Trail Creek Invs. LLC v. Warren Oil Holding Co., 2023 NCBC 36A.

STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
22 CVS 4473

TRAIL CREEK INVESTMENTS LLC and WARREN OIL COMPANY, LLC,

Plaintiffs,

v.

(1) WARREN OIL HOLDING COMPANY, LLC; (2) WARREN UNILUBE HOLDING COMPANY, INC.; (3) the ESTATE OF W. I. WARREN, and H. LAWRENCE SANDERSON and JAMES M. YATES, JR., as Executors of the ESTATE OF W. I. WARREN; (4) W. I. WARREN 2003 IRREVOCABLE TRUST, and H. LAWRENCE SANDERSON, JAMES M. YATES, JR., and REED WARREN in their capacity as Trustees of the W. I. WARREN 2003 IRREVOCABLE TRUST; (5) WENDY WARREN SPELL 2016 IRREVOCABLE TRUST, and H. LAWRENCE SANDERSON and JAMES M. YATES, JR., in their capacity as Trustees of the WENDY WARREN SPELL 2016 IRREVOCABLE TRUST; (6) WILLIAM IRVIN WARREN, JR., 2016 IRREVOCABLE TRUST, and H. LAWRENCE SANDERSON and JAMES M. YATES, JR., as Trustees of the WILLIAM IRVIN WARREN, JR. 2016 IRREVOCABLE TRUST; (7) CHRISTIAN WARREN SPELL 2016 IRREVOCABLE TRUST, and H. LAWRENCE SANDERSON and JAMES M. YATES, JR., in their capacity as Trustees of the CHRISTIAN WARREN SPELL 2016 IRREVOCABLE TRUST; (8) GREYSON WINDHAM SPELL 2016 IRREVOCABLE TRUST, and H. LAWRENCE SANDERSON and JAMES M. YATES, JR., in their capacity as Trustees of the GREYSON WINDHAM SPELL 2016

AMENDED ORDER AND OPINION ON DEFENDANTS' PARTIAL MOTION TO DISMISS AMENDED COMPLAINT AND PLAINTIFFS' MOTION TO STRIKE OR EXCLUDE CERTAIN EXHIBITS

IRREVOCABLE TRUST; (9) REED ADELE WARREN 2016 IRREVOCABLE TRUST, and H. LAWRENCE SANDERSON and JAMES M. YATES, JR., in their capacity as Trustees of the REED ADELE WARREN 2016 IRREVOCABLE TRUST; (10) COLBY JACKSON WARREN 2016 IRREVOCABLE TRUST, and H. LAWRENCE SANDERSON and JAMES M. YATES, JR., in their capacity as Trustees of the COLBY JACKSON WARREN 2016 IRREVOCABLE TRUST; (11) JAIMMY ELIZABETH WARREN 2016 IRREVOCABLE TRUST, and H. LAWRENCE SANDERSON and JAMES M. YATES, JR., in their capacity as Trustees of the JAIMMY ELIZABETH WARREN 2016 IRREVOCABLE TRUST; (12) H. LAWRENCE SANDERSON, in his capacity as Seller Representative and in his individual capacity; and (13) RONNIE C. WALKER, SR.,

Defendants.

THIS MATTER comes before the Court on Defendants' Partial Motion to Dismiss Plaintiffs' First Amended Complaint ("Motion to Dismiss," ECF No. 53) and Plaintiffs' Motion to Strike or Exclude Certain Exhibits ("Motion to Strike," ECF No. 64) (collectively, the "Motions"). **THE COURT**, having considered the Motions, the parties' briefs, the arguments of counsel, and all appropriate matters of record, **CONCLUDES** that the Motions should be **GRANTED**, in part, and **DENIED**, in part, as set forth below.

Tuggle Duggins P.A., by Denis E. Jacobson, Jeffrey S. Southerland, Brandy L. Mansouraty, Daniel D. Stratton, and Shauna L. Baker-Karl, for Plaintiffs.

Robinson, Bradshaw & Hinson, P.A. by David C. Wright, Stephen D. Feldman, Melissa A. Romanzo, Andrew R. Wagner, and Emma W. Perry, for Defendants.

Davis, Judge.

INTRODUCTION

1. The Amended Complaint in this case is lengthy—consisting of over 130 pages and more than 475 paragraphs. In essence, it asserts that Defendants fraudulently failed to disclose substantial existing environmental liabilities in connection with the sale of Warren Oil Company, Inc. ("Warren Oil"), Warren Unilube, Inc. ("Warren Unilube"), and their affiliated companies to Plaintiff Trail Creek Investments LLC ("Trail Creek"). Despite the voluminous nature of the allegations, however, Defendants contend that the Amended Complaint fails to allege facts sufficient to establish the required legal elements of the claims Plaintiffs are asserting. For the reasons set out below, the Court finds that many, although not all, of Plaintiffs' claims have been inadequately pled.

FACTUAL AND PROCEDURAL BACKGROUND

2. The Court does not make findings of fact on a motion to dismiss pursuant to North Carolina Rule of Civil Procedure 12(b)(6) and instead recites only those allegations of the Complaint that are necessary to determine the Motion before the Court. *Se. Anesthesiology Consultants, PLLC v. Rose*, 2019 NCBC LEXIS 52, at *1 (N.C. Super. Ct. Aug. 20, 2019).

3. At the outset, the Court notes that this lawsuit involves numerous events and a variety of "players." Although the Court will strive to set out a

streamlined summary of the relevant facts and parties, that is admittedly easier said than done.

4. The origin of this lawsuit lies in the sale of equity interests in Warren Oil, Warren Unilube, and their affiliated companies (collectively the "Companies"). (First Amended Complaint ["Am. Compl."] ¶ 1, ECF No. 40.)[1]

5. Trail Creek "agreed to purchase the issued and outstanding equity interests of the Companies pursuant to an Equity Interest Purchase Agreement (the 'EIPA')." (Am. Compl. ¶ 11.) The EIPA was dated 19 August 2016 and had a closing date of 7 October 2016.

6. The sellers under the EIPA were the following parties: W.I. Warren (the founder of the Companies, who died on 1 December 2020), certain affiliated trusts connected to the Warren Estate, and various companies associated with the W.I. Warren Estate. (Am. Compl. ¶ 12.) These sellers "were the owners of the issued and outstanding equity interests of the Companies prior to Plaintiffs' purchase of those interests." (Am. Compl. ¶ 13.)

7. The Companies "manufactured, blended, and packaged motor oils, transmission and hydraulic fluids, automotive chemicals, gear oils, greases, and various other oils, cleaners, and related products." (Am. Compl. ¶ 14.)

8. As noted above, the buyer under the EIPA was Trail Creek, a North Carolina limited liability company. (Am. Compl. ¶ 15.)

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[1] For ease of reading, the Court will often refer in this Opinion collectively to the "Companies" or "Defendants" rather than identifying the specific entity within Defendants' control at issue.

9. As a result of the transaction, Warren Oil was converted into Warren Oil Company, LLC—the other named Plaintiff in this lawsuit (along with Trail Creek)—on 29 September 2016. (Am. Compl. ¶ 16.)

10. Although each of the persons and entities listed as sellers in the EIPA are named as Defendants in the Amended Complaint, there are four individuals most relevant to this case, who are identified below.

