

STATE OF NORTH CAROLINA
CUMBERLAND COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
22 CVS 5535

CUMBERLAND COUNTY
HOSPITAL SYSTEM, INC.,
individually and derivatively on
behalf of WOODCOCK CUSTOM
VISION, LLC,

Plaintiff,

v.

MICHAEL G. WOODCOCK,

Defendant,

v.

WOODCOCK CUSTOM VISION,
LLC,

Defendant and
Nominal
Defendant.

**ORDER AND OPINION ON
DEFENDANTS' JOINT MOTION TO
DISMISS**

THIS MATTER comes before the Court on Defendants Michael G. Woodcock and Woodcock Custom Vision, LLC's Joint Motion to Dismiss Pursuant to N.C.R. Civ. P. 12(b)(1) and 12(b)(6) ("Motion," ECF No. 15).

THE COURT, having considered the Motion, the briefs of the parties, the arguments of counsel, and all appropriate matters of record, **CONCLUDES** that the Motion should be **GRANTED**, in part, and **DENIED**, in part, for the reasons set forth below.

K&L Gates LLP, by Nathan A. Huff and Anderson M. Shackelford, for Plaintiff Cumberland County Hospital System, Inc.

Douglas S. Harris for Defendant Michael G. Woodcock, and Krispen Culbertson for Defendant Woodcock Custom Vision, LLC.

Davis, Judge.

INTRODUCTION

1. In this dispute between the two owners of a limited liability company (“LLC”), the Court must consider the applicability of the “irreparable injury” exception to the statutory requirement that a derivative claim cannot be filed less than ninety days following a demand letter. In addition, the Court is required to determine whether the plaintiff, a minority member of the LLC, has stated valid individual claims against the defendant, who is the majority member.

FACTUAL AND PROCEDURAL BACKGROUND

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

3. Woodcock Custom Vision, LLC (“WCV”) is a North Carolina LLC owned by Plaintiff Cumberland County Hospital System, Inc. (“CCHS”), a private, not-for-profit health system operating in southeastern North Carolina, and Michael G. Woodcock, an ophthalmologist in Fayetteville, North Carolina. (Verif. Compl. ¶¶ 1, 11–12, ECF No. 3.) Woodcock currently owns 2,000 Units (or 66.66%) of WCV, and CCHS owns 1,000 Units (or 33.33%). (Verif. Compl. ¶¶ 1, 20.)

4. Woodcock conducts his medical practice through Vision International, PA d/b/a Carolina Vision Center, a North Carolina professional corporation (“Vision International”). (Verif. Compl. ¶ 13.)

5. Prior to 16 March 2018, Woodcock was the sole owner of WCV. (Verif. Compl. ¶ 14.) He was also the sole shareholder of a corporation called Carolina Optical Partners, Inc. (“COP”) and the sole member of a company called Woodcock Investment Partners, LLC (“WIP”). (Verif. Compl. ¶¶ 15–16.)

6. The relationship between Woodcock, CCHS, and the above-referenced entities is governed by five documents that were all executed on 16 March 2018: (1) a Bill of Sale; (2) an Assignment; (3) WCV’s Operating Agreement; (4) a Management Services Agreement; and (5) a Lease. (Verif. Compl. ¶¶ 17–18.)

7. Pursuant to the Bill of Sale, “COP sold and transferred to WCV all of COP’s tangible and intangible assets utilized in the operation of COP’s business[,]” retaining no assets of its own. (Verif. Compl. ¶ 18.)

8. In the Assignment, Vision International “sold and transferred to WCV all of [its] tangible and intangible assets . . . except for several specifically excluded assets[.]” (Verif. Compl. ¶ 19.)

9. By virtue of the Operating Agreement, in exchange for a capital contribution of \$5,236,366.41, CCHS purchased 1,000 Membership Units of WCV, and the funds were distributed from WCV to Woodcock. (Verif. Compl. ¶¶ 20–21.)

10. In the Management Services Agreement, Vision International agreed to pay WCV \$250,000 per month for administrative services and to “pay or reimburse WCV for certain direct costs incurred by WCV[.]” (Verif. Compl. ¶ 24.)

11. Finally, through the Lease, WCV leased the premises previously utilized by Vision International from WIP. (Verif. Compl. ¶ 25.)

