kirkhart*, 561 S.E.2d 276, 286 (N.C. Ct. App. 2002) (internal citation omitted). Additionally, Plaintiff must show that the contract would have ensued but for Defendants' interference. *Id.*

Plasman contends that the "potential contracts are those of customers purchasing Bolier furniture." (Br. at 34.) However, the referenced portions of the Complaint do not allege that prospective or potential customer opportunities existed or that those customers refrained from entering into a contract with Bolier as a result of any Defendant's interference. (See R p 692-93, ¶¶ 441-49.) Therefore, Plasman's claim for prospective interference was properly dismissed.

G. Chris Plasman Failed to State a Claim for Conversion.

To state a claim for conversion, a plaintiff must allege: (1) ownership in the plaintiff and (2) wrongful possession or conversion by the defendant. *Variety Wholesalers, Inc. v. Salem Logistics Servs., LLC*, 723 S.E.2d 744, 747 (N.C. 2012).

As the Majority in Interest, Decca USA has the sole right to possess and control Bolier property – not Plasman. Accordingly, Plasman's allegation that furniture "diverted to Decca USA" (R p 693, ¶ 452) somehow constitutes conversion is misplaced. Plaintiff's alleged 'money conversion' claims likewise do not pass muster. Plasman's brief contends that Decca USA "exercised independent 'ownership' over the furniture to the 'exclusion' of Bolier, and it did the same as the money was transferred to Decca China to the 'exclusion' of Bolier." (Br. at 35.) However, these arguments are not supported by the paragraphs cited by Plasman. (*See* R p 693, ¶¶ 451-57.) Rather, Plasman alleges that certain furniture was "diverted to other destination[s]," that the "money in the Bank of North Carolina established for use by Bolier was transferred to and converted by Decca China," and that certain Defendants "direct[ed] Bolier property and funds to exclusive control by Decca USA." (*See id.*)

Plasman's primary complaint appears to be that after Plasman hijacked Bolier's operations by refusing to accept his termination, Decca USA took steps to regain control over Bolier. This included securing the funds from the Bank of North Carolina account, which the Plasmans improperly opened on behalf of Bolier following their termination. (R p 1063, 536-38.) This also included managing shipments of furniture intended for Bolier after Plasman's termination. (*See* R p 672, ¶ 214 (alleging that "around November 9, 2012, Cindy Tin directed shipments from Decca China Plant and other Decca Group businesses bound for Bolier to be

delivered to Decca USA).) Defendants' attempts to secure Bolier's finances and furniture after Plasman was terminated are not grounds for a conversion claim.

Finally, with respect to Bolier's website, Plasman alleges that Bolier's website was registered and owned by Plasman in his personal capacity, and that Decca China high-jacked Bolier's website and committed conversion. (Br. at 35-36.) This claim is brought derivatively – not directly. Because the website was alleged to be owned by Plasman and not Bolier, the derivative claim fails. Even considering the claim on its merits, the Complaint contains no more than conclusory allegations that the website was "converted," without providing any detail regarding the nature of this alleged conversion. (*See, e.g.* R p 693, ¶ 458.) These conclusory allegations are insufficient to state a claim.

H. Chris Plasman Failed to State a Claim for Defamation.

"To be actionable, a defamatory statement must be false and must be communicated to a person or persons other than the person defamed." *Ward v. Jett Props., LLC*, No. COA08-1508, 2010 N.C. App. LEXIS 210, at *7 (N.C. Ct. App. Feb. 2, 2010). Plasman alleges that a letter from Decca to Bolier's customers and a letter from Decca's undersigned counsel to Bank of North Carolina are libelous. (R p 694, ¶¶ 468-70.) However, Plasman failed to identify which statements in these letters are libelous, instead generally alleging that the customer letter contains "numerous" untrue statements and the letter to Bank of North Carolina "contains obvious omissions and clear mischaracterizations . . . ." (R p 694, ¶¶ 468, 470.) By failing to allege which statements are false, Plasman failed to state a claim for libel.

See Ward, 2010 N.C. App. LEXIS at *9 (upholding dismissal of complaint where the plaintiff merely "allege[d] that defendant's letter subjected him to 'public scorn, contempt, ridicule and disgrace'").