11. Defendant H. Lawrence Sanderson is a resident of Horry County, South Carolina. Sanderson was the Chief Financial Officer of Warren Oil prior to the EIPA's closing. (Am. Compl. ¶ 19.) Sanderson signed the EIPA as the "Seller Representative and as Trustee on behalf of the eight Trust Entity Defendants." (Am. Compl. ¶ 19.) Despite being sued by Plaintiffs in this action, Sanderson—somewhat paradoxically—continues to serve on the Board of Representatives of Plaintiff Warren Oil Company, LLC and is a member of the audit committee of that Board. (Am. Compl. ¶ 19.) Sanderson is named as a Defendant individually as well as in his capacities as co-executor of the Estate of W.I. Warren and co-trustee of various trust Defendants. (Am. Compl. ¶ 19.)

12. Defendant James M. Yates, Jr. is a resident of Wake County, North Carolina. Yates is a co-executor of the Estate of W.I. Warren, the co-trustee of various trusts named as Defendants, and the secretary and vice-president of one of the subsidiary companies that was sold as part of the EIPA. (Am. Compl. ¶ 20.) Yates served as primary outside corporate counsel for the Companies, the Sellers, and the Warren family. (Am. Compl. ¶ 20.) Yates is named as a Defendant solely in his

capacities as co-executor of the Estate of W.I. Warren and co-trustee of the various trust Defendants. (Am. Compl. ¶ 20.)

13. Defendant Ronnie C. Walker, Sr. is a resident of Harnett County, North Carolina. Walker was the chief operating officer of Warren Oil prior to the execution of the EIPA. (Am. Compl. ¶ 21.) Walker was employed by the recently created Warren Oil Company, LLC until 27 April 2022 and also served as an officer of the company until 16 February 2022. Walker's duties at Warren Oil—and subsequently at Warren Oil Company, LLC—included environmental compliance and oversight. (Am. Compl. ¶ 21.)

14. W.I. Warren served on the Warren Oil Company, LLC's Board of Representatives until his death on 1 December 2020. (Am. Compl. ¶ 368.) His estate is named as a Defendant.

15. The events giving rise to this lawsuit principally relate to alleged environmental problems existing at certain facilities controlled or operated by Warren Oil—primarily at a particular Warren Oil facility in West Memphis, Arkansas. Plaintiffs allege that Defendants (1) fraudulently concealed these liabilities from them during the "due diligence" period preceding the actual sale of the Companies to Trail Creek; and (2) continued their attempt to cover up these liabilities even after the EIPA was executed.

16. The following is a chronological overview of the primary events—as alleged by Plaintiffs in the Amended Complaint—that led to the initiation of this action.

A. Acquisition and EPA Inspection of the West Memphis Facility

17. The specific Warren Oil facility that is most relevant to this lawsuit is the West Memphis Facility (the "Facility"), which was acquired by the Companies in 2003. Around that same time period, an attorney for Warren Oil sent a letter to company executives stating that various storage tanks at that facility had numerous environmental compliance problems and that the Facility's Spill Prevention, Countermeasure, and Control Plan ("SPCC Plan") was deficient. (Am. Compl. ¶¶ 41–48.)[2] The attorney warned that correcting the environmental compliance issues would be expensive and would take a significant amount of time. (Am. Compl. ¶ 49.)

18. In June 2007, representatives of the Environmental Protection Agency ("EPA") visited the West Memphis Facility and performed an inspection. (Am. Compl. ¶ 65.) The EPA determined that the Facility had "fail[ed] to implement adequate SPCC and FRP plans at the Facility." (Am. Compl. ¶ 65.)

19. The Companies—with Sanderson and Walker taking the lead—negotiated with the EPA in an attempt to reach a resolution of these issues. On or around 30 October 2007, the Companies agreed to draft an updated SPCC Plan, which was memorialized in an email sent by the EPA on 1 November 2007 to various company officials. (Am. Compl. ¶ 67.) The new plan contained a commitment by the Companies to implement a systematic tank inspection program. (Am. Compl. ¶ 68.) The Companies continued negotiating in the hope of receiving a reduced penalty from

[2] Federal law mandates that companies operating facilities such as the West Memphis Facility "create and maintain" an SPCC and Facility Response Plan ("FRP"). (Am. Compl. ¶ 47 n.8.)

the EPA stemming from any environmental compliance violations. (Am. Compl. ¶ 69.)

20. On 27 March 2008, Dale Wells, who was serving at the time as the president of Warren Unilube, sent the EPA a letter (the "Wells Letter") stating that the Companies agreed "to institute a tank integrity and corrosion prevention plan the [sic] next 15 years to inspect and make necessary improvements on a prioritized basis." (Wells Letter, ECF No. 59.3.) The letter committed to "making these improvements on an annualized basis of 10-12 tanks per year." (Am. Compl. ¶ 72.) The letter also included a draft SPCC plan. (Am. Compl. ¶ 73.)[3]

21. The EPA and the Companies ultimately entered into a Consent Agreement and Final Order (the "CAFO") on 18 June 2008. (Am. Compl. ¶ 76; *see also* CAFO, ECF No. 59.1.) The CAFO addressed the allegations regarding the Companies' insufficient SPCC and FRP plans and assessed a civil penalty of $23,700.00. (CAFO, at 1–5.) However, the CAFO made no mention of any of the commitments regarding tank testing or corrosion prevention plans that were the subject of the Wells Letter.

B. Defendants Attempt to Sell the Companies

22. Defendants began entertaining offers to purchase the equity interests in the Companies around 2010. During that time, prospective buyers were able to

[3] The significance of the Wells Letter is a major source of disagreement between the parties. Plaintiffs contend that it reflected a binding commitment between the Companies and the EPA, while Defendants, conversely, argue that it was wholly non-binding because it was not mentioned in the consent agreement that was ultimately executed between the EPA and the Companies.

access a "virtual data room" (the "Data Room") that provided information about the Companies to potential buyers. (Am. Compl. ¶ 100.) However, Plaintiffs allege that after several potential buyers lost interest after learning of the Companies' environmental compliance problems, Defendants began to restrict the access of prospective purchasers to certain critical information regarding those deficiencies. (Am. Compl. ¶¶ 108–09.)

23. Defendants ultimately engaged Wells Fargo Securities, LLC ("Wells Fargo"), an investment banking firm, to help facilitate the sale of the Companies. (Am. Compl. ¶ 98.) Around that same time, Trail Creek learned that the Companies were for sale and contacted Wells Fargo to obtain more information. (Am. Compl. ¶ 122.) Plaintiffs allege that in mid-2016, "Defendants, through Wells Fargo, provided [Trail Creek] with a Confidential Information Presentation. . . . The [p]resentation, upon information and belief, was prepared, reviewed, and approved by Defendants, Wells Fargo, and [defendants' counsel]. The [p]resentation was riddled with inaccuracies, omitted material facts, and contained numerous misrepresentations." (Am. Compl. ¶ 125.)

24. For example, the balance sheet provided during the presentation "did not include the Companies' short-term and long-term liabilities related to their obligations to comply with certain environmental regulatory requirements, city ordinances, and contractual commitments[.]" (Am. Compl. ¶ 127.) In addition, a slide entitled "Legal Matters" stated that "[t]he Company is not aware of any outstanding or anticipated legal issues." (Am. Compl. ¶ 129.)

25. After the presentation, Trail Creek initiated a due diligence process. The Data Room was reactivated by the Companies, but before doing so Defendants removed key information regarding the existing environmental compliance issues. (Am. Compl. ¶ 137.)