12. WCV’s Operating Agreement provided options for both Woodcock and CCHS to buy out the other member. “[T]he 1,000 Units of WCV held by CCHS were deemed ‘Class A Units’ and CCHS was deemed the ‘Class A Member.’” (Verif. Compl. ¶ 28.) “[T]he 2,000 Units of WCV held by Woodcock were deemed ‘Class B Units’ and Woodcock was deemed the ‘Class B Member.’” (Verif. Compl. ¶ 29.)

13. “The Class A Member Purchase Option conferred upon CCHS the option to purchase 1,000 of Woodcock’s then owned 2,000 Units between August 1, 2019 and August 31, 2019.” (Verif. Compl. ¶ 31.)

14. CCHS chose not to exercise its option to purchase Woodcock’s Units. (Verif. Compl. ¶ 32.)

15. “Because CCHS declined to exercise the Class A Member Purchase Option pursuant to Section 8.6(a) . . . , Section 8.7 [] conferred upon Woodcock . . . the Class B Member Redemption Option.” (Verif. Compl. ¶ 33.) “Pursuant to Section 8.7, beginning on August 31, 2019 and continuing indefinitely thereafter, the Class B Member Redemption Option allow[ed] Woodcock the right to purchase the 1,000 Units of WCV held by CCHS.” (Verif. Compl. ¶ 34.)

16. CCHS alleges that “rather than exercising his Class B Member Redemption Option when it became available on August 31, 2019 (and thus buy out CCHS from WCV), Woodcock resolved to drive down the value of WCV in anticipation of exercising his Class B Member Redemption Option. Ostensibly, Woodcock desired to minimize the price at which he would have to buy out CCHS.” (Verif. Compl. ¶ 35.)

17. The Operating Agreement provided CCHS and Woodcock with the right to each appoint two managers of WCV. On 16 March 2018, Woodcock appointed himself and his wife, Deborah Woodcock, as managers. CCHS, in turn, appointed its Chief Operating Officer, Daniel Weatherly, and its Chief Executive Officer, Michael Nagowski, as managers. (Verif. Compl. ¶ 26.) However, under Article III of the Operating Agreement, once CCHS chose not to exercise its option to purchase Woodcock’s shares, Woodcock thereafter acquired the authority to appoint three of the company’s four managers, and CCHS retained the right to appoint only one manager. (Verif. Compl. ¶ 37.) In accordance with Article III, Woodcock thereafter appointed J. Mark McDaniel to replace Nagowski as a manager of WCV. (Verif. Compl. ¶ 38.)

18. The Operating Agreement required that distributions be made to CCHS and Woodcock in “proportion to their respective Percentage Interests . . . at least on a yearly basis.” (Verif. Compl. ¶ 40.) However, although Woodcock approved and directed a distribution of \$2 million by WCV to himself in 2021, he only “provided CCHS with a check in the amount of \$150,000.00” on behalf of WCV for that year—even though CCHS owned 33% of WCV as of that year. (Verif. Compl. ¶¶ 42–45.)

19. In or around January 2021, a meeting was convened by Woodcock and the other managers of WCV appointed by him. No proper advance notice of the meeting was given to Weatherly, the remaining manager appointed by CCHS. (Verif. Compl. ¶ 51.) At this meeting, a motion amending the Management Services Agreement was passed, which effectively reduced the amount owed by Vision International to WCV under the Management Services Agreement from \$250,000 per month to zero. (Verif. Compl. ¶¶ 52–53.)

20. On 1 August 2022, Woodcock notified CCHS of his intent to purchase CCHS' ownership interest in WCV in accordance with Section 8.7 of the Operating Agreement by means of a letter, which stated as follows:

In accordance with the Amended and Restated Operating Agreement of WOODCOCK CUSTOM VISION, LLC, I hereby notice my intent to exercise my Class B Member Redemption Option as codified and delineated in Section 8.7.

We are currently compiling the necessary documentation from the previous 12 month period and we are in the process of selecting an independent expert to determine the calculation for the Redemption Option to be completed.

(Verif. Compl. ¶ 54.)

21. Weatherly replied by letter to Woodcock on 18 August 2022, requesting that he “be included in all discussions and correspondence relating to the selection of an appraiser” regarding the value of CCHS' Units and on “any correspondence or documentation that has already been generated as part of the process of requesting an appraiser.” (Verif. Compl. ¶¶ 56–57.)