North Carolina defines slander as "oral defamation." *See Donovan v. Fiumara*, 442 S.E. 2d 572, 574 (N.C. Ct. App. 1994). There are two classes of oral defamation: slander per se and slander per quod. "That is, the false remarks in themselves (per se) may form the basis of an action for damages, in which case both malice and damages are . . . presumed; or the false utterance may be such as to sustain an action only when causing some special damage (per quod), in which case both the malice and the special damage must be alleged and proved." *Id.* (citations omitted). North Carolina courts have held that the only statements constituting slander per se are those involving: (1) crime or offense involving moral turpitude; (2) impeachment of trade or profession; or (3) loathsome disease. *Id.* at 575.

Plasman alleged that Tin made certain false statements to Bolier's employees. (R p 461, ¶¶ 461-65). The only statement which Plasman claims impeached him in his profession is that Plasman claimed to own 100% of Bolier. (*Id.* ¶ 463). Plasman, however, does not allege how this statement impeached his profession because he agreed to be a minority owner of Bolier in writing. It is unclear how such a statement, if made, imputes to Plasman "conduct derogatory to his character and standing as a business man and tending to prejudice him in his business . . . ." *Zubaidi v. Earl L. Pickett Enters.*, No. COA05-1582, 2006 N.C. App.

LEXIS 1809, at *10 (N.C. Ct. App. Aug. 15, 2006). Consequently, the alleged statement pertaining to Plasman's ownership of Bolier cannot support a claim for slander per se. Regarding allegations concerning Plasman misappropriating Bolier's funds, those statements cannot form the basis for a libel claim because they are true. The documents attached to the pleadings establish that "Christian Plasman and Barrett Plasman on behalf of Bolier & Company, LLC opened the bank account with Bank of North Carolina on October 24, 2012 to facilitate Bolier & Company, LLC's continued operation." (R p 537.) At that time, Chris Plasman had no authority to act on behalf of Bolier and ultimately misappropriated Bolier's funds by opening and utilizing that account. On the remaining alleged slanderous statements, Plasman failed to allege malice and special damages.

Further, to recover for defamation, a plaintiff must show "that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person." *Boyce & Isley v. Cooper*, 568 S.E.2d 893, 897 (N.C. Ct. App. 2002) (emphasis added). Statements made within a company, even if defamatory, cannot support a defamation claim against the company because there is no publication to a third person. *See Satterfield v. McCellan Stores*, 2 S.E.2d 709 (N.C. 1939) (holding there was no publication for purposes of defamation where a company manager and stenographer communicated regarding plaintiff's alleged misconduct); *Reikowski v. Int'l Innovation Co.*, No. 3:12CV854, 2013 U.S. Dist. LEXIS 18048 (W.D.N.C. Feb. 11, 2013) (dismissing defamation claim for lack of publication where all statements

occurred between agents and employees of the defendant).[5] Plasman's libel and slander allegations fail.

I. Chris Plasman Failed to State a Claim for Misappropriation of Trade Secrets.

Misappropriation of a trade secret is prima facie established by the introduction of substantial evidence that the person against whom relief is sought (1) knows or should have known of the trade secret and (2) has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner. *See* N.C. GEN. STAT. § 66-155. To plead misappropriation of trade secrets, "a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur. . . . [A] complaint that makes general allegations in sweeping and conclusory statements, without specifically identifying the trade secrets allegedly misappropriated, is 'insufficient to state a claim for misappropriation of trade secrets.'" *Washburn v. Yadkin Valley Bank & Trust Co.*, 660 S.E. 2d 577, 585 (N.C. Ct. App. 2008).

Plasman failed to identify any such trade secret, generically referring to Bolier's "business records" as "confidential information and trade secrets," or how

[5] In *White v. Trew*, 720 S.E.2d 713 (N.C. Ct. App. 2011), *rev'd on other grounds*, 736 S.E.2d 166 (N.C. 2013), this Court held that statements in an employee's annual review that were subsequently shared with other management employees could constitute a published communication because the individual who read the communications was independent of the process by which the communications were produced. This is inapplicable where, as here, the individuals who heard the allegedly defamatory statement at the meeting were not independent of the process by which the communications were produced.

any such information has been misappropriated. (R p 695, ¶ 475.) Moreover, Plasman alleged that "Casey and Herbst caused Bolier employees to use Bolier's confidential pricing information," (*id.* ¶ 478), but does not allege how the Majority in Interest's access to Bolier's pricing information constitutes misappropriation of Bolier's trade secrets. Because Decca USA is the majority in interest of Bolier, it necessarily acquired any alleged trade secret with authority to do so.