26. As a part of the transaction, Plaintiffs prepared a "Legal Due Diligence Checklist" to ensure they had all necessary documents to review relating to the Companies. (Am. Compl. ¶ 140.) Section 2.1 of the Due Diligence Checklist requested a

> [s]chedule of and documents relating to (i) any and all prior, pending or threatened suits, actions, demands, litigations, claims, administrative proceedings or other investigations or inquiries of any kind asserted against or otherwise affecting the Assets [defined as the assets currently used in the conduct of the Business as well as any other assets needed to operate the Business in the manner historically conducted or currently contemplated to be performed in the future] or the Business [defined as the business carried out by the Company] over the past three years and (ii) known, alleged, or suspected violations of federal, state or local laws or regulations, including those relating to the environment and employees.

(Am. Compl. ¶ 144.)

27. The Sellers' response to this provision was that such information was "PROVIDED IN DATA ROOM." (Am. Compl. ¶ 145.) However, the Wells Letter, among other things, was not present in the Data Room that was viewed by Plaintiffs. (Am. Compl. ¶ 145.)

28. Plaintiffs further requested in Section 2.3 of the Diligence Checklist "all consent decrees, judgments, other decrees or orders and settlement and similar agreements to which the Company is a party or is bound, requiring, prohibiting, or

affecting any future Activities of the Business or use of the Assets." (Am. Compl. ¶ 146.) The Sellers' response stated, "NOT APPLICABLE." (Am. Compl. ¶ 147.)

29. Plaintiffs received similar responses of "PROVIDED IN DATA ROOM" or "NOT APPLICABLE" to requests for information regarding significant assets or liabilities of the company, agreements with federal or regulatory agencies, commitments not entered into in the ordinary course of business, and commitments that might adversely affect the business or would otherwise "prohibit or would prevent or impede consummation of the proposed transaction." (Am. Compl. ¶¶ 149–55.)

30. The Amended Complaint also describes a due diligence meeting on 2 August 2016 in which Sanderson was present and participated. During the meeting, Trail Creek inquired about any ongoing "open issues" regarding environmental compliance but was not provided with any further information on that subject. (Am. Compl. ¶ 159.)

31. Plaintiffs engaged an environmental consultant during the due diligence process to perform a "Phase I assessment at each of the Facilities[.]" (Am. Compl. ¶ 161.) Despite the extensive discussions that the consultant and Trail Creek had with Defendants, no additional disclosures were made about the Companies' substantial environmental liabilities. (Am. Compl. ¶ 161.)

32. Plaintiffs allege that Defendants were "aware that a Phase II [environmental] evaluation could potentially reveal the full scope of environmental

issues" and therefore "specifically restricted [Trail Creek] from conducting a Phase II environmental assessment of the Facilities." (Am. Compl. ¶ 168.)

33. Plaintiffs further assert that there were conversations in 2016 that Sanderson and Walker had with representatives of Trail Creek in which Sanderson and Walker "falsely represented that the aboveground storage tanks in the Companies' Facilities were *not* in need of any maintenance or repair *and* that the type of fluids stored by the Companies kept the tanks corrosion free and in operational condition." (Am. Compl. ¶ 167.) According to Plaintiffs, neither Sanderson nor Walker (who both remained in positions with the Companies even after the EIPA was executed), ever disclosed any ongoing environmental compliance issues to Plaintiffs. (Am. Compl. ¶ 172.)

34. The parties executed the EIPA on 19 August 2016, and the transaction closed on 7 October 2016. Plaintiffs paid $154,999,000 in cash "together with two notes in the amount of $7,500,000 (the 'Escrow Note') and $15,000,000 (the 'Subordinated Note'), and $7,500,000 in rollover equity." (Am. Compl. ¶ 179.)

35. The EIPA contained a number of representations and warranties that are relevant to this lawsuit. Plaintiffs allege that these representations by Defendants relating to the Companies' absence of ongoing environmental problems were intentionally false. (Am. Compl. ¶ 220.)

36. The EIPA also contained indemnification provisions, the proper interpretation of which is disputed by the parties in this lawsuit. These provisions, in part, provided that Defendants would indemnify Plaintiffs for losses stemming

from breaches of, or inaccuracies contained within, the representations and warranties contained in the EIPA.

37. Section 10.11 of the EIPA contains certain provisions relating to escrow funds in connection with the sale of the Companies. These provisions, which are relevant to various claims asserted by Plaintiffs in this action, state in pertinent part as follows:

> 10.11 Escrow; Escrow Note.
>
> (a) For purposes of securing the Sellers' indemnification obligations under this Agreement, providing a source of funds to recovered uncollected Accounts Receivable pursuant to Section 2.4(g), and, if applicable, providing a ready source of funds to refund a portion of the Initial Cash Purchase Price pursuant to Section 2.4(d), on the Closing Date the Buyer will deposit the Escrow Amount with the Escrow Agent to be held in accordance with this Section 10.11 and the Escrow Agreement. Upon the Buyer's determination that any Buyer Indemnified Party has suffered any indemnifiable Loss, the Buyer will promptly deliver a notice of such claim to the Seller Representative and the Escrow Agent. Unless within thirty (30) days after receipt of the such notice, the Buyer and the Escrow Agent receive a written objection from the Seller Representative disputing the claim, then, subject to the limitations set forth in this Article 10, the Buyer will be entitled to recover from the Escrow Amount the amount set forth in the notice of the claim, and the Seller Representative and the Buyer will issue a joint written instruction letter to the Escrow Agent to distribute such amount to the applicable Buyer Indemnified Party. In the event the Seller Representative timely objects in writing to the claim, the Escrow Agent will make no disbursements from escrow relating to such claim unless and until the Buyer and the Seller Representative have resolved the claim by mutual agreement, arbitration or litigation. The Buyer and the Seller Representative agree to act in good faith to resolve any disputed claim.
>
> . . .
>
> (d) For a period of thirty-six (36) months from the Closing Date but only following the release of the entirety of the Escrow Amount (whether to one or more Buyer Indemnified Parties in respect of claims or to the

> Sellers following the Release Date or both), the Buyer will be entitled to set off against the Escrow Note the amount of any indemnification obligations of the Sellers hereunder. Upon the Buyer's determination that any Buyer Indemnified Party has suffered an indemnifiable Loss, the Buyer will promptly deliver a notice of such claim to the Seller Representative. Unless within thirty (30) days after receipt of such notice the Buyer receives a written objection from the Seller Representative disputing the claim, then, subject to the limitations set forth in this <u>Article 10</u>, the Buyer will be entitled to set off the amount set forth in the notice of the claim against any amount owed by the Buyer pursuant to the Escrow Note. In the event the Seller Representative timely objects in writing to the claim, the Buyer may set off any amount finally determined to be payable by the Sellers to any Buyer Indemnified Party hereunder following final resolution of the claim by mutual agreement, arbitration or litigation.

(EIPA, Section 10.11(a), (d).)

C. Plaintiffs Discover Environmental Compliance Issues

38. In or around 2018, Plaintiffs learned that there were serious unresolved environmental compliance issues within the Companies—primarily the ones related to the Facility—that had existed before the EIPA was executed and had never been disclosed to Plaintiffs. Plaintiffs allege that all of the Companies' other facilities (except a facility located in Johnstown, Pennsylvania) are also "materially non-compliant with environmental laws[.]" (Am. Compl. ¶ 90.)