22. The Complaint asserts that Woodcock ultimately planned to sell WCV and that his intentions were reflected in a memorandum prepared by a broker hired by him to assist in that process. The memorandum stated “that Woodcock ‘plans to exercise and deliver the Class B Member Redemption Option [to CCHS] at a time he feels comfortable that the contemplated deal will be consummated (i.e. the purchase agreement is finalized (ready to sign) and funds are escrowed for the ensuing Transaction [to sell WCV to a third party].’” (Verif. Compl. ¶ 36.)

23. On or about 31 August 2022, WCV transferred \$600,000 to Vision International at Woodcock’s direction, and Vision International paid Woodcock a “[b]onus for performance” in the amount of \$685,295.52. (Verif. Compl. ¶ 64.)

24. On 28 September 2022, CCHS received a letter from McDaniel, one of the managers of WCV appointed by Woodcock, which purported to redeem CCHS’ Units in WCV and enclosed a check made payable to CCHS in the amount of \$1,132,738.00. The letter did not provide any explanation of how the \$5,236,366.41 investment CCHS made in WCV on 16 March 2018 had decreased in value to only \$1,132,738.00. (Verif. Compl. ¶¶ 65–69.)

25. WCV’s Operating Agreement set out certain steps to be taken in the event of the transfer of ownership interests in WCV. Section 8.10 provided for a closing to be conducted upon the sale of any interest in the company. (Verif. Compl. Ex. A [“Operating Agreement”], ECF No. 3, at 25.) In addition, Section 8.11 required that “[e]ach party . . . execute and agree[] to be bound by the terms of a transfer

agreement, in a form substantially similar to that set forth” in an exhibit to the Operating Agreement. (Operating Agreement, at 25.)

26. Despite these provisions, no transfer agreement has ever been presented to or executed by CCHS, and no closing has occurred. (Verif. Compl. ¶¶ 76–78.)

27. On 3 October 2022, CCHS, through its attorney, sent a letter to WCV pursuant to N.C.G.S. § 57D-8-01 demanding that WCV and/or Woodcock pay CCHS the full value of its 1,000 Units. The letter also contained a brief statement demanding that WCV initiate legal proceedings against Woodcock. (Verif. Compl. Ex. F [“3 October 2022 Demand Letter”], ECF No. 3, at 1–2.)

28. Nine days later, on 12 October 2022, counsel for CCHS sent WCV an “[u]pdated” letter that was intended to “replace[] and supersede[]” the 3 October letter. (Verif. Compl. Ex. G [“12 October 2022 Demand Letter”], ECF No. 3, at 1.)

29. The 12 October letter added greater detail regarding the events that had transpired between the parties over the previous four years, including Woodcock’s failure to pay appropriate distributions to CCHS and to properly comply with the redemption option as set out in the Operating Agreement. In this letter, CCHS demanded that it be paid all of the distributions to which it was entitled as well as the full value of its Units in connection with Woodcock’s exercise of the redemption option. In addition, the letter enclosed a draft complaint and stated that CCHS would file the complaint the following day unless its demands were met. (12 October 2022 Demand Letter, at 1.)

30. One day later, CCHS filed its Complaint in Cumberland County Superior Court—naming as Defendants both Woodcock and WCV. (ECF No. 3.)¹

31. In the Complaint, CCHS asserts the following claims: (1) individual and derivative claims for breach of operating agreement against Woodcock and WCV; (2) individual and derivative claims against Woodcock for breach of fiduciary duty; (3) an individual claim against Woodcock for constructive fraud; and (4) individual and derivative claims for declaratory judgment against Woodcock and WCV.

32. The case was designated a mandatory complex business case on 14 October 2022 and assigned to the undersigned the same day. (ECF Nos. 1, 2.)

33. On 20 December 2022, Defendants jointly filed the present Motion.

34. The Court held a hearing on the Motion on 28 February 2023. The Motion is now ripe for decision.

LEGAL STANDARD

35. Defendants' Motion challenges CCHS' standing to assert both its derivative and individual claims pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure. In addition, Defendants seek the dismissal of several of CCHS' individual claims based on Rule 12(b)(6) for failure a state a claim upon which relief can be granted.