Accordingly, the order dismissing Plasman's claim for misappropriation of trade secrets should be affirmed.

J. Chris Plasman Failed to State a Claim for Unfair and Deceptive Trade Practices.

To succeed on a claim under North Carolina's Unfair and Deceptive Trade Practices Act ("NCUDTPA"), a plaintiff must show: "(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business." N.C. GEN. STAT. § 75-1.1 (2013); *McLamb v. TP. Inc.*, 619 S.E.2d 577, 582–83 (N.C. Ct. App. 2005).

As discussed above, Plasman's defamation claim fails, so it cannot form the basis for a NCUDTPA claim. As to Decca China's alleged unfair furniture supply practices, an act that falls within NCUDTPA must violate industry standards, offend established public policy, injure customers, or deceive or be likely to deceive. *See generally McInerney v. Pinehurst Area Realty, Inc.*, 590 S.E.2d. 313 (N.C. Ct. App. 2004). Plasman alleges that Decca China "cut off supply of products for their 'own interests,'" citing to paragraph 390 of the Complaint. (Br. at 39.) Notably,

Plasman's Complaint limits this claim in time to after his termination, arguing that "[f]ollowing October 19, 2012, Decca Defendants cut off supply of Bolier products and disrupted Bolier's operations for Decca Defendants' own purposes . . . ." (R pp 687, ¶ 390; 671, ¶¶ 197-98.) It is neither unfair nor deceptive to attempt to regain control of Bolier's operations after Plasman improperly hijacked them. Nor is it unfair or deceptive not to send Bolier furniture to Plasman, because Plasman had no authority act on behalf of Bolier at that time.

With respect to the allegation regarding Contract Services, the acts or practices alleged are not "in or affecting commerce." NCUDTPA governs interactions among and between businesses and consumers, not a company's "internal operations." *White v. Thompson*, 691 S.E.2d 676, 678 (N.C. 2010). Indeed, "any unfair or deceptive conduct contained solely within a single business is not covered by the Act." *Id.* at 680. Here, many of Plasman's allegations under NCUDTPA only speak of purported unfairness internal to Bolier. In particular, Plasman's primary complaint appears to be that Decca USA should have negotiated more favorable terms for Bolier, which is internal since Decca USA was acting on Bolier's behalf. Where the alleged unfairness was directed solely within a business entity or at an internal business partner, a NCUDTPA claim cannot survive. *Id.* Consequently, Defendants' alleged actions fall outside the scope of NCUDTPA.

Additionally, Plasman's reliance on *Sara Lee Corp. v. Carter*, 519 S.E.2d 308 (N.C. 1999) is misplaced. In *Sara Lee*, the Supreme Court held that Section 75-1.1 would apply to the defendant's self-dealing activities wherein he sold goods and

services to his employer from companies owned by him. *Id.* However, *Sara Lee* was dependent upon the trial court's determination that the defendant engaged in self-dealing and had not informed the plaintiff-employer of his self-interest. *Id.* In this case, Plasman's allegations of self-dealing fail.

Finally, with respect to competitive furniture, nothing in the Complaint indicates why these acts are any different from typical, legal commercial activity that is expressly contemplated by the Operating Agreement (R p 48 § 6.1(c)(ii)) — let alone how they are unfair or deceptive. Plasman does not explain whether any conduct (such as showing more than one furniture line in one location and utilizing employees to support multiple furniture lines) falls outside standard industry practice. *Sunbelt Rentals, Inc. v. Head & Engquist Equip., LLC*, 2003 NCBC LEXIS 6, at *145-46 (N.C. Super. Ct. May 2, 2003) ("The appellate court decisions dealing with unfair competition . . . demonstrate an awareness that competition is healthy and not to be unduly discouraged.") *aff'd* 620 S.E.2d 222 (N.C. Ct. App. 2005). Plasman's claim were properly dismissed by the Business Court.