39. As a result, Plaintiffs made several indemnification demands upon Defendants. (*See*, *e.g.*, Am. Compl. ¶¶ 289–92.)

40. In 2018 and 2019, Sanderson engaged in successful efforts to have the $7.5 million Escrow Amount released in full to Defendants and $3.9 million paid out on the Escrow Note. (Am. Compl. ¶ 357.) Plaintiffs allege that but for Sanderson's machinations, these funds "would have been held back . . . to address environmental

liabilities." (Am. Compl. ¶ 357.) Sanderson told Plaintiffs that notwithstanding the release, Defendants would honor their indemnity obligations and "informed Plaintiffs that the $15 million subordinated note executed in favor of Defendants could be subject to offset to address the indemnity obligations." (Am. Compl. ¶ 357.) Sanderson further told Plaintiffs that releasing these escrow funds "would make the beneficiaries of the various trusts more willing to work with Plaintiffs on the indemnification." (Am. Compl. ¶ 358.) Based on these representations, Plaintiffs allowed the release of the Escrow Amount on 12 April 2018 and made payments on the Escrow Note on 27 September 2019, "but rather would have exercised [their] recovery and set-off rights as provided in the EIPA." (Am. Compl. ¶ 373.)

41. After failing to achieve a satisfactory resolution with Defendants of the above-referenced environmental compliance issues, Plaintiffs ultimately elected to initiate the present action and filed their original Complaint in Wake County Superior Court on 26 April 2022. (Complaint, ECF No. 3.) This case was designated a mandatory complex business case and assigned to the undersigned on 27 April 2022. (ECF Nos. 1, 2.)

42. On 27 June 2022, Defendants filed a Motion to Dismiss the Complaint. (ECF No. 19.) However, Plaintiffs filed an Amended Complaint on 16 August 2022, thereby mooting Defendants' original Motion to Dismiss. (Am. Compl.)

43. Plaintiffs' Amended Complaint contains the following claims: breach of contract against all Defendants; recission against all Defendants; fraud against all Defendants; breach of fiduciary duty against Walker, Sanderson, and the Estate of

W.I. Warren (through his co-executors Yates and Sanderson); constructive fraud against Walker, Sanderson, and the Estate of W.I. Warren (through Yates and Sanderson); negligent misrepresentation against all Defendants; primary liability for violations of the North Carolina Securities Act against W.I. Warren, Warren Oil Holding Company, LLC ("Warren Oil Holding"), and Warren Unilube Holding Company, Inc. ("Unilube Holding"); secondary liability for violation of the North Carolina Securities Act against W.I. Warren, Walker, and Sanderson; declaratory judgment against all Defendants; breach of confidentiality agreements against Sanderson; obstruction of justice against all Defendants; and civil conspiracy against all Defendants.

44. Defendants filed the Motion to Dismiss that is currently before the Court on 15 September 2022. (ECF No. 53.) In support of this Motion, Defendants submitted twelve exhibits. (ECF Nos. 59.1–59.12.)

45. On 4 November 2022, Plaintiffs filed a Motion to Strike or Exclude Certain Exhibits—the other motion currently before the Court—in which they argued that Exhibits 4, 5, 7, 8, 9, 11, and 12 to Defendants' Motion should be stricken. (ECF No. 64.)

46. The Motions came before the Court for a hearing on 8 February 2023 and are now ripe for decision.

LEGAL STANDARD

47. In ruling on a motion to dismiss pursuant to North Carolina Rule of Civil Procedure 12(b)(6), the Court reviews the allegations in the Complaint in the light

most favorable to the plaintiff. *See Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5 (2017). The Court's inquiry is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory[.]" *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 670 (1987). The Court accepts all well-pleaded factual allegations in the relevant pleading as true. *See Krawiec v. Manly*, 370 N.C. 602, 606 (2018). The Court is not required, however, "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 274 (2005) (quoting *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002)).

48. "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 Cty.*, 355 N.C. 161, 166 (2002)).

49. On a Rule 12(b)(6) motion, the Court "can reject allegations that are contradicted by the documents attached to, specifically referred to, or incorporated by reference in the complaint." *Moch v. A.M. Pappas & Assocs., LLC*, 251 N.C. App. 198, 206 (2016) (quoting *Laster v. Francis*, 199 N.C. App. 572, 577 (2009)). Moreover, the Court "may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are

presented by the defendant." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60 (2001) (citing *Robertson v. Boyd*, 88 N.C. App. 437, 441 (1988)). The Court is permitted to consider such documents without converting the Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment. *Schlieper v. Johnson*, 195 N.C. App. 257, 261 (2009). However, if such documents are not specifically referenced in, and are not the subject of, the Complaint, consideration of such documents under Rule 12(b)(6) is improper as "[p]erhaps the most fundamental concept of motions practice under Rule 12 is that evidence outside the pleadings cannot be considered in determining whether the complaint states a claim on which relief can be granted." *Vanguard v. Pai Lung, LLC v. Moody*, 2019 NCBC LEXIS 39, at *10 (N.C. Super. Ct. June 19, 2019) (cleaned up).

ANALYSIS

I. Plaintiffs' Motion to Strike or Exclude

50. Plaintiffs move to exclude or strike certain exhibits submitted by Defendants in support of their Motion to Dismiss on the basis that they are improperly before the Court at the Rule 12 stage. Plaintiffs contend that the documents at issue are either not specifically referenced at all or are not the subject of the Amended Complaint. The Court will analyze each of the applicable documents in turn.

A. Exhibits 4 and 5

51. Exhibits 4 and 5 consist of the 2008 SPCC Plan and the 2008 FRP along with supporting tables. Plaintiffs concede that these documents were, in fact,

specifically referenced in the Amended Complaint as having been included in the "Data Room" created during the due diligence process but argue that the documents did not exist in the Data Room in the same form as they appear in the Exhibits—that is, with the supporting tables attached.

52. The Court concludes that it is entitled to consider Exhibits 4 and 5. These plans were clearly referenced in the Amended Complaint and are relevant to a number of the claims asserted by Plaintiff. Although the documents may have been organized in the Data Room in a somewhat different way, the Court is satisfied that the manner in which they are presented in Exhibits 4 and 5 do not materially alter the Court's consideration of them. Plaintiffs' Motion is therefore **DENIED** as to Exhibits 4 and 5.

B. Exhibit 7

53. Plaintiffs argue that Exhibit 7, an indemnity demand letter sent on their behalf to Defendants on 9 April 2018, is not specifically mentioned in the Amended Complaint and therefore cannot be properly considered in connection with Defendants' Motion. The Court agrees.

54. The Court has conducted a thorough review of the Amended Complaint, and although it references generally the fact that an indemnity demand was made, there is no specific reference to the 9 April 2018 letter itself. For this reason, Plaintiffs' Motion is **GRANTED** as to Exhibit 7.

C. Exhibits 8 and 9

55. Exhibits 8 and 9 are excerpts from the 2007 EPA Inspection Report.

56. Paragraph 189 of the Amended Complaint merely cites to the schedules that are part of the EIPA that contain *references* to Exhibits 8 and 9. Accordingly, the Court concludes that Exhibits 8 and 9 cannot be considered and therefore **GRANTS** Plaintiffs' Motion as to these Exhibits.

D. Exhibit 11

57. Plaintiffs also seek to exclude Exhibit 11, which is a 24 September 2019 letter from Sanderson confirming the payment of $3,894,500 to Defendants pursuant to the terms of the Escrow Note executed in connection with the EIPA. The Court concludes that this Exhibit is appropriately before the Court in connection with Defendants' Motion.