36. "A plaintiff's standing to assert its claims may be challenged under either Rule 12(b)(1) or Rule 12(b)(6) of the North Carolina Rules of Civil Procedure." *Raja v. Patel*, 2017 NCBC LEXIS 25, at *11 (N.C. Super. Ct. Mar. 23, 2017). A Rule

¹ WCV is named as both a "Defendant" and a "Nominal Defendant" in the Complaint.

12(b)(1) motion challenges a court's jurisdiction over the subject matter of the plaintiff's claims. N.C.R. Civ. P. 12(b)(1). "Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest," *In re T.R.P.*, 360 N.C. 588, 590 (2006), and "has been defined as 'the power to hear and to determine a legal controversy; to inquire into the facts, apply the law, and to render and enforce a judgment,'" *High v. Pearce*, 220 N.C. 266, 271 (1941). "[T]he proceedings of a court without jurisdiction of the subject matter are a nullity." *Burgess v. Gibbs*, 262 N.C. 462, 465 (1964) (citation omitted).

37. "As the party invoking jurisdiction, plaintiff[] ha[s] the burden of establishing standing." *Queen's Gap Cmty. Ass'n v. McNamee*, 2011 NCBC LEXIS 37, at **3 (N.C. Super. Ct. Sept. 23, 2011). In determining the existence of subject matter jurisdiction, the Court may consider matters outside the pleadings. *Emory v. Jackson Chapel First Missionary Baptist Church*, 165 N.C. App. 489, 491 (2004). However, "if the trial court confines its evaluation [of standing] to the pleadings, the court must accept as true the [claimant]'s allegations and construe them in the light most favorable to the [claimant]." *Munger v. State*, 202 N.C. App. 404, 410 (2010) (quoting *DOT v. Blue*, 147 N.C. App. 596, 603 (2001)).

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

v. Guilford Cnty., 355 N.C. 161, 166 (2002)). The Court may also “reject allegations that are contradicted by the documents attached, specifically referred to, or incorporated by reference in the complaint.” *Laster v. Francis*, 199 N.C. App. 572, 577 (2009).

ANALYSIS

I. Lack of Standing Based on Rule 12(b)(1)

A. Derivative Claims

39. Defendants initially argue that CCHS lacks standing to assert its derivative claims in this action because it failed to fully comply with N.C.G.S. § 57D-8-01.

40. Pursuant to N.C.G.S. § 57D-8-01(a)(2), a member of an LLC may bring a derivative action on the company’s behalf if, among other things,

[t]he member made written demand on the LLC to take suitable action, and either (i) the LLC notified the member that the member’s demand was rejected, (ii) 90 days have expired from the date the demand was made, or (iii) irreparable injury to the LLC would result by waiting for the expiration of the ninety-day period.

N.C.G.S. § 57D-8-01(a)(2) (2021).

41. This Court has recognized that “[a] party’s standing to bring a derivative claim depends on compliance with the demand requirement in N.C. Gen. Stat. § 57D-8-01(a)(2).” *Azure Dolphin, LLC v. Barton*, 2017 NCBC LEXIS 90, at *20 (N.C. Super. Ct. Oct. 2, 2017), *aff’d*, 371 N.C. 579 (2018) (cleaned up). “‘Standing’ refers to the issue of whether a party has a sufficient stake in an otherwise justiciable controversy that he or she may properly seek adjudication of the matter.” *Creek Pointe*

Homeowner's Ass'n, Inc. v. Happ, 146 N.C. App. 159, 165 (2001) (citation omitted). Standing is therefore “a necessary prerequisite to the court’s proper exercise of subject matter jurisdiction.” *Id.* at 164 (citation omitted). Accordingly, any “challenge to the adequacy of any pre-suit demand is, *inter alia*, a challenge to the Court’s subject matter jurisdiction over the derivative claims.” *Barefoot v. Barefoot*, 2022 NCBC LEXIS 8, at **9 (N.C. Super. Ct. Feb. 2, 2022) (citations omitted).