K. Chris Plasman Failed to State a Claim for Violations of the LLC Act.

Notably, § 57D-2-30 makes clear that the Operating Agreement sets forth the rights and duties of the parties involved, except in very limited circumstances. Plasman not only failed to identify what information has been allegedly withheld from him but he also failed to establish that such unidentified information is included in the limited information rights set forth by § 57D-3-04.

Now, Plasman argues that this claim also includes allegations relating to "good faith, reasonableness, bests interests and loyalty." Notably, these alleged reasons for liability are not clearly articulated in the Complaint. (*See* R p 697, ¶¶ 495-97.) Rather, the Complaint solely explains Decca USA's alleged failure to provide information and voting on matters requested by Plasman. (*See id.*) Even if they were alleged, however, and as described in more detail throughout this brief, Plasman has failed to sufficiently allege that Defendants engaged in any misconduct that would support his generic "good faith, reasonableness, bests interests and loyalty" allegations. Accordingly, this Court should affirm dismissal of the § 57D claim.

L. Chris Plasman Failed to State a Claim for Violations of the Wage and Hour Act.

Under the N.C. Wage and Hour Act ("Act"), "[e]mployees whose employment is discontinued for any reason shall be paid all wages due . . . ." N.C. GEN. STAT. § 95-25.7 (2011). Plasman was terminated on October 19, 2012. The Act only allows an employee to collect wages that have been earned. *See Stec v. Fuzion Inv. Capital, LLC*, 2012 NCBC 24 ¶ 45 (granting motion to dismiss claim for wages allegedly owed after termination). The claim appears to be premised on Plasman's mistaken supposition that he could never be terminated as a Bolier employee. The Employment Agreement and Operating Agreement make clear that Plasman may be terminated with or without cause, without a vote, and effective immediately. *See* Section I.A.1. Moreover, Plaintiff clearly misunderstands the Act because Plaintiff attempts bring a derivative claim under the Act on behalf of Bolier for wages;

however, because Bolier is not an employee, it cannot recover wages under the Act. Because Plasman was terminated, he is not entitled to collect any wages.

M. Chris Plasman Failed to State a Claim for Piercing the Corporate Veil.

"Piercing the corporate veil is not an independent cause of action. Rather, piercing the corporate veil is a method of imposing liability on an underlying cause of action." *Shearson Lehman Hutton, Inc. v. Venners*, No. 97-1949, 1998 U.S. App. LEXIS 28005, at *5 (4th Cir. Oct. 13, 1998); *see also Green v. Freeman*, 756 S.E.2d 368, 372 (N.C. Ct. App. 2014) ("Agency, like piercing the corporate veil, is not itself a cause of action. . . ." (emphasis added)). Further, *Green v. Freeman,* 749 S.E.2d 262, 271 (N.C. 2013) does not hold that piercing the corporate veil is an independent cause of action – rather, it makes clear that "it is not a theory of liability," but instead provides an avenue to pursue recovery against other individuals. *Id.* Thus, the Court should affirm dismissal of this claim.

N. Appointment of a Receiver is not Warranted.

A receiver may be appointed before judgment where a party (1) "establishes an apparent right to property which is the subject of the action;" (2) that property is "in the possession of an adverse party;" and (3) the property is "in danger of being lost, or materially injured or impaired . . . ." N.C. GEN. STAT. Ann. § 1-502(1). Decca USA has the right to all property identified in the Complaint and the right to make decisions regarding that property. Further, Plasman failed to allege that any property is in danger of being lost. Instead, he only alleges disagreement with the

Defendants' business decisions. Finally, and as discussed herein, Plasman cannot succeed on any of his claims, which necessarily bars his request for a receiver.[6]

II. The Counterclaims Fail to State Any Claims Upon Which Relief Can be Granted.[7]

A. Barrett Plasman Failed to State a Claim for Violations of the Wage and Hour Act.

Barrett Plasman's claim was properly dismissed because he was an at will employee that was not entitled to wages after his termination. "North Carolina follows the at-will employment doctrine, which dictates that 'in the absence of a contractual agreement establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party.'" *Brackett v. SGL Carbon Corp.*, 580 S.E.2d 757, 76 1 (N.C. Ct. App. 2003) (*quoting Kurtzman v. Applied Analytical Industries, Inc.*, 493 S.E.2d 420, 422 (N.C. 1997), *reh'g denied*, 502 S.E.2d 594 (N.C. 1998)).