58. The Amended Complaint specifically references this letter in Paragraph 218, stating that "[p]ursuant to a letter dated September 24, 2019, signed by Sanderson as Seller Representative and as agent and Attorney-in-Fact of the Sellers listed on Exhibit A of the Escrow [N]ote, and as CFO and President of Unilube Holding, the Subordinated Note ($15 million) is also available for set-off." (Am. Compl. ¶ 218.) Moreover, the release of escrow funds serves—at least in part—as a basis for Plaintiffs' allegations of injury in this case.

59. Plaintiffs' Motion is therefore **DENIED** as to Exhibit 11.

E. Exhibit 12

60. Exhibit 12 consists of a "joinders" to the EIPA that added new sellers to the EIPA. The Court concludes that the joinders are properly before the Court.

61. First, the joinders are specifically referenced in the Amended Complaint in footnote four, which states that "[t]he two holding entities became Sellers pursuant to Joinders to Equity Interest Purchase Agreement executed and delivered as of October 7, 2016." (Am. Compl. ¶ 12, n.4.) Furthermore, the Court notes that the joinders are a part of the EIPA, and the EIPA is obviously of great importance to Plaintiffs' claims in this case.

62. Accordingly, Plaintiffs' Motion is **DENIED** as to Exhibit 12.

II. Defendants' Motion to Dismiss

A. Statute of Limitations

63. As an initial matter, Defendants contend that Plaintiffs' claims for fraud, negligent misrepresentation, breach of fiduciary duty, and civil conspiracy are time-barred based on the application of the relevant statutes of limitations.

64. The limitations period for each of these claims is three years. *See Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 2015 NCBC LEXIS 64, at **18 (N.C. Super. Ct. June 19, 2015), *aff'd,* 370 N.C. 1 (2017) ("The statute of limitations governing a fraud claim is three years and begins to run from the time the claimant should have discovered the facts constituting the fraud."); *Trillium Ridge Condo Ass'n v. Trillium Links & Vill., LLC*, 236 N.C. App. 478, 501 (2014) ("Breach of fiduciary duty claims accrue upon the date when the breach is discovered and are subject to a three year statute of limitations."); *Trantham v. Michael L. Martin, Inc.*, 228 N.C. App. 118, 126 (2013) (The statute of limitations for . . . negligent misrepresentation is three years."); *Lau v. Constable*, 2017 NCBC LEXIS 10, at **20 (N.C. Super. Ct.

Feb. 7, 2017) ("The applicable statute of limitations to a civil conspiracy claim is three years.").

65. However, a statute of limitations does not begin to run until the plaintiff has actual or constructive notice of the defendants' wrongful acts. *See*, *e.g., BDM Invs. v. Lenhil, Inc.*, 2012 NCBC LEXIS 7, at **37 (N.C. Super. Ct. Jan. 18, 2012) (quoting *Jennings v. Lindsey*, 69 N.C. App. 710, 715 (1984)) ("Where a person is aware of facts and circumstances which, in the exercise of due care, would enable him or her to learn of or discover the fraud, the fraud is discovered for the purposes of the statute of limitations."); *see also Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666 (1997) ("[A] claim for negligent misrepresentation does not accrue until two events occur: first, the claimant suffers harm because of the misrepresentation, and second, the claimant discovers the misrepresentation." (cleaned up)).

66. Our Supreme Court has previously addressed statute of limitations issues raised at the Rule 12 stage, stating the following:

> A statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim. *Hargett v. Holland*, 337 N.C. 651, 653, 447 S.E.2d 784, 786 (1994). Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired. *See Little v. Rose*, 285 N.C. 724, 727, 208 S.E.2d 666, 668 (1974).

Horton v. Carolina Medicorp, 344 N.C. 133, 136 (1996).

67. In their respective briefs, the parties hotly debate the specific dates upon which Plaintiffs knew, or should have known, the key facts upon which these claims

are based. Having carefully considered the parties' arguments on this issue, the Court **CONCLUDES** that dismissal of these claims based on the statute of limitations at this time would be inappropriate. Defendants, of course, will be free to renew this argument at the summary judgment stage at which time the Court will be aided by the existence of a fully developed factual record. Defendants' Motion to Dismiss based on the statute of limitations is therefore **DENIED**.

B. Breach of Fiduciary Duty

68. Defendants seek dismissal of the claim in the Amended Complaint for breach of fiduciary duty, which is asserted against Walker, Sanderson (in his individual capacity), and the Estate of W.I. Warren (through Yates and Sanderson as co-executors). This claim is based on the roles of Walker, Sanderson, and Warren in connection with the newly created Warren Oil Company, LLC following the execution of the EIPA and Plaintiffs' allegations that their failure to disclose environmental liabilities to the company while serving in these roles constituted a breach of their fiduciary duty.

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

70. In the Amended Complaint, Plaintiffs allege that Sanderson served—and, in fact, continues to serve—on the Board of Representatives for Warren Oil

Company, LLC, that Walker served as an officer of the company until on or about 16 February 2022, and that Warren served on the Board of Representatives until his death on 1 December 2020. (Am. Compl. ¶¶ 364–69.)

71. Defendants initially contend that the absence in the record of the operating agreement for Warren Oil Company, LLC makes it difficult to determine the existence or extent of any fiduciary duties owed by these individuals to the company. It is true that parties to a limited liability company ("LLC") possess great authority to structure duties owed between the parties and the company in the company's operating agreement any way they desire. *See Barefoot v. Barefoot*, 2022 NCBC LEXIS 8, at **24 (N.C. Super. Ct. Feb. 2, 2022) ("[U]nlike a corporation, an LLC is primarily a creature of contract, and the operating agreement governs the internal affairs of an LLC and the rights, duties, and obligations of the company officials in relation to each other, the LLC, and the interest owners" (cleaned up)). Here, Plaintiffs have not attached the operating agreement for Warren Oil Company, LLC to their Complaint, so the Court is without the benefit of that document.[4] Therefore, for purposes of the present motion, the Court must rely on the default rule regarding the existence of fiduciary duties owed by persons possessing a management role in an LLC to the company.

72. "Under the North Carolina Limited Liability Company Act . . . an LLC's managers and company officials owe fiduciary duties to the LLC to discharge their duties in good faith, with the care of an ordinary prudent person, and in the best

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[4] Presumably, that document will be contained in the record at the summary judgment stage of this case.

interests of the LLC." *Timbercreek Land & Timber Co., LLC v. Robbins*, 2017 NCBC LEXIS 64, at *12 (N.C. Super. Ct. July 28, 2017). The LLC Act defines a company official as "[a]ny person exercising any management authority over the limited liability company whether the person is a manager or referred to as a manager, director, or officer or given any other title." N.C.G.S. § 57D-1-03(5) (2021). As noted above, the Amended Complaint alleges that Sanderson, Walker, and Warren each served as a member of the company's Board of Representatives or as an officer. Therefore, subject to any contrary provisions of the operating agreement, they would otherwise possess a fiduciary duty to Warren Oil Company, LLC.

73. Indeed, Defendants do not appear to be arguing that these individuals owed no fiduciary duty to the LLC at all while serving in these capacities. Instead, Defendants make a number of fact-based arguments about the scope and termination of any such duty owed by these Defendants that the Court believes are better suited for the summary judgment stage of this case.