42. As we have previously noted, “[t]he demand requirement gives the LLC a chance to investigate the claim and, if it chooses, to vindicate its own rights before freeing its members to seek relief on its behalf.” *Al-Hassan v. Salloum*, 2020 NCBC LEXIS 22, at *5 (N.C. Super. Ct. Feb. 20, 2020). Its purpose is thus “to ‘allow[] the [company] the opportunity to remedy the alleged problem without resort to judicial action, or, if the problem cannot be remedied without judicial action, to allow the [company], as the true beneficial party, the opportunity to bring suit first against the alleged wrongdoers.’” *Zoutewell v. Mathis*, 2018 NCBC LEXIS 95, at *18 (N.C. Super. Ct. Sept. 13, 2018) (quoting *Bridges v. Oates*, 167 N.C. App. 459, 467–68 (2004)).

43. In the present case, the Court concludes that CCHS has failed to satisfy N.C.G.S. § 57D-8-01(a)(2) for two reasons.

44. First, its assertion of derivative claims in this action did not comply with the ninety-day requirement set out in the statute. CCHS filed its Complaint on 13 October 2022—just ten days after CCHS’ initial demand letter and only one day after CCHS’ amended demand letter.

45. Although CCHS concedes that its Complaint was filed well before the expiration of the ninety-day period, it contends that the “irreparable injury” exception to this requirement renders the filing of its Complaint timely. *See Emrich Enters., LLC v. Hornwood, Inc.*, 2020 NCBC LEXIS 45, at *21 (N.C. Super. Ct. Apr. 8, 2020) (“N.C.G.S. § 57D-8-01(a)(2) provides that the 90-day waiting period is excused by a finding of irreparable injury that would result from imposing such a waiting period.” (cleaned up)).

46. However, the Court is not persuaded. CCHS has failed to show that WCV was under threat of immediate injury unless CCHS filed its lawsuit at the time it did so. CCHS attempts to argue that its actions were justified by the memorandum prepared by Woodcock’s broker, which revealed Woodcock’s stated intent to exercise his redemption option (by purchasing CCHS’ shares at a substantially reduced price) and then sell WCV to a third party. But even assuming *arguendo* that such an imminent sale of the company would satisfy the “irreparable injury” exception, CCHS conceded in its own Complaint that after receipt of the 12 October letter “Woodcock ‘temporarily’ withdrew his attempt to exercise the Class B Redemption Option” and that “[i]t remains unclear whether or if he will unilaterally reinstate his exercise.” (Verif. Compl. ¶ 83.) Thus, by CCHS’ own admission, at the time this lawsuit was filed Woodcock’s plans were speculative. Accordingly, it simply cannot be said that the sale of WCV was imminent.²

² The Court observes that upon filing its complaint CCHS did not seek a temporary restraining order or a preliminary injunction against Woodcock to prevent any of the actions that it claims would have resulted in irreparable injury.

47. Indeed, CCHS has failed to cite any cases in which North Carolina courts have held that the “irreparable injury” exception was triggered under facts even remotely similar.

48. CCHS also argues that the issue of whether it complied with the ninety-day requirement is moot because more than ninety days have now passed since its demand letters were sent, and as of this date WCV has failed to initiate legal action against Woodcock. However, the Court cannot accept this “no harm, no foul” argument. The ninety-day requirement is not a mere formality that a litigant can avoid by means of an end run. Rather, it reflects a determination by our General Assembly that a company should be given ninety days in which to fully investigate a demand by one of its members that the company file suit against an alleged wrongdoer. Such legislative intent would routinely be thwarted if CCHS’ argument was allowed to carry the day. In almost every case, more than ninety days will have elapsed between the date of a demand letter and the date the defendant’s motion to dismiss the derivative claims on timeliness grounds is heard by the court. As such, the rule would be honored more in its breach than in its observance.

49. Second, CCHS’ demand letter was also deficient for an additional reason. N.C.G.S. § 57D-8-01(a)(2) requires that a member make “written demand on the LLC to take suitable action” before filing suit. N.C.G.S. § 57D-8-01(a)(2) (2021). This Court has noted that assessing the sufficiency of a demand requires comparing “the derivative claims asserted in a complaint against the specific demands a plaintiff

has made prior to filing suit.” *Miller v. Burlington Chem. Co., LLC*, 2017 NCBC LEXIS 6, at *30 (N.C. Super. Ct. Jan. 27, 2017) (cleaned up).