The Counterclaims allege that on October 19, 2012, Decca USA terminated Barrett Plasman's employment with Bolier. (R pp 829-30 ¶¶ 14-15.) Barrett Plasman does not allege that his employment with Bolier was for a definite term, and therefore he could be terminated with or without cause. Barrett Plasman

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[6] Assuming *arguendo* that Plasman relies on N.C. GEN. STAT. § 57D-6-04(a), Plasman is not entitled to the appointment of a receiver under that section because Bolier's shareholders are not deadlocked. As discussed in detail throughout this brief, Plasman is merely displeased with the majority shareholder's business decisions, but that displeasure does not entitle him to the appointment of a receiver.

[7] Barrett Plasman does not advance any arguments in support of his counterclaims for tortious interference with contract and piercing the corporate veil. Thus, those claims have been abandoned. N.C. R. App. P. 28(b)(6).

refused to accept his termination and purports to have continued to work for Bolier until January 2013. (R p 830, ¶¶ 18-19, 23.) Barrett Plasman's subjective impressions concerning his belief that Decca USA did not have the authority to terminate his employment are irrelevant. As discussed throughout this brief, the Operating Agreement clearly vests this authority in Decca USA. Therefore, Barrett Plasman is not entitled to any wages for the period after his employment with Bolier was terminated.

B. Barrett Plasman Failed to State a Claim for Defamation.

With respect to the libel claims, Barrett Plasman identifies two publications as being allegedly libelous: (1) a letter from Decca USA to Bolier's customers, vendors, and associates; and (2) a letter from Decca's undersigned counsel to Bank of North Carolina ("BNC Letter"). (R pp 832-33, ¶¶ 50-51.) However, he does not allege which statements in those letters are allegedly defamatory, which is fatal to his claim. (*See id.*); *Ward*, 2010 N.C. App. LEXIS 210 at *9.

With respect to the slander claims, Barrett Plasman alleged that Tin made untrue statements about him to Bolier's employees. (R p 832, ¶ 44.) Specifically, Barrett Plasman alleged that Tin told Bolier employees that he stole Bolier's funds, is power hungry, and ruled with an iron fist. . (*Id.* ¶¶ 45-47.) Barrett Plasman then states in conclusory fashion that Tin made "numerous false statements" to impeach his profession. (*Id.* ¶ 49.)

Barrett Plasman stole Bolier's funds when he opened the Bank of North Carolina account to house Bolier funds after his termination, as he had no right to

access those funds. (*See* R p 537.) Truth is an absolute defense to slander per se, and therefore this claim was properly dismissed.

Moreover, Tin's alleged statements concerning Barrett Plasman being power hungry and ruling employees with an iron fist are not a basis for slander, as "[r]hetorical hyperbole and expressions of opinion not asserting provable facts are protected speech . . . ." *Daniels v. Metro Magazine Holding Co., L.L.C.*, 634 S.E.2d 586, 590 (N.C. Ct. App. 2006) (internal citations omitted). With regard to the remaining allegedly slanderous statements, specifically comments made to the police, (R p 832, ¶ 48), Barrett Plasman does not contend that they impeached his profession, nor does he allege malice and special damages. Without these necessary elements, Barrett Plasman's slander per quod claims fail.

III. The Business Court Properly Dismissed the Claims Under Rule 8.

The Complaint failed to comply with the basic tenet of Rule 8's requirement of a "short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved . . . ." N.C. R. Civ. P. 8(a)(1). Plasman failed to specifically allege how each Defendant participated in the alleged acts which he purports give rise to each cause of action.