74. Viewing the Amended Complaint in the light most favorable to Plaintiffs, as the Court must do on a Rule 12(b)(6) motion, Plaintiffs have alleged that these Defendants breached their fiduciary duty to Warren Oil Company, LLC by failing to disclose significant environmental compliance issues to the entire Board and that—had they done so—Warren Oil Company, LLC "would not have permitted the release of the Escrow Amount on or about April 12, 2018 ($7.5 million, which has been released in full) nor made payments on the Escrow Note on or about September 27, 2019 ($7.5 million, approximately $3.9 million paid), but rather would have

exercised its recovery and set-off rights as provided in the EIPA." (Am. Compl. ¶ 373.)

75. It remains to be seen, of course, whether Plaintiffs will be able to put forth sufficient evidence in support of this claim at the summary judgment stage. But for now the Court is satisfied that these allegations are sufficient to state a claim.

76. The Court therefore **DENIES** Defendants' Motion to Dismiss Plaintiffs' breach of fiduciary duty claim.

C. Constructive Fraud

77. Defendants also seek dismissal of the constructive fraud claim asserted against these same three Defendants.

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

79. In contending that Plaintiffs' constructive fraud claim should be dismissed, Defendants repeat their arguments in favor of the dismissal of the breach of fiduciary duty claim (which the Court has now rejected), but also add the additional

argument that Plaintiffs have failed to assert that Sanderson, Warren, or Walker received a personal benefit from their acts that were allegedly taken in violation of their fiduciary duties to Warren Oil Company, LLC.

80. Plaintiffs respond that the Amended Complaint essentially alleges two types of personal benefits received by Sanderson, Warren, and Walker. First, they assert that by failing to disclose the environmental compliance issues, these Defendants were able to maintain their ability to purchase equity in the company and to enjoy continued employment and bonuses. However, "[a] plaintiff [raising a constructive fraud claim] must allege that the benefit sought was 'more than a continued relationship with the plaintiff' or 'payment of a fee to a defendant for work' it actually performed." *Ironman Med. Props., LLC v. Chodri*, 268 N.C. App. 502, 513 (2019) (quoting *Sterner v. Penn*, 159 N.C. App. 626, 631–32 (2003)). Therefore, this argument lacks merit.

81. Second, Plaintiffs contend that the release of the escrow funds was a benefit personal to these individuals. Although these allegations are not replete with details, the Amended Complaint alleges that Sanderson and Warren received a portion of the released escrow amounts. Such allegations are minimally sufficient to satisfy the "personal benefit" prong of Plaintiffs' constructive fraud claim, and Defendant's Motion to Dismiss regarding this claim is therefore **DENIED** as to Sanderson and Warren.

82. However, the Court does not construe the Amended Complaint as containing similar allegations against Walker. Therefore, the Court **GRANTS**

Defendants' Motion to Dismiss the constructive fraud claim as to Walker, and this claim is **DISMISSED** without prejudice.[5]

D. Negligent Misrepresentation

83. Defendants also move to dismiss Plaintiffs' claim for negligent misrepresentation, arguing that the economic loss rule bars such a claim. The Court agrees.

84. "The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206 (1988).

85. However, as this Court has recently stated,

> [t]he economic loss rule "denote[s] limitations on the recovery in tort when a contract exists between the parties that defines the standard of conduct and which the courts believe should set the measure of recovery." *Akzo Nobel Coatings, Inc. v. Rogers*, 2011 NCBC LEXIS 42, at *47–48 (N.C. Super. Ct. Nov. 3, 2011). This rule exists because "the open-ended nature of tort damages should not distort bargained-for contractual terms." *Artistic Southern Inc. v. Lund*, 2015 NCBC LEXIS 113, at *25 (N.C. Super. Ct. Dec. 9, 2015).

USConnect, LLC v. Sprout Retail, Inc., 2017 NCBC LEXIS 37, at *13–14 (N.C. Super. Ct. Apr. 21, 2017).

86. In this case, it is clear that the allegations that form the backbone of Plaintiffs' breach of contract claim—that the representations made in the warranties and disclosure sections of the EIPA were not true—are the same allegations forming

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

the basis of the negligent misrepresentation claim. The economic loss rule bars such recovery on a tort theory.

87. Plaintiffs cite to *Cummings v. Carroll*, 379 N.C. 347 (2021), for the proposition that a negligent misrepresentation claim can survive notwithstanding the economic loss rule if it does not “rely on the relevant contractual provisions.” *Id.* at 359. However, in that case, the source of the negligent misrepresentation claim was a disclosure statement that was “not incorporated into the purchase contract” from which the relevant breach of contract claim derived. *Id.* at 360.

88. *Cummings* is easily distinguishable from the present case. Here, Plaintiffs’ negligent misrepresentation claim stems from allegedly false representations by Defendants that the Companies were in environmental compliance at the time of the sale. Such assertions of environmental compliance were expressly contained in the representations and warranties sections of the EIPA—the breach of which forms the basis for Plaintiffs’ breach of contract claim. As such, the economic loss rule applies.

89. The Court therefore **GRANTS** Defendants’ Motion to Dismiss Plaintiffs’ negligent misrepresentation claim with prejudice.

E. Fraud

90. Defendants contend that Plaintiffs’ fraud claim asserted against all Defendants should be dismissed, arguing that this claim—as currently pled— fails to comply with Rule 9(b) of the North Carolina Rules of Civil Procedure.

91. A fraud claim requires a plaintiff to allege a "(1) false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact to deceive, and (5) resulting in damage to the injured party." *Harrold v. Dowd*, 149 N.C. App. 777, 782 (2002). Rule 9(b) states, in pertinent part, that "[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." N.C. R. Civ. P. 9(b).

92. Defendants argue that the allegations of fraud in the Amended Complaint do not contain the requisite particularity as mandated by the Rule. The Court agrees.

93. Plaintiffs' fraud claim is based on theories of both misrepresentation and concealment. "With respect to fraud and misrepresentation claims, each such claim made against a defendant must be supported by specific allegations as to that defendant as required by Rule 9. By way of example, allegations of misrepresentations by a [defendant] should specify each misrepresentation, the [specific defendant] making the misrepresentation and the plaintiff to whom the misrepresentation was made." *Allen v. Land Res. Group of N.C., LLC*, 2010 NCBC LEXIS 18, at *9–10 (N.C. Super. Ct. Sept. 22, 2010).

94. With regard to a fraudulent concealment theory,

> Rule 9(b) requires a claimant alleging fraudulent concealment to identify the person or persons who allegedly participated in the concealment. *Oberlin Capital, L.P. v. Slavin*, 2000 NCBC LEXIS 8, at *15-16 (N.C. Super. Ct. Apr. 28, 2000), *aff'd*, 147 N.C. App. 52, 554 S.E.2d 840 (2001). The claimant must plead specific facts that "give rise to an inference of knowledge, intent, or reckless disregard" as to the

> concealment. *Id.* at *16 (quoting *Andrews v. Fitzgerald*, 823 F. Supp. 356, 374 (M.D.N.C. 1993)). "Conclusory allegations that a defendant acted in conspiracy with others are insufficiently specific to meet the requirements of Rule 9(b)." *Id.*; *see also Oberlin Capital, L.P.*, 147 N.C. App. at 57, 554 S.E.2d at 845 (holding that the plaintiff "failed to allege sufficient facts of individual participation in any wrongdoing" by three corporate directors).

Tillery Envtl. LLC v. A&D Holdings, Inc., 2018 NCBC LEXIS 13, at *28 (N.C. Super. Ct. Feb. 9, 2018).