50. A careful reading of CCHS’ 12 October demand letter reveals that its focus was to protect *not* WCV but rather *its own* financial interests. The key “demand” language in the letter stated as follows:

In order to effectively exercise his Class B Member Redemption Option, Dr. Woodcock must pay CCHS \$5,236,366.41 to purchase all of CCHS’s Units of WCV, along with an additional amount equal to the appreciation in value of such Units that would have obtained but for Dr. Woodcock’s systematic efforts to artificially deflate the value of WCV. Additionally, WCV must immediately make all pro rata distributions to which CCHS is entitled, including without limitation the \$1 million CCHS should have received at the time Dr. Woodcock approved and issued a \$2 million distribution from WCV to himself in 2021, and the \$300,000 CCHS should have received at the time Dr. Woodcock approved and issued a \$600,000 distribution from WCV to himself in August 2022.

(12 October 2022 Demand Letter, at 3.) As such, this is not a proper demand within the meaning of the statute.

51. CCHS contends that any deficiency in the letter itself was mitigated by the fact that attached to the letter was a draft complaint. CCHS asserts that the inclusion of the draft complaint put WCV on direct notice of the claims it intended to assert if WCV failed to take action against Woodcock. However, CCHS has failed to cite any North Carolina case law standing for the proposition that attaching a draft complaint to a demand letter is a valid substitute for making a proper demand for suitable action by the company in the letter itself. The absence of such case law is not surprising as the statute contemplates a demand upon the company to take appropriate and tangible action rather than the member simply providing the

company with a list of legal claims for relief to be asserted by the member in a forthcoming lawsuit.

52. The Court therefore **GRANTS** Defendants' Motion based on lack of standing as to the derivative claims asserted by CCHS, which are **DISMISSED** without prejudice.³

B. Individual Claims

53. Defendants next contend that CCHS also lacks standing to assert the individual, or direct, claims contained within its Complaint—albeit for a different reason. Defendants argue that the claims set out in the Complaint can only be asserted derivatively because any injuries CCHS suffered due to Woodcock's alleged wrongful acts are the same as the injuries incurred by WCV.

54. “It is a well-settled principle of North Carolina law that ‘shareholders of corporations generally may not bring individual actions to recover what they consider their share of the damages suffered by the corporation.’ ” *Barefoot*, 2022 NCBC LEXIS 8, at **20 (quoting *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 660 (1997)). The underlying rationale for this rule is that “the loss of an investment is identical to the injury suffered by the corporate entity as a whole.” *Atkinson v. Lackey*, 2015 NCBC LEXIS 21, at *13 (N.C. Super. Ct. Feb. 27, 2015) (cleaned up). “This concept loosely has come to be known as the *Barger* rule.” *Gusinsky v. Flanders Corp.*, 2013 NCBC LEXIS 43, at **12 (N.C. Super. Ct. Sept. 25, 2013).

³ “A dismissal for lack of jurisdiction is generally a dismissal without prejudice.” *N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Exam'rs*, 2016 NCBC LEXIS 33, at **27 n.8 (N.C. Super. Ct. Apr. 26, 2016).

55. “Our courts recognize two exceptions to this rule: shareholders may bring an individual action when (1) the wrongdoer owed them a special duty or (2) they suffered a personal injury distinct from the injury sustained by the corporation itself.” *Barefoot*, 2022 NCBC LEXIS 8, at **20 (cleaned up). This Court has made clear that “[b]oth the general rule and its exceptions are equally applicable in the LLC context.” *Id.* (cleaned up).

56. Here, CCHS contends that both exceptions to the *Barger* rule apply. However, the Court need not determine the applicability of the special duty exception because it is satisfied that the special injury exception is invoked by CCHS’ allegations.

57. In order for a plaintiff’s claims “to fall under the second exception to *Barger*, they must allege ‘an individual loss, separate and distinct from any damage suffered by the corporation.’” *Harris v. Wachovia Corp.*, 2011 NCBC LEXIS 8, at **28 (N.C. Super. Ct. Feb. 23, 2011) (quoting *Barger*, 346 N.C. at 659).

58. A review of the Complaint in this action makes clear that CCHS has sufficiently alleged personal injury under the *Barger* framework. Indeed, a substantial portion of CCHS’ allegations concern Woodcock’s acts in (1) thwarting CCHS’ ability to receive distributions in proportion to its ownership interest in WCV; and (2) refusing to comply with certain provisions of the Operating Agreement providing safeguards to CCHS in connection with Woodcock’s ability to purchase CCHS’ Units in WCV. These allegations are sufficient to fall within the second *Barger* exception. *See, e.g., Emrich*, 2020 NCBC LEXIS 45, at *27 (“When a member

of an LLC seeks to enforce its own rights under the LLC's operating agreement, not the rights of the LLC, in an effort to remedy its own injury, that member has standing to bring its [individual] breach of contract claim.”).