For example, Plasman advanced a derivative claim for breach of contract against "Decca China, Decca Contract, [and] Decca Hospitality" without alleging which of those entities breached any provision of any identifiable contract. (See id. ¶¶ 354-68.) Similar fatal pleading errors also appear in the claims for tortious

interference, conversion, defamation, misappropriation of trade secrets claims, as well as the direct breach of contract claim, among others. (*See, e.g.*, R pp 683-86, ¶¶ 369-78; R pp 692-95, ¶¶ 440-80.) Further, Plasman only alleged that he was damaged by some—not all—of the parties who purportedly wronged him. (*See, e.g.*, R p 690, ¶ 416; R p 695, ¶ 473.) Plasman's repeated failure to follow Rule 8's basic pleading requirements does not place Defendants on notice of the allegations against them and deprives Defendants of the ability to adequately respond to the Complaint.

Plasman contends that the Court could not dismiss the Complaint under Rule 8 absent a specific reference to Rule 41(b), alleging that Rule 41(b) is the only method to enforce a Rule 8 violation and that Plasman lacked knowledge that his Complaint may be dismissed. (Br. at 45-46.) As an initial matter, a motion under Rule 41 is not necessary to dismiss a claim for violations of Rule 8(a)(1). Motions brought under Rule 12(b)(6) are also appropriate avenues to seek dismissal under Rule 8(a)(1). *See, e.g.*, *Westover Prod., Inc. v. Gateway Roofing Co.*, 380 S.E.2d 369, 373–74 (N.C. Ct. App. 1989) (noting that a party argued negligence and breach of implied warranty claims did not comply with Rule 8(a) and elaborating that "[t]he first avenue by which a party may properly address the failure to state a claim is through Rule 12(b)(6)."

Even if Rule 41 is applicable, Defendant's failure to specifically cite it is not dispositive, as Defendants made clear the substantive grounds for their motion and the relief desired. *See In re Estate of English*, 350 S.E.2d 379, 382 (N.C. Ct. App.

1986) ("[R]eliance upon an inappropriate rule is not fatal in this case when the face of the motion revealed, and the . . . parties clearly understood, the relief sought and the grounds asserted therefor . . . ."); *McGinnis v. Robinson*, 258 S.E.2d 84, 89 (N.C. Ct. App. 1979) (holding that a movant's failure to state any rule number was not a fatal error when "[t]he substantive grounds and relief desired [w]as [sic] manifest on the face of the motions") Here, the Plasmans were clearly aware of the nature of Defendants' motion, which specifically stated that the Complaint failed to meet Rule 8's requirements and should be dismissed with prejudice as a result. (R pp 849-50.) The Plasmans understood this and vigorously argued that all of their claims should survive dismissal. (*See, e.g.*, R pp 959-985.)

With respect to the allegation regarding lesser sanctions, the Business Court noted that the Complaint "failed to fully cure [the] defects identified in the Court's prior order and opinion." (R p 1032.) The Court further noted that it had "already afforded Plaintiff the opportunity to re-plead his claims and specifically identified the ways in which Plaintiffs First Amended Complaint and Proposed Second Amended Complaint were insufficient." (R p 1034.) Thus, the Business Court clearly did consider whether lesser sanctions would suffice and determined that it would not.

CONCLUSION

For the foregoing reasons, neither the Complaint nor Counterclaims state any claims upon which relief could be granted. The Business Court's decision should therefore be affirmed.

Respectfully submitted this 16 day of May, 2017.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they have personally signed it.

Attorneys for Defendants Decca Furniture (USA), Inc., Decca Contract Furniture, LLC, Elan by Decca, LLC, Decca Hospitality Furnishings, LLC, Richard Herbst, Darren Hudgins, Wai Theng Tin, and nominal defendant Bolier & Company, LLC

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure and the Order of this Court, counsel for the Appellees certifies that the foregoing brief, which is preparing using a proportional font, is less than 10,250 words (excluding cover, captions, indexes, tables of authorities, certificate of service, this certificate of compliance, and counsel's signature blocks, as reported by the word-processing software.

This the 16th day of May, 2017

By: /s/ Robert A. Muckenfuss
Robert A. Muckenfuss (NC Bar # 28218)

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CERTIFICATE OF SERVICE

I hereby certify that on **May 16, 2017**, the foregoing **DEFENDANTS-APPELLEES' BRIEF IN RESPONSE** was served on Appellants-Plaintiffs by United States mail, postage prepaid, at the address set forth below:

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