95. Although the Court could give numerous examples of this deficiency in the Amended Complaint, for the sake of brevity, it suffices to simply say that the allegations relevant to Plaintiffs' fraud claim are too general to satisfy Rule 9(b). Among other things, the Amended Complaint frequently alleges that "Defendants" collectively made certain statements or undertook certain acts or omissions rather than attributing them to specific persons. Rule 9(b) does not permit such generalized pleading. Moreover, despite the length of the Amended Complaint, it is impermissibly vague as to the specifics of the misrepresentations and acts of concealment that Plaintiffs contend rose to the level of fraud. These allegations—as currently pled—fail to conform to the requirements of Rule 9(b) and its interpretive case law as set forth above.

96. Therefore, Defendants' Motion to Dismiss Plaintiffs' claim for fraud is **GRANTED**, and this claim is **DISMISSED** without prejudice.

F. Rescission

97. Defendants' Motion to Dismiss also challenges Plaintiffs' claim seeking a rescission of the EIPA. As an initial matter, Defendants correctly assert that

rescission is a remedy rather than a claim for relief—a point that Plaintiffs concede. Accordingly, to the extent the Amended Complaint seeks to assert a standalone claim for rescission, that claim is **DISMISSED**.

98. Defendants further argue, however, that the allegations in the Amended Complaint demonstrate that Plaintiffs are also not entitled to the *remedy* of rescission.

99. "A court may order the rescission of an agreement that was induced by fraud or mistake." *Green v. Condra*, 2009 NCBC LEXIS 20, at **22 (N.C. Super. Ct. Aug. 14, 2009). In the Amended Complaint, Plaintiffs seek to rescind the EIPA on the basis of fraud. Defendants offer a number of arguments in support of their contention that rescission should not be an available remedy in this case. Without expressing any opinion on the arguments made by Defendants on this issue, the Court deems it inappropriate to rule on this issue at the pleadings stage. It is presently unknown whether Plaintiffs will successfully seek leave to amend their fraud claim and, if so, whether any such reasserted claim will survive a future motion for dismissal or for summary judgment. Defendants will be permitted to reassert their arguments regarding the unavailability of rescission as a remedy in this case at the appropriate time in the event that Plaintiffs continue to pursue this theory of recovery.

G. Securities Act

100. The Amended Complaint also contains claims against certain Defendants under the North Carolina Securities Act (the "Securities Act").

Essentially, these claims assert that (1) the equity interests in the Companies sold to Plaintiffs qualify as "securities" under the Securities Act; and (2) these interests were sold "by means of false and misleading statements of material fact or omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . . " (Am. Compl. ¶¶ 398–99.)

101. Plaintiffs assert claims under theories of both primary liability and secondary liability under the Securities Act. Each are addressed in turn.

i. Primary Liability

102. Plaintiffs have asserted that Defendants Warren, Warren Oil Holding, and Unilube Holding are liable for violations of two distinct provisions of the Securities Act under a theory of *primary* liability—N.C.G.S. §§ 78A-8 and 78A-56(a).

103. N.C.G.S. § 78A-8 reads as follows:

> It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:
>
> (1) To employ any device, scheme, or artifice to defraud,
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading or,
>
> (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

N.C.G.S. § 78A-8 (2021).

104. N.C.G.S. § 78A-56(a) reads as follows:

> (a) Any person who:

> (1) Offers or sells a security in violation of G.S. 78A-8(1), 78A-8(3), 78A-10(b), 78A-13, 78A-14, 78A-24, or 78A-36(a), or of any rule or order under G.S. 78A-49(d) which requires the affirmative approval of sales literature before it is used, or of any condition imposed under G.S. 78A-27(d) or 78A-28(g), or
>
> (2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission,
>
> is liable to the person purchasing the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at the legal rate from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if the purchaser no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it and interest at the legal rate as provided by G.S. 24-1 from the date of disposition.

Id. § 78A-56(a).

105. Defendants argue that the claims under both provisions of the Securities Act should be dismissed due to Plaintiffs' failure to plead the allegations supporting them with the degree of specificity required by Rule 9(b). We have previously held that "the standards of Rule 9(b) will apply to a subsection [78A-56](a)(2) claim based on fraud." *Tillery*, 2018 NCBC LEXIS 13, at *63. Given that the language of § 78A-8 (and Plaintiffs' claims thereunder) are also grounded in fraud, the Court agrees

with Defendants that Rule 9(b) likewise applies to Plaintiffs' claim under that theory.[6]

106. Plaintiffs' factual allegations that give rise to these claims under the Securities Act are—for all practical purposes—the same allegations that support their fraud claim. As discussed above, the Court has ruled that Plaintiffs' fraud claim will be dismissed without prejudice for failure to comply with Rule 9(b). For the same reasons, the Court **CONCLUDES** that Plaintiffs' claims for primary liability under the Securities Act should likewise be **DISMISSED** without prejudice.

ii. Secondary Liability

107. Defendants also argue that dismissal is proper as to the *secondary* liability claims under the Securities Act asserted in the Amended Complaint against Warren, Walker, and Sanderson.

108. N.C.G.S. § 78A-56(c) establishes secondary liability under the Securities Act, stating, in pertinent part, as follows:

> (1) Every person who directly or indirectly controls a person liable under subsection (a), (b), or (b1) of this section, every partner, officer, or director of the person, every person occupying a similar status or performing similar functions, and every dealer or salesman who materially aids in the sale is also liable jointly and severally with and to the same extent as the person, unless able to sustain the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.
>
> (2) Unless liable under subdivision (1) of this subsection, every employee of a person liable under subsection (a), (b), or (b1) of this section who materially aids in the transaction giving rise to the liability and every other person who materially aids in the transaction giving rise to the

[6] Plaintiffs do not dispute the applicability of Rule 9(b) to claims brought under these provisions.

> liability is also liable jointly and severally with and to the same extent as the person if the employee or other person actually knew of the existence of the facts by reason of which the liability is alleged to exist.

N.C.G.S. § 78A-56(c).

109. Here, because the Court is dismissing—albeit without prejudice—Plaintiffs' claims premised on a theory of primary liability under the Securities Act, it is appropriate to similarly dismiss without prejudice Plaintiffs' claims based on a theory of secondary liability. *See Tillery*, 2018 NCBC LEXIS 13, at *67 ("North Carolina law . . . requires a claim for secondary liability under the [Securities Act] to be preceded by a claim for primary liability.").

110. The Court therefore **GRANTS** Defendants' Motion to Dismiss as to Plaintiffs' claims for secondary liability under the Securities Act, and those claims are **DISMISSED** without prejudice.

H. Breach of Confidentiality Agreements

111. Plaintiffs also assert a claim labelled "breach of confidentiality agreements" against Defendant Sanderson. In this claim, Plaintiffs allege that Sanderson entered into two confidentiality agreements in connection with his employment with the Companies, which he subsequently breached following execution of the EIPA by disclosing confidential information to third parties whose interests were adverse to Plaintiffs' interests. Defendants argue that even under North Carolina's liberal notice pleading standard, dismissal of this claim is proper due to the lack of detail in Plaintiffs' supporting allegations. *See, e.g.*, *Fox v. City of Greensboro*, 279 N.C. App. 301, 320 (2021) ("Under our State's notice theory of

pleading, plaintiffs must allege facts, not mere conclusions, to support their asserted causes of action. While the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a legally recognized claim or it may be dismissed under Rule 12(b)(6)." (cleaned up)).

112. Here, although the claim alleges the existence of confidentiality agreements entered into by Sanderson, the Amended Complaint is essentially devoid of any details of the alleged breach. As such, it fails to satisfy even the low bar of notice pleading.