59. The Court therefore **DENIES** Defendants' Motion under Rule 12(b)(1) based on lack of standing as to CCHS' individual claims.

II. Dismissal Under Rule 12(b)(6)

60. Having determined that standing exists as to CCHS' individual claims, the Court must now turn its attention to Defendants' arguments under Rule 12(b)(6). Although each of the four claims asserted in the Complaint are brought—at least in part—individually, the only specific arguments contained in Defendants' brief in support of their Motion based on Rule 12(b)(6) relate to CCHS' claims for breach of fiduciary duty and constructive fraud. The Court will discuss each in turn.

A. Breach of Fiduciary Duty

61. “To establish a claim for breach of fiduciary duty, a plaintiff must show that: (1) the defendant owed the plaintiff a fiduciary duty; (2) the defendant breached that fiduciary duty; and (3) the breach of fiduciary duty was a proximate cause of injury to the plaintiff.” *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 339 (2019).

62. A fiduciary relationship

has been broadly defined . . . as one in which there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . . [and] it extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, *and resulting domination and influence on the other.*

Dalton v. Camp, 353 N.C. 647, 651–52 (2001) (cleaned up).

63. Our Supreme Court has held that “[a] fiduciary relationship may exist in law or in fact.” *Azure Dolphin, LLC v. Barton*, 371 N.C. 579, 599 (2018) (citation omitted).

64. In the present case, Woodcock “wore two hats”—serving as both a manager of WCV and as the majority member of the LLC. The Complaint does not clearly state whether CCHS’ fiduciary duty claim is based on Woodcock’s actions as a manager, as the controlling majority member, or as a combination of both. Therefore, it is necessary to review key principles from our case law regarding the potential existence of fiduciary duties stemming from both roles.

65. The general rule is that “managers of a limited liability company . . . owe a fiduciary duty to the company, [] not to individual members.” *Kaplan v. O.K. Techs., L.L.C.*, 196 N.C. App. 469, 474 (2009). Likewise, as a general proposition, LLC members do not owe fiduciary duties to each other or to the LLC itself. *Emrich*, 2020 NCBC LEXIS 45, at *29. As we have often noted, “[t]he rights and duties of LLC members are ordinarily governed by the company’s operating agreement, not by general principles of fiduciary relationships.” *Strategic Mgmt. Decisions v. Sales Performance Int’l*, 2017 NCBC LEXIS 69, at *10–11 (N.C. Super. Ct. Aug. 7, 2017).

66. However, in some circumstances, “a holder of a majority interest who exercises control over the LLC owes a fiduciary duty to minority interest members.” *Vanguard Pai Lung, LLC v. Moody*, 2019 NCBC LEXIS 39, at *17 (N.C. Super. Ct. June 19, 2019) (citation omitted).

This Court in *Vanguard* specified several actions which, if taken by a majority member, indicate an exercise of control potentially sufficient to

create a fiduciary duty, including: (1) managerial control over a board of directors or other managers; (2) the ability to dissolve the company; (3) the ability to declare bankruptcy; and (4) the ability to amend the operating agreement without approval from other members. The exercise of control through any of these actions weigh in favor of the majority member owing minority members a fiduciary duty.

Merrell v. Smith, 2023 NCBC LEXIS 3, *23 (N.C. Super. Ct. Jan. 11, 2023) (cleaned up).

67. The Court must now apply these principles to the present case. With regard to acts taken by Woodcock in his capacity as a *manager* of WCV, it is clear that he owed no fiduciary duty to CCHS. Indeed, Section 3.5 of WCV's Operating Agreement expressly provides that "[e]xcept as otherwise provided herein, Managers shall have no fiduciary duties with respect to the Company or any *Member*." (Operating Agreement, at 11 (emphasis added).)

68. However, neither Section 3.5 nor any other provision of the Operating Agreement appears to address the potential existence of fiduciary duties owed by members to other members. Thus, the Operating Agreement does not eliminate the fiduciary duty that a controlling majority member would otherwise owe to a minority member under the circumstances discussed in *Vanguard*.

69. Therefore, the only remaining question is whether CCHS has alleged facts that would give rise to such a duty based on a theory of majority member control. Based on its thorough review of the Complaint, the Court is satisfied that CCHS' allegations are sufficient in this regard. Viewed in the light most favorable to CCHS, the Complaint alleges a number of examples of ways in which Woodcock has used his position as the majority member of WCV to assert absolute control over the company.

For example, the Complaint alleges that Woodcock exercised majority control over WCV's board.

70. Moreover, the Complaint likewise asserts that Woodcock *breached* his fiduciary duty to CCHS as a minority member in a number of respects. Among other examples, CCHS alleges that Woodcock (1) used his position of control to improperly withhold distributions owed to CCHS; (2) refused to provide CCHS with information regarding his appraisal of the value of its Units in connection with his decision to exercise the Class B Member Redemption Option; and (3) ignored a number of provisions in WCV's Operating Agreement at the expense of CCHS. (Verif. Compl. ¶¶ 93–99.)

71. Accordingly, with respect to CCHS' individual breach of fiduciary duty claim, Woodcock's Motion is **GRANTED** as to actions taken by Woodcock in his capacity as a manager of WCV. However, the Motion is **DENIED** as to Woodcock's actions taken in his capacity as a controlling majority member of WCV.⁴

B. Constructive Fraud

72. Finally, Defendants seek the dismissal of CCHS' individual claim for constructive fraud.

73. “Although the elements of constructive fraud and breach of fiduciary duty overlap, each is a separate claim under North Carolina law.” *Chisum v.*

⁴ For purposes of the present Motion, the Court declines to engage in the task of parsing the Complaint to ascertain which allegations are based on Woodcock's actions as a manager of WCV and which acts were undertaken by him as a majority member. Such an analysis, if necessary, will be more efficiently conducted with the benefit of a factually developed record at the summary judgment stage.

Campagna, 376 N.C. 680, 706 (2021) (cleaned up). “A successful claim for constructive fraud requires proof of facts and circumstances ‘(1) which created the relation of trust and confidence [between the parties], and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.’” *Id.* at 706–07 (quoting *Terry v. Terry*, 302 N.C. 77, 83 (1981)). Thus, “[t]he primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the intent and showing that the defendant benefitted from his breach of duty.” *Ironman Med. Props. v. Chodri*, 268 N.C. App. 502, 513 (2019) (citation omitted).

74. CCHS’ claim for constructive fraud is based on its allegations that (1) Woodcock stood in a position of trust and confidence in relation to CCHS; and (2) he used this position to benefit himself and the entities he owned at CCHS’ expense (as discussed above).

75. In arguing for the dismissal of the constructive fraud claim, Defendants do not contend that CCHS has failed to adequately allege the elements set out above. Instead, they assert that constructive fraud is not a viable claim in a case such as this one in which monetary damages are adequate to fully compensate the plaintiff. In making this argument, however, Defendants appear to be laboring under the misapprehension that constructive fraud is a claim that is equitable in nature. As made clear above, that is not the case. In any event, they have failed to offer any valid basis for dismissal of this claim.

76. Accordingly, Woodcock's Motion is **DENIED** as to CCHS' individual claim for constructive fraud.

CONCLUSION

THEREFORE, IT IS ORDERED that Defendants' Motion to Dismiss is **GRANTED**, in part, and **DENIED**, in part, as follows:

1. With regard to Defendants' Motion based on Rule 12(b)(1):
 - a. the Motion is **GRANTED** as to the derivative claims contained in the Complaint, which are dismissed without prejudice; and
 - b. the Motion is **DENIED** as to the individual claims contained in the Complaint.
2. With regard to Defendants' Motion based on Rule 12(b)(6) as to the individual claims contained in the Complaint:
 - a. Defendants' Motion is **GRANTED** with prejudice with respect to CCHS' claim for breach of fiduciary duty based on actions taken by Woodcock as a manager of WCV; and
 - b. Defendants' Motion is **DENIED** in all other respects.

SO ORDERED, this the 21st day of March, 2023

/s/ Mark A. Davis

Mark A. Davis

Special Superior Court Judge
for Complex Business Cases