113. Defendants' Motion to Dismiss the breach of confidentiality agreements claim is therefore **GRANTED**, and that claim is **DISMISSED** without prejudice.

I. Obstruction of Justice

114. Defendants seek the dismissal of Plaintiffs' claim for obstruction of justice on similar grounds. The Court agrees that dismissal of this claim is proper.

115. Our Court of Appeals has previously stated that

> "[o]bstruction of justice is a common law offense in North Carolina." *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983). "It is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice." *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 33, 588 S.E.2d 20, 30 (2003) (citing *Burgess v. Busby*, 142 N.C. App. 393, 408-09, 544 S.E.2d 4, 12, *disc. review improvidently allowed*, 354 N.C. 351, 553 S.E.2d 679 (2001)). As a result, "acts which obstruct, impede or hinder public or legal justice . . . amount to the common law offense of obstructing justice," so that a complaint alleging that the defendants engaged in such activities states a claim for relief. *Henry v. Deen*, 310 N.C. 75, 87, 310 S.E.2d 326, 334 (1984); *see also Grant v. High Point Reg'l Health Sys.*, 184 N.C. App. 250, 255-56, 645 S.E.2d 851, 855 (2007), *disc. review improvidently allowed*, 362 N.C. 502, 666 S.E.2d 757 (2008) (stating that the "[p]laintiff's complaint stated a cause of action for common law obstruction of justice" in that it alleged "'acts which obstruct, impede or hinder public or legal justice and would amount to

> the common law offense of obstructing justice'") (quoting *Henry*, 310 N.C. at 87, 310 S.E.2d at 334).

Blackburn v. Carbone, 208 N.C. App. 519, 526 (2010).

116. The Amended Complaint generally alleges that "Defendants"—without any attempt to specify *which* of the Defendants—obstructed justice through "mass deletion and destruction of emails." (Am. Compl. ¶ 466.) However, Plaintiffs do not make any serious effort at specificity regarding, for example, the content of the emails or the circumstances upon which they were deleted. These bare-bones allegations, once again, fail to satisfy even the liberal notice pleading standard in North Carolina.

117. The Court therefore concludes that Defendants' Motion to Dismiss is **GRANTED** as to Plaintiffs' claim for obstruction of justice, and this claim is **DISMISSED** without prejudice.

J. Civil Conspiracy

118. Defendants next ask the Court to dismiss Plaintiffs' claim for civil conspiracy. As we have previously stated,

> [c]ivil conspiracy is not an independent cause of action in North Carolina. Rather, liability for civil conspiracy must be alleged in conjunction with an underlying claim for unlawful conduct. *Toomer v. Garrett*, 155 N.C. App. 462, 483, 574 S.E.2d 76, 92 (2002). To state a claim for civil conspiracy, a plaintiff must allege: "(1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme." *Piraino Bros., LLC v. Atlantic Fin. Grp., Inc.*, 211 N.C. App. 343, 350, 712 S.E.2d 328, 333 (2011) (internal citations and quotations omitted).

Global Textile Alliance, Inc. v. TDI Worldwide, LLC, 2018 NCBC LEXIS 104, at **18–19 (N.C. Super. Ct. Oct. 9, 2018).

119. Here too, Plaintiffs' allegations in support of this claim are not a model of specificity. Moreover, these allegations refer generally to "Defendants" without making any attempt to differentiate between the numerous individuals and entities who are named as Defendants. As a result, it is unclear as to which of the Defendants are actually being alleged to have engaged in such a conspiracy.

120. Therefore, Defendants' Motion to Dismiss is **GRANTED**, and this claim is **DISMISSED** without prejudice.

K. Breach of Contract

121. In their breach of contract claim, Plaintiffs assert that Defendants breached the EIPA because "contrary to the Representations and Warranties contained therein, there were material undisclosed liabilities within the [k]nowledge of the Defendants" that Defendants knowingly concealed. (Am. Compl. ¶ 315.) Plaintiffs further allege that Defendants are also in breach of the EIPA by virtue of their refusal to indemnify Plaintiffs for their losses as required in the indemnification provisions contained in the EIPA.

122. Although Defendants do not seek dismissal of Plaintiffs' breach of contract claim in its entirety, they do seek a ruling from the Court as to the proper construction of the indemnification provisions at issue. Specifically, Defendants argue that Plaintiffs' claimed entitlement to indemnification for 100% of the losses they allegedly sustained from the failure to disclose the environmental liabilities at issue is legally incorrect. Defendants argue that the EIPA instead only requires

Defendants to pay 50% of Plaintiffs' losses incurred as a result of Defendants' concealment of "special environmental matters."

123. Plaintiffs, conversely, contend that Defendants are responsible for 100% of their losses pursuant to these indemnification provisions of the EIPA.

124. Since the briefing in connection with the pending Motions was completed, Plaintiffs have filed a Motion for Leave to File Second Amended Complaint. ("Motion to Amend," ECF No. 78.) In the Motion to Amend, Plaintiffs seek leave to file a new complaint containing certain additional allegations relevant to the Court's resolution of the parties' dispute regarding the indemnification provisions.

125. In its discretion, the Court elects to **DEFER** ruling on this issue at the present time given the pending Motion to Amend. The parties shall be free to renew their arguments regarding the indemnification issue at a later date.

CONCLUSION

THEREFORE, IT IS ORDERED as follows:

1. Defendants' Motion to Strike is **GRANTED** as to Exhibits 7, 8, and 9 and **DENIED** as to Exhibits 4, 5, 11, and 12.
2. Defendants' Motion to Dismiss is **GRANTED**, in part, and **DENIED** in part as follows:
    a. Defendants' Motion to Dismiss various claims based on the application of the statutes of limitations is **DENIED**.

b. Defendants' Motion to Dismiss Plaintiffs' claim for breach of fiduciary duty is **DENIED**.

c. Defendants' Motion to Dismiss Plaintiffs' claim for constructive fraud is **GRANTED** as to Defendant Walker, and that claim is **DISMISSED** without prejudice. Defendants' Motion to Dismiss Plaintiffs' claim for constructive fraud is otherwise **DENIED**.

d. Defendants' Motion to Dismiss Plaintiffs' claim for negligent misrepresentation is **GRANTED,** and that claim is **DISMISSED** with prejudice.

e. Defendants' Motion to Dismiss Plaintiffs' claim for fraud is **GRANTED**, and that claim is **DISMISSED** without prejudice.

f. Defendants' Motion to Dismiss Plaintiffs' claim for rescission is **GRANTED**, and that claim is **DISMISSED** without prejudice to Plaintiffs' right to pursue rescission as a remedy to the extent such a remedy is legally viable.

g. Defendants' Motion to Dismiss Plaintiffs' claims under the North Carolina Securities Act is **GRANTED**, and those claims are **DISMISSED** without prejudice.

h. Defendants' Motion to Dismiss Plaintiffs' claim for breach of confidentiality agreements is **GRANTED**, and that claim is **DISMISSED** without prejudice.

i. Defendants' Motion to Dismiss Plaintiffs' claim for obstruction of justice is **GRANTED**, and that claim is **DISMISSED** without prejudice.

j. Defendants' Motion to Dismiss Plaintiffs' claim for civil conspiracy is **GRANTED**, and that claim is **DISMISSED** without prejudice.

k. The Court **DEFERS** any ruling at the present time on the issue relating to the proper interpretation of the indemnification provisions of the EIPA.

SO ORDERED, this the 24th day of May, 2023.

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